



**Republic v Khalumi & another (Criminal Case E002 of 2024)
[2024] KEHC 13582 (KLR) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E002 OF 2024
RN NYAKUNDI, J
NOVEMBER 5, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER USHURU KHALUMI 1ST ACCUSED

DAVID EKHAI LOKERE 2ND ACCUSED

JUDGMENT

1. The accused persons were 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 31st day of December, 2023 at Kimumu village in Moiben Sub-County within Uasin Gishu County, in the Republic of Kenya murdered Edward Kiplagat Chemweno alias Benjamin Kiplagat
2. The accused persons each pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The lead prosecution counsel in these proceedings was Mr. Mark Mugun for the state whereas the Accused persons were under the retainer of Learned counsel Mr. Sonkule for the 1st accused person and Mr. Maathai for the 2nd accused.
3. In determining this matter, I am in concurrence with the summary of the evidence given by the lead counsel for the prosecution Mr. Mugun who was seized of this proceedings as herein summarised:
4. PW1: Fransom Kirop Erika testified that on the night of 30-31st December 2023 at around 0115HRs, he was awoken from his sleep by the sound of something metallic being dragged on the road. This was followed by a loud bang. The noise sounded like it came from the tarmac road just outside his house. He therefore decided to leave the house to check what was happening. As he was approaching the scene, he saw a young man dressed in a dark suit and white shirt running away from the place where a car was in a ditch. Underneath the car was a motor-cycle. He assumed that young man was also a good Samaritan who had gone to look for help. At the scene, he met another neighbour who directed



- him to switch off the car engine. As he was doing that, he realised that there was a man on the driver's seat. The man was bleeding and his body was lying across the seat such that the head was on the co-driver's seat. There was also a lot of blood in the car. They realised that the man was dead and decided to call traffic police. When the police came, they realised that it was not a road traffic accident and called officers from DCI. Shocked by the revelation that a man had been murdered in their village, they all decided to conduct private investigations. A neighbour provided CCTV footage of the incident and it was then that he realised that the young man he had seen running away from the scene, was not a good Samaritan but one of the two people who had committed the murder.
5. PW2: Joseph Limo Biwott: similarly testified that on the night of 30-31st December 2023 he was at home sleeping. His sleep was interrupted by the sound of something metallic being dragged along the tarmac road next to his house. He then heard a loud bang which made him rush outside to find out what was happening. He met PW1 and they went to the scene where they found a car inside a ditch. The car engine was still running and he asked PW1 to switch it off. It was then that they realised that the driver's body was straddling between the driver and co-driver's seats. There was a motor cycle underneath the car. Traffic police were notified of the incident and when they came, it immediately appeared to them that this was not a case of a traffic accident because the deceased's body had 2 deep stab wounds; one on the left side of the chest and another on the neck. Officers from the DCI took over the matter. Alarmed by the fact that a gory murder had been committed within their neighbourhood, they followed the blood drops which led them to Block 10. They were able to watch and retrieve CCTV footage which showed two men pursuing the driver of the motor vehicle.
 6. PW3: Eric Achieng testified that he works with Tugende Ltd. He testified that he received a request from the DCI officers concerning the particulars of motor cycle registration KMFV 533Y. He confirmed that the motor cycle was still registered in the name of the company although they had sold it to David Ekhai Lokere through a hire purchase arrangement. He testified that the said David Ekhai Lokere had fully paid for the motor cycle but had not come for the transfer to be executed in his favour. He produced the hire purchase agreement, accused 2's KRA PIN and copy of ID Card used at the time of entering into the hire purchase agreement together with the application form as Exh 2A-2D respectively.
 7. PW4: PC Bancy Wanjera testified that she is a police officer assigned to the forensic crime department. She testified that they received a request from DCI Moiben to review video footage and certify its authenticity. She reviewed the footage and found it to be authentic and unaltered. She extracted screengrabs therefrom which yielded 18 photographs. These photographs depicted scenes relevant to the case at hand. She produced the 18 photographs, CD containing video footage, Exhibit Memo and Certificate of Electronic evidence as Exh 1A-1D respectively.
 8. PW5: Judy Jeptoo Limo's testimony was almost similar to that of PW1 and PW2. She told the court that she was PW2's daughter and that on the night in question, her sleep was disturbed by the sound of something metallic being dragged along the road. That was followed shortly thereafter by a loud bang. When she went outside their gate to confirm what was going on, she noticed that a car rammed into a ditch. There were broken pieces of a motor cycle and helmet. She noted that there was a motor cycle underneath the vehicle.
 9. PW6: Maurice Awino testified that he is a mason who'd been hired by the deceased's brother. On the night of 30-31 December 2023 around 2330HRS, the deceased carried him and his co-workers in his brother's vehicle. They were all dropped off at their respective residences. The following day, he was shocked to learn that the deceased had been murdered on his way back home.



10. PW 7: Polycarp Lutta Kweyutestified that he is a government analyst based in Kisumu. He testified that he received a request from DCI Moiben to examine a blood- stained knife, clothes and blood samples from the deceased and accused persons. He was required to ascertain whether there was any genetic relationship of DNA profiles generated from the exhibits. His expert analysis found that the blood stain in the knife yielded a mixed DNA profile of the deceased and the accused persons. His analysis of the clothes arrived at the same conclusion. He produced his report, Exh Memo Form, knife and assorted clothes as exhibit 3A-3D.
11. PW8: Dr. Benson Machariat testified that he conducted a post-mortem on the body of Edward Kiplagat Chemweno, the deceased herein. On external examination, the body was pale, there was blood on the face, a stab wound measuring 5 x 2cm wide and 8cm deep in the mid clavicle region, the left middle finger was completely disarticulated (it was brought in a piece of paper and lastly a superficial cut on the neck measuring 2 x 2cm lateral to the midline. Internal examination revealed that there was massive haemothorax left side with collapse of the left lung. There was also a stab wound between the 2-3rd intercostal space on the left side which, had gone through aorta and pericardium. As a result of his observations, it was his professional opinion that the cause of death was hypovolemic shock due to excessive bleeding into the chest cavity caused by a penetrating stab wound. He produced the post-mortem report as Exh 4. Lastly, he collected and handed over blood samples and a T-Shirt to the investigators.
12. PW9: PC Inyasio Mwanikitestified that he was the officer who investigated the case. As soon as the case was minuted to him for investigations, he rushed to the crime scene where they found a lifeless body lying inside a motor vehicle reg. no KBU 507Y, Toyota Hilux pick up. That vehicle was inside a ditch. After documenting the scene, they retrieved the body from inside the vehicle and noted that there was a deep stab wound in the chest and the left middle finger had been completely cut off. Underneath the vehicle, they found a motor cycle bearing Reg No KMFP 578Q and chassis no MD2A21BX6MWE93424. His investigations would reveal that the motor cycle reg no and the chassis did not match with the records held at NTSA. It was falsified and based on the chassis no lifted from the motor cycle, the true reg no was KMFV 533Y. This motor cycle was registered in the name of Tugende Ltd. He investigated this further to reveal that the motor cycle had been sold to David Ekhai Lokere (Accused 2) on hire purchase terms but a transfer was yet to be registered in his name. Also, as part of his investigations, he obtained CCTV footage that showed a car being driven into a ditch. There was something underneath the vehicle that was dragged along the road. A man in a dark suit then follows the car to where it rammed into the ditch. That man appeared to be beckoning another man, a motor cyclist popularly known as boda-boda, who followed the vehicle and as they leave the scene, one of the men conceals a knife in his clothes. He retrieved this footage and sent it for analysis at the DCI Cyber-crime lab.
13. Based on the data he collected regarding the motor cycle ownership, they trailed David Ekhai Lokere to Kitale in Trans-Nzoia. David Ekhai Lokere (Acc 2) led them to the home of Peter Ushuru Khalumi (Acc 1). In the home of Peter Ushuru Khalumi, they recovered a blood-stained knife, ID Card and blood-stained dark suit and white shirt, black tie and hat. From the home of David Ekhai Lokere, they found a motor cycle monthly parking sticker for m/c reg no KMFV 533Y, a deliver note from Tugende Ltd for m/c reg no KMFV 533Y, hire purchase agreement for the same m/c, KRA PIN, Certificate of Insurance, documents appertaining Eld CMCR Misc Application No 508/2023, jeans trousers with blood stains, safari boots, black jacket, red stripped scarf with blood stains amongst other items. He prepared an inventory in the presence of the accused persons which they signed confirming as a true account. He caused pictures of the accused to be taken while dressed in the very same manner that they had arrested them; in blood-stained clothes. They bore quite an uncanny resemblance to the people



he had seen in the CCTV footage, attacking the deceased. He then successfully moved the magistrate court for an order that DNA samples be collected from the accused for purposes of forensic analysis. A report of the analysis would reveal that the deceased blood was found on the knife recovered from the house of Accused 1. That knife also contained blood from both the accused persons. He was satisfied that the accused persons were responsible for the murder of the deceased. He produced the two inventories of recovered items, photographs, NTSA reports for m/c reg no KMFP 758Q and KMFW 533Y, copy of court order and application made in Eldoret CMCR Misc. E005/24 and the accused person's blood-stained clothes as Exh 5A-5G.

14. Following the closure of the prosecution case, this court considered the provisions of Section 306 of the Criminal Procedure Code with regard to the elements of the offence of murder facing the accused persons and it opined that each one of them had a case to answer.

Summary of the defence case as led by the defence counsels

15. The first to take the witness stand was Peter Ushuru who elected to give unsworn statement in answer to the charge with the following highlights:
 - a. That on 30th December 2023 he was in town having a good time in a social club called Belasco.
 - b. That within that time and in between of enjoying his alcoholic drinks with other customers, he stepped out and met the owner of the motorcycle David Ekal whom he hired to drop him at some destination.
 - c. That on agreement with the owner of the motorcycle he proceeded towards Langas and entered into a country lodge which is next to Sosiani primary school.
 - d. That is where he found someone unknown to him standing off the road but nevertheless the person stopped them and made a request to be carried by the same motorcycle.
 - e. This led to some negotiations on fare and on agreement he was on board having paid Kshs. 300.
 - f. That it was his evidence that on arrival at the roundabout he decided to fall over as the motorcycle rider proceeded to another destination and was left to wait on him but apparently never came back. According to the accused, he had to hire another motorcycle which dropped him at Televue next to Hills school next to his homestead. That is where he spent the night as usual but before long, he heard a knock at his door with full force but did not know what were the events of that incident.
 - g. It was further his testimony that he saw very many people wearing civilian clothes who started assaulting him and finally effected an arrest on grounds that he was a suspect of having committed a crime. In that same scene, the following items were carried away: the kitchen knife, mobile phone and they proceeded to David Ekali's house. In company of the persons who effected arrest, they proceeded to a nearby motor vehicle which proceeded to Central Police Station and thereafter indicted of the offence of murder. He denied any knowledge of the motorcycle rider or the deceased who is a subject of the instant criminal proceedings.
16. The second accused person David Ekal also gave his unsworn statement and admitted that he is a motorcycle rider. He recollected the events of 31st December, 2023 which day he went about his normal duties of picking and dropping passengers to various destinations of their choice. He also admitted having gone to Belasco club on or about 12AM where he met the first accused who hired him to be taken home. Further the second accused told the court that on their way to the 1st accused home, they came with contact of a person standing off the road who flagged them down with a need to ride the



same motorcycle to have him dropped at Kimumu. The 2nd accused acknowledged that he negotiated a fare of Kshs. 300 with the said person and both of them were carried in his motorcycle. Apparently, in the evidence of the 2nd accused, on their way, the passenger drew a knife, aimed it at assaulting him and in the struggle he was robbed of his motorcycle. According to the accused he telephoned the police station but none picked his phone. He was however to be arrested and placed in custody and charged with the offence of killing the deceased Edward Kiplagat Chemweno Alias Benjamin Kiplagat.

17. Learned Counsel Mr. Mugun filed written submissions in an attempt to establish the ingredients of the offence of murder. Learned Counsel submitted that the Accused persons were accorded an opportunity to render an explanation why the deceased's blood found its way to their clothes, they offered none. That the accused persons were similarly granted a golden opportunity to explain how their blood found itself on a knife that was used to murder an innocent man, they yet again offered nothing.
18. In addressing the element of Malice Aforethought, learned counsel submitted that first, a dangerous weapon namely a knife was used to commit the offence. Secondly, the accused persons used the knife to stab the deceased in the chest and in the neck. Third, the stab wound to the chest was 8cm deep. That it connotes that a lot of force was used. This similarly suggests that the deadly strike was purposeful and not accidental at all. According to learned counsel, the accused persons knew or should have known that stabbing him so would either mortally wound or cause him grievous harm. Fourth, the attack was so vicious that the deceased's left middle finger was completely severed.
19. On this element, learned counsel relied on the case of *N M W v Republic* [2018] eKLR and *Daniel Muthee v Republic* [2007] eKLR.
20. Learned Counsel also submitted on the doctrine of common intention and stated that from the CCTV footage, accused 1 is seen beckoning at someone and Accused 2 swiftly responds to that, we can very easily infer a common intention. He invited this Honourable Court considers that in the very same CCTV footage, both the accused persons are seen casually walking away from the scene as Accused 1 puts a knife in his inner coat pocket, it becomes quite easy to conclude that they had plotted to do something to the deceased, which they were successful at doing. That was the only reason why they were walking together so casually from a scene of murder. They had just confirmed that the man they stabbed had died.
21. In support of the element of common intention, counsel cited the cases of *Dickson Mwangi Munene v Republic* [2014] eKLR, *Republic v Tabulayenka s/o Kirya* [1943] EACA 51, *Njoroge v Republic*, [1983] KLR 197 at p. 204 and *Eunice Musenya Ndui v Republic* [2011] eKLR
22. Counsel concluded by submitting that accused persons are guilty of the offence for reasons that the deceased's blood was found on the clothes worn by the accused persons shortly after the murder. That the blood of both Accused 1 and Accused 2 was found on the murder weapon should remove any doubt that the accused persons are responsible for the murder of an innocent man.

Analysis and determination.

23. The next question to tackle is whether the conditions under which an offence of culpable homicide punishable with death under Section 203 of the penal Code which the accused persons have been prosecuted for have been met and proved beyond reasonable doubt. The conditions to be met are thus;
 - a. That the deceased had died.
 - b. That the death of the deceased was caused by the accused persons unlawfully.



- c. That the act or omission of the accused persons which caused the death of the deceased was intentional with knowledge that the death or grievous harm was its probable consequences essentially actuated with malice aforethought.
- d. That the accused persons before court were positively identified and placed at the scene of the crime.
24. The standard of proof required in a criminal trial such as the one at hand as reiterated elsewhere remains vested with the prosecution and must be that of beyond reasonable doubt. This doctrine is clearly explained in the following authorities. In *Miller vs Minister of Pensions* (1947) 2 ALL E.R. 372 at page 373-374 the court stated as follows:

“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.”

25. In the same breadth the court in *Andrea Obonyo & Ors. V. R.* (1962) E.A. 542 had this to say on the standard and burden of proof:

“As to the standard of proof required in criminal cases Denning, L.J. (as he then was), had this to say in *Bater v. Bater* (1950) 2 ALL E.R. 458 at 459:

‘It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.’

26. The essence of this is that for the prosecution to secure judgment of guilty and conviction against the accused persons jointly or severally, the elements of the offence has to be conclusively discharged beyond reasonable doubt. In approaching this evaluation and analysis of evidence from both the prosecution and the defence, I am bound by the principles in the persuasive case of *Abdu Ngobi vs Uganda*, S.C.Cr. App No. 10 of 1991, the supreme court expressed itself as follows on treatment of evidence:

“Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged.”



27. It is trite law that proof of guilty of an accused person is based on two parameters of evidential material. The first one being direct and secondly circumstantial evidence of the witnesses who can allude to the issues within the five senses namely: sight, touch, smell, taste and hearing. The prosecution evidence of nine witnesses would be tested as to its credibility, veracity, proof of existence or non-existence of facts in issue and the acts of omission and commission with regard to the offence of murder facing the accused persons. It is the totality of the evidence which counts plays a greater part to establish the elements of the offence.
28. Pursuant to this position of the law on evidence which is applicable and admissible, this court proceeds to singularly deal with each element of the offence as hereinunder stated:

a. Proof of death of the deceased.

29. From the circumstantial evidence of the nine witnesses and the defence rebuttal of the two accused persons, there is no dispute that Edward Kiplagat Chemweno Alias Benjamin Kiplagat is dead as at 31st day of December, 2023. There is evidence from the post-mortem report produced as exhibit 4 as opined by Dr. Macharia that the deceased suffered multiple injuries on the upper, middle and lower limbs. It is also settled in law that proof of death is through medical evidence which the prosecution acquitted themselves by demonstrating that the deceased is dead and his death is prima facie within the provisions of Section 203 of the *Penal Code*.
30. The second crucial element is on actus reus, simply meaning the acts or omission and the results or consequences of the act or omission which caused the death of the deceased. Some of the key considerations in this respect stem from Section 213 of the *Penal Code* which 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 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 undergo a surgery or treatment which causes his death;
 - b. He inflicts injury on another which would have caused the death if the injured person had submitted the 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 person to perform an act to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstance appear natural to the person whose death is so caused:
 - d. He by an act hastens the death of a person suffering under by any disease or injury which apart from such an act or omission would have caused the death; and
 - e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person kill or of other persons.
31. To turn to liability and causation in this case, the prosecution must establish through common intention of the two accused persons. According to Section 10 of the *Evidence Act*, anything said, done or written by any of the persons deemed to have a common intention in reference to their common intention is relevant evidence of such common intention.
32. The law on common intention is set out under Section 20 of the *Penal Code*. The law purposes the elements to include the person who actually does the prohibited act or makes the omission which constitutes the offence, the person who does anything or omits to do any act with a view to enable



or assist another person commit the offence, the person who aids or abets another in committing the offence, and the person who counsels or procures any other person to commit the offence.

33. The court of appeal in *Eunice Musenya Ndui v Republic* [2011] eKLR laid down the ingredients of common intention as follows:

“A reading of section 21 of the *Penal Code* reveals the following identifiable ingredients which in turn trigger the presumption:

1. There must be two or more persons;
 2. They must form a common intention;
 3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
 4. An offence must be committed in the process; and
- The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose”

34. The best known and often quoted definition comes from Jonathan Burchell, *Principles of Criminal Law* (*Supra*) at 574 which reads as follows:

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.”

35. On the facts of this case, it is the duty of the prosecution to establish prior agreement or active participation in the joint venture of the accused persons to commit the crime of murder against the deceased.

36. The answer to this question on the unlawful death of the deceased is dependent on the circumstantial evidence of PW1-PW9. It is with respect, important to bear in mind that the post-mortem report is crystal clear on clear characteristic features that the deceased was unlawfully killed. It follows that before 31st December, 2023 the deceased was alive, his injured body was found PW1 and PW2 inside a pick-up which had landed in a ditch. PW1 & PW2 are categorical in their testimony that the accused at the time had suffered some form of physical injuries. It is also in the evidence that prior to each one of them running to the scene, there was a loud bang which drew their attention from their slumber to go out and check the source of that unusual sound. On arrival at the scene, it is the evidence of PW1 & Pw2 that they had presumed that it was a normal accident which caused the vehicle to land into the ditch but on further observations, they ruled out any such theory. As PW1 endeavoured to demonstrate, this same motor vehicle was being chased by a motorcycle rider of registration No. KMFV 533Y. It is clear in my respective view that the general tenor of the prosecution case with regard to this element is the circumstantial evidence of PW1, PW2, PW3, PW5, PW6 and subsequent scientific evidence from Dr. Macharia who conducted the post-mortem. The individual acts of the two accused persons manifested an active association which caused the death of the deceased. In all aspects of this case, the death of the deceased does not fall on any of the exceptional circumstances of justification, excuse, self-defence or provocation as postulated in Section 17, 207 & 208 of the *Penal Code*. As is quite evident from the facts the unlawful acts of the persons who caused the death of the deceased can be imputed from the circumstantial evidence adduced by the prosecution. The accused persons herein did not form part of any crown in the event which resulted to the cause of death of the deceased to raise a doubt that the deceased may have been killed by a mob. There is nothing in the defence evidence to suggest that they



were not within the vicinity of the scene of the crime. I pause to remark the element of the death being unlawful has been proved beyond reasonable doubt. In arriving at this finding I rely on the principles of the Constitutional court of south Africa in Thebus which held as follows:

“(45) A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active as association and its relationship, if any, to the criminal result and to all other prerequisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case.”

37. To sum up, there is no dispute as to the killing of the deceased on the 31st December, 2023.
38. The most critical element in culpable homicide in Kenya is the manifestation of Malice Aforethought as defined in Section 206 of the *Penal Code*. This section provides for circumstances when malice aforethought is deemed to be established. These circumstances are;

An intention to cause the death of or to do grievous harm to any person, whether that person is the one actually killed or not;

The knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person;

An intent to commit a felony;

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.

39. Therefore, in our law, in relation to murder and malice aforethought, the reconciling factors are as stated in the following authorities:

40. In *N M W v Republic* [2018] eKLR the Court of Appeal stated that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v. Uganda*, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

41. In *Daniel Muthee v Republic* [2007] eKLR, there was evidence to show that the appellant used a panga to cut the deceased on the head, chest and arms, the Court of Appeal while addressing the issue of whether malice aforethought had been proved stated:

“When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the *Penal Code*.”



42. This intention and culpability of murder was also revisited in the comparative jurisprudence in [*S vs. Pistorious 2016 \(1\) SACR 431*](#) stated as follows:

“in case of murder, there are principally two forms of dolus which arise: dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person’s intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore ‘gambling’ as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act ‘reckless as to the consequences’ (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been ‘reconciled’ with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient, is sufficient to constitute the necessary criminal intent.’

43. The evidence before this court is sufficient to proof beyond any reasonable doubt that the accused person jointly with common intention actuated with malice aforethought intended to kill the deceased. Their conduct of being armed with a dangerous weapon which was used to inflict multiple injuries against a defenceless victim prove beyond a shadow of doubt that they had legal constructive intention contemplated by Section 206 of the [*Penal Code*](#) to kill the deceased. This intention or Malice aforethought was satisfied by the unlawful acts of omission accompanied by recklessness as to its consequences, in this case recklessness is as to whether Edward Kiplagat Chepngeno will die. Fortunately for them that wider ambit of malice aforethought as defined in these provisions of the penal code as manifested is sufficient to sustain a conviction for murder contrary to section 203 of the [*Penal Code*](#). The law is very clear that if a person attacks another with the intention to cause grievous bodily harm and death ensues then the offence of murder is inferred in perspective.
44. In the context of this murder trial the established circumstances were such that this particular accused persons with the knowledge and capacity they actually possessed ought to have thought through about the likely consequences of the action as planned and executed on the material day of the incident. If the accused persons had stopped to think the ramifications of their conduct and the result it will bring it is very unlikely that the life of the deceased could have been pre-maturely unlawfully terminated. The [*constitution*](#) forbids any infringement, violation or threats aimed at on the right to life as expressly stated in Article 26. Therefore, the intent to murder is a violation of The [*constitution*](#) and of the penal laws of the Republic of Kenya. This was not an excusable or justified homicide. The deadly force was used as the perpetrators were armed with a panga primarily to cause grievous harm or death of the deceased. The other elements which flow from the conduct of the accused persons is that they acted wilfully and knowingly that at a particular outcome within the text of Section 203 of the [*penal code*](#) will result. The word knowingly generally means that an act was done voluntarily and intentionally and not because of a mistake or by accident. Whereas the word wilfully means that the act was committed voluntarily and purposely with the intent to do something the law forbids, that is with a bad purpose to disobey



or disregard the law. These characteristics of the findings made by this court were never controverted by the defence in their respective testimonies.

45. This decision could be incomplete without a mention on the element of identification of the accused persons as having been placed at the scene of crime. I place reliance on this aspect on the following authorities: *Wamunga vs Republic* (1989) KLR 424, *Ogeto v Republic* (2004) KLR 19, *Roria v Republic* (1967) EA 583, the issue of identification is of course one of the fundamental importance and this court has underscored in other cases together with other superior courts the necessity of careful consideration of such evidence particularly where the conviction is dependent on it. As a matter of fact identification evidence of the accused persons is underpinned within the frame of circumstantial evidence as espoused in the cases of: *Rex V Kipkering Arap Koske and Another* (1949) EACA 135, and *Simon Musoke V R* (1958) EA 715. Clearly this is a case where the evidence flows in a very straight forward manner from the CCTV footage analysis report dated on 11.1.2024 produced before this court by PW6 as exhibit 1b. Some of the key features captured in the CCTV which are relevant in placing the accused at the scene of the crime are herein reproduced for clarity purposes.

Cam1: 23.12.31: This camera covers a curved road leading to an estate. A motor cycle which has two occupants is seen driving from the far end where this camera covers them takes a corner and drives out of the camera coverage. The rider has an helmet, a red reflection on top of a black jacket and a grey scarf while the passenger has a grey head cap.

Cam 1: 2023: 12: 31 A pickup vehicle is seen emerging from where the motorbike came from but it seems to be driven at a high speed.

Cam1 2023:12:31: Few minutes later the pickup is driven back to the direction it came from and a man suspiciously walks towards the direction of the car as the car is seen rolling up after a bump. From his head cap, he resembles the passenger who was in the motorbike which was seen before the pickup. When he gets at the corner he is clearly seen dressed in a black suit with white shirt and a blueish tie. After seeing what has happened to the pickup, he turns back and calls someone by hand signal

Cam1: 2023: 12: 32 a man dressed like the rider who was seen driving on this road is seen walking towards, where the man he had carried has gone but shortly he turns back as the other man is seen walking around the pickup which overturned

Cam1: 23:12:31 The rider is seen walking to where he emerged from and he seems uneasy the other man in suit is still next to the pickup.

Cam1 23:12: 31 the man in suit is still next to the pickup and a person is seen walking out from the iron sheet building nearby and the man in suit begins to walk away from the scene. He is seen putting back a knife into his coat inner pocket as he walks to where he came from.

Following the observation and analysis above, it is my opinion that two male persons (suspects) were present at the scene when the offence occurred and one of them is well captured with a knife which could have been used as the murder weapon.

46. The evidence considered in CCTV electronic device gives credence to motorcycle Registration No. KMFW 533Y purchased by the 2nd accused from Tugende Limited as he supported by higher purchaser agreement dated 16.12.2021 produced as exhibit 2. This piece of evidence was never rebutted or denied by the second accused in his testimony. The CCTV footage positively identified the accused persons as having been at the scene on the night 31.12.2023. That piece of evidence also remains uncontroverted by the defence. In addition, the investigating officer also forwarded the following exhibits:

- a. Blood sample from Edward Kiplgat (deceased) marked "A"



- b. A knife (brick red, wooden handle) in a brown envelope marked “B”
 - c. A light blue long sleeved shirt for Peter Ushuru (accused) in a brown envelope marked “G1”
 - d. Buccal swab sample from Peter-Ushuru (deceased) marked C2”
 - e. A long pair of blue jeans trouser for David Ekhai Lokere (accused) in a brown envelope marked “D1”
 - f. Buccal swab sample from David Ekhai Lokere (Deceased) marked “D2”
 - g. A red/navy blue/white multicoloured rubbers shoes/shawl/scarf in a brown envelope
47. Based on the analysis carried out by PW8 the following conclusions and opinion was arrived at:
- a. The DNA profiles generated from the blood stains on the trouser (item D1) and the stains on the scarf (item “E”) are identical and match the DNA profile of David Ekhai Lokere (deceased)
 - b. The DNA profile generated from the blood stains on the knife handle (item B) and shirt (C1) are identical and are a mixed DNA profile of Edward Kiplagat (deceased) and Peter Ushuru (Accused)
 - c. The DNA profile generated from the blood stains on the knife blade (Item B) is a mixed DNA profile of Edward Kiplagat (deceased) and David Bokere (accused)
48. In line with the foregoing, the issue of identification of the accused persons is a foregone conclusion that in this murder they were at the scene and both issues of causation of death and malice aforethought were precisely executed against the deceased on 31.12.2023. Having carefully reviewed the defence evidence the test remains here at the prosecution case on identification is also unchallenged.
49. In the end, looking at the material evidence of both the prosecution and the defence, I strongly hold the view that the prosecution case is of such strength as to hold the accused persons liable for the offence of murder contrary to Section 203 of the [Penal Code](#) and as such I find them guilty and enter an order of conviction.

Verdict On Sentence

50. The convicts jointly have been convicted of murder contrary to section 203 punishable under Section 204, which carries a maximum of a death sentence. However, following the [Francis Muruatetu versus Republic](#), 2017 eKLR, the supreme court decision which outlawed the mandatory death sentence had it only reserved for the rarest of the circumstances arising out of the aggravated homicide in Section 203 of the [Penal Code](#).
51. It is necessary at this point to lay down the fundamental purposes of sentencing as provided for in the [sentencing policy guidelines of the Judiciary](#), 2023 which can be pursued by the court in applying one or more of the following eight objectives:
- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.



- d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
 - g. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - h. Reintegration: To facilitate the re-entry of the offender into the society.
52. The other additional principles that trial judges must take into consideration include:
- a. Proportionality
 - b. Parity
 - c. Totality
53. During the sentencing hearing, legal counsels for both the accused person made strong submissions on mitigation on account of which each pleaded to the court to exercise restraint from imposing the death penalty as proposed by the victim representatives. Mr. Sonkule for the 1st accused on his part submitted and relied on the following highlights in seeking a non-custodial sentence:
- a. That the accused person having been convicted of the offence of murder prays for leniency from the honorable court for the following reasons.
 - b. That the accused person is a first time offender and does not have any criminal record. This is an indicator that the accused can easily reintegrate with the society. He apologizes a thousand times and he has learnt his lesson having spent 11 months in remand prison. During this period, he has had an opportunity to recollect the events surrounding the occurrence of the offence and he regrets and is remorseful.
 - c. That the 1st accused person is aged 36. At this age he still has a life ahead to fulfill and a family to take care of considering that his wife is still young and has a baby who is barely four months. He was the sole bread winner and the family has been going through hardship since the first accused was arrested. He humbly prays to be pardoned so as to be with his young family.
 - d. That the 1st accused's parents are elderly people both aged over 80 years and suffer from various lifestyle diseases including but not limited to hypertension.
54. On the other hand, Mr. Mathai for the 2nd accused mitigated on his behalf asking the court to take into account his age, lack of any previous conviction, that he is remorseful on the events leading to the commission of the crime and should be given a chance of being rehabilitated and integrated into society. Learned counsel further addressed the issue on the death penalty which was being advanced by the victim representatives and the state on grounds that the nature on the peculiar circumstances of the case demanded imposition of the maximum sentence than any other proposal being made by the defense. In addition, learned defence counsel in advancing the accused interests argued and submitted that the accused never made a plea under the plea bargaining protocols but he requested for compassion and leniency from this court in the process of imposing the verdict on sentence. It was learned counsel's contention that bearing in mind the prescribed sentence which is not mandatory and the other factors including sentencing policy guidelines, he proposed a custodial sentence of 20 years' imprisonment.



55. In the motion for aggravating factors, Senior Prosecution Counsel Mr. Mugun submitted that this is a case in which the convicts killed the deceased with malice aforethought as deduced from the multiple injuries confirmed by the pathologist in his autopsy report dated 4th January, 2024. Learned Senior Prosecution Counsel invited the court to draw an inference from the findings in the post mortem report 4, which clearly demonstrate that the accused person in stabbing the deceased had premeditated to occasion death. It was further the submission by Senior Prosecution counsel that the use of a dangerous weapon namely a dagger knife used to inflict various stab wounds penetrating vulnerable parts of the deceased body as an additional aggravating factor which will count towards the court considering imposing the death penalty.
56. In buttressing his arguments for the death penalty, learned prosecution Counsel relied on the threshold principles in the cases of *Republic v Ruth Wanjiku Kamande* (Criminal Case No. 93 of 2015 and *Republic v Irungu & Another* (2024) KEHC (Criminal Case 51 of 2018) 2533 (KLR).
57. In addition, the victim impact statement in support of the death penalty came from the mother of the deceased one Elizabeth Jemeli who went at lengths to explain to the court on how the death of her son has impacted her psychologically, emotionally, physically and even leading to ill health. It was the mother's evidence that the deceased was a first born whom she depended on for maintenance and financial provisions to meet her basic needs. That since his death, life for her has not been the same in terms of financial support to meet the basic needs; food, shelter and health. From the same family, Vincent Kibet and David Chemweno both brothers to the deceased gave evidence detailing on how cruel and heinous was the crime committed to the deceased by the accused persons. It was the arguments by the brothers that this is one case in which the death penalty
58. is reasonably justified to be imposed against the accused persons as a just dessert for their culpability in committing the offence. Taken to its logical conclusion, the victim statement is suggestive of the court not to restrain itself from being persuaded by the aggravating factors on the overall scope of this case to pass a death penalty so that justice cannot only be seen to be done but actually be done to the victim's family.
59. As stated elsewhere in this ruling, any accused person found culpable for homicide under Section 203 of the Penal Code shall be reliable, be punished by imposition of a death penalty although it is no longer mandatory nor the minimum mandatory sentence. In the case of *Muruatetu* (*supra*), the Supreme Court set out the factors traditionally to be taken into account in sentencing process. The ultimate impact of all the circumstances like the age of the offender, the previous conviction, the gravity of the offence etc are all relevant to sentencing but must be measured against the yardstick of sentencing policy principles and objectives in the sentencing policy guidelines of the judiciary. To justify a departure from the penalty as ordained by the legislature. Therefore, the trial court in determining an appropriate sentence must take into account the convict's personal circumstances, interests of society, the crime and circumstances surrounding its commission and in doing so, it must keep a fine balance between them with a view to achieve an outcome which is fair and proportionate to the crime.
60. The *Constitution* 2010 sets out certain fundamental rights and freedoms such as the right to life in Art. 26 which provides that no person shall be deprived of his life intentionally save in execution of the sentence in a court in respect of an offence under the law of Kenya of which he/she has been convicted. The combined sample of the evidence from the prosecution witnesses and the defense shows that the death of the deceased executed by the accused person was not justified or excusable in any of the exceptions stipulated in Section 17, 207 and 208 of the Penal Code on self-defense and provocation. In essence, there were no compelling or extenuating circumstances which can dissuade



this court to exercise discretion to pass a non-custodial sentence as submitted by learned Counsel Mr. Sonkule for the first accused. In my view, in order to exercise discretion, towards determining any appropriate sentence, a trial court has to adopt a holistic approach factoring in various parameters including jurisprudential principles which have been developed over time to act as a yardstick in the sentencing process of a convict in any given situation. The rationale of this consideration is to ensure the balancing act of the trial court gives rise to a proportionate sentence for the offence.

61. In this respect, the Constitutional Court of South Africa in *State v. Makwanyane* (1995) CCT/3/94 remarked as follows on mitigation and aggravating factors in sentencing:

“mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person’s conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.”

62. This is one case of murder on appreciating the circumstances under which it was committed even in the presence of mitigating factors, it calls for a serious consideration on the nature and category of punishment to be passed by this court. Some crimes are so heinous that a plea of youth, remorse, regret or being a first offender are never relevant to reduce the sentence to a non-custodial or a mere minimum of the period of imprisonment. In purposing to exercise discretion in this matter, I draw inspiration from the following persuasive authorities:

63. In *Veen v. The Queen* (No. 2) (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ stated at 476:

“sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of other who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”

64. Similarly, in *R v Engert* (1995) 84 A Crim R 67 at 68, Gleeson CJ observed:

“Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment

In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean



that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.”

65. I have considered all the factors isolated in each of the submission made by both counsels on mitigation on behalf of the accused persons, the aggravating factors by the Senior Prosecution Counsel calling for a death penalty together with the victim impact statement from the brothers and mother to the deceased. Given the strength of the principles in the above cited cases, including the lead authority by the supreme court commonly referred to as Muruatetu 1, both denunciation, retribution and rehabilitation have some measure of contribution to guide this court towards proportionality test in sentence. As a consequence, I sentence each of the accused persons to a term of 35 years’ custodial sentence with a discounted period spent in pre-trial detention as the case may be pursuant to section 333(2) of the *Criminal Procedure Code*.

66. It is so ordered.

67. 14 days right of appeal explained.

DATED AND SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF NOVEMBER, 2024

.....

R. NYAKUNDI

JUDGE

Representation

Mr. Mark Mugun for the state

Mr. Sonkule for the 1st Accused

Mr Mathai for the 2nd Accused

