



**Republic v Iyaya & 3 others (Criminal Case 53 of 2020)  
[2024] KEHC 3868 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3868 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE 53 OF 2020**

**DK KEMEL, J  
APRIL 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**FRANCIS AMULEI IYAYA ..... 1<sup>ST</sup> ACCUSED**

**PAUL MUTHEMBI KILONZO ..... 2<sup>ND</sup> ACCUSED**

**EMMANUEL ODUOR OTIENO ..... 3<sup>RD</sup> ACCUSED**

**EUTYCHUS MWANGI WAMBUGU ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on the 26<sup>th</sup> December, 2018 at Nambusi ‘B’ village, Butonge sublocation, Malakisi location Bungoma West Sub County within Bungoma County, jointly murdered George Namalwa Wekesa.
2. The prosecution called seventeen (17) witnesses in support of its case.
3. PW1, Xavier Wamalwa, minor stated that on 26/12/2018 at around 4.00 pm, while driving cows home, he met his uncle one George Wekesa (deceased) who informed him that he had quests at his home and requested him to join him and carry some luggage from the market. He saw the area assistant chief in the company of six police officers whereupon the deceased removed his sandals and ran wherein the police gave chase. The police officers fired gunshots in the air while the deceased was still running and who dropped his bag and continued running while he followed them from behind where he saw his uncle sit down. That thereafter, a short and build police officer who was carrying a stick kicked him on the chest and hit him using a long gun. That other officers joined him. Later in the evening he learnt that his uncle had passed on.



4. That he later attended the police station to record his statement and identified the accused persons in a police identification parade. On cross-examination, he stated that it was the 1<sup>st</sup> accused who hit the deceased with a rifle while the 3<sup>rd</sup> accused hit him with a stick on the chest. On re-examination, he stated that the 2<sup>nd</sup> accused had a pistol.
5. Michael Tukai Marisia (PW2) testified that he saw four persons carrying the deceased and placing him on the ground. He stated that the deceased requested him for water to drink. He identified the four persons as the accused herein. He testified that another officer by the name of Cheruiyot organized for a police vehicle which took the deceased to hospital. He later learnt that the deceased had passed on. On cross-examination, he stated that he did not see injuries on the deceased and that he did not witness the incident.
6. Moses Wamukota Wenani (PW3) testified that he heard gunshots and on rushing on scene, he found the deceased already subdued by police officers and that he attempted to intervene only for 3<sup>rd</sup> and 4<sup>th</sup> accused persons to handcuff him. He was later released to go away through intervention of a police officer named Cheruiyot. On cross-examination, he stated that he did not witness the incident and that the deceased had no injuries on the face. He stated that he had not known that the deceased used to suffer attacks of epilepsy and had been operated on in the past.
7. Wilson Matisi Simiyu (PW4) stated that he rushed to the scene and found the deceased lying down and that the four accused persons were among the police officers at the scene and further that the 1<sup>st</sup> accused was in possession of a rifle. On-cross examination, he stated that he did not witness the incident.
8. John Wekesa Lumpuku (PW5) stated that he was the father to deceased and that upon being alerted of the incident, he rushed to Malakisi health centre where he saw the body of the deceased. He later organized for an autopsy which revealed that the injuries were due to a blunt object on head. On cross-examination, he stated that he did not witness the incident and that the deceased had not been hospitalized in the past over other illnesses.
9. No 231998 CIP Samuel Kipngeno Koech (PW6), the OCS Malakisi police station testified that the assistant chief Butonge sub location requested for a police raid so as to rid the area of illicit drinks. That he assembled about ten officers for the task and including the four accused herein. He added that after the incident he rushed to the health centre while alerting the DCI, Bungoma West as members of public had become irate over the death of the deceased. On cross-examination, he stated that he had warned the officers not to use unnecessary force.
10. No 105599 PC Purity Thiongo (PW7) testified that she was among the raid party but reached the scene after the deceased had fallen down and got injured and only accompanied the deceased to the health centre and then escorted some prisoners who had been nabbed during the raid. On cross-examination, she stated that she did not witness the incident.
11. No 120094, PC Vicky Munyi Njeru (PW8) testified that she was part of the team engaged in the raid but she had remained behind with other colleagues while the rest went in search of illicit brewers. She later joined her colleagues at the scene where she saw the deceased lying down and unconscious. She added that the deceased was put onto the police land rover and taken to Malakisi health centre where the nurses took charge as they took five suspects to the police station. On cross-examination, she stated that she did not see injuries on the deceased's body.
12. Francis Waswa Wandabwa (PW9) testified that he was the assistant chief of Butonge sub-location and the one who approached the police to carry out a raid in his area so as to rid the area of rampant illicit brews. He led the operation and that in one area, they managed to apprehend five suspects. They moved



- to another area on foot as they did not want to alert the suspects. On arrival at the scene, he found the deceased lying down and asking to be given water. He did not see any injuries on the body of the deceased. He testified that the irate members of public later torched his offices and residence. On cross examination, he stated that he was the one who coordinated the officers during the raid. He stated that he did not witness any of the police officers assaulting the deceased. He also stated that there were no injuries on the body of the deceased. He formed the opinion that the deceased died due to alcohol related causes.
13. No 67341 Cpl. William Lonyangat (PW10) testified that he was tasked by the OCS to organize a raid party which was to visit Butonge sub location and apprehend illicit brewers in the area and that in one of the villages, they arrested five suspects. From the other part of the village, the deceased herein on seeing the police officers, took off and was pursued by the officers. He fell down and then rose and continued running but later fell down. On reaching him, he was panting heavily and was asking for water to drink. He stated that he arranged to have him rushed to Malakisi health centre where he passed on only for the villagers to get irate and pelt the police with stones. He finally stated that he left the area and went back to the police station. On cross examination, he stated that the four accused persons chased the deceased but did not see any of them beating the deceased. He maintained that none of the accused persons touched the deceased and that he had been surprised that the accused had been charged.
  14. No 23756 IP Selinah Aiyabei (PW11) testified that she conducted an identification parade of all the accused persons and that the witnesses identified them after which she filled the parade forms which she produced as exhibits. On cross examination, she denied having a hatchet job of fixing her fellow colleagues in the force.
  15. No 78066, CPL. Johana Tanui (PW12) testified that he conducted an identification parade for the 1<sup>st</sup> accused herein who was promptly identified by witnesses. He produced the parade form as an exhibit. On cross examination, he confirmed that the parade was conducted after the 1<sup>st</sup> accused had been arraigned in the court.
  16. No 233771 CIP Francis Wafula (PW13) testified that he conducted an identification parade for the 1<sup>st</sup> accused herein who was promptly identified by witnesses. He produced the parade on exhibit. On cross examination, he confirmed that the parade was conducted after 1<sup>st</sup> accused had been arraigned in court.
  17. No 2002058164 CPL. Cornelius Kipkosgei Cheruiyot (PW14) testified that he joined the raid party and saw the deceased herein fleeing on seeing police officers and on reaching where he had fallen, he could not manage to stand up. They took him to Malakisi health centre only for his condition to deteriorate and that he passed on which angered the villagers who thronged the health facility and threaten to harm police officers. He stated that they retreated and went back to the station where they booked the report. On cross examination, he denied seeing injuries on body of the deceased.
  18. JW (minor) (PW15) testified that she heard a gunshot and on rushing to find about the same, she saw the deceased being pursued by police officers and that the deceased later sat down and raised his hands where upon one police officer hit him on head with a rifle. She also stated that other police officers later joined and kicked the deceased. She maintained that the 1<sup>st</sup> accused hit the deceased on head with a rifle while the rest of the accused persons kicked him. On cross examination, she maintained that she witnessed the incident.
  19. Dr. Dickson Mchana (PW16) testified that he conducted an autopsy on the body of deceased. He noticed bruises on both elbows and right knee. He also noticed a bruise on left back side of scalp. He formed the opinion that the cause of death was closed head injury secondary to blunt force trauma. He



- produced the report as an exhibit. On cross examination, he stated that he established that the deceased had consumed alcohol. He also maintained that the injuries sustained were not consistent with the fall.
20. IPOA No 00140 Isaac Kirwa (PW17) testified that he is the investigating officer in the matter. He stated that he interviewed the officers involved in the raid party as well as civilian witnesses and also checked documents prepared. He testified that the four accused herein were the first to come in contact with the deceased and after considering all issues, he recommended that the four accused herein be charged with the murder of the deceased.
  21. At the close of the prosecution's case, the accused herein were found to have a case to answer and were thus put on their defence. DW1 PC Francis Amulei Iyaya testified that on 26.12.18 at around 15.20 hours he accompanied the assistant chief of Butonge sub location with other officers. That he was armed with a G 3 rifle, PC Otieno had an MP 5 gun and CPL Lonyangat had a pistol while PC Kilonzo had a wooden stick.
  22. On the incident, he stated that at Nambusi "B" people ran on seeing them, they ran in all directions. One of them ran towards the open swampy field while carrying a black bag. He ran for about two hundred meters and fell down. He dropped the bag and then continued running but fell down again and that he found the man lying on his back and who complained of sharp abdominal pain. He requested for water while claiming that he had taken alcohol without food. Members of public charged towards them and that he was forced to fire one shot from the G3 rifle. He denied committing the offence.
  23. DW2-Paul Muthemi Kilonzo confirmed being in the company of the officers conducting the operation. That they sighted people drinking under a tree and that there were children playing nearby. That a man ran away and that DW1 fired into the air whereupon the man fell down, stood up and continued running. That Cpl Lonyangat asked him about the justification by DW1 firing into the air. When they reached where the man was lying on the ground, he was informed by a man who claimed to be the deceased's nephew and who requested to take the deceased home. That they took the injured man to Malakisi dispensary where he passed on.
  24. DW3 PC Samuel Otieno confirmed being part of the team undertaking the operation. His testimony was that he was armed with a MP5 rifle which was not produced in court as evidence and that he was the third person to arrive at the scene. That he didn't see anyone assaulting the deceased.
  25. DW4 PC Eutyclus Mwangi Wambugu stated that he had carried nothing during the operation except for the bag which he picked from the scene. He denied assaulting the deceased.
  26. DW5 Protus Wamalwa stated that he was near the scene of crime preparing wood for charcoal when he saw somebody running and who was being pursued by police officers and who fell down near a trench. That a certain person following him arrived and stood by while holding a firearm. That he directed the other officers to the scene. In his testimony nobody assaulted the deceased.
  27. DW6 David Manyonge testified that he was herding cattle at the field when he heard a gunshot. That the man fell down, stood up and ran again before falling down. He denied seeing anyone assault the deceased.
  28. Both the prosecution and defence counsels duly filed and exchanged submissions. The same have been considered.



### **Analysis and determination.**

29. I have considered the evidence of both the prosecution and defence as well as submissions presented. The offence of murder is provided for under section 203 of the Penal Code as follows;
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
30. To secure a conviction for the offence therefore, the following ingredients ought to be established beyond reasonable doubt; (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased; (c) and that the accused persons had harboured malice aforethought.
31. In establishing its case, the prosecution is under obligation to prove each of the ingredients beyond reasonable doubt. It is trite that the burden of proof lies on the prosecution in all cases save only for a few statutory offences. Proof of beyond reasonable doubt has however been stated not to mean beyond any shadow of doubt. The standard is discharged when the evidence is so strong that only a little doubt is left in his favour. (See *Miller v Minister of Pensions* [1947] ALL ER 372.)
32. The facts presented herein are that the accused persons herein were police officers engaged in an operation to weed out illicit brewers in the area. The four accused were in a team when they met the deceased.
33. The fact of the death of the deceased is not in doubt. There is ample evidence from the testimony of PW5, the deceased’s father and PW16, the doctor who conducted the post mortem on the deceased’s body.
34. PC Cornelius Cheruiyot (PW14) also testified that he was part of the team conducting the raid. His testimony was that the deceased was being chased by his colleagues and finally caught up with him and when he arrived at the scene, the deceased was lying down facing up. That they rushed the deceased to Malakisi dispensary before he passed on.
35. PW15, JW also witnessed the incident as it happened at a distance of 500 metres from her home. That the man being pursued fell down and was hit on the head with a rifle by one of the officers.
36. PW1 testified that on the day the deceased was assaulted, he was walking with him before he was chased by police officers who were on patrol to weed out illicit brews from the area. According to him, the deceased fell down while running and that the police officers kicked him severally while on the ground.
37. This account of the witness resonates with the post mortem report (Pexh-1) that the cause of death was closed head injury secondary to blunt force trauma as presented and documented in the post mortem report.
38. The above settles the first issue that indeed there was death and that the cause of that death was established.
39. On the second ingredient, that the accused committed the unlawful act which caused the death of the deceased, PW1 testified that he was with the deceased when police officers in the company of the assistant chief chased his uncle. His testimony was that the deceased fell down after shots had been fired



in the air. He stated that upon falling down, the officer who had a gun hit him with it. His testimony before the court was as follows;

I was following them from behind and saw my uncle sit down. A police officer who had a stick kicked him on the chest. The officer was short in height but well built. Another tall police officer hit him using the rifle. It was a long rifle.

.... I have seen the officer who had a rifle as the 1<sup>st</sup> accused herein ( pointing to 1<sup>st</sup> accused in the dock) while the 3<sup>rd</sup> accused was the one with a stick ( pointing the 3<sup>rd</sup> accused).

40. PW1's testimony was corroborated by PW2 who heard gunshots and came to the area where a crowd had formed. He reiterated the assertion that it was the 1<sup>st</sup> accused who had a rifle. PW3 confirmed that he met PW1 and another one named Alex herding cattle. That the boys explained to him on what had happened and indeed he proceeded to the scene and found the deceased lying on the ground. He had an exchange with the police officers and had to be handcuffed at some point. This narrative was also put forth by PW4.
41. PW6, the then O.C.S Malakisi confirmed deploying his officers to track down brewers in the area. He confirmed the accused herein were among the members of the team. He confirmed receiving a call from Cpl Lonyangat that one of the suspects had fallen down. That the suspect later died and he visited the hospital where the deceased had been rushed for first aid. He confirmed that his officers were armed but he could not recall the type of rifles issued.
42. PW7 No.105599 PC Purity Thiongo confirmed that some officers were armed and others had sticks. She stated that PC Iyaya had a G3 rifle while PC Emmanuel had MP 5 slim gun while another had an Ak47 rifle. PW8 No 1200094 PC Vicky Munyi Njerru confirmed that she was armed with a G3 rifle, PC Otieno had a short gun make MP5 and PC Iyaya had a G3 rifle.
43. PW9 Francis Waswa Wandabwa, the then assistant chief who was in the company of the police officers confirmed the incident that he rushed to the scene after hearing gunshots and found the deceased lying on the ground visible injured. He stated that among the officers he had was the 1<sup>st</sup> accused who had a long rifle while the 2<sup>nd</sup> accused had a stick.
44. PW10 No 67341 Cpl William Lonyangat, stated that he was in charge of the operation. That before leaving the station, he assigned some of his officers' arms to use. He stated that once the deceased sighted them, he ran away into an open field when PC Iyaya fired in the air. He narrated that he confronted the officer for firing when there was no threat. He produced into evidence the arms movement register. His testimony was that PC Iyaya was issued with a G3 rifle while Emmanuel Otieno took an MP5 rifle. He stated that the man fell down and died while being attended to at Malakisi dispensary. PW14 testified as much on who had the G3 rifle.
45. The Constitution at Article 26 of the Constitution prohibits the taking away of life unless within the confines allowed by the Constitution and other laws. From the evidence presented in this matter, there is no doubt that the deceased died in the hands of the police officers who were conducting the crackdown. The witnesses visibly pointed out the 1<sup>st</sup> accused as the one in possession of the firearm in question. In fact, on cross examination, PW10 confirmed the serial number of the G3 Rifle was 6926988 and which was issued to the first accused. That the firearm was returned on 27/12/2018 less one ammunition.
46. PW10 further testified that he confronted the 1<sup>st</sup> accused for firing when there was no threat as he had also warned them prior to commencing the mission against using excess force. The O.C.S also stated that before releasing the officers on assignment, he had advised them against use of excessive force.



47. The witnesses also stated that the deceased was running away from the police and that there is no evidence that the deceased retaliated to warrant the use of force exhibited herein.
48. Similarly, from the evidence of PW11 No 237356 IP Salinah Aiyabei, PW13 No 233771 Francis Wafula who conducted the identification parade after the incident at the Divisional headquarters. Her evidence was that Xavier Wamalwa (PW1) was the first to arrive at the scene and who pointed out the said Francis Iyaya who was placed between number 4 and 6 by touching him. He also stated that the second witness to identify him was PW15, Jemimah Wekesa who identified the 1<sup>st</sup> accused who had been positioned between number 7 and 9 in the parade.
49. Learned counsel for the prosecution has submitted that the doctrine of common intention under section 21 of the *Penal Code* is applicable in the circumstances to rope all the accused persons to the crime herein since they were together on the material date and in pursuit of the deceased and who were placed at the scene of crime. It was also the prosecution's submissions that the four accused persons were in concert during the illicit brew raid party and that they all participated in the killing of the deceased. The said section 21 of the *Penal Code* provides as follows:

“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 probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The prosecution has now urged this court to find that all the four accused persons must be held responsible for the murder of the deceased since they were at the scene of crime. Indeed, learned counsel has sought to rely on the last seen doctrine to rope in all the accused persons to the crime. Further, the prosecution's counsel has submitted that the police in general resort to the use of the blue code of silence to protect their own from the rigours of the law. It is noted that the raid party was out to apprehend illicit brewers within Butonge sub-location and which exercise was under the supervision of the area assistant chief. It is also noted that at the time of the incident some alcohol brewers had already been apprehended and were awaiting to be transported to the police station. Hence, I find the common intention at the time was to apprehend the illicit brewers at the time and not to kill any member of public. Further, it is my view that there was no common intention by the four accused persons to kill the deceased. All the prosecution witnesses did give their versions of events at the scene while those of the defence also gave their versions. What emerged is that the deceased died as a result of closed head injury due to blunt force trauma following assault occasioned by blunt force from a heavy object namely the butt of an assault rifle as confirmed by the doctor (Pw16). Each of the accused persons gave their separate defence and denied involvement and called their witnesses. Looking at the injuries sustained by the deceased together with the different versions of the testimonies of the witnesses, I find that it is only the 1<sup>st</sup> accused who had a rifle and who used to hit the deceased who is culpable. All the prosecution witnesses did not have any difficulty pointing him out as the person who arrived at the scene immediately the deceased fell down and started hitting him with his rifle before the other officers and the assistant chief arrived. The evidence of the witnesses regarding the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused was somehow contradictory. It is my considered view that every person must carry his/her cross and that each of the police officers and the assistant chief plus members of public who were at the scene have given their version of the events. I further find that it would be a travesty of justice to convict the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused solely on the basis that they were part of the raid party and were at the scene when the doctor's evidence regarding the cause



of the death of the deceased implicates only the 1<sup>st</sup> accused herein who was armed with a rifle and who used it to hit the deceased. I find the evidence is overwhelming against the 1<sup>st</sup> accused herein who used his rifle to hit the hapless deceased who was had fallen down and was not a threat in any way. The 1<sup>st</sup> accused used excessive and unwarranted force against the deceased. The deceased even though a partaker of illicit brew did not deserve to die. The claim by the defence that the deceased died due to epilepsy was not established and did not dislodge the prosecution's case that the deceased prior to his death led a normal healthy life. The 1<sup>st</sup> accused herein used excessive force against the deceased and that he ought to have known that the weapon was a dangerous gadget that can easily kill and which should be handled with great care. The weapons and arms issued by the police are meant to protect the citizens and deal with criminals. The use of a rifle at the time even after the deceased had fallen down and who was no longer a danger or threat was therefore uncalled. The actions of the 1<sup>st</sup> accused must be deprecated as it has put the National Police Service on the spotlight regarding the handling and use of firearms when dealing with citizens who are not armed.

50. Based on the above, I am satisfied that the 1<sup>st</sup> accused was positively identified as the person who had the rifle and also the person who hit the deceased with it.

51. Despite the 2<sup>nd</sup> to 4<sup>th</sup> accused persons being part of the team that conducted the raid, the evidence presented herein shows that it was the 1<sup>st</sup> accused who caused the death by hitting him on the head with a rifle. On this, I am guided by the persuasive authority in South Africa Supreme Court in *S v Cunningham* {1996} 1 SACR 631 where the Court stated:

“That in discharging this onus the state is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and involuntary, that this was attributable to some cause other than mental pathology.”

52. Nyakundi J in *Republic v Juma Kituko Mwambegu* [2020] eKLR observed as follows;

Our Criminal Law as codified requires proof of acts and omissions at the very least on the part of the accused that take the form of an act of assault, striking, beating, shooting or stabbing in order to bring the conduct within the element of unlawfulness in the offence of murder.

53. The third ingredient requires the prosecution to establish that the accused had malice aforethought.

54. Malice aforethought can be established from the circumstances under section 206 of the *Code* which provides thus;

“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;
- a. 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;

- a. an intent to commit a felony;
- a. 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.”

55. From the above summary, it was plainly clear that the deceased died from a blunt force trauma to the brain. The photographs produced herein Pexh 9(a)-(l) showed internal injuries after removal of upper head skull layer. This piece of evidence is in tandem with the evidence of the pathologist (Pw16), PW1 and PW15.
56. The issue of malice aforethought was discussed in the case of *Hyam v DPP* {1974} A.C. the Court held inter alia that:
- “Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”
57. Similarly, in *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No 32 of 1990) the Court held;
- “the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”
58. I have considered the nature of the weapon used, the circumstances under which the offence was committed and the fact that the 1<sup>st</sup> accused chose to hit the deceased on the head with the butt of the rifle despite there being no threat goes to point out that the 1<sup>st</sup> accused harboured malice aforethought. I find the actions of the 1<sup>st</sup> accused were reckless and which constitutes the malice aforethought under section 206 of the Penal Code. The deceased had already fallen down and not a threat at all. I thus find that the element of malice aforethought was established beyond reasonable doubt against the 1<sup>st</sup> accused herein.
59. The accused persons denied committing the offence. They testified as captured in the preceding paragraphs. The 1<sup>st</sup> accused admitted being issued with the gun in question which was produced as evidence (Pexh-6). The fact that the rifle serial number 6926988 was in his possession lays credence to the testimony that the deceased was hit with a rifle.
60. I accept the 2<sup>nd</sup>-4<sup>th</sup> accused’s defence that they didn’t injure the deceased and which I find to be plausible. Further, several of the prosecution witnesses gave contradictory evidence regarding the involvement of the said 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons. There is no denial that the four were in a joint operation but the exact cause of death was that the injuries were sustained after being hit with the butt of an assault rifle. I am therefore unable to agree with the prosecution’s counsel’s suggestion to cite them all together as culpable pursuant to the doctrine of common intention. I find it unsafe to convict them based on the evidence availed. There is some doubt created in the prosecution’s case against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons and hence the benefit of such doubt must be resolved in their favour.



61. In the upshot, I find that the prosecution has proved its case against the 1<sup>st</sup> accused Francis Amulei Iyaya of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly. I also find that the prosecution has not proved its case against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused herein beyond any reasonable doubt and who are hereby acquitted of the charge accordingly and are ordered set at liberty unless otherwise lawfully held.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF APRIL 2024**

**D. KEMEI**

**JUDGE**

In the presence of :

Francis Amulei Iyaya 1<sup>st</sup> Accused

Paul M Kilonzo 2<sup>nd</sup> Accused

Emmanuel Oduor 3<sup>rd</sup> Accused

Eutyclus 4<sup>th</sup> accused

Wekesa for Anwar for 1<sup>st</sup> Accused

Miss Chepkwony for Nyamweya for 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Accused

Miss Owino for IPOA ( watching brief)

Kizito Court Assistant

