



**Republic v Chemorei & 2 others (Criminal Case E007 of 2021)
[2024] KEHC 15597 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E007 OF 2021
DK KEMEL, J
DECEMBER 6, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

KENNEDY JUMA CHEMOREI 1ST ACCUSED

PETER OSUGOL ALIAS ODEA 2ND ACCUSED

DAVID NDIWA ALIAS SIRO 3RD ACCUSED

JUDGMENT

1. The accused herein Kennedy Juma Chemorei, Peter Obugol alias Odea and David Ndiwa alias Siro, were charged with the offence of murder contrary to Sections 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 21st January 2021 to 22nd January 2021, at Sirikanyi Village, Ngachi sub location in Cheptais sub-County within Bungoma County jointly murdered Bramwel Boiyo Wananda
2. All three accused persons denied the charge and the prosecution presented six (6) witnesses in support of its case.
3. The Prosecution was under a duty to prove the guilt of the accused persons and in doing so, it had to prove all the ingredients of the offence of murder. The elements of the offence as provided for under Section 203 as read with Section 204 of the [Penal Code Act](#) are: -
 - i. That the deceased is dead;
 - ii. That the death was caused unlawfully;
 - iii. That there was malice aforethought; and
 - iv. That the accused directly or indirectly participated in the commission of the alleged offence.



4. PW1 was Grace Naliaka Imobus who testified that she is a resident of Cheptais where she is a peasant farmer. According to her, on 21st January 2021 at around midnight while outside to answer a call of nature, the accused persons passed by her door while carrying fence posts. They were drunk and making noise while claiming that they were out to finish the school watchman. She recognized them as they were her neighbours. She testified that they were armed with three fencing posts and that she saw them heading towards the school. She retired to bed and at around 5.00 a.m., she heard the daughter of the deceased, Naomi, claim that her father had been killed. She rushed outside heading towards the school where she saw the body of the deceased. She observed that the deceased was tied on both hands and legs with a wire and that his face was covered with a white paper. The teachers arrived at the scene as the three accused herein joined the villagers in demanding to know who had killed the school watchman. She told the Court that the 3rd accused has been threatening her over her action to testify in this case. It was her testimony that all the accused persons are from her village. She recalled earlier in 2015, her son was killed while in the house of the 3rd accused herein and referred to him as a notorious alcohol brewer. She told the Court that she is not fabricating things against him since she saw him while he was in the company of the 1st and 2nd accused during the night the deceased was murdered. She told the Court that the deceased was called Bramwel Boiyo who hailed from her village and that he had served as the area youth wing and also the watchman at Chapatis primary school. She added that he used to be an informer and would liaise with the authorities over crime in the area. According to her, the accused persons were accusing the deceased of betraying them to the authorities over alcohol brewing in the area.

On cross-examination, she told the Court that she was outside when she saw the accused persons passing near her house which is close to the roadside. She had gone out to answer a call of nature and was heading back to her house from the toilet. She elaborated that her toilet is near the roadside and that she stood next to the toilet and saw each accused armed with one fencing post and that they were drunk and making noise. She told the Court that her husband and family members were still asleep and that there was no electricity in her compound and that all this occurred at night. She testified that she recognized the accused persons' voices as she was well familiar with their voices and that it was the 3rd accused who made the threats. She told the Court that her home is close to the school compound and that other villagers live close to the school but she is the closest. She testified that the accused persons hail from her village and that it seemed they emerged from the house of the 3rd accused and that the three are friends. She testified that she did not alert her neighbours or authorities on what she had heard and seen that night. She did not hear any screams from the deceased as she had remained outside for about ten minutes. She told the Court that she did not witness the killing of the deceased and that she had already lodged her complaint over threats issued by the 3rd accused in this matter.

On re-examination, she told the Court that there was moonlight and was able to see the accused persons who are well known to her and that she is familiar with their voices.

5. PW2 was Alice Boiyo who testified that she is a resident of Cheptais near Cheptais Primary School and that she sells bananas in the area. According to her, the deceased herein was her husband and a night guard at Cheptais primary school. She recalled on 21st January 2021 around 7.00 p.m. her husband left for work. She woke up the following morning and went in search of bananas and on her return, one of the teachers from his place of work alerted her that her husband had been severely injured and tied up with wires. She rushed to the scene and found her husband tied up with wires on his legs and hands whilst lying on the ground outside the school offices. He was rushed to Cheptais Health Center and then to Bungoma but he passed on afterwards. According to her, the deceased had enemies as she recalled on 24th April 2020, the deceased arrived home claiming that the 2nd and 3rd accused persons had stoned him and that he had lodged report with the police. Subsequently, in November 2020 she met



the 2nd accused who threatened that he would lynch her husband but she ignored the threats. Later, at around 5.00 pm the same day, the 3rd accused met her and issued similar threats which she duly relayed to her husband. According to her, the deceased was one of the community policing members in the area and the 1st accused was well known to her as he used to refer to the deceased as his grandfather. The 2nd accused was also a neighbour as well as the 3rd accused. She told the Court that she did not witness the post-mortem examination of the body of the deceased.

On cross examination, she told the Court that she received the report on the incident around 7.00 a.m. and that her husband used to come back from his workstation around 5.00 a.m. She left the house at six in the morning. According to her, when she got to the scene she found her deceased husband lying facing down and that his whole body was covered except his face but she never witnessed the incident. The police officers were called to the scene. She reiterated that the 2nd and 3rd accused persons had earlier issued threats against her husband and that she did not hear any screams that night.

6. PW3 was Timothy Kones Chumbe who testified that he is from Cheptais and is the Head Teacher of S.A Primary School. He told the Court that the deceased was the school night guard and that he found him there when he reported to the school. He told the Court that the school has a fence but before the incident, some of the fencing posts had been stolen and that there is a public road of access which goes around the school fence. He recalled on 22nd January 2021, at around 6.45 a.m. he received a call from one of the parents, Nickson Kurwa, who alerted him of the incident involving the deceased. He rushed to the scene and found the office locks had been broken and that the three office doors were ajar. He established that nothing had been stolen but that the deceased had been tied with a wire on both his hands and legs and tethered onto a bench. His mouth had been stuffed with soil and there was blood on his head. He alerted the area chief and the police as the deceased was rushed to Cheptais Hospital where he was referred to Life Care Hospital Bungoma but he passed on at around 5.00 p.m. He told the Court that it was only the doors that were interfered with since the offices and stationary were left intact and that he knew the 1st accused herein as he is a nephew. The 2nd accused was a parent at his school and likewise the 3rd accused. He told the Court that the 2nd accused was among the villagers who thronged to the scene.

On cross-examination, he told the Court that at the time of the incident part of the fence was not intact and that he is not always in school at night. He confirmed that nothing was stolen from his office but the padlocks were damaged and that the weapons used by the night guard are well known to him. He testified that he was not aware of the type of weapons the deceased used while guarding the school.

7. PW4 was Nancy Jemutai who testified that she is a resident of Cheptais and sells fruits within the market. She recalled on 22nd January 2021, while at the market at around 8.00 a.m., the 1st accused turned up and claimed three times that he had hit his grandfather (babu) as he went his way and she proceeded with her business. She told the Court that the deceased was her younger uncle while the 1st accused referred to the deceased as his grandfather. Later in the evening, she alerted her sister, Rosemary Yego, about what she heard from the 1st accused.

On cross-examination, she told the Court that the 1st accused claimed that he had hit the deceased and that she did not know the identity of those who were around her when the 1st accused uttered those words. She told the Court that she did not know the cause of death of the deceased.

8. PW5 was NO. 93768PC Johnson Wanjohi who testified that he is currently attached at Langata DCI Nairobi but in January 2021 he was stationed at the DCI Cheptais Sub-County. He told the Court that he investigated the matter and did recall that on 22nd January 2021, at around 7.00 a.m. he received a report from his DCIO that he should proceed to Cheptais Primary School where it was alleged that the school offices had been broken into and the night guard severely injured. On arrival, he established



that the guard, one Bramwel Boiyo, had been rushed to a nearby hospital for treatment. On further enquiry, he established that the headteacher's office and staff room had been broken into and the teachers confirmed that none of the teaching materials were stolen. He learnt that the night guard had been found lying and tied onto a chair outside the staff room with both his hands and legs tied with a wire, which he found at the scene. He commenced investigations and visited the hospital where he found the guard being given first aid. He observed that he was not in a position to be interrogated. The deceased was later transferred to Life Care Hospital for further treatment but he succumbed to his injuries. He proceeded to record statements of witnesses and established that on the night before the incident around 1.00 a.m., a neighbour who was outside her house attending to a call of nature managed to see three people whom she recognized and who were carrying fencing posts. He followed the said leads and after a few days, the accused persons were apprehended by members of the public and escorted to Cheptais police station. On 29th January 2021, he visited Bungoma Referral Hospital where a post-mortem was conducted on the body of the deceased. The doctor established that the cause of death was severe head injury due to blunt force trauma inflicted by a blunt object. He later escorted the suspects to the hospital for mental assessment. He told the Court that they recovered some of the old fencing posts and a piece of barbed wire. He produced the recovered items in Court as follows: - Exhibit 1A & B – (Two old fencing posts) and Exhibit 2 – (One piece of barbed wire).

On cross-examination, he told the Court that he arrived at the school compound around 6.45 - 700 a.m. and found teachers, pupils and members of the public. He did not find the deceased at the scene as he had already been rushed to the hospital by the headteacher. He told the Court that he observed that the school compound was fenced but not fully as there were several gaps to which anybody could gain access easily. He told the Court that the key witness lived as a neighbour to the school about 200 meters away and that the compound of the witness is near the road. Further, he believed the witness and that he found the two old fencing posts on the ground outside the staff room. He told the Court that the recovered fencing posts were the murder weapons even though there were no blood stains on them and that he had nothing to show that the fencing posts were the murder weapons. He also testified that he found the barbed wire tied on the seat but lacked evidence showing that the barbed wire was tied around the seat. He testified that he relied on the testimony of his key witness and that he did not receive a confession from the accused persons. He told the Court that he had wrapped up his investigations before he was transferred and that none of the witnesses saw the deceased being attacked.

9. PW6 was Dr Ombongi Haron who testified that he is based at Bungoma County Referral Hospital, testified that he conducted a post-mortem examination of the body of the deceased on 29th January 2021, where he observed that there was a swelling on the left side of his head measuring approximately 4cm. He noted that there was an obvious depression on the same site indicating a skull fracture. On the internal examination of the body, he established a depressed skull and that there was an internal haemorrhage. He opined that the cause of death was severe head injury due to assault by blunt objects. Samples of blood were collected for DNA analysis. He produced a post-mortem report dated 29th January 2021, in Court marked as Exhibit 3.

On cross-examination, he told the Court that there was only one injury on the body of the deceased while the other parts were normal and that the assault on the deceased's body was done only once.

10. Thereafter, the Prosecution closed its case and the parties opted to rely on the evidence on record regarding the question of whether the prosecution had established a prima facie case against the accused persons. Vide a ruling dated 22/5/2023, the accused persons herein were found to have a case to answer and thus placed on their defence. They elected to tender sworn evidence and called two witnesses.
11. Kennedy Juma Chemorei (DW1) denied the charge levelled against him and told the Court that he did not know the deceased herein. According to him, he does not know the village referred to as Sirikanyi;



that he does not know the Prosecution witnesses PW1, PW2 and PW4, and that he does not know who the deceased herein is. He confirmed that he knows PW3 as he is his father. He told the Court that on the night of the incident, he was in his house and that during the day he spent time at the farm. He denied knowledge of the Cheptais Primary School and the allegations levelled against him and the other two accused persons and denied the allegation that they were notorious alcohol brewers. He told the Court that he does not consume alcohol and that he only met the other two accused persons before this Court as he does not know them.

On cross-examination, he told the Court that his home is within Sirisia Sub-County and that he knows Cheptais market as he frequents the place but does not know Cheptais Primary School. He also confirmed that he knows the Cheptais Salvation Army and that the same is near the School. He reiterated that he does not know the deceased herein. He confirmed that he was arrested by a clan elder and taken to the police station. He told the Court that on the night of the incident, he was at home alone.

On re-examination, he reiterated that on the night of the incident, he was home alone.

12. Peter Osugoi Osenchu alias Odea (DW2) testified that he is the 2nd accused herein and he denied the charge levelled against him. According to him, he knew the deceased herein as the watchman at Cheptais Primary School where his children are students and that they also resided in the same village. He told the Court that he did not know his co-accused and that the evidence of PW1 was false. He told the Court that during the night of the incident, he was at home with his wife and children. He told the Court that he knew the deceased herein and they never disagreed. He told the Court that he had known PW1 since 1992 but she cannot recall his voice. He confirmed the existence of a road of access over the land of PW1 and that on the night of the incident, he was at home with his wife and children. He denied that they had ganged up against the deceased for harassing them over illicit brews in the area.

On re-examination, she told the Court that she was familiar with PW2 as she was his aunt.

13. Dorine Anyisi (DW3) testified that she is the wife of DW2 and that she does not know his co-accused persons. She confirmed that the deceased herein was a neighbour and watchman at a nearby school. She recalled on the night of 21st January 2021, she was at home with DW2 and their children and that he never left the house the whole night. She told the Court that PW1 was the wife to her husband's uncle and her evidence could not be true as PW1 is not a neighbour to the school where the deceased worked as a watchman.

On cross-examination, she told the Court that DW2 is her husband and that she had no problem with him.

14. David Ndiwa Kipsoi (DW4) testified that he is the 3rd accused herein and he denied the charge levelled against him. He confirmed that he knew the deceased very well as a guard at a nearby school and that he knew him since his childhood. He told the Court that on the day of the incident, he was at home with his wife and children and that he did not venture outside. He told the Court that he knows the 2nd accused and that the evidence as tendered by PW1 is false.

On cross-examination, he told the Court that he was at his house on the date of the incident and that he knew PW1 very well. He told the Court that voices are different and that he cannot understand why PW1 would implicate him.

15. Emma Temko Temoi (DW5) testified that she is the wife to the 3rd accused herein (DW4) and that she knew the deceased as the night guard At Cheptais Primary School. According to her, on the night of the incident, she was with her husband at home with their children and that her husband did not venture outside as he was unwell. She deemed the evidence as tendered by PW1 to be false.



On cross-examination, she told the Court that she does not know the 1st accused and that the 2nd accused is known to her as he is a neighbour.

On re-examination, she told the Court that her husband suffers from epilepsy and when he has an episode he has to be rushed to the hospital if funds are available.

16. At the close of the defence hearing, parties were directed to file their respective written submissions. It is only the defence who complied.
17. I have considered the evidence adduced herein by both the Prosecution witnesses and the defence. The main issue for determination is whether the Prosecution has proved its case against the accused persons to the required standard and which standard has been held to be that of beyond any reasonable doubt.
18. Three witnesses gave evidence tending to connect the accused persons with the murder and were PW1, PW2 and PW4. None of them witnessed the actual murder, however. The Prosecution's case as regards the actual murder is solely built upon circumstantial evidence. It is trite law that before a Court can draw from circumstantial evidence that the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt [see *Sawe v Republic* [2003] KLR 364]. It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; 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 [see *Teper v Republic* [1952] ALL ER 480 and *Musoke v Republic* [1958] EA 715].
19. In considering the totality of their evidence, I have appraised myself with the applicable law, as set out in the locus classicus *Kipkering Arap Koske & Anor v R* (1949) 16 EACA 135 where it stated:

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always in the prosecution and never shifts to the accused.”
20. Again, in the case of *Simoni Musoke v R* (1958) EA 715 it was held that:

“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”
21. Citing the decision of the Privy Council in *Teper v R* [1952] 2 ALL E.R. 447; [1952] A.C. 480 the Court stated in *Musoke*:

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”



22. Secondly, the trial Court is mindful of the fact that the murder occurred at night and that the visual and voice identification evidence of the witness (PW1) must be treated with caution. In *Joseph Muchangi Nyaga & Anor v R* [2013] eKLR the Court of Appeal stated:

“Evidence of visual identification should always be approached with great care and caution (see *Waithaka Chege v R* [1979] KLR 271). Greater care should be exercised where the conditions for a favourable identification are poor. (*Gikonyo Karume & Another v R* [1980] KLR 23). Before a court can return a conviction based on the identification of any accused person at night and in difficult circumstances, such evidence must be watertight. (see *Abdalla Bin Wendo & Another v R* (1953) 20 EACA 166; *Wamunga v R* [1989] KLR 42; and *Maitanyi v R* [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and the time taken by the witness to observe the accused to be able to identify him...”

23. It is the evidence of PW1 that on 21st January 2021, at around midnight while outside to answer a call of nature, the accused persons passed by her door while carrying fence posts. They were drunk and making noise while claiming that they were out to finish the school watchman. She recognized them as they were her neighbours. She testified that they were armed with three fencing posts and that she saw them heading towards the school. On cross-examination, she elaborated that her house is close to the roadside and that her toilet is near the roadside. She told the Court that she stood next to the toilet and saw each accused persons armed with one fencing post and that they were drunk and making noise. Further, she told the Court that she recognized the accused persons' voices as she was well familiar with their voices and that it was the 3rd accused who made the threats. On re-examination, she told the Court that there was moonlight and that she was able to see the accused persons who were well known to her and was familiar with their voices.
24. According to PW2, the deceased had enemies and she recalled on 24th April 2020, the deceased arrived home claiming that the 2nd and 3rd accused persons had stoned him and he lodged a report with the police. Subsequently, in November 2020 she met the 2nd accused herein who threatened that he would lynch her husband but she ignored the threats. Later, at around 5.00 pm the same day, the 3rd accused met her and issued similar threats which she duly relayed to her husband. Finally, PW4 told the Court that she recalled 22nd January 2021, while at the market at around 8.00 a.m., the 1st accused turned up and claimed three times that he had hit his grandfather (babu)-the deceased herein-as he went his way and that she proceeded with her business.
25. PW1 claimed to have seen the accused persons that night with the aid of the moonlight. The rest of her evidence as to the recognition of the accused persons' voices as she was well familiar with their voices and that they were making noise while claiming that they were out to finish the school watchman and dire warnings preceding the attack on the deceased is in tandem with PW2's evidence, and is also confirmed by PW4 who confirmed that the 1st accused turned up and claimed three times that he had hit the deceased herein.
26. There is no indication at all from their answers in cross-examination that either PW1 or PW2 deliberately contrived their evidence to give false impressions. On the contrary, they struck me as witnesses of truth whose evidence ought to be considered not in isolation but as a whole. As I have indicated, the evidence is consistent save for the circumstances of identification of the accused by PW1 and the fact that she heard the voices of the accused persons as they used the road of access near her land.



27. The accused person's defence is an alibi to the effect that on the fateful night, the 1st accused was at his home, the 2nd accused was at his home with his wife and children as was the 3rd accused herein. During cross-examination of PW1, that defence alibi was not canvassed. PW1 described so vividly how on that fateful night she had stepped out to answer a call of nature and while standing next to the toilet, she saw each accused armed with one fencing post and that they were drunk and making noise. Further, she told the Court that she recognized the accused persons' voices as she was well familiar with their voices and that it was the 3rd accused herein who made the threats.
28. The Court of Appeal has stated in the past in *Osiwa v R* (1989) KLR 469 that an accused person who pleads an alibi assumes no burden to prove it. (See also *Leonard Aniseth v R* [1963] EA 206; *Ssentale v Uganda* [1968] EA 365). However, like any defence offered by an accused person, the Court must examine it in light of the entire case to see, for example, whether it was plausible or an afterthought raised at the last possible moment. There was no possibility in this case of an error in identification concerning PW1 who knew the accused persons well and it was not shown to exist any misunderstanding with her before the offence. The 1st accused's denial of knowledge of Sirikanyi village, I think, reflects a guilty mind, in light of the following considered evidence of PW1.
29. PW1 stated that she identified the accused persons by voice and visual recognition. Of the former, the Court stated in *Choge v R* (1955) 1 KLR
- “Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognized it and that the conditions obtained at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”
30. Also, in *Libambula v R* [2003] KLR 683, the issue of voice identification was dwelt on by the Court of Appeal in which it stated as follows:
- “Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtained at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See *Choge v Republic* [1985] KLR 1.”
31. In this case, there is no doubt that PW1 was a neighbour of the accused persons. According to DW2, PW1 was his neighbour from the year 1992 and also his aunt as she was the wife to his uncle, but he never engaged in any lengthy discussions with her. DW3 on the other hand, told the Court that he knows the 2nd accused and PW1. He indicated that PW1 was a neighbour but he has no relationship with her.
32. What comes from the foregoing is that PW1 knew the accused persons very well having stayed with them as neighbours and residents of the same village. On the material date, at around midnight while outside to answer a call of nature the accused persons passed by her door while carrying fence posts. They were drunk and making noise while claiming that they were out to finish the school watchman. She recognized them as they were her neighbours. She testified that they were armed with three fencing posts and that she saw them heading towards the school. On cross-examination, she elaborated that her house is close to the roadside and that her toilet is near the roadside. She told the Court that she



stood next to the toilet and saw each Accused person armed with one fencing post and that they were drunk and making noise. Further, she told the Court that she recognized the accused persons' voices as she was well familiar with their voices and that it was the 3rd accused who made the threats. It also transpired from the evidence that two of the accused persons had issued threats to the effect that they would eliminate the deceased as he had been at the forefront of the fight against alcohol brews in the area

33. Applying the foregoing to the instant case, it is evident that when she heard the assailants' noise and vivid threats towards the deceased, she had no proven reason to be anxious; she must have thought they were mere rantings of drunk accused persons and knowing them best as her neighbours she saw no need to alert her other neighbours or authorities. As an aunt to the 2nd accused (by marriage), it is believable that PW1 knew and recognized his voice when he made noise while passing through the road of access in front of her house. It is also imperative to note that she was a neighbour to the 1st and 2nd accused persons and it is clear that she had a recognition skill of the voices of her neighbours. Hence, in the circumstances, there seems little chance of mistaken identity or confusion. This assurance came out clearly in the manner PW1 handled her cross-examination.

34. In addition to the voice, during re-examination, she stated she had seen the accused persons with the aid of the moonlight. In the case of *Joseph Muchangi Nyaga & Another v R* the Court of Appeal reviewing relevant case law stated:

“Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.”

35. The Court of Appeal in the case of *Joseph Muchangi Nyaga & another v Republic* [2013] eKLR stated that before acting on evidence of visual recognition, the trial Court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

36. The difference in approach between identification and recognition was expressed thus by Madan J.A in *Anjononi and Others vs The Republic* [1980] KLR;

“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

37. PW1 stated that the accused persons are well known to her. All the accused persons denied that they were at the scene of the crime on that fateful night and maintained that they did not use any road of access in front of PW1 nor did they issue any threats to the deceased. The offence was committed at night. The only source of light according to PW1 was the moonlight.

38. In addition, PW1 did specifically told the Court how the accused persons promised to finish the deceased with the 3rd accused issuing threats. She testified that she was able to recognise the accused persons vide visual and voice recognition. The conditions at the time the voices were being heard were not marked with fear and confusion by PW1 who was outside attending to a call of nature. In my considered view, I find that the conditions were indeed conducive for a positive and safe recognition that existed at the time. Accordingly, the accused persons can be said to have been positively recognised



by visuals and voice, and thus the question of identification was therefore settled beyond reasonable doubt.

39. In reference to the testimony of PW2, it is clear that the assault on the deceased commenced soon after PW1 heard the promised threats to finish the deceased uttered by the accused persons carrying fence posts while she was outside near her toilet. This action and the warning were also preceded by more threats and/or warnings by the 2nd and 3rd accused persons to the deceased, as per the evidence of PW2. The deceased's body was found at his place of work, Cheptais Primary School, the next morning. The accused person's alibi cannot stand. The proven inculpatory facts in this case inexplicably point to the accused persons as the culprits in the murder of the deceased. Moreover, there are no co-existing circumstances to weaken that hypothesis. Their defence cannot withstand the weight of the prosecution's evidence and is utterly displaced. It is instructive that the accused persons had earlier issued threats against the deceased and sought to eliminate him over his zeal to rid the area of illicit brews and thus they are the persons heavily implicated in the death of the deceased.
40. By inflicting severe head injuries on the deceased, his assailants intended to cause him grievous harm if not kill him. Malice aforethought is self-evident. I find that the Prosecution has proved its case against the accused persons beyond any reasonable doubt. Consequently, I find Kennedy Juma Chemorei, Peter Osugol alias Odea and David Ndiwa alias Siro guilty of the offence of murder and are each convicted according therefor.

COMCLUSIONS

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Kennedy Juma Chemorei.....1st Accused

Peter Osugol.....2nd Accused

David Ndiwa.....3rd Accused

M/s Natwati.....for Accused

M/s Kibet.....for Prosecution

Kizito/Ogendo.....Court Assistant

