



REPUBLIC OF KENYA



**Republic v Amukhuma & 3 others (Criminal Case 16 of 2016)  
[2024] KEHC 9332 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9332 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 16 OF 2016  
SC CHIRCHIR, J  
JULY 18, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**STEPHEN OMUKWENYI AMUKHUMA ..... 1<sup>ST</sup> ACCUSED**

**JOSEPH SHEM MAKOKHA ..... 2<sup>ND</sup> ACCUSED**

**DAVID AMWESHE ..... 3<sup>RD</sup> ACCUSED**

**FRANCIS MAPESA ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the *penal code*.
2. The particulars of the offence are that on the 24<sup>th</sup> day of October 2015 at Bulemo village, Kamaisha sub-location in Mumias sub-county, within Kakamega County, murdered Allan Okutoyi Ateya.
3. They all denied the charges and the matter proceeded for trial.

**The Prosecution's case**

4. The first prosecution witness was the deceased's father. He testified that on 30.10.2015, at around 8.00 p.m, he received a call from an unknown person. The person informed him that some people had invaded his house at Kamachia . Later he received a call from a doctor at St. Mary's Hospital , informing him that his son had been hospitalized. He travelled to Mumias, but by the time he arrived, his son had died.



5. PW2 was the deceased's mother. She told the court that on 23.10.2015 while at her house, the deceased's wife went to her home and told her that the 1<sup>st</sup> Accused had gone to her house and went away with the deceased. The deceased's wife further told PW2 that it sounded to her as though the two quarrelled upon exiting the house.
6. PW2 then went out, and saw some people on the road. The people were taking away the deceased, while beating him. She identified the people as Stephen ( 1<sup>st</sup> Accused), Francis Mabesa( 4<sup>th</sup> Accused), David Amuyee (3<sup>rd</sup> Accused- now deceased) and Shem Makokha (2<sup>nd</sup> Accused). She further stated that all of them were beating the deceased with rungun. She screamed and the attackers ran away leaving the deceased on the road. One Idd juma and Joseph Oponyo responded to her screams. They took the deceased back to his house. The deceased only talked once . The deceased said that “ people had beaten him and he was dying”, He said “Stephen had beaten him badly” . She looked for a motorbike to take to the deceased to hospital but the first accused and Ishmael came back. They told her that they wanted to take the deceased to hospital, but PW2 refused . A struggle ensued but the 1<sup>st</sup> accused and the said Ishmael managed to take the deceased. They put him in a motorbike , she stated. The time was around 10pm.
7. At 5.30am the following day she went to report the incident , and later headed to st . mary's hospital . The deceased died shortly after her arrival. She further stated that the 1<sup>st</sup> and the 2<sup>nd</sup> accused were arrested after a week. She is the one who identified them to the police.
8. It was further her evidence that she identified the attackers positively as she was talking to them, and she had a torch. She was asking them why they had attacked her son. She stated that the people she was referring to were the 1<sup>st</sup> to the 4<sup>th</sup> Accused. They were her neighbours. She added that the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Accused were working with the deceased . They used to work at the home of the 1<sup>st</sup> accused, digging out building stones .
9. She further testified that the 4<sup>th</sup> Accused was an uncle to the deceased; he had earlier threatened that the deceased will not finish a year, and that indeed the deceased died within a month of those threats.
10. On cross- examination, she told the court that her husband's brothers, who included the 4<sup>th</sup> accused were the ones who made her husband ( PW1), to move to Nairobi. She further testified that on the material night ,she went to the 4<sup>th</sup> Accused 's house to confront him. She did that after the deceased had been taken to hospital. She stated that there were a total of nine people attacking the deceased, but five escaped.
11. PW3 told the court that the deceased was his brother. He told the court that on 23/10/2015 he was in the home of the deceased. The other people present were the deceased, the deceased's wife, Diana, and his sister Anne Okwaro (PW4). He stated that the 1<sup>st</sup> accused came to the house and told the deceased to go out with him as he wanted to talk to him. The two left . After 3-4 minutes , they heard shouts from outside. They went out and saw Stephen,(1<sup>st</sup> Accused) Ishmael Makokha, Shem Makokha,(2<sup>nd</sup> accused) Amuyee ( 3<sup>rd</sup> Accused) and others. There was also Rajab who was a village Elder at the time. The 4<sup>th</sup> accused was also there . They were nine people in total . They were beating the deceased. They were on the road. He further stated that the 4 people on the dock were beating the deceased. They were using Rungus, and fists. The 1<sup>st</sup> Accused had a “Jembe Rungu” , the 3<sup>rd</sup> Accused had a whip. The 2<sup>nd</sup> accused had a whip too. The deceased was seated. He further stated that they asked them why they were beating the deceased. In response they told the deceased's wife to keep quiet or go to sleep. The deceased's wife screamed. His mother came, and started screaming. Idd Musa and Vincent Oponyo responded to her screams. The Accused said they wanted to take Deceased to hospital. The deceased was taken to his house. The 1<sup>st</sup> Accused called for another motorbike and took away the deceased .



Before leaving, the 1<sup>st</sup> accused called the Assistant chief and told him that the deceased had been injured by people. He identified the accused persons as : the 1<sup>st</sup> Accused as Stephen the 2<sup>nd</sup> accused as shem, the 3<sup>rd</sup> accused as Amuyee and the 4<sup>th</sup> as Francis .He further told the court that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Accused were friends to the deceased , while the 4<sup>th</sup> was his paternal uncle.

12. On cross examination, he acknowledged that he recorded his statement with the police but denied that he told the police that the 1<sup>st</sup> Accused picked the deceased at 6pm. He insisted that he told them it was 9pm.
13. He reiterated that he was at home with the deceased, his wife and their sister Anne when the 1<sup>st</sup> accused went out with the deceased. He further told the court that the road where the incident took place is next to their house
14. PW4 was the sister to the deceased and PW3. She told the court that on the material day at 8pm, she was in the deceased's house together with the deceased, the deceased's wife and PW3. She testified that the 1<sup>st</sup> accused came to the house and told the deceased that he wanted to talk to him, that it was an urgent matter. The two left. About 15 minutes later, they heard some shouts coming from the road. The deceased's wife , Diana went and called the deceased's mother (PW2). She accompanied her. PW2 then went to the house of the 4<sup>th</sup> Accused but she did not find him. PW2 returned to the road and started screaming. She stood with her at the gate. After a while PW2 went back to the 4<sup>th</sup> Accused's house, she accompanied her .On this 2<sup>nd</sup> visit she found him. She heard PW2 telling the 4<sup>th</sup> Accused to go and see what was happening to the deceased on the road. Initially the 4<sup>th</sup> accused agreed but on reaching the gate , he refused to go any further, and returned to his house. The 4<sup>th</sup> Accused told PW2 that they will attend to the matter in the morning. The witness and PW2 went back to their house. While inside the house they heard the deceased asking his attackers why they were killing him. They came out of the house and they heard the people shouting that the deceased had stolen chicken. She further stated that PW3 and Diana had gone to the where the deceased was being attacked. Her mother (pw2) left the house but she did not know if she went to where the deceased was being attacked.
15. On cross -examination, she testified that she recorded her statement on 30/10/2019 while the deceased was killed in 2015. She stated that the beating started at 8 p.m and that the deceased was brought back to the house at 11p.m. She identified the accused persons as their neighbours.
16. PW5 was Dr. Aimale Niyubahwe, a medical officer at St. Mary's hospital. He testified on behalf of Dr. Munoka who conducted the post mortem . He told the court that Dr. Munoka has since gone on transfer. He produced the post mortem report for the autopsy done on the deceased's body on 30/1/2015. He told the court that on examination the deceased was found to have multiple bruises on the right chest and right iliac fossa region. There was contusion with hematoma on the right forearm –( 3x4 cm ) and a right occipital partial scalp hematoma. The doctor concluded that the cause of death was left occipital sub-dural haematoma. He produced the post- mortem report ( PExb. 1)
17. PW6 was the Assistant- chief of Ekeru location. He told the court that on 24/10/2015 at about 1.38 a.m he got a call from a resident informing him that someone from the family of James Makokha had caught two thieves who had stolen chicken. He was given the names of the suspects as Fredrick Okwach and Allan Okutoyi ( the deceased). He instructed the caller to take them to his home , so that he could take them to the police. He waited but no one came and he decided to go back to bed. He further stated that he called them back at 5.30 am and he was told that the suspects had been beaten and had been taken to hospital. He called Stephen , a relative of the deceased, who was with the deceased in the hospital, and Stephen told him that the deceased was in bad shape and needed to be taken to a hospital



in Eldoret. . The same Stephen later called to inform him that the deceased had died. He further stated that the chicken had been stolen from the 1<sup>st</sup> accused father's home.

18. On cross- examination he reiterated that he had instructed that the suspects should be taken to him and that it was the 1<sup>st</sup> accused who had called him to inform him that the deceased was in bad shape.
19. He stated that he knew the deceased well and that there was no grudge between the family of the deceased and the family of the 1<sup>st</sup> accused. He however knew the deceased as a habitual thief and Fredrick as a drunkard.
20. PW7 was Corporal Joseph Maroa stationed at Mumias Police station. He took up the investigation at some stage. He stated that on 24/10/2015, the deceased's wife reported that her husband had been assaulted and he had died as a result. They accompanied her to the hospital. They saw the deceased's body and later proceeded to the village, where the incident took place. He interviewed witnesses. He was informed that the deceased and his friend , who is now deceased, were subjected to mob justice for having stolen a chicken from a neighbour. The deceased was taken to Ekeru police post and later to hospital, where he died. He produced photographs of the chicken and sandals that were allegedly being won by the deceased at the time. He never interacted with the suspects before, and only saw them in court. He further stated that two of the suspects were yet to be arrested.
21. On cross- examination , he admitted that in her statement to the police , PW2 never mentioned being with PW3 and PW4 at the time. He stated that PW3 and PW4 recorded their statements on 30.10.2019.
22. In the course of the prosecution's case, the 3<sup>rd</sup> accused died and the remaining three were put on their defence at the close of the prosecution's case .

#### **Defence case**

23. DW1 was the 1<sup>st</sup> accused. He denied participating in the killing of the deceased, whom he claimed was his friend. He stated that on 24/10/2015, he was asleep when he was woken up by some shouts. He heard sounds of " mwizi, mwizi" ( "Thief , "Thief" ) from outside. He got out and found David,( the then 3<sup>rd</sup> Accused) Makokha( 2<sup>nd</sup> Accused), and Ismael Makokha outside. They all went towards the direction of the shouts. He found the deceased and one Fredrick . They had been beaten. He heard that they had been caught stealing. Someone called the Assistant chief and the chief told them to take the suspects to the AP camp. They went there together with the second accused and the deceased , and later to hospital. The deceased later died. He told the court that PW3 never witnessed what happened as he was away in Nairobi. He recorded his statement in November 2015, and was arrested in march 2016, that was 6 months after the incident. He blamed his arrest on PW1, whom he had had a disagreement with a while back . The said disagreement led to his arrest but was later released.
24. During cross- examination , he stated that he found the deceased lying down. They called the Assistant chief by the name Okwero ( PW6). They told the chief that there was a person who had been caught stealing. He also stated that when they were making a report, they were reporting a case of mob justice as a result of theft. He told the court that he only identified the person who was being beaten, but not those beating them. He further stated that though it was dark , he had a torch and had moved closer and was therefore able to see properly . He testified that the incident took place between 11pm and midnight . He told the court that it was not the first time that he was in conflict with PW1, as the PW1 had accused him earlier of having broken his leg. He did not have any evidence of any report in respect to this earlier incident. He asserted that those who testified to have seen him leaving with the deceased were in Nairobi at the time.



25. DW2, was Joseph Makokha, the 2<sup>nd</sup> accused .He told the court that on 24/10/2015 he was asleep when he heard shouts from outside. He woke up. He also found his co- accuseds had woken up. They went to the direction of the shouts. They found a crowd and two people being beaten. They were one Okwachi and the deceased. Someone called the chief and the chief instructed them to take the two to the Administration Police (AP) Camp. They did as instructed and later took the deceased to the hospital. He denied killing the deceased and states that he was arrested in march at the instigation of PW1. He said he had had a case with PW1 before . The case went up to the police station .
26. On cross -examination, he stated that he identified the people being attacked , but not those those who were beating the deceased. He stated that the report they gave to the chief was that there was a person who had been beaten and had suffered injuries. He denied that they were lying to the chief so as to cover their own role in the crime. He did not have any evidence of having reported his complain to the police on the case he alleged to have had with PW1 before. He finally told the court that he had no reason to disagree with what PW2 had told the court.
27. DW3 was Francis Mapesa the 4<sup>th</sup> Accused. He denied killing the deceased. He knew the deceased, as he was his brother's ( PW1) child .He further stated that on that night, he was a sleep when he was woken up by PW2. She requested his phone so that she could talk to her husband, to inform him that the deceased had been accused of theft. She gave her the phone and she talked to her husband. He stated that he was charged due to the differences he had with the deceased's father ( PW1). He further stated that the differences came about because of some sugarcane proceeds that PW1 had taken off with and went to Nairobi.
28. He told the court that PW 2 and PW3 were in Nairobi at the time of the incident and they were not at the scene.
29. On cross- examination, he confirmed that PW2 and PW3 knew him well and they could identify him through his voice . However he insisted that they were in Nairobi at the time.
30. On cross- examination by the court , he insisted that PW2 requested for the cell phone. He never handed his phone to the police during investigations.
31. DW4 was Fredrick Okwachi. He testified that he knew the deceased . He told the court that on 23/10/2015 he was in a club with the deceased and they later left for home. The deceased was was carrying a "rungu." They met a crowd on the way home who asked them where they got the rungu from. The crowd started attacking them with rungu's and whips. They screamed and people came; that the 1<sup>st</sup> and 2<sup>nd</sup> accused came , but the 4<sup>th</sup> accused did not come.. They were taken to the police , then the hospital. He told the court that he was admitted for one and half months at the hospital. He stated that the accused persons were not among the attackers .
32. On cross examination, he stated that he was with the deceased until 10.00 pm when they left the club. The club belonged to one James wellington. He stated that among the attackers were one Matetete and Shaban . When they screamed the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Accused came to the scene. He had made the report at the police but he had no record of such report. He admitted that he has not gone for the occurrence book since 2015, when the case began. He stated that the 1<sup>st</sup> and the 2<sup>nd</sup> Accused were in the scene
33. The defence closed its case.

#### Accused submissions

34. It is the submissions of the accused persons that despite the evidence of Pw2 and PW3 who allegedly found the accused assaulting the deceased, none of them mentioned DW4 who, according to the



evidence of PW6 and PW7 ,was also victim of the attack. They also cast doubts on PW3 and PW4 being at the scene as they recorded their statement 4 years after the incident. They further submitted that the same PW3 and PW4 resided in Nairobi and therefore could not have been on the scene at the time of the incident.

35. It is further submitted that the evidence of DW4 was consistent with that of DW1 and DW2. In respect to the 4<sup>th</sup> Accused , it is submitted that the evidence of PW6 and PW1 shows that he was not on the scene at the time.
36. The prosecution did not file any submissions.

### **Determination.**

37. Section 203 of the Penal Code defines the offence of murder as follows:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

38. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR the Court of Appeal expounded on what constitutes murder. It stated:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (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 and (c) that the Accused had malice aforethought

### **The death of the Deceased and its cause.**

39. According to the post-mortem report ( PExb. 1) prepared by Dr. Munoka the cause of death was described as left occipital sub-Dural hematoma. According to the doctor the injury could have been caused by being hit on the head or could be caused by a traffic accident. The body was identified by Sylvester Ateya and Vincent Juma. Accordingly, the death of the deceased and its cause was proved.

### **Was the death caused by an unlawful act of the three accused persons ?**

40. It was the testimony of Pw2, the deceased mother that when she was called by the deceased’s wife at about 8pm, she went and saw 1<sup>st</sup> accused hitting the deceased with a rungu. She also saw the 4<sup>th</sup> , the 3<sup>rd</sup> and 2<sup>nd</sup> Accused hitting the deceased with Rungus. The 1<sup>st</sup> Accused later came back and forcefully took the deceased to hospital. She said she could identify the accused persons as she had a torch and she was talking to them . She identified the 1<sup>st</sup> Accused as Stephen, the 2<sup>nd</sup> as Shem, the 3<sup>rd</sup> as David and the 4<sup>th</sup> as Francis Mapesa.
41. PW3 told the court that he was in the deceased’s house when the 1<sup>st</sup> Accused came for the deceased . The two went out and shortly thereafter, they heard shouts . They went to the road with the deceased’s wife and found the first accused , Ismael Makokha , the 2<sup>nd</sup> Accused, the 3<sup>rd</sup> Accused , one Isaaka and others beating the deceased. He further stated that the 4<sup>th</sup> accused was also there , he was beating the deceased with a rungu and a whip, while the 1<sup>st</sup> accused had a jembe rungu; that later PW2 asked the 1<sup>st</sup> accused where they were taking the deceased to and he responded that they knew, so she should keep quiet. He said that he identified the accused persons using the moon- light.
42. PW4 , the deceased sister also told the court that the first accused picked the deceased from his house . she was present with PW3 and the deceased’s wife . She never went to the scene but she later saw the



- 1<sup>st</sup> accused bring back the deceased to the deceased's house , together with the 2<sup>nd</sup> Accused and another shem whom she said, was not in court .
43. Thus there is consistency in the evidence of pw3 and pw4 in that the 1<sup>st</sup> Accused went for the deceased in his house and took him away, and shortly thereafter they heard shouts . At the end of the fracas , the deceased was brought back to the house seriously injured. According to PW3 he noticed that the deceased's head had been smashed. It was this injury that led to his death as per the testimony of PW6.
44. Further PW2 and PW3 saw the 1<sup>st</sup> accused not only in the scene but also hitting the deceased. PW2 and PW3 testified that they also saw the 4<sup>th</sup> and 2<sup>nd</sup> Accused hitting the deceased with Rungus.
45. In view of the testimonies of PW2,PW3 and PW4 , am satisfied that the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Accused were positively identified as among the people who attacked the deceased that material day
46. The incident occurred at night and therefore the question of positive identification needs to be addressed. Both the prosecution witnesses and the accused persons in their testimonies told the court that there was sufficient illumination despite the night. PW2 stated that she identified the attackers as she was talking to them. She also had a torch; PW3 stated that he could see them well as there was light. DW1 told the court that he could see well as he had a torch; DW2 also told the court : “ we found 2 people being beaten, I knew them well, one was Okwachi Fredrick and Allan Ateya ( deceased) . One was bleeding on the head , the other had a swollen neck”. Thus DW2 not only saw the injured persons, but he could pinpoint the location of the injuries. It is common ground therefore that identification is non- issue, as both the prosecution witnesses and the defence affirmed that there was sufficient light on the scene.
47. Further it also emerged from the testimonies of both the prosecution and the defence that the prosecution witnesses and the accused persons knew each other well prior to the incident. The 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> accused persons used to work with the deceased at the home of the 1<sup>st</sup> Accused. As for the 4<sup>th</sup> accused, it emerged from the evidence of PW2 and the 4<sup>th</sup> Accused himself that the deceased was a nephew to the 4<sup>th</sup> Accused. The first four prosecution witnesses were also neighbours with the accused persons. Pw2 further told the court that he could identify them as he was talking to them. This testimony was not challenged at cross- examination. The 4<sup>th</sup> Accused ( DW3), also admitted that the court that PW3 could identify him by his voice.
48. I have considered the accused persons defences. The defence of the 1<sup>st</sup> and 2<sup>nd</sup> Accused was that they arrived at the scene after the incident and were simply coming to the aid of the deceased. They dismissed the evidence of PW3 and Pw4 on grounds that the two were in Nairobi. The 4<sup>th</sup> Accused's defence is that he was not on the scene.
49. However on perusal of PW3 and PW4 testimonies on cross- examination, they were not taken to task on the portion of their testimonies touching on their allegation that the 1<sup>st</sup> Accused came and picked the deceased from his house. The only issue taken up by the defence counsel was the issue of time, that is whether the deceased was picked from his house at 6pm or 9.p.m.
50. PW2 was never taken to task on the issue of identification of the three accused persons on the scene.
51. I have considered the testimonies of DW1and DW3, who insisted that PW3 and PW4 were away in Nairobi. The presentation of the said piece of evidence by the all the accused persons were almost word by word. The statements appeared to me to have been rehearsed.
52. I noticed something else :- all the accused persons talked of a strained relationship between the deceased 's father and each of them. It raises the question as how then did they come to know the children of



- pw1, that is PW3 and PW4 ,were in Nairobi, and not anywhere else. Their relationship with PW1 , it seems, going by their own testimony, would not have allowed room for the sharing such family details. Their testimonies would have been more plausible if they simply stated that the two were away.
53. I have also considered the testimony of PW4 who told the court that the was with the deceased on the material night , and that he too was attacked; that he was admitted in the hospital for one and half months. The presence of this witness on the scene is doubtful and this is why:There was no documentary evidence showing that he was injured or admitted in hospital for the alleged period of time. This was a crucial witness for defence. It is rather odd that the defence did not find it necessary to table such evidence before court. Nothing would have been more convincing than a documentary evidence showing that PW4 was injured in the same attack. It would have made his evidence that he was with the deceased on the material night plausible.secondly, although he told the court that he reported the attack to the police ,he had no Occurrence book (OB) extract to show such report was ever made. This was a serious attack that led to the death of one of the victims . The prosecutor took him to task in this regard and he did respond that he had not found it necessary to go for the OB notwithstanding that he had the chance , from the year 2015, to procure the OB extract.The other pertinent question is :- what exactly happened to this victim after the attack? According to DW2 he noticed that this witness had a swollen neck. In this regard I have considered the testimony of the 1<sup>st</sup> Accused. His testimony on the events that took place after the attack is curiously silent on what happened to the 2<sup>nd</sup> victim, DW4 herein.
54. The defence counsel has submitted that PW2, PW3 and PW4 never made any reference to the presence of PW4 in the scene and therefore making their evidence incredible. However , PW2, 3 and 4 were never questioned on the presence of a second victim of the attack. DW4 only featured for the first time in the testimonies of the Accused persons. It is my considered view that since the presence of DW4 was known to the Accused persons , these questions should have been put to the prosecution witnesses during cross- examination. The questions were not put to them , and therefore their failure to mention them can not be used to discredit their testimonies.
55. I also find that the 1<sup>st</sup> and 2<sup>nd</sup> Accused were less than candid in their testimony. They insisted that they saw the two people being attacked; the 2<sup>nd</sup> Accused went further to state that he could even see on which parts of the victim’s bodies the injuries were, yet they did not identify any of the attackers. Further to the two , the deceased was a friend to each of them , it is therefore unusual that they were not keen to know who the attackers of their friend were.
56. Finally, all the accused persons told the court that each one of them was arrested because of a pre-existing feud between the deceased’s father ( PW1) and each of them at different times . However there was no evidence of any complain having been reported to the police. The 1<sup>st</sup> Accused stated that PW1 had earlier accused him of breaking his leg but he submitted no evidence to show that the alleged crime was ever reported to the police . The 2<sup>nd</sup> Accused told the court that he had had a case with PW1 which went up to police. Such a complain if it went to the police, would have been recorded in the OB. He did not avail such a record . To the 4<sup>th</sup> Accused, the disagreement was about the proceeds of sugarcane sale which PW1 allegedly took off with. Such an act would also constitute a crime, yet no record of such a complain having been reported to the police was submitted in evidence .
57. From the totality of the evidence am satisfied that the prosecution has proved that all the accused persons were not only present on the scene of the attack , but participated in attacking the deceased
58. From the evidence of both the prosecution and defence witnesses it emerges that the deceased was a victim of what is often touted as “ mob justice”. He was attack on allegations of having stolen chicken .



59. Mob justice is not really justice, it is a criminal offence. In *Republic v Mohammed Wanyoike & another* [2017] eKLR the court had this to say about mob justice: “The concept of mob justice is nothing more than a group of people taking the law into their own hands. There is nothing justice in the unlawful acts committed by a mob. There is no principal of justice by the majority. The fact that the mob did not premeditate to commit the offence cannot be a good defence. Anyone who is part of the mob is duty bound to arrest the suspect and take him to court. Administering kicks and blows to the suspect in the pretext of mob justice does not make those acts lawful. The mob becomes the investigator, the trial court and the administer of the sentence. What is the extent of the punishment administered by the mob” One year, two years, life imprisonment or the death penalty. Such actions cannot be allowed in a country based on democracy and the rule of law.”
60. The offence is captured under Section 21 of the *Penal Code*. The section 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 a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
61. The offence was expounded in the case of *NJOGU V REPULIC* [2007] 2 KLR, 123, where the court held interalia:
- “Under section 21 of the *Penal Code* (Cap 63), 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.”
62. Thus the nature of the offence is such that the mere presence of a person in the “mob” makes him or her liable for the act(s) being committed. In this regard I find support in the case of *Republic vs Mohammed* (supra), the court further stated: “Every person within the mob who assaults the victim is individually liable for his/her criminal acts. Common intention does not need to be fore planned. It can be inferred from the acts of the perpetrators of the offence. (Emphasis added)
63. I have already found that all the accused persons were identified to have been not only on the scene of the attack, but were also seen attacking the deceased.
64. Am therefore satisfied that the prosecution has proved that the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Accused persons were part of the mob that attacked and caused fatal injuries to the deceased.

### **malice afterthought**

65. Section 206 of the *penal code* sets out the circumstances which constitute malice aforethought as:
- “a). an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted or not;
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually netted 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 (Emphasis added)



66. In the case of *Hyam v DPP* {1974} A.C. the Court held interalia 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.” ( Emphasis Added)

67. PW3 told the court that the Deceased ‘s head was smashed . This was corroborated by the autopsy report which states that the deceased died from left occipital sub-dural haematoma. An attack directed at the head of a human being , which houses such a sensitive organ as the brain in the manner it was done was likely to cause a fatal injury , and the accused person must have known that . The manner in which the deceased was attacked meets the definition of malice as set out under section 206 of the penal code. Therefore it is my finding that the prosecution established that the Accused persons had malice aforethought.

68. In conclusion, I do find that the prosecution has proved the offence of murder against the each of the accused persons pursuant to section 203 and 204 of the [penal code](#) and I hereby convict the 1<sup>st</sup> , 2<sup>nd</sup> and 4<sup>th</sup> Accused accordingly.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**S. CHIRCHIR**

**JUDGE .**

In the presence of :

Godwin – Court Assistant

Ms . Nafuye Advocate for the accused persons

Stephen Amukwenyi- 1<sup>st</sup> Accused

Joseph Shem Makokha- 2<sup>nd</sup> Accused

Francis Mapesa- 4<sup>th</sup> Accused.

