



**State v Oloo (Criminal Case E007 of 2023) [2024] KEHC 3402 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3402 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E007 OF 2023**

**RE ABURILI, J**

**APRIL 3, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**KELLY OTIENO JAMES ALIAS OLOO ..... ACCUSED**

**JUDGMENT**

1. The accused person Kelly Otieno James alias Oloo is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 20<sup>th</sup> March 2023 at Korando B sub-location in Kisumu West sub-county within Kisumu County jointly with others not before court, the accused murdered one Dan Otieno Ouma. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial.
2. The prosecution called a total of ten (10) witnesses in support of its case which is summarised herein below.

**The Prosecution's Case**

3. PW1 David Odhiambo Ouma, the deceased's younger brother testified that the accused was their neighbour. It was his testimony that on the 20<sup>th</sup> March 2023 at about 9pm, he heard noises outside despite it raining heavily so together with Mark, Jeremy and Stephen, sons to his guardian, they went to check on what was happening. It was his testimony that they reached their home and found the accused's parents making noise and that the accused's mother was holding a slasher.
4. PW1 testified that he spoke to his mother who told him that the deceased had assaulted a lady from the neighbourhood using firewood and that she had taken the lady to hospital for treatment. He testified that he then returned to his guardian's, Mama Abigail's, place to sleep and that after about 30 minutes, he heard bangs at the deceased's house and informed his guardian, Abigael.



5. It was his testimony that he proceeded to the place and found mama Kelly, Kelly and his brother Billy, Kelly's father and their worker talking. He testified that Oloo (Kelly Oloo) came and using a piece of metal, he dug the deceased's house at the door and opened it. PW1 testified that Kelly entered David's house then Kelly came out saying "Mbwa mjinga analala" then Kelly, the accused herein started looking for a rope with the intention of tying him up and escorting Dan, the deceased, to the Chief's place. He testified that Kelly then returned to David's house, with their workman and that the deceased got up and closed his door.
6. PW1 testified that Kelly and some youths including Paul and Jackton demolished Dan's door, pulled him out and started cutting him with pangas and hitting him with rungun. He testified that he took photographs of what was happening using his blue techno smart phone but that when Paul saw him taking photographs, he hit PW1 on the back using a rungu then took the said phone of PW1 and smashed it on a nearby tree. He further testified that another youth took the phone and said that they did not want to destroy the phone but only wanted PW1 to delete photos which he had taken of the scene and videos which he had taken of the scene. That the youth then returned the phone to PW1 and directed him to delete the videos and photos which PW1 could not as the phone was already broken after being smashed.
7. PW1 testified that the youths continued beating the deceased until he became unconscious when Mama Kelly came and told them that the beatings were enough. He testified that a neighbour, Benta Oraro, came and told the youths and Kelly to stop assaulting Dan but that instead, Dan's assailants beat up the lady Benta and chased her away. PW1 testified that Kelly got into the deceased's house, took a mattress and said that they wanted to burn Dan and that Paul started smoking bhang. It was his testimony that Kelly continued beating Dan while claiming that Dan had killed Nelly's dog after which they left Dan lying on a mattress on which they had placed him. PW1 testified that him and his uncle, Collins assisted Dan into his house as they thought he was just tired and would recover. He testified that he then went to sleep at his guardian's house.
8. PW1 testified that the following morning, the 21<sup>st</sup> March 2023, he heard screams from his mother saying Dan had died. He testified that he went to Dan's house and confirmed that Dan had died and that as Dan used to be a motorcyclist, other motorcyclists who were in the house started chasing after Kelly who was in the company of his friends but Kelly ran away and went to report to the police at Kojolla and that Kelly returned in the company of police officers who shot in the air to scare away the crowd. PW1 testified that the police went to his home and after explaining to them what had transpired, the police arrested Kelly and removed Dan's body to Russia Mortuary. It was his testimony that there were solar lights from a neighbour's house and so he was able to see the accused and his company and further that they had torches so he saw them very well.
9. In cross-examination, PW1 testified that the deceased was his elder brother who was married with a child but that the said wife and a child were not present at that material time. He testified that the deceased had a house in their father's homestead but that he used to sleep at John Maloa's home. He reiterated that he saw the people who attacked the deceased very well adding that the villagers did not attack and assault Dan.
10. In re-examination, PW1 testified that although it was raining, the assailants had torches and further, that there was a solar light nearby thus he was able to see the deceased's attackers well who included Kelly the accused herein, Paul, Jackton and Billy who is the accused's brother.
11. PW2 Priscilla Awuor, the deceased's mother testified that the accused was her neighbour. She testified that on the 20<sup>th</sup> March 2023 at about 8.30pm, she was in the house when she heard a knock on the door and her small daughter entered followed by one Rose 'Nyasembo' who was a worker in the area.



- PW2 testified that Rose informed her that Dan, PW2's son had assaulted her to which PW2 responded that she did not approve of her, Rose, talking to small boys. She testified that she called Dan's father and told him that Dan had assaulted someone before leaving to look for means to take Rose to hospital because she was injured on the face but that before she could take action, the whole of Kelly's family arrived while screaming.
12. PW2 testified that she got a neighbour, John Maloah, who carried her, Junior and Rose to the General Hospital and while at the hospital, Benta, a neighbour called her saying something bad was taking place in the homestead of PW2 and she wanted to know where PW2 was at that time so PW2 requested Benta to go to PW2's home and find out what was happening. It was her testimony that from the hospital, they went to Central Police Station to report the incident at between 2am and 3am after which they went home. It was her testimony that at 6am, she woke up Collins and directed him to go and check on Dan and Collins returned saying Dan was dead. She testified that she went and found Dan dead lying on a mattress and that he was muddy all over with his eyes and mouth open.
  13. PW2 testified that police were called to the scene from Maseno and on arrival, they stated that they had received a suicide report. She testified that she accompanied the police to take the body to Russia Mortuary. It was her testimony that she had no grudge with Kelly, the accused, and that they lived peacefully before this incident. She testified that before she took Rose to hospital, Kelly and his parents went to PW2's home and screamed loudly.
  14. In cross-examination, PW2 testified that the deceased was assaulted after PW2 had already gone to hospital with Rose. She testified that she did not see Dan the time that Rose came saying that Dan had assaulted her but that she got information on how Dan had assaulted Rose.
  15. PW3 Collins Otieno testified that he knew the accused who was a neighbour to the deceased. He testified that the deceased was his nephew and that on the 20<sup>th</sup> March 2023 at about 8pm, a lady who was injured on her face came saying that Dan had injured her and so Dan's mother took her to hospital. He testified that later, Kelly and his family members arrived, broke Dan's door using a rod and entered Dan's house and assaulted him after removing him from his house. He testified that the assailants used rungas and metals to assault Dan after which Dan's brother took Dan into the house and the following morning, Dan was found dead. He testified that Dan's body was taken to the mortuary. He testified that he had no grudge with the accused.
  16. In cross-examination, PW3 testified that Priscilla, PW2 was his sister and that he had gone to visit her and that when Rose came, she found him in Priscilla's house. It was his testimony that Priscilla's house and Dan's house were about 15 metres apart and that although it was raining and the crowd was hostile, he was present at the door and saw what was happening.
  17. In re-examination, PW3 testified that he saw Oloo and other people whom he did not know, assaulting Dan.
  18. PW4 Jacklyne Atieno Ouko testified that the accused, Kelly Otieno, was her neighbour and that the deceased was her in-law's son. It was her testimony that on the 20<sup>th</sup> March 2023 at 9pm, the accused went to her house and asked for her husband's whereabouts and whether Dan, the deceased, had returned. She testified that she told him that she had not seen Dan to which the accused responded by saying that should he meet Dan; wonders would take place. She testified that she went back to sleep and the following morning, Dan's mother called her husband and told him that Dan was dead. She testified that she and her husband went to Dan's home and confirmed that he was dead and that the police came and removed Dan's body to the morgue.



19. In cross-examination, PW4 stated that her home is behind Priscilla's home and that they share the same fence. She testified that she knew Maloah, another neighbour. In re-examination, she stated that she was the one who asked Kelly whether Dan had returned and he said he had not seen Dan adding that if he was to meet Dan, wonders would happen. She testified that she asked Kelly about Dan because her husband had just called her that night and informed her that Dan had assaulted a certain lady.
20. PW5 Joseph Ouma Olang testified that the deceased was his son while the accused was his neighbour. He testified that on the 20<sup>th</sup> March 2023 at 8pm his wife Priscilla called and informed him that Dan had assaulted and injured Mama Margaret's house help and that Kelly, Kelly's father and mother had gone to PW5's homestead screaming saying Dan's house should be demolished because Dan was a thief. He testified that PW2, his wife, later called saying she had gotten a vehicle from John Maloah a neighbour and was taking the injured lady to hospital.
21. PW5 testified that he called PW2 later and she told him that she was still in hospital. It was his testimony that he called her at about 6am and she told him that she had slept and so she sent Collins to go and check on Dan, only for Collins to return and inform her that Dan was dead. He testified that PW2 informed him that Dan had been killed. It was his testimony that he went home and the police came and removed the deceased's body to the morgue where he witnessed the postmortem.
22. PW6 Dr. Ombok Lucy testified that she carried out an autopsy on the body of Dan Otieno Ouma and filled the post-mortem Form on the 29<sup>th</sup> March 2023 at Jaramogi Oginga Odinga Teaching and Referral Hospital mortuary. It was her testimony that she observed that the body was of a male naked African about 26 years old, of good nutrition and height of 178cm. She testified that the body was well preserved in the morgue.
23. PW6 testified that externally, there was a deep cut wound on the right foot with bruises and lacerations whereas internally, there was a massive haematoma on the neck towards the sternum while on the head, there was slight bleeding with increased intra cranial pressure. She testified that other systems were essentially normal and that as a result of her examination, she formed the opinion that the cause of death was severe internal bleeding as a result of a blunt force trauma. She issued death certificate No. 1552699 and signed the report on 29<sup>th</sup> March 2023. PW6 produced the post mortem report dated 29<sup>th</sup> March 2023 as PEX1.
24. In cross-examination, PW6 testified that no toxicological tests were done and that no samples were taken for further analysis. She testified that she did not approximate the time of death as there is no provision in the form for stating approximate time of death and further that all that she was expected to do was to establish the cause of death. She testified that there were injuries to the neck and the head and further that the injury to the neck caused internal bleeding. She testified that she found clotted blood inside the blood vessels on the neck but that she never found any puncture wounds.
25. PW7 Rose Auma testified that she knew the accused as she lived with his grandmother and that she also knew the deceased who was a neighbour. It was her testimony that in March 2023 she was working for Margaret Diwaka as her caregiver at Lekso. She testified that on the 20<sup>th</sup> March 2023 at about 8pm she was in Margaret's house when Dan, the deceased, went there with other people, hit the door using a stick, got in and using a rubber, held PW7 by the neck, strangled her and lay on her. She testified that the deceased took a knife and stabbed her saying he wanted to kill her but she pleaded with him to spare her as she was caring for the old lady.
26. She testified that lightning struck as it was raining and the lights went off. It was her testimony that the deceased stood up, held her but she freed herself and escaped screaming towards the road saying Dan was killing her. She testified that she saw people coming towards the home with spotlights but she



- continued running towards the road and only returned because a child was sent to call her to go back to the homestead. It was her testimony that she returned and found people gathered at the homestead including the accused. She testified that she had blood all over and that the deceased's mother arrived and escorted her to hospital where she was stitched. She testified that she did not know what happened to the other people after she had gone to hospital.
27. In cross-examination, PW7 testified that she did not see Dan being beaten by anyone.
  28. PW8, a Clinical Officer working at Kisumu County Hospital testified that he had a P3 form for Rose Auma Owiti which he filled on 29<sup>th</sup> March 2023 and who gave a history of being assaulted by a person known to her on 20<sup>th</sup> March 2023 at around 9pm at Kisian area. He testified that the patient sustained soft tissue injuries, was in a fair general condition and locally, she had swelling on the left eye and cut wound on the cheeks. He testified that the patient had a swollen and tender neck and that her left arm was also swollen.
  29. PW8 testified that he filled the P3 form 9 days after the patient had received treatment at Kisumu District Hospital. He further testified that the cut was sutured and that the patient got analgesics and antibiotics. He testified that he assessed the degree of injury as harm and signed the P3 form on 29<sup>th</sup> March 2023. He produced it as PEX2.
  30. PW9 No. 110673 PC Kariuki Samson testified that on the 21<sup>st</sup> March 2023, he was called by the DCIO Kisumu West and instructed to take up a reported murder incident vide OB No. 10/21/3/2023 and that he was to take up the matter with PC Elijah Thogo. He testified that they commenced their investigations and on 24<sup>th</sup> March 2023, they revisited the scene near Kisian area and established that on 20<sup>th</sup> March 2023, Dan Otieno Ouma, the deceased, had assaulted Rose Auma at around 8pm at the house of her employer after which he escaped.
  31. PW9 testified that they established that after being assaulted, the complainant went and informed the assailant's mother of what had happened and at about 9pm, some members of the public went to the deceased's home and took revenge. He testified that the deceased's uncle, Collins Odhiambo, PW3 and David Odhiambo, PW1, identified some of the suspects who assaulted the deceased. He testified that they interviewed witnesses who recorded their statements and who identified the accused with others currently at large as the ones who assaulted the deceased, after breaking the door to gain access to the deceased's house, entered and killed the deceased after removing him from the house.
  32. PW9 testified that he established that the assailants left the scene after which the uncle and brother of the deceased took the deceased into the house while he was unconscious and in the morning of 21<sup>st</sup> March 2023 when they went to check on the deceased, they found him dead. He testified that the scene was processed and the body was removed to Jooth for preservation and postmortem. He testified that the accused was arrested at Kojolla Police Post where he had gone to take refuge as members of the public wanted to revenge against him.
  33. PW9 testified that the accused was rearrested by PC Calvis Abuom and escorted to Maseno Police Station. He further testified that he recovered some exhibits among them, a rungu and a piece of rubber pipe which the deceased allegedly used to assault Rose. He produced the Rungu as PEX 3 and the rubber as PEX 4. It was his testimony that at the scene, no other exhibit was recovered but that Collins Odhiambo mentioned that he saw the suspect assault the deceased, using a torch and further that a mobile phone which a witness had and lit at the suspect and used to record the incident was maliciously damaged by the accused. He produced the blue Techno Spark mobile phone as PEX5.
  34. In cross-examination, PW9 testified that he was given four names of the suspects being, Kelly Otieno James, Billy, Jackton Orienda and Paul, as people who participated in beating the deceased. He testified



that one witness used a torch as source of light to identify the suspects and also a phone light. He further testified that when he visited the scene, he found there was security light from the neighbour's house. He further testified that he was not the one who recorded the statement of Rose Auma who was attacked at a different homestead. PW9 testified that the owner of the phone was Collins Odhiambo though he had not adduced evidence of ownership or disclosed the IMEI number. He testified that the phone was not working because it was damaged during the incident and as such it was not processed for video clips.

35. In re-examination, PW9 testified that he confirmed from witnesses who said that they identified suspects using nearby security light whereas another witness said he used the torch and phone lights. He testified that four persons were stated to have assaulted the deceased. He reiterated that the phone was said to have been damaged during the incident.
36. PW10 No. 236812 PC Calvin Abuom testified that on the 21<sup>st</sup> March 2023 he was on standby when they got information that a man had been killed at Korando 'B'. He testified that they went to the scene and found a man lying still on the mattress which had blood and that the man had a wound on the head next to the ear. He testified that the man's clothing's were also bloodied. It was his testimony that the scene was processed by DCI who removed the body to the morgue at JOOTRH. He testified that they were notified that the suspects were locked up in a nearby house so they arrested them and took them to the police station. He testified that he attended the postmortem of the deceased and the cause of death was as per the Postmortem Report.
37. In cross-examination, PW10 testified that the deceased was fully clothed and that there was a deep cut on the deceased near the ear. He testified that the deceased's body was inside the house on the floor of the sitting room and further that the door to the shutter of the steel door had been removed from the frame. He testified that the reason why the accused was locked up in the house was because people bayed for the suspects' blood for allegedly killing the deceased.
38. The prosecution closed their case.

### **Defence Case**

39. Placed on his defence, the accused gave sworn testimony that on 20<sup>th</sup> March 2023 he was in his house asleep as he had gone to bed as early as 8pm when he heard ululation from his grandmother's home so he got up and walked to his grandmother's home which was about one and a half kilometers away. He testified that he saw very many people in the homestead and that it was raining. He testified that he could not identify all the people but that he saw Auma and 'Omwami' and other tenants from the area whom he knew physically but not by name. He testified that he saw about 50 people who said that they had gone to rescue Rose who had raised an alarm.
40. The accused testified that he later learnt that the deceased had broken his grandmother's door. He testified that he found Rose bleeding and that some youths had escorted Dan, the deceased, to his mother's house to explain to her what Dan had done to Rose. It was his testimony that he advised that Rose be taken to hospital and she was escorted to hospital as he remained at the scene. He testified that before Rose was taken to hospital, Dan ran to his house and locked himself up and that Dan's mother told the mob that since Dan had locked himself in the house, he should be caned. He further testified that Dan's brother and uncle removed him from the house and took him outside to discipline him and other people joined them including Omwami, Olienda, Paul and Amos and others.
41. The accused denied being among the mob that was disciplining Dan and stated that he was only trying to help. He testified that there was light from a neighbour's home. The accused testified that after



sometime, power went off and that he did not see the people who pulled Dan out of the house. He denied pulling Dan from the house. He stated that Dan was a little bit drunk.

42. It was his testimony that when he was trying to help Dan, people caned him saying he was helping thieves. He testified that there was nothing to indicate that Dan would die the following day and that when he went to see how Rose was recovering from the assault, Dan's mother saw him and started screaming saying that the accused had incited people to kill Dan. He testified that he saw people invade him so he escaped but that the people invaded their home. He testified that the people had weapons, chasing him and that he surrendered to the police station at Ojolla.
43. The accused testified that he returned in the company of two (2) police officers and found one young man cutting 'Omwami' with a panga suspecting that he was among those who killed Dan. He testified that he was rearrested, taken to Maseno Court and arraigned.
44. In cross-examination, the accused testified that he saw Ouma and Omwami because they had torches and light from their phones. He denied inciting people to assault Dan. He further testified that he found people had already broken the house of Dan, entered and were assaulting him. He testified that he was only in the compound and as Dan was beaten while in the compound, he saw what was happening. He testified that Dan was beaten after being dragged out of the house. He testified that he went to the police to escape from the wrath of the mob and that he was arrested as an accused person. He further testified that he was arrested while at Dan's mother's house.

### **Analysis and Determination**

45. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel, urging this court to acquit the accused person on account that the prosecution had not proved its case against him beyond reasonable doubt. The issue for determination is whether the prosecution proved beyond reasonable doubt all the elements of the offence of murder as stipulated in section 203 as read with section 206 of the Penal Code.
46. From all the evidence for the prosecution a witnesses and the defence, it is without doubt that the deceased met his death after being assaulted and fatally injured by a mob of people on suspicion of having attacked and injured one Rose. This was a typical case of what is referred as "mob justice", which in itself is no defence. Any person participating in jointly assaulting and fatally injuring the victim of mob justice commits an offence and must invariably be held responsible for the consequences of his unlawful action.
47. The fact of death was proved beyond reasonable doubt as an autopsy cannot be conducted on a live person. The post mortem report PEX1 established that the cause of death was severe internal bleeding as a result of a blunt force trauma. It also shows that the deceased's injuries were extensive and severe thereby implying that the attack against him was vicious. Accordingly, the cause of death was proved beyond reasonable doubt.
48. On whether the death of the deceased was unlawfully caused, both the prosecution witnesses and the defence testified that the deceased was assaulted on account that he had assaulted one, Rose. The assault on the deceased was after Rose raised an alarm. None of the witnesses testified that they found the deceased assaulting Rose. Rose too testified that she screamed for help after being assaulted by the deceased and many people went to her rescue at her employer's house. There is no justification for an eye for an eye. I am therefore satisfied that the death of the deceased was unlawfully caused. by those who responded to the screams for help by Rose.



49. The next question is whether the accused herein was positively identified as being among those who unlawfully attacked and unlawfully killed the deceased.
50. Identification evidence and especially at night must always be treated with caution. I therefore caution myself of the dangers of relying on such evidence. Such evidence must be free from error or mistake because a witness might be mistaken even if he is honest (see, Joseph Onyinkwa Nyariki v Rep [2019] eKLR).
51. Further, I must consider the prevailing circumstances at the material time and scene of the offence. In that regard, whether favourable conditions and adequate opportunity existed for the positive identification or recognition of the offenders especially if the offence occurred in the hours of darkness as was in this case must be considered.
52. In the instant case, PW1 and PW3 both testified that they saw the accused gain access into the deceased's house before dragging him out and taking part in the attack of the deceased. They both testified that they knew the accused person who was a neighbour to the deceased.
53. As regards the conditions that night and whether the same were sufficient and conducive to aid in the positive identification of the accused, PW1 testified that there were solar lights from a neighbour's house and so he was able to see the accused and his company and further that they had torches so he saw them very well. PW9 also testified that when they went to the scene, they found nearby security lights. The accused himself testified that although it was raining that night, the place was well lit thanks to lighting from the neighbour's home.
54. From the evidence above, and having warned myself of the dangers of relying on evidence by identifying witnesses at night, I am satisfied beyond doubt that the conditions were favourable for proper identification of the deceased's killers who were also personally known to the witnesses and especially PW1 who vividly narrated what the accused and his accomplices did at the scene and therefore the identification of the accused herein was that of recognition and not between strangers.
55. On his part, the accused denied that he was part of the mob that attacked the deceased. He stated that he was helping the deceased not to be assaulted despite the deceased's mother allegedly directing that since the deceased had assaulted Rose and locked himself in the house, he should be disciplined. PW1 and PW3 who were eye witnesses to the incident both testified to seeing the accused take part in the attack of the deceased after breaking the door to the deceased's house, then removing the deceased from the house and beating him from outside the house.
56. In addition, PW4 testified that the accused went to her house and asked for her husband's whereabouts and whether the deceased had returned and when she informed him that she had not seen the deceased, the accused responded by saying that should he meet Dan; wonders would take place.
57. Juxtaposed against this evidence led by the prosecution was the accused's testimony that he saw other people discipline the deceased on the instructions of the deceased's mother which defence in my view was not coherent and appeared to be made up. I find the said testimony to be a mere denial.
58. The accused was placed at the scene of the offence by the prosecution witnesses who clearly recognized him as one among the group of people who broke the door to the deceased's house, assaulted him, occasioning him fatal injuries.
59. In situations where the death of the deceased is attributed to "mob justice", it is difficult if not impossible to pinpoint which person in the mob administered the killer or fatal blow. Therefore, in such circumstances, a common intention by the assailants to assault and kill the deceased or to take the law in their own hands may be lacking. However, a common intention may be drawn from the



presence of the assailants at the scene of the offence, their action and even the omission of any of them to disassociate himself or herself from the assault. There is no evidence that the accused herein prevented the other assailants from assaulting the deceased.

60. Section 21 of the Penal Code provides that:

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.

61. It was established beyond reasonable doubt that the deceased herein was unlawfully killed by a mob of people. Each of the persons who took part in assaulting and killing the deceased was as guilty as the other for the murder. The accused person herein was positively identified and recognized by the eye witnesses as one of those who participated in assaulting the deceased.

62. In *Rex v Tabula Yenka s/o Kirya & others* (1943) 10 EACA 51, it was stated that:-

“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 omissions of any of them to disassociate himself from the assault.”

63. In this case, the deceased was assaulted and killed for his attack on the accused's grandmother's caregiver. All those who took part in the unlawful transaction did not deem it fit to apprehend the suspect and hand him over to law enforcers, instead they decided to take the law in their hands. They were not permitted under any circumstances to do so and having done so, they came into direct conflict with the law.

64. The accused contended that he was not in the mob of people who assaulted and killed the deceased. Despite his denial, the accused was placed at the scene by the prosecution witnesses PW1, and 3 whose testimonies I found credible and stood the rigours of cross-examination.

65. These witnesses saw the accused at the scene and recognized him. They indicated that the scene was well lit with flash lights and solar lamp lighting from the neighbour's home thereby making it possible to recognize the accused and see exactly what he did, being part of the mob of people who assaulted and fatally injured the deceased.

66. The witness aforementioned positively identified and indeed recognized the accused with the help of flash lights and solar lamp lighting from the neighbour's home which provided favourable conditions for positive identification and rendered the possibility of mistaken identity quite remote.

67. It is therefore my finding from the above evidence that the accused's defence was effectively discredited and disproved by the entire prosecution evidence. Indeed, the prosecution evidence against the accused proved and established that he was positively identified as being part of the mob of people who assaulted and killed the deceased in what is known as “mob justice” Although motive is immaterial, in this case, the motive is clear, that the deceased had attacked and injured one, Rose, who was the accused person's house help.

68. On whether malice aforethought was proved beyond reasonable doubt, Section 206 of the penal Code defines what malice aforethought is. Malice aforethought can also be inferred having regard to circumstances of each case. the type of weapon used in unlawfully killing the deceased, the type



of injuries sustained by the deceased and which parts of the body were targeted can impute malice aforethought.

69. In this case, the deceased person's assailants used crude weapons in assaulting him. The injuries identified by Dr. Ombok Lucy who carried out an autopsy on the body included a deep cut wound on the right foot with bruises and lacerations whereas internally, there was a massive haematoma on the neck towards the sternum while on the head, there was slight bleeding with increased intra cranial pressure. The injuries demonstrate that the assailants intended to cause grievous harm and eventual death of the deceased. Accordingly, I find that malice aforethought was proved beyond reasonable doubt.
70. In the end, I find and hold that the prosecution proved all the elements of the offence of murder against the accused person herein and I therefore find Kelly Otieno James alias Oloo Guilty of the offence of murder as charged and convict him accordingly.
71. Sentence shall be pronounced after records, mitigation, presentence report and the victims impact statements from the deceased's close family members.
72. I so order

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF APRIL, 2024**

**R.E. ABURILI**

**JUDGE**

