



**Republic v Mauti & 2 others (Criminal Case 20 of 2021)  
[2023] KEHC 23896 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23896 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL CASE 20 OF 2021  
REA OUGO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**HOSMAN OBURE MAUTI ..... 1<sup>ST</sup> ACCUSED**

**NICHOLAS MOMAYA MAUTI ..... 2<sup>ND</sup> ACCUSED**

**LABAN OMBASA MAUTI ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. Hosman Obure Mauti ( 1<sup>st</sup> Accused), Nicholas Momaya Mauti (2<sup>nd</sup> Accused), and Laban Ombasa Mauti ( 3<sup>rd</sup> Accused) are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that; on the 25<sup>th</sup> June 2021 at Bamarongo Village, Nyakite sub-location, Bomonyara location in Gucha South Sub County within Kisii County, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Accused persons jointly murdered Boniface Obara Matara.
2. Each accused person denied the charge and the case proceeded to hearing. The prosecution called nine (9) witnesses.

**Prosecution Case**

3. Caleb Onyancha Matara( Pw1) testified that he stays at Bomonyara village. He knows the accused persons. They are family. They are his cousins. The deceased too was his cousin. On 25/6/2021 he passed through his auntie’s place at 7.00 pm. His auntie Grace told him that Obara the deceased had gone to ask for forgiveness so that they would not keep following him. He went to his grandmother’s place. His grandmother told him that Obara had passed through there and told her that he was going to Mauti’s place to ask for forgiveness. Obara had held the sister of the accused persons at the neck. As he went out he heard Obara screaming from the boma of the accused persons. He proceeded to the said



boma but did not reach there. He saw the 1<sup>st</sup> accused person hitting Obara with coffee sticks. He saw Obara tied with a rope on the hands and legs. He was being beaten on both legs. The bench was placed on his chest. Laban (3<sup>rd</sup> accused) placed the bench on the deceased's chest. Laban stepped on the bench and said, "You were playing here at home now a man has arrived" Hosman ( 1<sup>st</sup> accused) and Nicholas ( 2<sup>nd</sup> Accused) continued beating the deceased. The deceased was screaming asking them to forgive him. They did not listen to him. All this time he was at the fence (about 6 meters away). He heard his grandmother plead with them to forgive the deceased. He moved to their shamba he could still see them. Laban removed the bench and placed it aside. By then the deceased had lost consciousness. The deceased went silent. Hosman asked his wife for water, and he took the water and poured it all over the body of the deceased. The others stood by. The deceased regained consciousness, he raised his head and asked for water. The place had sunkungs lights, a rechargeable solar, which they used to shine on the deceased. When his grandmother reached the place they were still beating the deceased. The deceased followed their grandmother and she was chased by Hosman. His grandmother intervened and asked them to leave the deceased. They stopped. The deceased was beaten from 7.00pm to 8.00pm. They stopped beating the deceased when his grandmother asked them to stop. The deceased was untied when the father of the accused persons asked them to untie him. The deceased stood up but fell down again, he had no strength to walk. He came out of his hiding place and carried the deceased home. He was still alive but not okay. The shirt he had on was bloody. He had injuries on the legs. He placed the deceased on a chair in his grandmother's place. The deceased asked for water. Then he heard him fall from the chair. He went back to the house and the deceased kept saying, " my chest my chest". He was sent by his grandmother and whilst at the shops he heard screams from the grandmother's place. He went back and found the deceased had died. He called his uncle Tom Motara and told him Obara had died. He advised him to call the Chief and police from Tabaka. The police went to their home the next morning and he told them what happened. The body was taken to Tabaka mortuary. He did not know if the parties had a grudge.

4. Mary Kwamboka ( Pw2) testified that the accused persons are her grandchildren. She raised the deceased. The deceased is her grandchild. She was called by Caleb and told that the deceased was being attacked. She went and saw the accused persons beat the deceased. The deceased was crying. She asked them why they were beating him. They told him that he had done wrong. They were beating him using coffee sticks. Each of them had a coffee stick. She also saw them step on the deceased in the stomach and chest area. They placed the bench ( Pext No.1) on the deceased and they beat him. The deceased spoke softly telling her "Shosho I am dying". He vomited blood. Before this the deceased had told her that he was going to ask for forgiveness. The accused persons had alleged that the deceased had defiled the girl but the girl denied it. She saw blood and an injury on the deceased's head. The chief later arrested the accused persons. The accused persons beat the deceased at their door. She did not see anyone else there except their parents. Caleb carried the deceased to her house. She screamed when the deceased died. The deceased vomited blood then he died. The body was taken to Tabaka mortuary.
5. Yvonne Mauti ( Pw3) testified that; the accused are her brothers. The deceased was her cousin. On 13/6/2021 she was picking coffee at her parents' shamba. The deceased approached her and told her he would give her 100/- and send her to Tabaka. She went to his place after picking coffee. The deceased asked her to enter his house to get the 100/-. When she entered his house he closed the door and held her at the neck. She screamed and she held his neck. He held her mouth. She told her aunties Grace Masea, and Agnes Masee that he tried to undress her. On 25/6/2021 at 7.00 pm she found the deceased telling her brother Hosman that " you cannot do anything to me". His brother told him to sit and explain what happened on the 13/6/21. Hosman also called her to explain what happened. He canned both of them on the buttocks and then she was ordered to go to the house. She left them canning Obara. Obara went to their home. At about 9.30 pm she heard screams, Obara had died. She testified further



- that it was not very dark at 7.00pm and that Nicholas and Laban were not at home on the 25/6/21. She did not see her brothers the next day. The deceased was helped up by his brother's daughter.
6. Grace Nyaboke ( Pw4) testified that; the accused persons are her nephews' children of her brother. The deceased Bonface too is related to her, he was her nephew. On the 25/6/21 she was at her place. She met the deceased along the road. He told her that he was going to his uncle's place to ask for forgiveness. He looked drunk. She cautioned him not to there looking the way he did. The deceased proceeded to their grandmother's place. She went to her place. At 9.00 pm she heard screams and on going to their grandmother's place she was told he had died. She heard Maria crying, " they have killed him they have killed him". But she did not mention the names. The next day Hosman was arrested. She had not heard of any dispute between the accused persons and the deceased. She did not see the accused persons on the 25/6/21. She heard that deceased wanted to rape the Yuonne.
  7. Issack Onyonka Oieri ( Pw5) testified as follows; he is an assistant chief at Nyatike sub-location. He knows the accused persons they are brothers and are from his sub-location. On 26/6/21 he was called by the village elder and informed that Boniface the deceased had been murdered by 3 family members namely Hosman Mauti, Nicholas Mauti and Laban Mauti. He went to the scene and arrested Hosman and Nicholas and took them to Tabaka Police station. Laban was not at the scene then. He was told that the 3<sup>rd</sup> accused took himself to Nyamarambe. He found the deceased's body lying in the house of Maria Matara. The body had bruises and physical injuries on the leg and around the abdomen. He was told that the deceased had gone to the home of Mauti to ask for forgiveness. The police picked a bench that was said to have been used on the deceased. It had some blood stains. He knew the deceased and he knew he used to drink.
  8. Doctor Brain Ayara ( Pw6) a pathologist testified as follows; he conducted a post-mortem on the body of Bonface Obara. On external examination, the body was lean and in poor nutrition. He had a number of recent injuries including multiple abrasions and the areas with the abrasions were; the left upper arm 4x4cm, multiple tiny on the left thigh, and multiple small abrasions on both legs anteriorly and also the left foot 4x2 near the big toe. On the right forearm was a defensive wound. In addition to the recent injuries, he had old scars of varying ages on the chest. The same could have been caused by a blunt object. The chest had scars that had been there. On internal examination what was significant was in the lungs and head. The lung had an adhesion that was adhering to the posterior surface. It showed the lung had an infection had healed. On the head, there was bleeding in the brain subdural hemorrhage. He formed the opinion that the cause of death was subdural hemorrhage due to blunt trauma. He noted that the deceased had been involved in a fight as he had defense wounds and that it was evident that all his body had been beaten. They took specimens of, a section of the liver, left kidney, and blood. He produced the post-mortem report as Pext no. 2.
  9. Jale Nabututu ( Pw7) a government analyst working at Kisumu testified that; on 7/7/2021 he received the following exhibits from the DCIO Gucha South under the escort of P.C Judy Omare. No. 1 blood in a bottle marked 'A'. No. 2 liver in a plastic bag marked 'B'. No. 3 a kidney in a white plastic container marked ' C'. No. 4 urine in a bottle marked ' D'. they were accompanied by an exhibit memo dated 7/7/21. He was required to ascertain whether the exhibits marked A,B,C and D had any toxic substance of poison and if so if the substance was administered on the body after or during the death. He did the analysis and his findings were as follows; Ethanol concentration of 257.35 mg per 100ml or 6 ½ litres of bottles of beer and 83.86mgs per 10ml or 7 ½ litre bottles of beer were detected in the blood and urine respectively. No other chemically poisonous was found in the other exhibits. He prepared his report and produced it as Pext. 4
  10. No. 80056 Sergeant ( Sgt) James Makobi ( Pw8) an officer attached to criminal investigations and seconded to Safaricom Ltd testified that; he received 3 documents in the form of call data records



from the following mobiles; Mobile No. 0725456895 registered under the name Hosman Mauti of ID Card No. 24269776 Pext5(a). Mobile No. 0791431580 registered under Nicholas Mauti ID Card No. 33177327, Pext 5(b). Mobile No. 0724227601 registered under Laban Mauti of ID Card No. 26598385, Pext 5 ( c ). The data call was for the period starting from 6<sup>th</sup> June 2021 to 6<sup>th</sup> July 2021. The summary shows the numbers queried and their records also show the numbers in contact with the number queried and the date and year time in 24 hours. The data shows the location where the subscriber was at the alleged time. The data also shows the IME number of the mobile number in question. It also shows the serial number of the sim card of the mobile number and it has the subscriber details. The data was collected after a formal request letter from the DCI Gucha South dated 6/7/2021. It requested that they provide the information as captured in the call data. Pw8 produced an electronic evidence certificate as provided under section 65(8) as read with section 106 (a) and (b) of the Evidence Act.

11. Pw8 testified further he printed the data from a computer and printer from Safaricom and the details are as indicated in Pexts 5a, 5b and 5c. For Hosman the data showed that on the 25/6/21 at 1930 hours he was within Kasere area and on 25/6/21 he was at a place called Tabaka and at 2202 hours he was at Rongo market. He was there up to 2303 hours and the locations were interchanging between Rongo and Kasere. For Nicholas Mauti the record indicated that on 25/6/21 there was communication at 1754hours the subscriber was a Machogo and the next communication was at 1220hours at Tabaka and 2018hours he was within at Kasere Tabaka area interchanging upto 2045hours he was at Kasera and at 2157 hours he was at Rongo and on 26<sup>th</sup> he was at Tabaka at 0603 hours in the morning. For Laban Mauti he was at Kasere at 1915 hours he was at Rongo free market and at 1930 hours he was at Kasere and at 1948 hours at Kasera and at 2038 he was at Rongo free market and at Machogo at 2115 hours. At 2326 hours he was at Kasere and on the 26/6/21 at 0042 hours he was at Kasere.
12. No. 236593 P.C Antony Kiragu ( Pw9) testified as follows; he is attached to DCI Gucha South and does general investigations. On the 25/6/21 at 830 hours he received information from the OCS Takaba that there was a murder incident at Nyatike sub-location. He accompanied his boss Inspector Warue to the scene of the murder located at Bomarongo village within Nyatike sub-location. They found the body of the deceased Boniface Obara laying besides the grandmother's house on a seat. The body had visible marks on the legs and hands and the clothes on him were soaked in water. The scene was processed. They were directed to the home of Mauti where they recovered a wooden bench. The assistant chief told them that he had arrested 2 suspects Hosman Mauti and Nicolas Momaya who were at Tabaka Police Station. They took the body to Tabaka Mission Hospital for preservation pending autopsy. The suspects were detained at Tabaka police station. thereafter he began investigations. He recorded statements from witnesses. On 28/6/21 they escorted the 1<sup>st</sup> and 2<sup>nd</sup> accused to Ogembo law courts and sought custodial orders to enable them to complete investigations. On 5/7/21 an autopsy was done on the body of the deceased, and samples of his liver kidney, and blood were taken for toxicology examination. He also requested for a call data from Safaricom ( K) Ltd to establish the locations of the accused persons on the material night. The data indicated that the 3 accused persons were within the same locality at the material hours and night. He got the 3 numbers from the accused persons. The 3 numbers were the ones registered in their names. Kisere, Rongo Magina are places within Rongo sub-county and Tabaka area. Kisere and Magina side share the same booster. Rongo has a booster at the free market and Tabaka too has a booster. They are close and are within the same locality a radius of about 3 to 5 kms depending on the location of the particular booster. He recovered a wooden bench ( Pext 1). He learnt that the accused persons and the deceased were first cousins and that they shared boundaries within the same locality. He was also informed that the deceased had attempted to defile Yvonne on 13/6 2021 and that on 25/6/21 the deceased had intended to apologize to the father of



the girl. The 3<sup>rd</sup> accused was arrested at Kilgoris police station where he works as a police officer. He produced the exhibit memo, Pext 3.

### Defence Case

13. The 1<sup>st</sup> accused person gave a sworn statement. The 2<sup>nd</sup> accused person too gave a sworn statement and so did the 3<sup>rd</sup> accused person.
14. The 1<sup>st</sup> accused person Hosman Obure Mauti ( Dw1) testified as follows; he stays at Tabaka Nyatike area. Boniface is his cousin. On 24/6/2021 he was home the whole day. He saw Boniface at about 10.00 to 11.00 am during the day. That was the last time he saw him. He did not see him at night that day. Boniface went to his place on the 24/6/2021. Boniface was staying with their grandmother. On a Sunday he was called by his sister called Scholastica and told that Boniface had called their younger sister of 14 years to go to his place. He locked her in his house and he removed her clothes in order to defile her. His sister pushed him and he held her at her neck so that she does not scream. That there was an aunty called Grace nearby. Boniface ran away after the incident. He continued to work after the call. On 25/6/21 Boniface went to his place at 7.00 pm and started abusing him telling him he was useless that he could cane him and that he had brought himself to be caned. No one was there to listen to this conversation. He left to inject his father who told him not to inject him that day as he was not feeling well. He went out and found Boniface standing out there. He told him to sit down and he sat down. Then he asked him to lie so that he could cane him. He asked his sister Yuonne to lie down to be caned. He caned them. He told her to go prepare uji for Mzee. Mary their grandmother found him canning the deceased. She told him to continue canning him as they had cautioned him over drinking. The deceased was drunk. He was canning a drunkard. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were not there he does not know where they were. Nicolas came and found he had already canned Boniface. Nicolas asked him to untie Boniface and to let him go. Boniface left for their grandmother's place. As he canned Boniface he touched a bucket of water which poured on him. His father explained to the grandmother what was happening. He knows Caleb. He did not see Caleb that day. Grace is his auntie. He did not see her that day. He saw Boniface walk away. None held him. The time was 7.30 pm. he heard of Boniface's death at 10.00 p.m. He did not go there. Since he had canned him he thought he would be killed. He stayed home that evening. The next day the chief asked him to explain what happened. The chief took him to the police station thereafter. He was arrested. He saw the wooden bench at Tabaka they usually use it to sit. The said bench was not out on the 25/6/21.
15. The 2<sup>nd</sup> accused person Nicolas Mauti ( Dw2) testified as follows; he stays at Tabaka. He sells tomatoes. On 25/6/2021 he left his home at 6.00 am to attend to his work. He returned home at 12.00pm. he took his motorbike and went to Nyambigene in Machogo. It was curfew time. He arrived home at 7.30 pm. he found Boniface tied at the hands. He was down. Only the children of his elder brother were there and the younger sister. Mary his grandmother and his father were in the house. He told his brother to untie Boniface and to let him go. He found Boniface already canned. He left for his home to prepare for a sermon. At 10.00 pm he heard cries. He did not beat Boniface. He heard that Boniface went to their home at 7.00 pm. He also heard that Boniface had been caught with the sister after he called her to send her to the shops. He did not return home on the 26/6/21. He returned home. On the Sunday the day of the incident he did not see Boniface nor did he get a chance to talk to him. He later saw his brother leave with the chief. He followed them and he was also arrested. His brother left home on the 25<sup>th</sup>. He told him he was in Kisii. He did not see the bench on the 25<sup>th</sup>. He saw the rope and stick he did not see the water.
16. The 3<sup>rd</sup> accused Laban Ombasa Mauti ( Dw3) testified that he is a police officer attached to Kilgoris police station. On 25/6/21 there was a funeral. He talked to his Mzee and then went to the funeral.



He had been transferred and he had reported on 22/6/21. He visited his home on the 23/6/21. He returned home on 25/6/21 at 12 p.m. and left for work. He went to Risiri and he was there at about 5.30 pm. The bike he had got spoilt. He decided to go to Rongo after leaving the bike. He slept in Rongo. His family stays in Nairobi so he did not sleep home. He was going to report to work. On 26/6/23 he took a vehicle to Kilgoris at 7.30 am. He did not receive any communication on what was happening at home. His phone was off at the station. He was told what happened the next day. He learnt that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were arrested on Monday, Nicolas informed him of their arrest. He asked for permission to return but he was denied. 2 weeks before this his father had told him of the alleged defilement case and that they had agreed that they settle the matter at home. He was not at their home at the time of the incident. He heard Boniface had run away.

## Submissions

17. The prosecution relied on the evidence that was adduced. It was submitted that it is sufficient and they rely on it. The accused persons filed written submission on the 14<sup>th</sup> of April 2023. The defense submissions reiterate the evidence adduced. It is submitted that the prosecution has not proved their case beyond reasonable doubt for the following reasons; that the prosecution failed to prove malice aforethought on the part of the accused persons. That Pw6 on cross examination testified that the bruises on the hands and legs cannot cause death of a person and also that Pw6 stated that there was no external injury on the head and that he could not tell the weapon used that it was just a blunt trauma. That though Pw1 and Pw2 stated that the wooden bench was placed on the chest of the deceased and used to assault him, this evidence does not match the post-mortem report which reveals that the deceased was healing from a chest infection and that the cause of death was subdural hemorrhage due to blunt force trauma on the head. Pw6 also testified that drinking beyond a certain amount can cause death. There was no external injury on the head. He cannot tell the weapon used it was just a blunt trauma. On the allegation that the murder weapon was a bench produced in court, it was submitted the evidence of Pw1 and Pw2 that the bench was placed on the chest and used to assault the deceased did not match the post-mortem result which revealed that the deceased had a healing chest infection and that the cause of death was subdural hemorrhage due to blunt force trauma on the head. That Pw6 testified that drinking beyond certain amounts can cause death. That this one is evidential to the fact that there was no malice afterthought. Reliance was made on the following cases Ernest Asami Bwire Abang Alias Onyango vs R Ndumbe CACKA No. 32 of 1990, Karani & three others vs Republic 1991 KLR 622, republic vs Godfrey Ngotho Mutiso 2008 eKLR and James Masomo Mbacha vs Republic 2015 eKLR. The accused persons acted normally with no single trait of them being a flight risk. That the 1<sup>st</sup> and 2<sup>nd</sup> accused persons did not run away since they did not intend to kill the deceased and that the 3<sup>rd</sup> accused was not at the scene and he brought up an alibi as his defense. When an accused raises a defense of alibi the burden of proving the defendant's guilt shifts to the prosecution as was held by the Court of appeal in the case of Victor Mwendwa Mulinge vs. republic [2014]eKLR. That the phone data Pext 5B did not place the 3<sup>rd</sup> accused at the primary scene of the alleged crime. Reliance was made on the case of Adedeji vs The State [1971] 1All N.L.R 75 where it was held that, 'failure by the police to look into and verify the validity of an alibi would cause reasonable doubt in the tribunal's mind and result in quashing of a conviction imposed, according to the law'.

That the testimonies of Pw1 and Pw2 only establish actus reus if any on the part of the accused persons whom they allege was beating the deceased. The circumstances that led to the beating of the deceased are very clear, but the motive remains uncertain. That the prosecution has failed to demonstrate how the accused persons caused the death of the deceased, the case has not been proved beyond reasonable doubt, thus the accused persons should be acquitted.



## Analysis and Determination

18. For the offence of murder, there are three elements that the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are the death of the deceased and the cause of death, that the accused committed the unlawful act which caused the death of the deceased, and that the accused had the malice aforethought.
19. On the death of the deceased and cause of death. There is sufficient evidence from Pw1, Pw2, Pw3, Pw4, Pw5 that the deceased died on the 25<sup>th</sup> of June 2021. Pw6 who performed the post mortem testified that the cause of death was subdural hemorrhage due to blunt force trauma.
20. The next issue is whether the accused persons caused the unlawful death of the deceased. Pw1 and Pw2 testified that they saw the accused person beat the deceased on the material day. Pw1 testified that he was about 6 meters away watching the 3 accused persons beat the deceased as he pleaded to be forgiven. The accused persons are his cousins he knows very well and he was able to see them using the sunkung solar lights which they had on. The beating took place for one hour. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons used coffee sticks to beat the deceased and at one time he saw the 3<sup>rd</sup> accused person take a bench and placed on the chest of the deceased and stepped on it. Pw2 testified the same day that she saw the accused persons beat the deceased. The accused person only stopped when she asked them to. She saw them beat the deceased in their homestead of the Mauti. The accused persons are her relatives. She knows them well and even spoke to them. She testified that the incident happened around 6.00 pm to 7.00 pm and that it was not that dark. The evidence of Pw1 was corroborated by the evidence of Pw2. They both witnessed the 3 accused persons beat the deceased. The 1<sup>st</sup> accused admitted that he canned the deceased and Pw3. It was alleged the deceased had attempted to defile Pw3. The 1<sup>st</sup> accused stated that the deceased woke up thereafter and left for the grandmother's house. The 1<sup>st</sup> accused admits he was with the deceased on the material day. The 2<sup>nd</sup> accused testified that he went to their home but did not participate in the canning and that he found the deceased tied up and he urged the 1<sup>st</sup> accused to untie him. Pw1 and Pw2 too did testify that the deceased was tied at the hands. I am not persuaded that the 2<sup>nd</sup> accused was not involved. Pw1 and Pw2 saw him beat the deceased with coffee sticks. The 3<sup>rd</sup> accused claims that he was not in the said homestead. He has raised a defense of alibi. As a court, I am aware that the burden lies with the prosecution to prove their case beyond reasonable doubt.
21. The prosecution had the responsibility of substantiating the falsehood of the defense alibi raised. The Court of Appeal in *Victor Mwendwa Mulinge vs. R* [2014] eKLR stated:

"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs. R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."
22. The court in *Waka Evans Amira v Republic* [2021] eKLR cited with approval the South African case of *Ricky Ganda vs. The State*, [2012] ZAFSHC 59, where the Free State High Court, Bloemfontein held as follows:

"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence



implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

23. I have to examine the defense of alibi against the evidence adduced by the prosecution. Pw1 and Pw2 testified that the 3<sup>rd</sup> accused was within the homestead where the deceased was being beaten and that he took a bench which was within the home and placed it on the deceased and stepped on it. Pw1 testified that the 3<sup>rd</sup> accused told the deceased that he know that there are men around. The prosecution also adduced evidence through Pw8 an officer attached to Safaricom Ltd on the accused person's phone number and usage on the material day between 7 to 8.00 pm and later after 9 pm. His evidence in chief was as follows;

"For Hosman the data showed that on the 25/6/21 at 1930hours he was within Kasere area and at 25/6/21 he was at a place called Tabaka and at 2202 hours he was at Rongo market. He was there upto 2303 hours and the locations were interchanging between Rongo and Kasere. For Nicholas Mauti the record indicated that on the 25/6/21 there was communication at 1754hours the subscriber was a Machogo and the next communication was at 1220hours at Tabaka and 2018hours he was within at Kasere Tabaka area interchanging upto 2045hours he was at Kasere and at 2157 hours he was at Rongo and on 26<sup>th</sup> he was at Tabaka at 0603 hours in the morning. For Laban Mauti he was at Kasere at 1915 hours he was at Rongo free market and at 1930 hours he was at Kasere and at 1948 hours at Kasere and at 2038 he was at Rongo free market and at Machogo at 2115 hours. At 2326 hours he was at Kasere and on the 26/6/21 at 0042 hours he was at Kasere."

24. Pw8 evidence is clear that the 3 accused persons were within Kasere area on the 25<sup>th</sup> of June 2021 in the evening. Laban the 3<sup>rd</sup> accused was within Kasere area where the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were between 7.15 pm he moved to Rongo then again at 19.30 hours he was at Kasere. This evidence coupled with the evidence of Pw1 and Pw2 that he was in the homestead persuades me that he was at the within the homestead where the deceased was. He was seen beating the deceased together with the 1<sup>st</sup> and 2<sup>nd</sup> accused. His defense of alibi has been displaced the evidence adduced by the prosecution. The defense has raised the issue that the cause of death as stated by Pw6 contradicts the evidence of Pw1 and Pw2 that the weapon used was the bench. Pw1 and Pw2 testified that the beating took some time, about an hour. After the beating the deceased woke up and fell and Pw1 had to carry him home. The cause of death was subdural hemorrhage due to blunt trauma. He has fresh abrasions all over his body and defense wounds. He died soon thereafter after leaving the home of Mauti. Pw6 made a comment in the post mortem that subdural hemorrhage is common in the aged and chronic alcohol users even minor trauma. Pw6 stated that the chest infection had healed. He also stated that the deceased must have been hit on the head and that the defense wounds showed he had been involved in a fight. The deceased did not die as a result of a previous injury but from the blunt forced injuries, he sustained on the material day and not because of alcohol. They had a common intention to discipline the deceased for the alleged accusation of attempting to defile their sister, I therefore find that the prosecution has proved that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> accused persons beat up the deceased and caused the unlawful death of the deceased.



25. The final issue for determination is whether the prosecution has proved malice aforethought on the part of the accused persons; Section 206 of the Penal Code defines malice aforethought as follows:

“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 from custody of any person who has committed or attempted to commit a felony.”

26. The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, the Court of Appeal held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

27. Pw6 who did the post-mortem on the deceased’s body noted that the cause of death was subdural hemorrhage due to a blunt object. The deceased was canded, and beaten for about one hour. A bench was also placed on his chest whilst being beaten. The multiple beatings caused him grievous harm and he died the same day within a short time after he left the homestead of Mauti. I am persuaded that the prosecution has proved malice aforethought beyond reasonable on the part of each accused person.



28. In conclusion I find that the prosecution has proved the charge of murder beyond reasonable doubt. I find Hosman Obure Mauti, Nicholas Momaya Mauti, and Laban Ombasa Mauti guilty of the murder of Bonface Obara Matara and convict each accused person as charged accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

**R. E.OUGO**

**JUDGE**

