Republic v Obae & 3 others (Criminal Case 3 of 2019)
[2023] KEHC 22300 (KLR) (19 September 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL CASE 3 OF 2019

RN NYAKUNDI, J

SEPTEMBER 19, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MOHAMED OKEY OBAE ..... 1ST ACCUSED

BAKARI KOMORA GUBANI ..... 2ND ACCUSED

SAID BAKARI KOMORA ..... 3RD ACCUSED

BWANAMKUU JILLO ALI ..... 4TH ACCUSED

JUDGMENT

1. The four accused persons are charged jointly with the offence of murder contrary to section 203 as punishable with 204 of the penal code. In brief the particulars of the offence are that on the 30th day of November 2018 at Manzini in Tana Delta Sub county within Tana River County jointly murdered Abubakar Tune

2. Each of the accused persons pleaded not guilty to the charge and therefore presumed innocent unless the contrary is proven by the prosecution beyond reasonable doubt. In this respect on behalf of the prosecution 8 witnesses testified as summarized herein below: At the trail the 1st accused was represented by Learned Counsel Mr Bosire whereas Mr. Gakanana appeared for the 2nd 3rd and 4th Accused persons in order to discharge the burden of proof. The prosecution summoned the attendance of the witnesses.

3. Overview of the Evidence (PW1) Buya testified as the father to the deceased that on 30th November, 2018 he received a telephone call from his daughter in regard to a misunderstanding behavior. The deceased and his wife thereafter, he was informed that the deceased had been taken to the hospital where he succumbed to death. (PW2) Fatuma Jillo, a wife to (PW1), testified that on 29th November

2018 she was at home when her daughter complained of the loss of Kshs 1,650/=. She inquired from the deceased on the whereabouts of the money being alleged by the daughter as missing. The deceased failed to give any information and as such attempts were made to conduct a quick search on him. In the course of that action the deceased who was armed with a panga used it to inflict harm on the wrist. (PW2) further testified that in view of the injuries she proceeded to Mnazini dispensary to seek medical treatment. In the afternoon when (PW2) went back home, the deceased happened not to be within the homestead. That is when (PW2) was told that the accused parsons had gone away with the deceased. In the course of inquiring information came in that deceased was at Mnazinini hospital where he was pronounced dead.

4. PW3 Bakari Marowa gave evidence that on 30th, November, 2018 he was in the MoSGUE when he heard the deceased had cut his mother. He took a step to go and see for himself where the incident indeed had taken place. On arrival (PW3) told the court that he was informed that the 1st accused and the Kenya Police Reservist picked him form the home. He followed up to the issue to the Chief's office but it was closed. (PW3) further testified that on his way back from the Chief's office he met school children surrounding the body of the deceased. In the same scene (PW3) told the court that the accused persons were also present armed with sticks.

5. (PW4) Nuur Hadia evidence was to the effect that on 30th November 2018 she heard screams by Fatuma saying "amenikata". On rushing to the scene (PW4) explained to the court that she saw the deceased armed with a panga and the complainant Fatuma bleeding from her wrist. (PW4) further testified that In company of one Ali, they persuaded the deceased to surrender his panga and subsequently tied him with a rope soon thereafter (PW4) told the court that she received information that the deceased is dead.

6. PW5 Mwanamtiti Hajito testified that on 30th November, 2018 while at home with the deceased and his mother a conflict arose in which the deceased cut Fatuma with a panga. It did not take long the accused persons came to the scene and took away the deceased as the mother proceeded to the hospital for treatment. He came to hear of the death of the deceased on the same day.

7. (PW6) – Mwanaisha Madawa told the court that she went to the Chief's office where she found the other three accused persons. (PW7) Kokaine Adhumani testified that he operates a bodaboda, which the 3rd accused asked him to use to pick a sick child. According to (PW7) the sick child he was to carry happened to be the deceased. On arrival at the pick up joint he met with the accused persons. In his observations the deceased was wearing a trouser but no shirt but in bad physical shape. However, (PW7) told the court that the he escorted the deceased to Mnazini Dispensary. On examination by the doctor the deceased was pronounced dead. (PW8) Dr Falid Swaleh attached to Malinid Sub- County hospital gave evidence with regard to the postmortem examination report dated on 1st December, 2018. According (PW8) evidence the deceased had sustained blisters on the right upper limb, facial oedema, blood oozing from the nose, mouth and ear. In conclusion (PW8) opined the cause the cause of death to be the head injury due to fracture base of the skull.

8. Last was the testimony of (PW9)- PC Francis Manyonge of Garsen DCIO office. In this case (PW9) gave evidence on the nature of investigations carried out which culminated in holding the accused culpable for the death of the deceased.

9. At the close of the prosecution case each accused was placed on his defense under Section 306 (2) as read under Section 307 of the criminal procedure code.

Defence Case

10. In the first instance the court admitted DW1 Mohamed Okey Abae. He testified as the area chief since the year 2004. He denied the charge of killing the deceased. It was his defence that on the material day he met with the members of the local security committee. It was at that time he received a report from Bakari that in a neighbor's house a fight had occurred with some evidence of injuries inflicted to the victim. That is when he left his house to the office and observed the deceased with some injuries to the face, neck, and lambing. The nature of the family dispute was found to be non-payment of a debt owed to one member of the family. The 1st accused denied vehemently being involved in inflicting the alleged fatal injuries upon the deceased.

11. Thereafter was DW2 Bakari Komora. He identified himself as a watchman but also a member of the security committed. In respect to the fateful day the accused in his defence alluded to an early meeting held under the chairmanship of the 1st accused as the area chief. Further the 2nd accused also testified that following the family feud between the deceased and his mother an arrest was effected to subject the conflict in further investigations. The accused further told the court that none of them inflicted injuries upon the deceased during the time he was in their custody.

12. Next was the third accused person Said Bakari (DW3) who in his sworn evidence denied the alleged unlawful killing of the deceased. In his explanation on the material day of 30.11.2018, a report was made about a family conflict between the deceased and his mother and as members of the local security committee, they had to be involved to settle the dispute. That is how he came to be in contact with the accused person as a suspect in that conflict. In addition the accused further stated in court that they had to escort the deceased to the Chief's office so that a meeting could be held towards resolving the dispute which had been reported by some of the family members. According to the accused it was during investigation at the chief's office who is the 1st accused in this proceedings that they realized that the deceased had suffered a swollen head and other soft tissue injuries. He however denied that any one of them took part in assaulting the deceased occasioning physical harm .

13. Finally on the primary defence case DW4 Mwanamkuu Jillo testified to the effect that he recalled a report being made on 30th of November 2018 involving the family of the deceased. As a clan elder he travelled to the scene to verify the information and that is how he found the deceased tied with a rope. Given the circumstance's in company of the 2nd & 3rd accused they decided to escort the deceased to the chief's office to appraise the complaint with a view to resolving it. In the cause of the investigation a panga which was recovered alleged used to inflict harm to the mother by the deceased was taken in as an exhibit. According to the accused testimony brief investigation was carried out against the deceased as to the circumstanced of the conflict in the homestead which emerged to be a non payment of a debt. That it was also clear to the accused that deceased had already suffered serious injuries which were none of their making.

14. In furtherance to their defence, accused persons lined up some witnesses to corroborate their respective testimonies. One such witness being Shukran. In his evidence on the alleged date he was at home when he left towards the family homestead of the deceased. His attention had been drawn from the alleged screams being raised by the women at the village. His travel to the scene of the screams was to establish the cause and take remedial action.

15. On arrival at the home, the door to the house was closed but in a little while it was opened. That is when he saw the grandmother assaulting the deceased but contrary to the evidence by the prosecution the 1st accused was never at that scene.

16. Next defence witness was DW6 – R. Bukari. He admitted knowing the 1st accused as his area chief. He left his house on the material day on 30.11.208 and was walking towards the shopping Centre when he noticed some people in a nearby homestead which happened to be that of the deceased, his mother and grandmother. He decided to enter into that homestead and saw a young man lying on the floor as his grandmother was holding the hands at the same time. On inquiry, the witness was informed that the circumstances at the scene were that the young man while armed with a panga had assaulted his mother. In the same conversation, the young man alleged that he had assaulted the mother in self defence. It was at that moment the witness decided to inform the 1st accused as the area chief to take further action. However, before he could leave the house, he was handed a rope which he used to tie the young man being the deceased in this case. Apparently at that moment, he witnessed the grandmother armed with a stick which he used to beat the deceased.

17. Last but not least was the testimony of DW7 (Said Baya) who recalled that on 30.11.2008 he left his home to go to the 1st accused's office to pursue the process of securing a birth certificate but on arrival that office was closed. In the cause of that morning, the four accused persons arrived and also in their company was was the deceased whose hands were tied with a rope. In a brief conversation, he learned that the deceased had stolen some money from his mother hence the reason of his arrest by the clan elders. On further inquiry, the witness told the court that the Deceased volunteered information to where he had hidden Kshs 700. However before long the witness evidence was to the effect that the deceased had difficult in walking and therefore allowed to sit down. It was the 1st accused initiative which called for the motorcycle as a means to escort the deceased to the hospital. The witness was to learn later that the Deceased succumbed to death.

18. With regard to D.W.8 Said Osman who works as a nurse at Mnazini dispensary he told the court that the deceased was taken to the hospital accompanied by his uncle with a history that he had been beaten for having stolen Kshs 1500 from his mother. In the witness observation the young man who later became the Deceased was convulsing and before he would dispense any medication he succumbed to death. That for him became a police case with no further action from the medical facility. He was later asked to record the witness statement with the police.

19. Besides the factual and evidence presentation by the prosecution and defence, both counsels elected to canvass the interlocking issues by way of written submissions. On the part of the state, Senior Prosecution Counsel Agather K Mkongo submitted and argued that the case against the accused persons has been proved beyond reasonable doubt and even the defence typology did not controvert any of the ingredients stated in Section 203 of the Penal Code. Learned Senior Prosecution counsel in support her legal perspectives on the determinants of the prosecution case placed reliance on the following authorities: In R vs Tubere S.O Ochea 1945 12 EACA 63, R.V DWK, In Deepok Sarna vs Republic R vs ECK Lessit J, Dickson Mwangi Mnene & Another v Republic

20. That in Senior Prosecution Counsel's contention the highlights from the prosecution case point to one logical conclusion that the prosecution has discharged the standard and burden of proof of beyond reasonable doubt that the accused persons jointly under the doctrine of common intention committed the crime of murder against the Deceased.

21. In respect of the 1st accused person learned counsel Mr. Bosire submitted to the effect with no direct or circumstantial evidence relied upon by the prosecution the charge of murder against the accused persons has no legs to stand on to warrant a finding of a case proved beyond reasonable doubt for this court to enter plea of guilty or conviction. In learned counsel submissions, the appropriate finding is to resolve the benefit of doubt in favour of the accused persons and have them acquitted of the offence all together. Learned counsel buttressed his submissions by urging this court to be guided by

the principles in the following cases: Daniel Vijay s/o Katherasan and Others Vpp (2010) SGCA, Vijay s/o Kotherasan and Others VPPP(2010) SGCA, Regina and Powell (1991) 1AC, Foster Crown Cases (1762) P. 369, Reg .v Price (1958)8 Cox C.C. 96. Too Vin Sheong v Public Prosecutor (1991) 1 SLR 682 (Too) In a nutshell this will form the basis upon which this indictment would be decided by the court.

Analysis And Determination

22. The real question is whether the prosecution has discharged the burden of proof beyond reasonable doubt on each of the elements stipulated in Section 203 of CPC. The case of Republic vs DWK (2020) lays it bare on what is expected of the prosecution to proof not on a balance of probabilities or suspicion but that of beyond reasonable doubt. " From the provisions, the elements of the offence of murder which the prosecution has a duty to proof for any conviction to be entered against the accused persons must incorporate the following:-

    a. The fact and cause of death

    b. The unlawful act or omission causing death

    c. The existence of malice aforethought

    d. That the accused persons jointly and severally executed the homicide in question

23. Similarly, in Republic Vs Andrew Omwenga (2009) eKLR the court stated:

> it is clear from this definition that for an accused persons to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction.

24. Whatever the evidence by the prosecution against an indictment to render support to the laid down guidelines on the burden of proof and on the other hand the rebuttal evidence by the accused persons it is the duty of the court to weigh the scale of the criminal justice administration and have the case determined squarely within purview of the decision in Miller vs Minister of Pensions (1947) 2 ALL ER 372 AT PAGE 373 to page 373 to page 374, Lord Denning stated quite succinctly that:

> the degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.
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> A similar point was made Kenny's Outlines of Criminal Law (16th Edn. (at P 416 " A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature...in criminal cases the burden rests upon the prosecution to prove that the accused is guilty "beyond reasonable doubt." When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do not more than show that there is reasonable doubt as to the guilt of the accused. See R.V Stoddart (1909) 2 Cr. App. Rep. 217 AT P. 242.

24. The evidence of the 9 witnesses for the prosecution has to be tested and applied against the culpability of each of the accused persons. Therefore, Section 203 of the Penal Code is purely homicide within the ambit of the Principles in Andrew Omwenga Case (Supra). The killing stipulated in the Penal Code must be one which in the normal cause of nature would cause death and must not be an injury that was accidental or unintentional or some other kind of injury which was not intended. The questions of fact which ought to be determined in light of the evidence adduced by the prosecution and taking into account all the surrounding circumstances of the case, is one which must show the injury proved was intended to achieve the outcome of a fatality. As can be seen it is not disputed that the deceased person Abubakar Tune is dead.

25. In the regime of our criminal law proof of death is essential either through direct or circumstantial evidence. One such critical characteristic of proof of death is usually through medical evidence. (See Nyamhanga v Republic (1990-1994) EA 462 Nyalali CJ Ramadhani JA and Mapigano AJA, Ndiba v Republic (1981) KLR , Republic vs Cheya and Another (1973) EA 500 (Mfalilia Ag. J.)

26. In the instant case the documentary evidence in the form of a post mortem report was produced as an exhibit dated on 1st December, 2018 by PW 8 affirming that he conducted a post mortem upon the body of Abubakar Tune the Deceased herein at Malindi sub county hospital. The body was identified by Buya Gavana Tune & Ali Said Hirbae under escort of Corp. Abdallah. In adherence to Section 48 of the *Evidence Act* Dr. Faya confirmed the Deceased suffered external injuries to the right upper limb, abdomen, and with blood oozing from the nose mouth and ears with predominant injury to the head. The defence did not dispute that the Deceased is dead. It is therefore manifested that the prosecution has proved this ingredient beyond reasonable doubt.

27. After that the prosecution evidence must prove whether the deceased death was unlawfully caused. This is about the actus reus element in this respect is an act or commission, or omission, which triggers occurrence of an event in which an accused person is alleged to be involved whose outcome is in breach of the penal law under Section 203. It is all about causation and proximate cause of the death of the Deceased. The cause of death in the first element likewise to the second ingredient is usually proved by medical evidence. (See Rex Mimbi s/o Ipopo (1946) 13 EACA, Benson Ngunyi Nundu v Republic)

28. To establish the crime of unlawful act of homicide it must be shown among other things that the accused persons committed an unlawful act. Secondly that the unlawful act was a crime. Thirdly the accused's unlawful act was a significant cause of the death of the Deceased. The factual situations covered by Section 213 of the Penal Code are significant as expressly stated in the following language:

> the Penal Code defines causing death to include acts which are not the immediate or sole causes of the death. The accused would be held responsible for another person's death although his act it's not the immediate or sole cause of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances: (a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death: (b) He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living (c) He by actual or threatened violence causes such other persons to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused (d) He by any act hastens the death of a person suffering under any deceased or injury which apart from such an act or omission would have caused death unless

it had been accompanied by an act or omission of the person killed or of other persons. (see Criminal Law by William Musyoka 2013 Law Africa Publishing Ltd pg 304)

29. Questions of causation frequently arise in many areas of the law but causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arises. Its matter of significance for the court to evaluate the chain of circumstances along the line to properly hold an accused person responsible for causing the occurrence against the right to life in Article 26 of *the Constitution*. The wrongful act sanctioned by the law entails some of the arguments on causation to be where an accused person is alleged to have armed himself or herself with a dangerous weapon which is used to inflict physical harm. That harm must be of a serious nature to maim vulnerable parts of the victim's body. In Kimemia and another v Republic (2004) the court defined a dangerous or offensive weapon to mean any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under the control for such use.

30. With regard to circumstances of this case, there are two hypothesis which point to the events which might have resulted in the injuries suffered by the deceased. The first narrative is the one put forward by the prosecution witness PW1, Buya Gavana the father to the Deceased. His testimony was all about receiving a telephone call from his daughter that the Deceased and his wife had a misunderstanding and quarreled over Kshs 1050. That the money in question had been demanded by the mother from the deceased who in retaliation armed himself with a panga which he used to inflict physical injuries on the left wrist. Thereafter PW1 was informed that the Deceased had passed on while undergoing treatment at Mnazini Dispensary. Essentially PW1 was not physically at the conflict zone. In the same vein PW2 the mother to the Deceased also told the court that prior to 30th November 2018 her daughter (Toto) reported to her about some missing amount of Ksh 1650 which she suspected the deceased had something to do with the loss. As a consequence PW2 took the mandate of inquiring from the Deceased on the whereabouts of the money only to be met with an act of violence from the Deceased who was armed with a panga. Those injuries inflicted caused her to visit Mnazini Dispensary to seek medical treatment. On her return home she found the Deceased having been also escorted to the hospital. Further on PW2 following up the issue she was informed by the medical staff that the Deceased had passed on while under undergoing treatment. It is alleged by PW3 that on arrival at the chief's office he was informed that the Deceased had been disciplined. According to PW3 he looked around and came into contact with a group of school children surrounding a person whom he identified to be the Deceased. In that scene the three accused persons were also present armed with a sticks. However, he did not see any of them inflicting injuries upon the Deceased, further in the context of PW4 evidence on 30.11.18 there seems to have been a scuffle in the home of PW2 in which she was cut with a panga by the Deceased. In that commotion PW4 wrestled the panga from the Deceased which he later surrendered to the 2nd Accused person.

31. It is a fact that the Deceased suffered harm some traceable to the scene of the conflict at his mother's house (PW2) and the 2nd scene was the one alluded to by PW3 near the school compound in the presence of the four accused persons.

32. The point in this case is that the Deceased's injuries were inflicted in the chain of causation rooted at the conflict in his homestead with the mother revolving around the question of money where the other actors happened to be the wife and grandmother. It is also undisputed fact the mother PW2 was assaulted by the Deceased. It is also true that the grandmother in agreement with PW4 took a rope and handcuffed the Deceased. In a short while the 2nd Accused came to the scene and from that time together with the rest of the accused persons they took over investigations of the incident. The kind of discipline stated in the prosecution case was from a witness who was never part of the direct or circumstantial evidence. What is deducible from the prosecution case by the reading of the Post

mortem report is the cumulative positive findings by the pathologist that the deceased had suffered injuries to the upper right limb and the head. In considering the cause of death the pathologist opined that the Deceased died of head injury being a fracture base of the skull. The answer to the on this offence is whether the Deceased death was unlawfully caused. In these circumstances I have no doubt to answer in the affirmative that the burden of proof which rests with the prosecution and never shifts to the accused person is completely discharged. The whole actus reus is therefore proved as the killing of a human being was the resulted consequence of the acts of omission by the perpetrators. The dominant factor identified by the evidence is that of serious assault on the person of the deceased.

33. The third critical element in the offence of murder is whether the deceased's death manifested malice aforethought under Section 206 of the Penal Code.

Malice aforethought on part of the Accused:

34. Malice aforethought is a technical term associated with the state of mind of the accused charged with the offence of murder. The district state of mind and circumstances the state must prove on any one of them is clearly stated under Section 206 of the Penal Code.

    a. The intention to Kill

    b. The intent to do/cause grievous harm

    c. Knowledge that the act or omission causing death with probably cause the death of or grievous harm to some person, whether tht 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 tht it may not be caused

    d. An intention to commit a felony

    e. An intention by the act or omission to facilitated the flight or escape from custody of any person who has committed or attempted to commit a felony.

35. Focusing on the strength of malice aforethought the approach in the case of Republic v Tubere S/O Ochen (1945) 12 EACA 63 has been found to be distinctive in breaking down the manifestation of the element as defined in Section 206 of the Penal Code: Thus

    1. The nature of the weapon used

    2. The manner in which it was used

    3. The part of the body targeted

    4. The nature of the injuries inflicted either a single stab/wound or multiple injuries

    5. The conduct of the accused before, during and after the incident

36. What must be demonstrated in the case by the prosecution before this court are substantive material evidence on what is defined as express malice aforethought in terms of an intention to kill, intent to cause grievous harm and whether the intent does or does not include an intent directed at a person than one killed. The other juncture is on implied malice. It is important to appreciate the letter of the Penal Code that malice in fact is a deliberate intention of executing that intention by an unlawful act to inflict bodily harm to another which is not authorized by the law. It is also necessary to appreciate this element is of greater contribution to the offence of murder under Section 203 of the Penal Code. In effect if there is some form of evidence adduced by the prosecution which shows existence of justification, excuse or mitigation in the resulting death then malice aforethought is not part of the actual design. It

should also not to be forgotten that malice aforethought may be present on a case to case basis where there was no actual design to kill or injure seriously the victim of the offence. It is also not necessary for the prosecution to show the willful doing of an act in the circumstances of the offence as the only feature to prove malice aforethought. There are key characteristics in a case which are obviously plain with a strong force to infer malice aforethought where the actus reus likelihood was that to cause death or great bodily injury whose cumulative effect is the human risk enjoyment of the right to life in Article 26 of *the constitution*.

37. The test here is whether the ingredient as defined in Section 206 of the Penal Code was manifested in the killing of the deceased. The very nature of the prosecution evidence is found with some degree of certainty that in situations of the deceased, having been hit on the head and the base of the skull fractured death was expected to result from such an act. It would therefore seem not improper to speak of malice aforethought as one of the connecting factors in the commission of this offence. We are told from the prosecution witnesses PW1-PW5 touching on various episodes on how the deceased came to meet his maker on the fateful day of 30th November 2018. The emphasis is placed at the home based conflict involving the wife of the deceased, the mother, and looping in the grandmother which was all about some missing amount of money. In that scuffle the mother of the deceased was apparently injured by an act initiated by the deceased. A further narrative by the prosecution in terms of the state of affairs at the home of the deceased was for him being handcuffed and subsequently picked up by the accused persons for further interrogation at the first accused office who happened to be the area chief. It is also categorical and plain from the evidence that none of the prosecution witnesses saw any of the accused persons inflict serious harm to the head. What has been said and suggestive of the prosecution case was that applying the last scene theory the greater degree of culpability in the legal phase of killing is attributable to the accused persons. In terms of absence of circumstances of justification, excuse, or mitigation the death of the deceased should be placed at the door step of the 1st accused office and his conspirators. Perhaps to be more accurate to speak of it as a label which is placed upon a group of states of mind any one of which is sufficient for completeness of the offence of murder.

38. The fallacy involved in this question lies in the fact that we are not told this kind of discipline referred to by PW3 as against the accused persons was the cause of the deceased death. The other extreme scenario made by the prosecution witnesses is to the effect that the accused persons were each armed with sticks but failed to make aware the gravity of these weapons and their usage in carrying out the murder. Why do I say so? The post-mortem put in evidence as exhibit 1 by the prosecution showed deep injuries to the head of the deceased due to the skull fracture as the cause of death. Which weapon was used to fracture the skull of the deceased? If this court applies the guidelines in the Tubere case (Supra) were those sticks capable of fitting the definition of dangerous weapons. Can this court by analogy draw a conclusion from direct or circumstantial evidence that the sticks in question were lethal weapons to cause death or grievous harm to another person herein personified as the deceased. Following the decision in DPP v Smith (1960)3 ALL ER. The court defined the intention in murder as to "when a person has an "intent to kill" if he means his action to kill, or if is willing for his action, though meant for another purpose, to kill in accomplishing that purpose."

39. Within the definition of malice aforethought, from the prosecution evidence more so the findings in the Autopsy report dated 1st December, 2018 it is explicit that the deceased died the same day of being inflicted with serious injuries targeting the head comprising the fracture base of the skull. That unlawful act is a near inevitable byproduct of a particular conduct that death will result from one's action. The use of a device, instrument, or dangerous weapon which caused the outcome in question is for all purposes and intents the central theme of malice aforethought in Section 206 of the Penal Code. It is clearly speak able from the circumstantial evidence of PW1, PW2, PW3, PW4, PW5, PW7 that some form of bodily harm had been inflicted upon the deceased within the chain of events when

the issue of money in the family unit was purposed to trigger a conflict between the deceased, his mother, the wife, and grandmother. It was somehow escalated into a scuffle involving violence of some sought between the deceased and his mother including seeking assistance with the area chief and clan elders named herein as the key suspects to the murder. The confinement of the deceased by the accused persons as suggestive from the evidence was for the sole purpose to resolve the conflict in one way or another without the necessity of a court case. The court was even told that as the accused persons were taking the deceased towards the school compound to recover part of the money subject matter of the dispute he was not able to walk to that scene as intimated by the witnesses. During or at that time the deceased had to be escorted to Mnazi dispensary. Soon thereafter before he could be attended the breath of a human being stopped and the death ensued therefrom.

40. My appreciation of the evidence by the prosecution and the defence is that the offence of murder was committed against the deceased actuated with malice aforethought. This evidence based inference shows clearly that the person whose unlawful act purposely targeted a head of the deceased knew that the consequence of it would definitely occasion death or to do grievous harm. The criteria of malice aforethought as outlined in Section 206 of the Penal Code mirrors adequately to the facts of this case

41. There is however paradox in this case arising from the phrase in the ordinary cause of events as captured by the prosecution. It covers the period indicative of the commencement of the conflict in situ the homestead of the deceased and his family quarrelling over the sought after lost money. The court was also told this scene at home was not without some occurrences of violence between the deceased and the mother etc. It was felt by the grandmother that a rope be obtained to handcuff the deceased may be with an intention to require further assistance from the area chief or as the case may be from the police. Eventually consideration was given to have him escorted to the chief's office for further interrogation, ironically he was rushed to the hospital where he passed on while undergoing treatment. However, speaking outside the realm of this homicide, it is uncertain as to what actually transpired at the primary scene being the homestead of the deceased, notwithstanding the desired effect to have him handed over to the local administration under the leadership of the 1st accused. The rationale why he was picked by the clan elders was for the purpose of a conflict settlement and not in relation to do grievous harm or do anything relevant on a charge of murder. In both the homestead and the chief's office there is need for probative evidence from the prosecution to show that the accused persons had conceived malice aforethought to cause death or grievous bodily harm. The evidence by the prosecution, is more pronounced on the accused persons being armed with sticks the nature of which were never exhibited before this court. The relevant degree of how the accused persons used the alleged sticks targeting the head of the deceased which finally became the substantial and real cause of the death is in the realm of possibilities. As noted from the evidence of the prosecution and submerging it strictly speaking on who between the siblings of the deceased and the accused persons in the ordinary cause of events unlawfully inflicted the fatal injuries there are serious gaps not cemented by the prosecution evidence. I find no moral or legal certainty on the subject viewed from the category of identifying the perpetrators of the murder based on intent or to do grievous harm as a requirement of the offence. The combination of blameworthiness to the level of culpability must be sufficiently satisfied by the prosecution. The puzzle in the jigsaw in the context of the crime situation analysis is who is to be condemned in killing the deceased. Can they be the named siblings within the homestead or the accused persons. There is no doubt that the burden of proof to place the accused person at the scene rests entirely with the prosecution. It must be emphasized that throughout this case there exist two locus in quo from which the deceased sustained some kind of injuries. It was said that the mother was actually injured in that scuffle. The obligation was therefore placed upon the prosecution to demystify the gravity of injuries suffered by the deceased at his home and the alleged contribution by the accused persons when they commenced investigation. In the instant case, the accused persons were the last people to be scene

with the deceased. Basically, this fact is not denied but the evidence of the circumstances, do not point to the guilty of the accused persons in causing his death. This is especially so as the principles on circumstantial evidence as outlined in the case of Abanga Alias Onyango Vs Republic Cr. Appeal No. 32 of 1990 are disproportionate to the facts of this case. Thus it is settled law when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established

ii. Those circumstances should be a definite tendency unerringly pointing towards guilt of the accused

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else

42. I cannot place the circumstances of the instant case in the same category as those of Abanga Alias Onyango (Supra) guidelines. In addition, as to whether the four accused persons were actuated of malice aforethought and unlawfully inflicted the injuries to the head of the deceased which was the ultimate cause of extinguishing his right to life was for the prosecution seeking to shift the burden of proof to the accused persons given the chain of events as described by the prosecution witnesses. Apart from the logistic conundrum created by the events at the home of the deceased and when a decision was made to move him to the chief's office, the attempts to convince the court at what point the manifested serious injuries were occasioned remains scanty.

43. The last seen theory as propounded by the Senior Prosecution Counsel is not in dispute. Reading in of the dictum in R vs ECK Lessit J & Moses Jua Vs the State (2007) PELR-CA/11 42/2006 the theory of last seen together is where two persons are seen together a live and the other is dead. If the period between the two is short the presumption as to the person alive being the author of the death of the other can be drawn. This theory is the import of circumstantial evidence for the court to draw and inference that it is the accused in court who committed the crime. In the circumstances of the present case there was more than considering the last seen theory against the accused persons based on lack of corroboration as to what point in time the deceased suffered the fatal injuries to the head. The fact that only shortly after the deceased and accused persons were walking towards the hideout of the suggested money he had difficulties in walking towards that scene intended to recover the exhibit. Thus circumstantially the surrounding events at that time none were found to incriminate the accused persons as having assaulted the deceased with an intention to cause death or to do grievous harm. The inference of guilt anchored on last seen theory can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused persons. When I test the facts of this case by the touchstone of law relating to this doctrine of last seen I go as far back on the circumstantial nature of evidence at the home of the deceased to establish any consistency or clarity and within human probability I can answer that the deceased may have been assaulted in the hands of his kin and not in company of the accused persons. These aspects were highlighted by the witnesses who came into contact with the deceased at that initial stage of the conflict.

44. Last but not least is the contribution of the mental element of the doctrine of common provided in Section 20 of the Penal Code. I find the persuasive principles to be of relevance as expressly stated by the court in R v Choge (2016 UKC 8 (2016) WLR (D) 84 the Supreme Court unanimously decided that:-

> The requisite conduct element was tht the accessory had assisted or encouraged the commission of the offence by the principal. The mental element was an intention to assist or encourage the commission of tht crime. Foresight that the principal might commit the

> offence charged was not to be equated with intent to assist. The correct approach was to treat foresight as evidence, for the jury to consider of intent to assist and encourage. The law had taken a wrong turn in Chan wing-Sui V the Queen (1985) AC 168, when it had equated foresight with intent to assist, as a matter of law. It was not legitimate to treat foresight as an inevitable yardstick of common purpose, in doing so the law had departed from the rule which had been well established over many years that the mental element required for accessory liability was an intention to assist or encourage the principal to commit the offence charged."

45. The overriding element here is as stated in Abdi Ali v R (1956) 23 E.A.C.A 573 that

> ...the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and tht the common act for which the accused were to be made responsible was acted upon in furtherance of the common intention. The presumption of common intention must not be too readily applied or pushed too far."

See Rex vs Mikaeri Kyeyune and others (1941) 8 EACC 84, Rex v Tabulayenka s/o Kiyra and three others (1943) 10 EACA 51, Rex v Dominiko Omenyi s/o Obuka and Others (1943) , Rex v Otineo s/o Okech and Others (1947) 14 EACC 68

> It is only when a court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensured or acted in concert with others in order to bring about that result that this section (of the Penal Code) can be applied."

46. The reasons for the above reasoning is that the test to determine whether a person had a common purpose as a perpetrator to commit a crime is usually expressed in the form of that person being actively involved in committing the offence as in this case the killing of the deceased. In my view association with the general design but in absence of a prior agreement or material portions of criminal conduct are insufficient to qualify as a common intention accompanied with actus reus to commit the alleged crime. It must be active participation with a particular conduct of act or mission or commission which caused the death of another human being. What this means is that the prosecution failed to lead evidence that the accused person's association was for the common purpose to carry out the actual killing of the deceased. Certainly if the guilty of the accused persons has to be considered to impose culpability issues that they acted in concert and in the cause of the events the unlawful assault on the head of the deceased is attributable to each one of them in furtherance of a common intention, the prosecution could have discharged the burden of proof of beyond reasonable doubt. I wish to state that the investigating officer ignored probative evidence arising out of the 1st scene at the homestead of the deceased. There was a sudden assault against the deceased in response to the attack against his mother. This was all about the events in search of the missing money and the accused became the immediate suspect. I am persuaded the facts of this case taken holistically are consistent with the guidelines in the comparative case of Regina and Powell (1999) 1AC

> To ensure this conviction for murder Crown would at the very least have to establish that the secondary party possessed an intent to cause serious bodily harm and that only if foresight is virtually certain can be evidence from which a jury can inter intent. The line of authority stemming from Chan wing- Siu v. The Queen (1985) A.C. 168 serves only to blur the distinction between foresight and intention. (Reference was also made to Reg. V Smith (Sesley) (1963) 1 W.L.R. 1200, 1206 Reg. v. Barry Reld (1975) 62 Cr. App. R 109 112, Reg. V Hancock (1986). A. C. 455 Reg. v Stack (1989) Q.B 775 and Reg. V. Smith (1988) Crim. L.R 616)

> The mens rea of a defendant may be proved by either proof of participation in a joint enterprise having the requisite character or by proof of a specific intent. Where proof of participation in the joint enterprise in the course of which the relevant act was done it considered to prove the mens rea appropriate to a lesser crime, only the letter crime will have been proved against the defendant, although the act may have involved the commission of the more serious crime by another against whom a specific intent can be proved, see Reg. V. Stewart and Schofield (1995) 1 Cr. App. R 441."

47. On the whole therefore, arising from the findings of the evidence, conclusions of facts and law on this criminal trial I am convinced the following orders shall abide.

48. I entirely agree with the prosecution that the deceased was murdered within the frame of Section 203 of the Penal Code but I am unable on the prosecution evidence to grant the relief sought of making a finding that the four accused persons jointly or severally are culpable for the death of the deceased to require a guilt plea to be entered and consequently an order of conviction for the alleged offence. The fundamentals which concerns the court are in accordance with the facts and circumstances of the case rooted primarily at the home of the deceased and its surroundings and the secondary scene when he accompanied the accused persons to address the recovery of the exhibits. There was also a serious issue on the presumption made by the prosecution that the injury inflicted to the head was caused by the accused persons ignoring any co-relation while in custody of his first tormenters. To this extent I resolve the benefit of doubt in favour of the accused persons and have them acquitted in accordance with the law unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT ELDORET THIS 19TH DAY OF SEPTEMBER 2023

R. NYAKUNDI

JUDGE