



**State v Ogola & 2 others (Criminal Case E009 of 2022)  
[2023] KEHC 3025 (KLR) (3 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3025 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E009 OF 2022  
RE ABURILI, J  
APRIL 3, 2023**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**ALFRED ODHIAMBO OGOLA ..... 1<sup>ST</sup> ACCUSED**

**ERIC OUMA OWINO ..... 2<sup>ND</sup> ACCUSED**

**OYIEKO OTIENO OUMA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

////ARGUMENTS

**Introduction**

1. The accused persons herein Alfred Odhiambo Ogola, Eric Ouma Owino and Oyieko Otieno Ouma are jointly 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 night of 1st and 2nd July 2021 at Mahero Village, Nyadorera 'A' sub-location in Siaya sub-county within Siaya County, they jointly with others not before court, murdered one Bonface Ochieng. The accused persons pleaded not-guilty and the matter proceeded to full hearing.
2. The prosecution called ten (10) witnesses in support of its case while the accused persons testified and called six witnesses, which evidence is summarised herein below.

**The Prosecution's Case**

3. PW1 Harrison Owino Shikuku from Nyadorera testified that on the 2/7/2021 at around 3am, he was at the funeral of his aunt at Mahelo after which they decided to go home. He testified that he was in the company of Nicholas Agwambo and Charles Okello and that enroute, they met people on the road



- who started assaulting them calling them cattle thieves. PW1 testified that he informed the people that they were from a funeral and he called Nobert and Ochieng who arrived on a motorcycle.
4. PW1 testified that upon the arrival of Ochieng and Nobert, the people on the road attacked them more and cut them with pangas. It was his testimony that their attackers beat up Nobert & Ochieng and they never listened to their pleas, forcing Nobert who was armed to shoot in the air but that, that in itself did not deter the people who continued beating their victims.
  5. It was his testimony that he knew the people who attacked them and that he clearly saw Erick Ouma Owino, Oyieko Otieno Ouma and the 1<sup>st</sup> accused whose name he forgot but that the 1<sup>st</sup> accused sells fish. He testified that the 3<sup>rd</sup> accused used to buy sodas from PW1 while the 2<sup>nd</sup> accused was a bodaboda rider and that he used to collect sodas from PW1. He further stated that he used to buy fish from the 1<sup>st</sup> accused.
  6. PW1 testified that he saw the three accused persons very well and even called them by name. It was his testimony that their attackers caused their victims to sit down and that the assailants lit torches at the said victims. He further testified that he knew their voices very well and that he called out Oyieko telling him that he was from a funeral. PW1 further testified that the three people also knew their victims very well.
  7. He testified that when Nobert shot in the air, Nicholas ran away and left PW1 and Charles Okello who sat on the ground being beaten by the accused. He further testified that when Nobert came to rescue them, they managed to run but Bonface who had an accident prior and could not run was overwhelmed by the three attackers who hit him using pangas and rungus.
  8. PW1 testified that he went home and in the morning, Nobert called him and instructed him to go and record a statement at Siaya Police Station as Bonface had been killed. PW1 testified that he had been cut on the head as was evident from a healed scar on the right side of the head. He testified that he went and recorded his statement. It was his testimony that the people who attacked them were many but he only knew the three accused persons very well since he was born as they lived in Nyadorera and he interacted with them regularly. He identified the three accused persons in the dock as being among their attackers on that material night
  9. In cross-examination, PW1 stated that the incident took place at 3am and that there was no light. He stated that there were many people and that the people who were in front had torches and forced the victims to sit down as they spoke to him. It was his testimony in cross-examination that the people wore black security aprons and had pangas and rungus. PW1 stated that since the attackers had torches, they lit those torches at their victims and on each other.
  10. PW1 reiterated that he called out Ayieko by name. He further stated that the three were facing him and beating him. He testified in cross-examination that as the assailants beat them, he raised his head and that he was also defending himself so he looked at them. PW1 testified that the 1<sup>st</sup> Accused had a panga while the other 2 accused persons had rungus.
  11. PW1 stated that they had carried chang'aa to the funeral and that after Nobert shot in the air, they ran but Bonface remained behind. He testified that he hid in a maize plantation and that the accused persons continued assaulting Bonface. He stated that he could see them from a distance as they continued beating Bonface, although he could not see the exact scene properly.
  12. In re-examination, PW1 testified that he hid in the maize and saw the attackers continue assaulting Bonface who had remained behind.



13. PW2 Charles Okello, a bodaboda rider in Nyadorera area testified that on the 2/7/2021 at 3am he was at a funeral in Mahelo after which they left for home with Harrison and Nicholas on a motorcycle. He testified that on their way, they were attacked by a group of people carrying rungu, pangas and torches who commanded them to stop, which they did, after which the group then started beating them as they commanded them to sit on the ground.
14. PW2 testified that the crowd accused them of being cattle thieves and they lit torches at them and at each other. He testified that they told the attackers that they were from a funeral and when the assailants demanded for evidence, PW2 and his friends told the attackers that they-victims could call the people at the funeral to come and confirm. It was his testimony that they told Harrison to call his brother Nobert and inform him of what was happening.
15. PW2 testified that Ochieng came on a motorcycle whilst carrying Nobert and stopped at the scene but that they were beaten thoroughly. He testified that Ochieng was also called Bonface. PW2 testified that Nobert then shot in the air and PW1 and his team ran away but Ochieng could not run so he was beaten thoroughly. He further testified that they were beaten by a crowd of over 30 people in which crowd, he knew Erick the second accused who was speaking to the victims and carrying a rungu that he used to beat them. PW2 testified that he saw Ayieko the 3<sup>rd</sup> accused who usually sells in a shop at Nyadorera. He testified that Erick was a bodaboda rider.
16. PW2 testified that Oyieko had a panga which he used to cut Harrison. He further testified that he also saw the 1<sup>st</sup> accused Odhiambo who was saying that they should be beaten. It was his testimony that the people had torches which they used to light the area and at themselves so the they-victims saw the assailants well. He testified that he knew the three accused persons well as they worked together at the same centre. He further testified that the four of them ran away leaving behind Ochieng who could not run as he had a metal implant in his leg following a road accident on a motor cycle.
17. PW2 testified that he ran to his home and informed his mother who advised him to go and sleep until the following morning. He testified that he did not know his colleagues' condition and that he went and slept until the following morning when Harrison's brother arrived carrying Harrison. PW2 testified that Ochieng's brother was crying saying that Ochieng had been killed and that Nobert was alive and at Siaya. He testified that they passed by the scene and saw many people gathered then proceeded to Siaya Mortuary where Ochieng's body was. He testified that he saw the deceased's body which had cuts on the head, chest and legs and all over his body. It was his testimony that he lost his Samsung phone at the scene of the attack. PW2 identified the accused persons as some of the people who beat them.
18. In cross-examination, PW2 testified that the incident took place at 3am. He stated that they had taken some chang'aa at the funeral between 1-2am. It was his testimony on cross-examination that they met about 30 people on the road but he only knew a few of them. He further stated that the people had torches and that the attackers called their victims by name and the victims also called the attackers by name. He further testified that the people who beat them had black aprons. He reiterated that Erick, the second accused had a rungu, Oyieko, the 3<sup>rd</sup> accused had a panga and Odhiambo, the 1<sup>st</sup> accused had a torch and was encouraging the crowd to attack their victims. He further testified that when he ran, the people were still beating them and that Ochieng was being beaten too.
19. PW3 Nobert Bwire Ndombi a police officer stationed at Langas police station in Eldoret testified that on the 1/7/2021, he had been assigned to provide security to Hon. Otwoma, the then Chairman of the Privatization Commission and that he went for his aunt's funeral at Mahelo village. He testified that on the night of 2/7/2021, he received a phone call from Harrison, his cousin, who was asking for



- help as he had been attacked. It was his testimony that he went to the scene with his brother Bonface Ochieng who carried him on the motor cycle.
20. It was his testimony that on arrival, they found many people carrying runigus and pangas. He further testified that Harrison was sitting down. He testified that the people attacked them and cut Bonface's helmet with a panga. He further testified that they tried telling the crowd that they had gone to help their brothers who had come from the funeral but the attackers could not listen so on sensing that they were in danger, he shot in the air twice then the crowd stood aside. He testified that Harrison was bleeding from the head.
  21. PW3 testified that he started talking to the crowd to calm them down and that the people became rowdy and damaged the motor cycle then attacked them again so he shot in the air twice and got away and ran back to the funeral using a different route. He testified that he ran and called his cousin Alphonce to come and help while Bonface remained at the scene as he had a problem with his leg after an accident. PW3 testified that Alphonce informed him that they had gone to Rwambwa Police Post to report using a vehicle and that they had been attacked by the same people who hit their vehicle with runigus.
  22. It was his testimony that the police from Rwambwa went to the scene and called him saying that Bonface had already been killed. He testified that he stayed until 6am when he went to Siaya Police Station to report the incident. He further testified that as he was running away from the scene, the deceased was crying saying they should leave him. PW3 testified that he was new in the area so he did not know the attackers who assaulted them.
  23. In cross-examination, PW3 stated that the time was about 1.25 am and that there were about 50 or more people some of whom had torches. He further testified that he could not identify the people that he saw.
  24. PW4 Alphonce Onyango Odhiambo testified that on the 1/7/2021 at about 5pm, he was at the funeral of his aunt Kalasina Ochieng with other family members including Bonface Ochieng, Nobert Ochieng, Charles and others. He testified that Harrison arrived later. It was his testimony that later in the night, Charles, Harrison and others left the funeral going back home while he remained with Nobert, Bonface and others. He further testified that Nobert received a distress phone call of an attack on Harrison and his colleagues.
  25. PW4 testified that Nobert and Bonface left on a motor cycle to go and rescue Harrison and his colleague but shortly, Nobert called PW4 saying that they had also been attacked. It was his testimony that he drove to the scene with Alphonce, Paul Oduor, Kevin Ochieng and another cousin and on arrival, saw many people carrying runigus, pangas and torches who attacked them, hitting the vehicle. It was his testimony that he sensed danger and drove to Rwambwa Police Post. He further testified that he did not identify the people who attacked them.
  26. PW4 testified that he reported to Rwambwa Police Post and returned to the scene with three police officers who told him to park the vehicle at a distance from the scene. He testified that he remained in the vehicle and still saw people attacking him so he drove off towards Nyadorera to be safe. He testified that Nobert called him saying Bonface had been killed. It was his testimony that he drove to Rwambwa to pick his cousins whom he had left there so he drove towards the scene and went to the funeral place. He testified that he learnt that Bonface had been killed. It was his testimony that Nobert called saying that Bonface's body was at Siaya Mortuary so he drove to the Mortuary and saw Bonface with the cuts on the head, legs, chest and all over his body. He further testified that the body was soaked in blood.



27. In cross-examination, PW4 stated that it was about 1am when he arrived at the scene of attack. He stated that the people he saw were in excess of two hundred in number and that he did not know any of the people in the crowd. He further stated that he worked far from Nyadorera and did not know the three accused persons. He further stated that he left police officers at the scene.
28. PW5 Emily Night Sibili testified that the deceased was her husband. It was her testimony that on the 1/7/2021, they parted at 6pm as he left for his aunt's funeral in the company of his brother Nobert Bwire and called her after 45 minutes saying they had arrived safely. She testified that on the 2/7/2021 between 5-6am her neighbour Mathias Ouma went and woke her up and on opening the door, he informed her that Bonface had died.
29. PW5 testified that at 7am, Father Joseph, her husband's brother arrived with other in-laws and they proceeded to Bonface's aunt's funeral. She testified that on the road, they found many people gathered and after Father Joseph's inquiry on what had happened, they were informed that a thief had been killed and the motor cycle had been set ablaze. It was her testimony that Bonface had an accident earlier on so he had a metal plate inserted in his leg that was not yet healed.
30. She testified that they proceeded to the funeral where they met her mother in-law and other relatives who said Bonface was dead and had been taken to Siaya. It was her testimony that they drove to Siaya with Father Joseph where they were led to the Mortuary where they found her husband lying in the morgue. She testified that she identified him because Father Joseph could not as a result of the bad injuries sustained by the deceased. She further testified that the deceased had injuries on the head. It was her testimony that the Postmortem was done later and witnessed by the deceased's brothers.
31. PW6 Paul Onyango Kanoti, the Area Chief Usonga Location testified that on the 2/7/2021 at about 2 am, he was asleep in his house when he received a call from the village elder for Nyadorera 'A' Mr. Joseph Okoth Odhiambo saying that some people had burnt 2 motor cycles. He testified that he called his Assistant Chief Mr. Stanislaus Oduor Okumu who went to the home of PW6 and together they proceeded to the scene and found two motor cycles burnt. He testified that he saw a dead body across the road that he learnt was Bonface Ochieng.
32. PW6 testified that he called Corporal Kigen, the in charge of Nyadorera Police Post who arrived at the scene after a few minutes. He further testified that the deceased did not live in his area and that he was informed that the deceased had only come for a funeral. PW6 testified that the deceased came from Samia in Busia.
33. In cross-examination, PW6 stated that when he arrived at the scene, he saw two motorcycles on fire and later saw the deceased's body. He stated that he did not witness the deceased's killing.
34. PW7 No. 46917 Corporal Philip Kigeni currently stationed at Webuye Police Station attached to Misikhu Police Post testified that in 2021, he was attached to Nyadorera Police Post as the in charge. He testified that on the 2/7/2021 at about 1 am, he received a phone call from Fredrick Okello of telephone No. 0720287473 who informed him that his brother had been attacked at Kahoya village, Nyadorera 'A' Sub Location. He testified that he left with 3 police officers and on arrival at Kahoya village, found a dead man on the road and many people gathered at the scene. He further testified that they found an identity card about 3 metres from the deceased.
35. It was his testimony that he called Siaya Police Station who sent officers to the scene. He testified that he also saw two motorcycles which had been burnt about 15 metres from the body, besides the road, some documents such as NHIF card bearing the deceased's name and also recovered National Police Service Card for Police Officer 82823 Norbert O. Bwire. He testified that the officers from Siaya Police Station arrived at the scene and removed the deceased's body to the mortuary. In cross-examination,



- PW7 stated that on arrival at the scene, they found very many people at the road near the body of the deceased.
36. PW8 Dr. Juma Gabriel Wekesa, a Medical Officer at Siaya Referral Hospital testified that he conducted the postmortem on the deceased, Bonface Ochieng on 2/7/2021 at Siaya County Referral Mortuary at 2pm.
  37. It was his findings that he was presented with a male with bloody and muddy trouser and jersey, well-nourished and stout physique. He testified that there was soiling of clothing and bloodstained, a fracture of the right proximal radio ulna and dislocation of left radio ulna joint. PW8 further testified that there was a sharp cut on the left distal tibia, a mandibular fracture and seven lost teeth.
  38. Dr. Juma testified that there was a total of 7 sharp injuries on the head, 5cm long being the longest. He testified that two were injuries on the forehead while the rest were on the jaw (1) and teeth (1), with 4 injuries on the left side of the head.
  39. Internally, Dr. Juma found that the head had seven cut wounds with underlying cracks and linear fractures with laxity and dislocation of the temporal mandibular joint. He testified that there was loss of 4 upper and 3 lower teeth with the 4 upper teeth being two incisors and 2 canine teeth while the three lower teeth were 2 incisors and 1 canine.
  40. On the nervous system, it was his testimony that there was a depressed skull fracture on occipital frontal area with underlying intracranial haematoma. He testified that the rest of the systems were normal. Dr. Juma testified that they concluded that the cause of death was severe head injury with intracranial haemorrhage due to sharp head trauma and that he issued Death Certificate No. 1656219 and signed and stamped the Report. It was his testimony that the seven cut wounds were caused by sharp objects and that those injuries could have not been self-inflicted. He produced the Postmortem Report dated 2/7/2021 as PEX 1.
  41. In cross-examination, Dr. Juma stated that from the injuries, he could only say that it was a sharp object with considerable force. He further stated that there could have been multiple people inflicting the injuries because the injuries were scattered all over the body of the deceased.
  42. PW9 Nicholas Ouma Ochieng testified that on the 2/7/2021 at 3am, he went to his aunt's funeral and stayed on with his cousins. He testified that they then left and met a gang of people 2 km away from Nyadorera who claimed that PW9 and his cousins were thieves so the people started assaulting them. He testified that they denied but the people beat them and set his motor cycle on fire. He testified that he was with Okello, Harrison, and Charles. He testified that they were attacked by many people and that he identified three of those people. It was his testimony that one of them rode a bodaboda, Erick Oyieko who was also a businessman whereas Odhiambo was a small scale businessman who sold fish on the market.
  43. PW9 testified that the people had bright torches and that he spoke to Oyieko, telling him that if indeed theyPW9 and his colleagues were thieves, they should be taken to the Police. He testified that they burnt his motor cycle, motor vehicle license while his phone and Kshs 14,000 got lost. It was his testimony that he escaped and went to his home that was near. He testified that before the crowd reached them, he saw them as he had a torch too. He testified that he saw pangas being wielded against them.
  44. It was his testimony that Bonface Ochieng and others had come to rescue them as they were being assaulted. He testified that Eric, Oyieko and Odhiambo were present beating them. He further testified that Bonface came with his brother, a police man, who was armed with a gun while PW9 was with their cousin who was also being beaten. He testified that he met Bonface at the funeral and they ate together



- at the funeral. PW9 testified that he heard a gunshot and got more shocked and escaped leaving Bonface and others being beaten as his motor cycle was on fire.
45. PW9 testified that Bonface arrived at the scene on a motor cycle too. He reiterated that he saw the accused persons Eric, Oyieko and Odhiambo assault Bonface. He testified that the attackers had pangas and rungas whereas Odhiambo had a rungu only. He testified that they beat Bonface on his head. It was his testimony that the rest of the people were armed with pangas and rungas. He further testified that he had known Eric for long because they worked together at the bodaboda Stage. He testified that Oyieko used to be his boss as PW9 used to ride his motor cycle before PW9e bought his own. He testified that he had known Oyieko and even Odhiambo for a period of over ten years. It was his testimony that he saw the accused persons assault the deceased. He identified the accused persons in court.
  46. In cross-examination, PW9 stated that it was at night when they left the funeral. He stated that he saw very many people on the road though he did not count them. It was his testimony in cross-examination that he spoke to the accused persons whom he knew well. He further stated that Eric assaulted him and that he was down on the ground as the assailants ordered the victims to be down. He reiterated that they were beaten by all the 3 accused persons. He further stated that all the three people in court were assaulting their victims and that they had torches and that he saw them well.
  47. PW9 testified that he saw Oyieko burn his motor cycle and that he ran after hearing a gunshot leaving his rescuers and cousins behind. He stated that the following morning, he heard that somebody was dead on the way and thought it was Harrison, his brother, only to learn that it was Bonface.
  48. PW9 stated that all the three accused persons wore dark jackets though he could not tell exactly how the rest of the members of the gang were dressed. He stated that he identified the three accused because he knew them well before and they spoke to him, so he knew their voices well. PW9 testified that he had never disagreed with the three accused persons and that in fact Eric was his friend.
  49. PW10 No. 58242 Sergeant John Nzive testified that on the 2/8/2021, he was in the office when the then (now late) DCIO Muhaya Nelson instructed him to take over investigations in a murder incident reported to have taken place at Nyadorera area on 1<sup>st</sup> and 2<sup>nd</sup> July 2021. He testified that two witnesses, Harrison and Police Constable Robert Bwire had already recorded their statements with OC Crime IP Kibor.
  50. PW10 testified that he began investigations and summoned several witnesses, 3 of whom said that they were attacked at 2am as they were leaving a funeral place. He testified that he recorded their statements and Police Constable Kiptoo gave him a Postmortem Report for Bonface Ochieng who was the victim of the murder. It was his testimony that in the course of investigations, 3 witnesses mentioned some suspects namely; Alfred Odhiambo Ogolla, Eric Ouma Owino and Oyieko Otieno Ouma as the people who were seen in the group of people who murdered Bonface Ochieng.
  51. He testified that he was not able to establish the exact number of the people who waylaid the deceased and the three witnesses, but the witnesses said the people were about 20 - 30 in number. He further testified that he liaised with the Area Chief Mr. Kanoti, one of the witnesses in this case, who summoned the three witnesses identified and he went and met them at Nyadorera Chief's Office, interrogated them, arrested them and preferred a murder charge. It was his testimony that the report was first received at Nyadorera Police Post by Corporal Kigen who testified as PW7. He testified that he did not receive the exhibits but that he saw two motor cycles which were set ablaze.
  52. In cross-examination, PW10 stated that he recorded statements from three witnesses who were also attacked. He stated that Charles Okello told him that he was also assaulted and he gave PW10 names of



the four people he identified from the gang that assaulted them, two of whom were Eric and Oyieko. PW10 admitted that he had not traced the other two suspects. He stated that he did not get any cartridges but recovered personal documents of the Police Officer, Police Constable Bwire. It was his testimony in cross-examination that police Constable Bwire fired while he was running and that the other people said they first heard gun shots.

### **Defence Case**

53. DW1 Alfred Odhiambo Ogola, the 1<sup>st</sup> accused testified that on the 1/7/2021 he went to pick his child from Father Odera Special School in Bondo. It was his testimony that he had a letter from school to show that he had permission to take out the child which he produced as DW1Ex1. He further testified that they had prayers then left with the child to go for prayers in a certain church at Anduro where he slept with the child for prayers then returned home on the motorcyclist with his child.
54. In cross-examination, DW1 stated that DW1Ex1 showed that the child was going home not prayers but he decided to take the child to Anduro for prayers. He further stated that the deceased was killed near the home of DW1. He admitted that some of the witnesses who testified in court knew him and he also knew them. He stated that he had never had disagreements with the said witnesses and so he could not tell why they said that they saw him kill the deceased.
55. DW2 Eric Ouma Owino, the 2<sup>nd</sup> accused testified that on the 1/7/2021, he was in his house sleeping when at 1 am, he heard screams upon being woken up by his wife. He testified that the screams were from a far. It was his testimony that he and his wife both got out and in 2 minutes they heard a blast which they thought was a tyre burst. He testified that there were three consecutive blasts and that after about 5 minutes, he heard footsteps of a person running on the road. He testified that he checked and saw a person running away from the scene where he had heard blasts and called out to him hallo hallo, and asked him what was happening but the person never answered him but ran away.
56. DW2 testified that his neighbour's daughter, Akinyi also came and asked him as to what was happening and he told her that he had asked the person running who gave him no answer so he went back to his house to sleep. It was his testimony that he knew Nicholas Ouma Ochieng whom they worked with in the same stage as boda boda riders. He testified that on the 5/5/2021 before the incident, his longtime customer went to where they were at the stage and asked for Ouma but because Ouma was absent, he hired DW2 and he took the customer to his destination and after he was done, returned him and was paid Kshs. 5,000 which he had never been paid in his life as a boda boda rider. He further testified that on another day, the customer came when Ouma was present and selected him instead of Ouma so Ouma got annoyed.
57. In cross-examination, DW2 testified that he knew Nicholas Ouma very well and that he never told him that he had carried his customer. He admitted that Nicholas was beaten that night. He stated that he never had any other dispute with Nicholas and that it was normal for customers to be carried by any rider.
58. In re-examination, DW2 stated that Nicholas got angry saying that issue would not be over and kept a grudge against him.
59. DW3 Ayieko Otieno Ouma, the 3<sup>rd</sup> accused testified that on the 1/7/2021 at night during curfew time, he had closed his shop at Nyadorera at 6.30 pm as he wanted 7 pm to find him in his house. He testified that he reached his house and watched 7 pm news, ate dinner, watched 9 pm news until 10 pm then his children went to sleep and he also went to sleep. It was his testimony that at 1 am, he heard a blast like a gun and woke up his wife who also told him that she had heard the blast. He testified that he sat on his bed and heard noises.



60. It was his testimony that cattle thieves were common at that time and he subsequently heard two more blasts and told his wife that they could not go near. He testified that they got out with their children, listened to the noises and entered the house and slept until the following morning when he went to his shop. DW3 testified that he met people gathered on the road where the incident had happened saying a motorcyclist was killed and a motorcycle burnt. He testified that he did not know the person who was killed.
61. In cross-examination, DW3 stated that the deceased was killed about 300 metres from his home. He further stated that he was a well-known businessman and that Ouma Agwambo was his boda boda rider who knew him well. He stated that they never disagreed and that he could not tell why Ouma Agwambo testified against him.
62. DW4 Raphael Oduor Oduol, a boda boda rider testified that he knew the three accused persons. It was his testimony that on the 1/7/2021, he carried the 1<sup>st</sup> accused Alfred Odhiambo Ogola to pick his child from school though he could not recall the name of the school. He testified that he had taken him to that school severally. DW4 testified that the child had a disability so they went and picked the child and took the child to a certain church at Anduro to a certain prayer man whom they found had gone away but returned later and prayed for the child, then they slept there and returned the child to school before returning to Nyadorera.
63. In cross-examination, DW4 stated that he knew the 1<sup>st</sup> accused because he usually carried him on boda boda. He stated that they reached Bondo at 3 pm though he could not recall what time they left Nyadorera. It was his testimony that it was raining so they stayed at the prayer place for long and that his motorcycle had developed mechanical problems after they picked the child from school. DW4 testified that at the church, they met a lady also waiting. It was his testimony in cross-examination that they arrived at the church around 8 pm towards 9 pm as the prayer man returned late.
64. DW4 stated that the child was prayed for that night and that they slept in the church where they found beddings and left the following day at 7 am. He stated that the prayer man was at the church when they left and that they reached school at 8am, dropped the child and returned to Nyadorera where they arrived at between 10 - 11 am.
65. DW5 Rosemary Akinyi Odimo testified that on the 1/7/2021 she was at Usonga having visited her sick mother. She testified that she knew all the three accused persons. She testified that Erick was her mother's neighbour. It was her testimony that she woke up at night at about 2 am after hearing noises, got out of the house to listen and heard Erick speaking to someone near the road asking the person why he was running and what had happened from where he was coming from.
66. DW5 testified that she called out Eric and asked him whom he was talking to and he said he did not know the person but that he was inquiring to find out what was happening. She further testified that she heard Eric saying that he wanted to enter his house and sleep. It was her testimony that she also entered the house and slept. DW5 testified that she had known Erick for long since he was born and had never known him to be a criminal.
67. In cross-examination, DW5 reiterated that she heard noises of 'huyo huyo' before she got out of the house and also heard a gunshot after she had returned to her house. She stated that she could not tell where Eric was before she met him outside. In re-examination, DW5 stated that Erick's home was near her mother's house.
68. DW6 Jacinta Ouma Oduol testified that on the 1/7/2021 she was in her homestead with her 2 grandchildren one of whom was sick. She testified that at 12.55 am, the sick child wanted water so she took him from where he slept to where she slept. It was her testimony that as she lived near the road,



- she saw motorcycles and light, then heard screams in the village. DW6 testified that there was a curfew and cattle theft was rampant at that time. She testified that she listened and heard noises going on and on checking the watch noticed that it was at 1.05 am.
69. DW6 testified that she heard 3 gun shots and got into the house as she was scared and was alone. She testified that she then heard more noises escalating. It was her testimony that there was no electric light in that place.
70. She further testified that she went to the road and found many people gathered but could not identify or recognize any of them. She testified that she knew all the accused persons who were her nephews. She testified that the 1<sup>st</sup> and 2<sup>nd</sup> accused were her in-laws. It was her testimony that she never saw them at the scene where there were many people and that the incident occurred far from their homes.
71. DW7 Eunice Atieno Ayieko testified that on the night of 1/7/2021 Joseph slept in their house having returned from his business and that at 7pm they watched news. It was her testimony that she went, cooked and they ate dinner then at 9 pm watched news with their children until 10pm then slept. She further testified that at about 1.30 am, her husband woke her up and told her about the blast.
72. DW7 testified that she was in bed so she sat on the bed and they heard a blast and her husband got out as she followed him. It was her testimony that she heard noises coming from far then heard another blast and Joseph told her that it was a gunshot so they returned into their house and slept. She further testified that when she got out, the children also got out.
73. It was her testimony that at 6 am she woke up and went to the farm that was at a distance and returned at 2.30 pm. She testified that as she passed by the road, she heard people saying a person had been killed but she went her way home. DW7 testified that Oyieko was a good person.
74. In cross-examination, DW7 stated that she was with Oyieko in their house where they slept as their children sleep in a different house. She testified that their neighbours lived far and that the shop was at the Centre. She further stated that she could not tell if other neighbours got out upon hearing the noises as it was night.
75. DW8 Stephen Onyango Osinde testified that on the 1/7/2021, they had gone to harvest sand in Busia County but the vehicle broke down so they returned to Nyadorera on 2/7/2023 in the morning. It was his testimony that he met Eric the 3<sup>rd</sup> accused at about 9 am when DW8 called him and they negotiated the motorcycle fare. He testified that Ouma Agwambo arrived and said that his motorcycle was burnt at Kamhango and that those people who lived near there must answer.
76. DW9 Karen Adhiambo Oyieko testified that on the 1/7/2021 at night, she was at home with Oyieko Otieno Ouma, her father. It was her testimony that it was during the Covid curfew and so people used to return home early. She testified that her father was a shopkeeper at Nyadorera so he returned home on that day before 7pm and that they ate dinner then she and her little sister and 2 children went to sleep and left their parents watching television at 10.00 pm.
77. It was her testimony that as they slept, they heard noises from the upper part of their home and that her and her sister got out to listen to what was happening and found their mother and father standing outside their house. DW9 testified that they listened to the noises and heard three gunshots in succession but because of the curfew, they could not go out of the homestead so they went back into their respective houses to sleep. She testified that the following morning, she went to Siaya where she worked and that her father also went to his shop. She further testified that she heard about the thieves the following day.



78. In cross-examination, DW9 stated that the reason her father was in court was because it was alleged that he was among the people who were making noises. She stated that she did not know that her father was charged with murder.
79. In re-examination, DW9 stated that when the police went to arrest her father, they claimed that he was among those who killed the deceased whereas her father was at home with her.
80. DW10 Jackim Amollo Oluoch, a preacher at Roho Maler Church testified that he knew Alfred Odhiambo. It was his testimony that on the 1/7/2021, the 1<sup>st</sup> accused went to the home of DW10 and found that he had gone to pray in Gem. He testified that when he returned, he found Alfred in his house at 9pm with his child from school in school uniform and a bodaboda rider. DW9 testified that the 1<sup>st</sup> accused had brought his child for prayers and that he had prayed for that child three times. It was his testimony that the 1<sup>st</sup> accused always brought that child for prayers and he always prayed for his family members since 1998. It was his testimony that after praying for the child, the 1<sup>st</sup> accused slept in the church until morning when they left with the child and the rider.
81. In cross-examination, DW10 stated that the Church has beddings and that he prayed for the 1<sup>st</sup> accused's child. He admitted that he had presented no attendance record for the 1<sup>st</sup> accused or his child before court. He stated that he knew the 1<sup>st</sup> accused in 1998 after praying for him. He testified that he had only come to tell court that he had seen the 1<sup>st</sup> accused on the night of 1/7/2021 but he could not tell if the 1<sup>st</sup> accused killed someone then went to DW10's home for prayers.
82. In re-examination, DW10 stated that the 1<sup>st</sup> accused took the child his child for prayers. He further stated that he normally records names of people he prays for. He further stated that Alfred went to his home at 9pm at night and that he slept there and left at 6am.

### **Accused Persons's Submissions**

83. It was submitted that the prosecution had not proved beyond reasonable doubt that any of the three accused persons were guilty of the offence of murder as was evident from the testimony of their prosecution witnesses which left many gaps as well as its rebuttal through the evidence by the defence.
84. The accused persons submitted, through their advocate on record, that the death of the deceased was not in question as the same was confirmed by PW8 and further that PW8 stated that the circumstances leading to the death of the deceased were as a result of mob injustice which was unlawful.
85. As to whether the accused persons participated in the deceased's death, it was submitted that none of the accused persons directly or indirectly participated in the commission of the alleged offence.
86. It was submitted that the accused persons gave an alibi defence and thus it was upon the prosecution to discharge their burden of proof and prove their case beyond reasonable doubt as enunciated in the case of *Victor Mwendwa Mulinge v Republic*, (no citation) where the Court of Appeal rightfully held that the burden of proving the falsity, if at all, of an accused's defence of an alibi lies on the prosecution.
87. The accused persons submitted that their alibi defence was raised at the earliest opportunity, in accordance with the law, when they recorded their statements on 4<sup>th</sup> October 2021, almost three months after the incident occurred and almost five months before they were presented in court for plea giving the investigating authorities adequate time to prod further and investigate any issues raised in their statements and thus their testimony as tendered was admissible.
88. It was further submitted that the evidence tendered by the prosecution did not controvert any of the defence witness testimonies but that as a matter of fact, the prosecution witness testimony only



demonstrated the failure to adequately investigate the alleged offence and reliance on witness testimony of persons with scores to settle such as PW9 and others including PW1, PW2 and PW3 who could not confirm key aspects relating to the involvement of the accused persons in the commission of the alleged crime.

89. It was submitted that evidence on identification or recognition should only ensue when it is crystal clear and there is no room for doubt and hence a possible error but that in this case all the prosecution witnesses testified that the circumstances leading to the death of the deceased were committed under the cover of darkness at approximately 1:30 am by a mob of people in excess of thirty (30), in an area that does not have any lighting and that they were all being beaten simultaneously by various objects while seated and thus in the prevailing circumstances no identification or positive recognition of any perpetrator could be accomplished in those circumstances.
90. Regarding malice aforethought it was submitted that PW8 indicated that the weapon used in attacking the deceased was a blunt object whereas the other prosecution witnesses referred to different sets of weapons including runkus, pangas and sticks and as such the nature of weapon used was not established by the prosecution witnesses. It was further submitted that none of the purported eye witnesses relied on by the prosecution tendered evidence to establish the manner in which the murder weapon (if any) was used and which part of the deceased body was targeted and that in the circumstances, the prosecution failed to prove malice aforethought.
91. It was submitted that the prosecution case indicated that the deceased was not a resident of the area and was in fact visiting and thus it was clear that the accused persons did not know the deceased to warrant them having any interaction with him based on malice or otherwise.
92. The accused persons submitted that the prosecution had not proffered any evidence to indicate any negative conduct on the part of them before, during and after the incident but that on the contrary, the accused persons willingly presented themselves when investigations were ongoing from residents living within the Nyadorera area and further that from the testimonies presented before court, the accused persons were painted as responsible and peace-loving residents.

### **Analysis & Determination**

93. I have considered the evidence by the prosecution witnesses, the defence and their witnesses and the submissions by counsel for the accused persons. The issue for determination is whether the prosecution have proved all the elements of the offence of murder beyond reasonable doubt which are: proof of the fact of death and its cause, proof that the said death was unlawfully caused, proof that it was the accused persons who unlawfully killed the deceased and that the said unlawful killing of the deceased was with malice aforethought.
94. From all the foregoing evidence, it is not in dispute that there was death of the deceased Bonface Ochieng as evidenced by the postmortem report produced as PEX1. In Addition, it is without doubt that the deceased met his death after being assaulted and fatally injured by a group of villagers or mob of people on suspicion of being part of cattle thieves who allegedly had been on the rampage in the area. This was a typical case of what is referred as mob justice, a form of extra judicial punishment in which a person suspected of wrong doing is humiliated, beaten and in many cases, killed by a mob of people.
95. The post mortem report (PEX 1) established that the cause of death was severe head injury with intracranial haemorrhage due to sharp head trauma. It also showed that the deceased's injuries were extensive and severe thereby implying that the attack against him was vicious as to leave no doubt that the assailants had a clear intention of snapping life out of the deceased. This kind of killing is no doubt unlawful as there was evidence that the killers were acting self defence or defence of property when



- they descended on the deceased with all manner of weapons yet he was not armed at all and neither was there evidence of him being a cattle thief. There was also no evidence that the deceased inflicted the fatal injuries on himself.
96. The prosecution having established without doubt that the deceased was unlawfully killed in a “mob justice” incident, the other issue arising for determination is whether the three accused persons or any one of them was positively identified as having been part of the mob of villagers who assaulted and fatally injured the deceased.
  97. Identification evidence must always be treated with caution. It 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).
  98. Further, consideration ought to be given to the prevailing circumstances at the material time and scene of the offence. In that regard, whether favourable conditions and adequate opportunity existed for the identification of the offenders especially if the offence occurred in the hours of darkness as was in this case.
  99. The prosecution relied on the testimony of PW1 who testified that they were attacked by a crowd who cut them with pangas. It was his testimony that he knew the people who attacked them and that he clearly saw Erick Ouma Owino, Oyieko Otieno Ouma and the 1<sup>st</sup> accused whose name he had forgotten but who sells fish. He testified that the 3<sup>rd</sup> accused used to buy sodas from him while the 2<sup>nd</sup> accused rode a bodaboda and used to come collect sodas from him. He further testified that he used to buy fish from the 1<sup>st</sup> accused.
  100. PW1 testified that he saw the three people very well and even called them by name and that he knew their voices very well and that he called out Oyieko telling him that he was from a funeral. PW1 further testified that the three people also knew them very well. In cross-examination, PW1 stated that the incident took place at 3am and that there was no light but that there were many people and that the people who were in front had torches and that since they had torches, they would light the torches at the victims and each other. PW1 stated that he called out Oyieko by name and that as the assailants beat them, he raised his head and looked at them. PW1 testified that the 1<sup>st</sup> Accused had a panga while the other 2 accused persons had rungu. He stated that even after he escaped from the scene and hid nearby, he could see them from a distance as they continued beating Bonface, although he could not see the exact scene properly. In re-examination, PW1 testified that he hid in the maize and saw the attackers continue assaulting Bonface who had remained behind.
  101. PW2 testified that they were attacked by a group of people carrying rungu, pangas and torches and who lit torches at the victims and at each other. He further testified that they were beaten by a crowd of over 30 people in which crowd, he knew Erick who was speaking to them and carrying a rungu that he used to beat the victims. PW2 testified that he saw Oyieko the 3<sup>rd</sup> accused who usually sells in a shop at Nyadorera. He testified that Erick was a bodaboda rider. PW2 testified that Oyieko had a panga and that he cut Harrison. He further testified that he also saw the 1<sup>st</sup> accused Odhiambo who was saying that they should be beaten. It was his testimony that the people had torches which they used to light the area and at themselves so the victims saw them well. He testified that he knew the three accused persons well as they worked together at the same Centre. In cross-examination, PW2 testified that the incident took place at 3am. He reiterated that Erick had a rungu, Oyieko had a panga and Odhiambo had a torch and was encouraging the crowd to attack them.
  102. PW3 told the court in cross-examination that they were attacked by 50 or more people some of whom had torches. He further testified that he could not identify the people he saw.



103. PW9 testified that they were attacked by many people and that he identified three of those people, one of whom rode a bodaboda, Erick Oyieko, who was also a businessman whereas Odhiambo was a small scale businessman who sold fish on the market. PW9 testified that the people had bright torches and that he spoke to Oyieko, telling him that if indeed they were thieves, they should be taken to the Police. He testified that before the crowd reached them, he saw them as he had a torch too. He testified that he saw pangas being wielded against them. He testified that Eric, Oyieko and Odhiambo were present beating them. It was his testimony in cross-examination that he spoke to the accused persons whom he knew well. He further stated that Eric assaulted him. PW9 stated that all three accused persons wore dark jackets though he could not tell exactly how the rest of the members of the gang were dressed. He stated that he identified the three accused because he knew them well before and they spoke to him, so he knew their voices well.
104. On their part, the accused persons through their advocate on record submitted that they gave alibi defences that were not disproved by the prosecution and thus the prosecution failed to discharge their burden of proving the case against them beyond reasonable prove.
105. I have considered the alibi defence by the accused persons. I find the following: It is noteworthy that both the 1<sup>st</sup> and 3<sup>rd</sup> accused state that the deceased was killed near their home however DW6 who alleged to know all the accused persons as in-laws and or nephews testified that the incident occurred far from the accused homes.
106. Further, DW6 in her statement contradicted herself by stating that she went to the road and found many people gathered at the scene but could not identify or recognize any of them but then turns and states that she never saw them at the scene where there were many people.
107. The 2<sup>nd</sup> accused on his part seems to point the blame of his inclusion in this case at one Nicholas Ouma who he claims had a grudge against him as he had ferried Nicholas' high paying client. However, apart from Nicholas who testified as PW9, the 2<sup>nd</sup> accused was identified at the scene by other independent witnesses specifically PW1 and PW2.
108. In this case, the evidence adduced by the prosecution was that the accused persons were identified by fellow villagers in this case PW1 and PW2. This meant that the identification of the accused was not based on identification of strangers rather it was more a case of recognition. Even so, in such cases caution must still be taken in order to overrule the possibility of mistaken identity and I so caution myself of such risk. this is because in addition to the incident having taken place at night, in situations where the death of the deceased is attributed to "mob justice" or "mob injustice", it is difficult if not impossible to pinpoint which person in the mob administered the killer or fatal blow. In the 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.
109. However, a common intention may be drawn from the presence of the assailants at the scene of the offence, their actions and even the omission of any of them to disassociate himself or herself from the assault.
110. 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.”



111. In this case, there is evidence that the deceased Bonface Ochieng was unlawfully killed by a mob of people comprising his village mates. Each of the villagers who took part in assaulting and unlawfully killing the deceased was as culpable as the other, for the unlawful killing.
112. 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.”
113. In this case, the deceased was assaulted and unlawfully killed on suspicion of being a cattle thief. 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.
114. Despite their denial and alibi defences, I have considered the prosecution evidence and the defences. The accused persons were placed at the scene by the prosecution witnesses i.e. PW1, PW2 and PW9 who testified on what role was played by each of the accused persons as well as the rest of the prosecution witnesses who corroborated these testimonies.
115. These witnesses saw the accused at the scene and recognized them. They indicated that the scene was well lit with torches carried by the mob and further that the assailants lit the said torches at each other and at the victims. PW1, PW2 and PW9 also being familiar with the accused persons’ voices, they recognized the same as they spoke to the accused persons herein and that the accused persons also spoke to them thereby making it possible to recognize the accused persons as being part of the mob of people which assaulted and fatally injured the deceased.
116. I find that even without the alibi defence as the accused persons were not obliged to testify or give self-incriminating evidence, the evidence by the prosecution witnesses was credible and sufficiently placed the three accused persons at the scene of crime. I find that the three prosecution witnesses PW1, PW2 and PW9 positively identified and recognized the three accused persons using the torchlight and voice recognition, to have been among the mob that attacked and fatally injured the deceased Bonface Ochieng and that there was no error in their recognition of the assailants who were in front of the other mob and even speaking to the victims. In my view, the accused persons’ alibi was a well calculated attempt to misdirect the court. It amounts to a denial of the fact that the accused persons took part in the lynching of the deceased. I therefore find that the prosecution evidence adduced proved beyond reasonable doubt that the three accused persons herein were among the mob that attacked and unlawfully killed the deceased Bonface Ochieng.
117. The other issue is whether the unlawful killing of the deceased by the accused persons herein was with malice aforethought. In a charge of murder, malice aforethought is taken to be the mental element or mens rea of the offence; ordinarily, it takes the form of an intention to unlawfully to kill which is the express malice or an intention unlawfully to cause grievous bodily harm which is the implied malice. Instances of malice aforethought are stated in Section 206 of the [Penal Code](#) which provides that:
- “206 Malice Aforethought shall be deemed to be established by evidence proving any one or more of the Following circumstances-



- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape of any person who has committed or attempted to commit a felony

118. In *Republic v Stephen Sila Wambua Matheka* [2017] eKLR it was held that:

The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In the *Ogelo v Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of *Ernest Bwire Abanga Onyango v Republic* [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit themurder.

See also *Republic v Martin Kinyua Nancy* [2016] eKLR

119. The accused persons never gave a chance to the deceased and the witnesses in this case who pleaded to be allowed to prove that they were not cattle thieves but mourners of their kin in the neighbourhood. These were PW1, PW2, PW3 and PW9 who tried to calm the crowd down and inform them that they were not cattle thieves but had come from a funeral. The accused persons used crude weapons to attack a defenceless person who was even disabled following an accident such that he could not escape like his colleagues did. they were determined to eliminate him as shown by their defiance of the gunshots by Norbert, an armed police officer who rushed to the scene to rescue his cousins and in the company of the deceased, brother. The accused persons were so daring that they feared no gun and had Norbert not restrained himself from using the gun he had to defend his brother, he could have killed so many of them. The accused persons were indeed daredevils.
120. As was held in *Republic v Mohammed Wanyoike & another* [2017] eKLR the accused persons turned to be the investigator, the trial Court and the executioner. They attacked the deceased and must have anticipated that he will die or be inflicted with grievous bodily harm. He died of the severe cut wounds sustained in the attack. I find that from the severe mutilating injuries sustained by the deceased as per the postmortem report, the weapons used to inflict those injuries namely, pangas and rungas, the accused persons herein had the necessary malice aforethought to unlawfully kill the deceased.



121. In view of the foregoing, I find that the prosecution has proved beyond reasonable doubt the ingredient of malice aforethought and indeed, all the elements of the offence of murder have been proved beyond reasonable doubt.
122. I hereby find the accused persons herein Alfred Odhiambo Ogola, Eric Ouma Owino and Oyieko Otieno Ouma guilty of the offence of murder contrary to section 203 of the [Penal Code](#) and I convict them for murder of Bonface Ochieng.
123. Sentence shall be pronounced after records and mitigation.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 3<sup>RD</sup> DAY OF APRIL, 2023**

**R.E. ABURILI**

**JUDGE**

