



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 7,8 AND 11 OF 2020 [MURDER] CONSOLIDATED

STATE.....PROSECUTION

VERSUS

MICHAEL WAHANDA ABIDHA.....1ST ACCUSED

BONIFACE OTIENO.....2ND ACCUSED

NICHOLAS OWAGA WAHANDA.....3RD ACCUSED

KELVIN OTIENO OGEJO.....4TH ACCUSED

KELVIN OTIENO ONJIKO.....5TH ACCUSED

JUDGMENT

Introduction

1. The five accused persons herein **Michael Wahanda Abidha, Boniface Otieno, Nicholas Owaga Wahanda, Kelvin Otieno Ogejo and Kelvin Otieno Onjiko** are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the Consolidated Informations are that on or about the 27th and 28th days of February 2020 at Wichlum, Sakwa location, within Siaya County the accused persons, with others not before court, murdered one **Jacktone Odhiambo Ojuok**.

2. All the five accused persons pleaded not guilty to the charge. The prosecution called ten (10) witnesses to establish a prima facie case against the accused persons who were all placed on their defence.

3. The prosecution's case sought to prove the ingredients of the offence of murder beyond reasonable doubt constituting the following elements:

- a) *The death of the deceased.*
- b) *The death of the deceased was unlawful.*
- c) *That in causing death there was malice aforethought on the part of the accused.*
- d) *That the accused was positively identified as the one who caused or participated in the killing of the deceased.*

4. The evidence adduced by the prosecution witnesses can be summarized as follows:

5. **PW1** a protected witness (**herein called PW1**) testified that he witnessed the deceased's death. It was his testimony that on the morning of 27th February 2020, he called his boss the 4th accused **Kelvin Otieno Ogejo** for whom he used to lease a music system. He testified that the 4th accused informed him not to send him the money for the music system as he had a 'fuliza' (loan) but to take the money to him at Wagusu where, upon PW1 arriving, the 4th accused told PW1 to accompany him to the 4th accused person's workplace.

6. PW1 further testified that Enroute, to the 4th accused's workplace, they passed by the 3rd accused's home where they were joined by two other visitors one of whom is the 5th accused whom he knew as 'Ja'Homabay'. PW1 stated that the 3rd accused Nicholas Owaga Wahanda

was the 4th accused's uncle. He testified that after taking tea, the 4th accused Kelvin Otieno Ogejo implored PW1 to join him and they proceeded to the house of the 1st accused Michael Wahanda Abidha where the 4th accused had visitors to greet them. He stated that after being introduced to Accused 1, PW1 returned to the 3rd accused's house where the 4th accused found PW1 and told him that he, the 4th accused was going to Agusu.

7. PW1 stated further that he informed the 4th accused that he also wanted to leave but the 4th accused told him not to leave as he- the 4th Accused left on a motorcycle which was ridden by the 2nd accused, leaving PW1 in the 3rd accused's house. He testified that the 4th accused returned alone and on foot at 5.30pm when the two visitors, one of whom was the 5th accused, followed the 4th accused, as PW1 assisted the 3rd accused to lead the cattle to their sleeping place. PW1 further testified that he noted the 4th accused held in his hands his mobile phone and a power bank.

8. PW1 testified that the 4th accused proceeded straight to the 1st accused's house where PW1 followed him and informed him that he wanted to leave for his home. He testified that at about 6.30pm, the two visitors, one of whom was the 5th accused, the 4th accused, the 3rd accused and PW1 all converged at the 2nd accused's house where he heard the two visitors telling the 4th accused that they could not stay away for more than 2 days as they had their families to take care of, of which the 4th accused responded by saying that he could not pay them as the work was not yet finished.

9. PW1 testified that at around 7 pm they were called to go and take dinner in the house of the 1st accused which they did, but that the 2nd accused arrived 10 minutes later. He testified that he again expressed his need to leave for home to the 4th accused who told him to relax as Accused 4 would get a motorbike to escort him home. He stated that at around 8 pm the two visitors left after which it started raining. He stated that he rushed to the 3rd accused's house where he sat until it stopped raining after which the 4th accused called the 3rd accused outside and they had a conversation which he did not hear.

10. It was PW1's further testimony that the 4th accused then entered the house as the 2nd accused left on a motorbike. He further stated that the 3rd accused then entered his house and removed two pangas which he gave to the two visitors one of whom, the 5th accused, was carrying a red torch with a yellow lighter. PW1 testified that at about 9.30pm, he again informed the 4th accused that he wanted to leave but the 4th accused advised him to wait until the two visitors could carry out a certain task for him-4th accused, so that they all could leave together.

11. PW1 testified that as it was approaching 10pm, they then left the house and walked up to a posho mill which was about 150 meters from the 3rd accused's house where the two visitors inquired from the 4th accused as to what they were to do to which the 4th accused first called the 2nd accused on his mobile phone and inquired as to how he was. He further testified that the 4th accused informed the two visitors that the 3rd accused had told him that there was a power blackout at Nango Market and so he had not found what he was looking for. He further stated that while they were still standing at the posho mill, he heard the 2 visitors tell the 4th accused **that-in that home, there were lights on and some dogs so they would not enter** after which the 4th accused told them to walk towards Yamoloko where they met the 2nd accused on a Honda motorbike which he could not tell the Registration number but which he identified as being red with a green seat.(MF13) which was produced as an exhibit).

12. PW1 testified that he then told the 4th accused that since the 2nd accused had come on a motorcycle, he should escort PW1 home but the 2nd accused stated that the motorbike did not have enough fuel to take PW1 home and for his return. He testified that the 4th accused informed him to escort him -4th accused with his visitors to go and talk to a certain man at his -4th accused's brother's home and that PW1 ought to wait so that the 4th accused calls for another motorbike to come.

13. PW1 testified that it was about midnight and that after walking for about 100 meters, the 4th accused told the visitors that **"this is the home"** to which the two visitors responded by telling the 4th accused to escort them up to the door of the intended house they were to go to. PW1 testified that he followed them to the home and on nearing the home, the dog started barking after which the 4th accused told them that dogs were barking and that there was also a security guard in the home. Further, that the 4th accused told the two visitors that it was the last time that they were going to that home so they must deal with it accordingly.

14. PW1 testified that the 4th accused, his two visitors and PW1 walked up to a kitchen store where the 4th accused stated that the watchman slept in that store. It was his testimony that the dogs in that home started barking loudly so watchman opened the door and the 5th accused (Ja'Homabay) lit the torch at the watchman and the two visitors started cutting the watchman using the two pangas which they were each carrying. He stated that one of the visitors also gave the panga to the 4th accused who also cut the watchman using the panga after which the 4th accused and the two visitors disappeared and he was left alone as the 4th accused and his visitors were running away. It was about 1.30am, according to PW1. He stated that he remained alone and started walking towards his home where he arrived at 3.00am. It was PW1's testimony that the following morning, he tried calling the 4th accused's number but it was not going through after which he took a motorbike and went to Wichlum where he worked.

15. PW1 testified that at about 10am on 28/2/2020 the 4th accused called him and asked him where he was to which PW1 responded stating that he was still at home although he was on his way heading to Wichlum. PW1 stated that on reaching Wichlum, the 4th accused called him and told him to go to the store where PW1 went and found the 4th accused's two visitors who included Accused number 5, whom he had met the previous day/night. PW1 testified that later, he informed his mother and uncle about what he had witnessed and subsequently, recorded his statement with the police at Bondo Police Station. He further stated that he did not know the watchman who was attacked that night and further that he never had any issue with the accused persons herein. He stated that it was the 5th accused who handed the panga to the 4th accused at the scene.

16. It was PW1's further testimony that when he met the two visitors at the Wichlum store the following morning, the 4th accused was not present but that the 4th accused called PW1 and informed him to look for a telephone number so that he-the 4th accused sends the 2 visitors money by MPESA so that the visitors could leave. PW1 testified that he got a number, that of a lady who was his customer, to which the 4th accused sent the 2 visitors the money. He testified that he later went with the said lady to the police officers who did their investigations. He further testified that the 4th accused sent Kshs. 1,200/= which PW1 handed over to the 5th accused, Ja'Homabay.

17. PW1 testified that later, the 4th accused called PW1 and enquired whether the two visitors had left and when PW1 answered in the affirmative, the 4th accused told PW1 to meet him at Osindo and on arrival by PW1, the 4th accused informed PW1 that the phone that PW1 was using was for the 4th accused and that it was possible that it could be traced so he took it from PW1 and switched it off. PW1 further testified that the 4th accused informed him that the 2nd accused had been arrested and that he had revealed everything that happened so, the 4th accused was planning to escape. PW1 testified that he feared so he went with the 4th accused to a place called Osindo in Homabay County where they stayed together at Crystal Annex lodging for two days after which PW1 returned to Wichlum but the 4th accused told him to take care of the store as he was not returning to Wichlum. He further testified that he stayed for a day at Wichlum then went home and told his mother what had happened and on the following day he informed his uncle of what had transpired.

18. In cross-examination by Mr Nyanga counsel for the 1st accused person, PW1 stated that he did not handle any weapon and that he never took part in the deceased's killing but that he was surprised at what happened. He stated that he never ran away but that the 4th accused ran away and later called him, asking him to take care of his property at Wichlum. He denied being arrested by the police but that he went to the police and told them what had transpired after returning from Osindo and after telling the same to his mother and uncle. On being questioned by Ms Abir advocate for the 2nd accused, PW1 stated that he went to report the incident on the 13/3/2020 and was detained at the police station for a week as he was being interrogated. He stated that the 'visitors' had been brought to Wichlum by the 4th accused person and that they had stayed there for about one week prior to the incident. Further, that the said visitors used to visit and stay for like two days and leave the premises rented for them by the 4th accused Ogejo. PW1 further stated that Nicholas, the 3rd accused is the one who handed over to the two visitors the two pangas which he identified in court, and that the place where the panga (MFI 1 with a black leather handle) was thrown is where it was found. He stated that Nicholas was not at the scene of murder. He denied being part of the plan to murder the deceased, saying that he only witnessed the incident.

19. On being cross examined by Mr Odongo counsel for the 4th accused person, PW1 stated that he was employed by the 4th accused as a disco Jocker-DJ and that he used to be paid after getting money on leasing out the instruments for entertainment during weekends. He stated that the business was of DJ thrived more during disco Matanga-funeral vigils but that he also used to be hired out during fundraisings. Further, that he used to be paid then he shares out the money with the 4th accused person. He denied the suggestion that the 4th accused was concerned that PW1 was stealing the proceeds. He denied stealing from the 4th accused person nor the 4th accused person raising any issue of the witness stealing the money. PW1 stated that he had prevailed upon the 4th accused person to let him go but on each of the 4 occasions, the 4th accused person told PW1 to stay on.

20. PW1 stated that he knew the two visitors well as he had been with them during the day and that not only did he know them by name, but by appearances as well, as he had lived with them at Wichlum for a period of about four weeks. On being asked whether he knew that the two visitors had pangas, he answered in the affirmative and stated that he never asked them what the pangas were for because accused 4 had told him that the visitors were his-4th accused.

21. On being questioned by Mr Okello advocate for the 5th accused, PW1 maintained that he knew the 5th accused as Ja Homabay who used to come with the 4th accused from time to time and that the 5th accused went to live in Wichlum since 2020 but that they did not live in the same house. He admitted that he told the police that the 4th accused used to bring people to the store where PW1 used to sleep, for accommodation and that he knew Ogejo since 2014 s Ogejo used to visit a hotel where PW1 worked. He stated that he told the police how the 5th accused was dressed in a Tshirt written at the back-23. He further stated that he the 5th accused had a torch. Further, that he knew the 5th accused as a miner. He stated that at one time, the 4th accused send to PW1 Kshs 5,000 to rent premises but that he did not know what their job was, noting that the two visitors ended up spending the money in question without renting a house.

22. PW1 further stated that he realized that the people Ogejo claimed to be his visitors and whom he was waiting for were familiar people who lived with PW1 at Wichlum and that the said people could at times do fishing and leave. He reiterated that after the killing of the deceased, the 4 and 5th accused and the other visitor escaped leaving PW1 who did not know the route very well so he only walked away. He maintained that the torch which was in court is the one which the 5th accused had in his pocket that night and that he used it to light the deceased before the assailants cut him. Further, that it was the 5th accused who, after cutting the deceased, gave the panga to the 4th accused who also cut the deceased before throwing the panga behind the fence as they escaped running. According to PW1, when he met the 4th accused at Osindo, the 4th accused told PW1 that it was the 2nd accused who carried the 4th accused after the incident.

23. In re-examination by the prosecutor, PW1 stated that the size of the torch and the actual torch which was used on that night was the one which was recovered at the scene and that it was the torch that had been presented before court. He stated that he was never promised anything to be a witness in this case and that he never struck any deal with the police so that he is not implicated in the case as a suspect.

24. PW2 Paul Oloo, a Medical Officer and Medical Superintendent at Bondo sub-county Hospital testified that he carried out the deceased's post-mortem on 4/3/2020 in the presence of police officers Suleiman Opondo, Joshua Ochieng Opolo and Samuel Asembo Ogola. He testified that the body was well preserved, supine, embalmed and with resolving rigidity with full rigor mortis, more than 72 hours from the time of death.

25. It was his testimony that externally, the body had injuries notably, a 6cm cut wound, 5 deep cut wounds and one superficial cut wound. He further stated that there was a deep cut wound running from the right side of the eye extending across the right cheek, the right earlobe to

the back of the neck which wound extended deep into the skull and measured about 20 cm.

26. He further testified that there was another cut wound at the back of the right shoulder measuring 12cm and another deep cut on the left side of the neck extending latterly measuring 11 cm. He stated that there was another deep cut wound laterally on the right thigh measuring 12 cm and a deep cut wound on the back of the forearm measuring 8cm, superficial cut wound on the inter part of the right forearm measuring 10 cm.

27. It was PW2's further testimony that internally all systems were normal whereas on the head there was a linear fracture on the right cheek bone extending laterally and posterior. The doctor opined that the cause of death was due to multiple cut wounds. PW2 produced the post-mortem form dated 4/3/2020 as PEx No. 1. He was not cross-examined by any of the accused persons' advocates.

28. **PW3 Triza Awuor Anyama a farmer and resident of Wichlum**, and working as hotelier testified that on 28/2/2020 at about 8.00am she was in her house when one Ochieng went and requested her for Kshs. 200/=. She testified that there were two people with a boda boda rider and that she knew Ochieng and another young man whom she had been seeing where she had rented a house. She testified that Ochieng had also rented a room at Wichlum and the other young man was his friend. She identified the young man she referred to as the 5th accused person herein.

29. It was her testimony that Ochieng then asked her for a telephone number so that money could be send to her and she gave him her number 0741121651. She further stated that she received Kshs. 1230 on her line which she withdrew and gave to Ochieng who then left after thanking her. In cross-examination by counsel for the accused persons, PW3 testified that she had lived in the same area with Ochieng for over 2months and that on that day there were two Ochiengs and that the other Ochieng whom she knew referred to was the 5th accused. She identified the Safaricom Data report showing that one Kelvin Otieno Ogejo had send her money.

30. On being cross examined by Mr Nyanga Advocate, she stated that it was morning hours and that the 5th accused was with two other people and his friend and that they left together. Questioned by Ms Abir, she stated that Ochieng had been her neighbour for two months and that he had lived alone but was visited by two people not that he lived with them. Cross examined by Mr Odongo, PW3 stated that when Ochieng went to her, he asked for Kshs 200 which she did not have so he asked her if she could give him a number so that money could be send to her although she did not know the purpose for which money was being send. On being asked by Mr Okello, PW3 stated that she knew the 5th accused by appearance as she saw him at their plot in her neighbourhood at Wichlum when he went there with Ochieng and a motorcycle rider. She clarified that she had seen him prior to the 28h February 2020. She further stated that she told the police that there were two Ochiengs but that she could not see in court the Ochieng who asked her for the Kshs 200. She denied knowing the motor cycle rider. She also stated that the 5th accused first went to eat in her hotel with Ochieng. She also stated that she told the police that Ochieng who was not in court took the music instruments and had a pickup.

31. **PW4 Mercy Achieng Odhiambo** from Yamoloko and a gold cleaner testified that on the 27/2/2020 she was at home, the 1st accused's home. It was her testimony that she worked in the gold mine from morning and returned home at about 7 pm in the evening where she found the 4th accused, her brother in law, in the company of three young boys sitting under a tree at the home of Accused 1 Michael Wahanda.

32. She stated that she went about her own business and entered her house which was not far from where they were. It was her testimony that she had known the 4th accused for a period of one year, being the time she had come into the 1st accused's homestead by virtue of her marriage to the 1st accused's great grandson, Alfred Odhiambo. In cross-examination by Mr Nyanga, she stated that she did not see the 1st accused that evening but saw the 4th accused and his friends. She stated that the 1st accused is usually a sickling. On being questioned by Mr Odongo, PW4 stated that it was normal to have visitors. She stated that Ogejo was a grandson of that home.

33. **PW5 Andrew Ochieng Mbara** a gold miner from Yamoloko testified that on 27/2/2020 he was at his home with his wife and children when at about 1 am he heard dogs barking seriously around the house but on checking in the window he saw nothing. He testified that his wife also checked and saw nothing. It was his testimony that his wife then opened the door and informed him that he had seen people outside prompting him to go out where he saw three people standing on the left side of the house near the door grills. It was his testimony that it was a clear night as there was moonlight but he could not recognize the three people and upon inquiry as to their identity, they stoned him on the left eye. He stated that he fell and his wife screamed alerting the neighbours who came with torches. He stated that they noticed blood coming from the kitchen and subsequently called the Assistant Chief who called the police and advised them not to go close to the scene.[court observed witness had a scar on the left eye.]

34. PW5 testified that at 3 am the police arrived in a land cruiser from Bondo and found the deceased who was Jacktone, PW5's inlaw's son inside the kitchen with cuts on his body. He further stated that the police waited until 8am when villagers went to the 1st accused's home and brought the 2nd accused who had a muddy motorbike which together with the deceased's body were placed in the police land cruiser. He stated that he was taken to hospital for treatment and a P3 filled as the deceased's body was taken to the mortuary.

35. PW5 stated that the 2nd accused informed them that the killers were the 4th accused's people. He stated that he did not have any disagreement with either the 2nd or 4th accused however he stated that the 2nd accused had burnt his house and an arson case had been brought against Bonface, Ogejo and Odhiambo at the Bondo Law Courts wherein PW5's wife Sharley Odhiambo was the complainant. He identified the charge sheet In Bondo Magistrate's Court (MFI 5).

36. In cross-examination, PW5 stated that he had a land ownership tussle with the 1st accused wherein the 1st accused had sold land to PW5's brother. He denied that the instant case was an effort to eliminate the 1st, 2nd & 3rd accused. He further stated that it was the 2nd accused who when arrested revealed the identities of his co-accused. He stated that the family of the 1st accused hate PW5 because it was PW5 who cared for his brother's disputed land as his brother lived away. He also stated that he never recognised any of the assailants that night. He stated that after the attack, they heard sound of a motor bike going away. Further, that he knew that Boniface was a gold miner. He reiterated that the case at Bondo Law Courts was still pending and that Boniface lived in the same homestead with the 1st accused Michael

Abidha; and that Michael the 3rd accused was the son of the 1st accused while Boniface was the 1st accused's grandson. He denied the suggestion that he was framing the 2nd and 3rd accused because they were the ones helping the 1st accused. On being asked by Mr Odongo, PW5 stated that the case at Bondo Law Courts was of arson and that there was also another civil suit between his brother and the 1st accused. He denied that they wanted to eliminate the accused over land. He stated that the first person who was arrested named all the other attackers. On being questioned by Mr. Okello, he stated that he knew the 5th accused after the arrest.

37. The testimony of **PW6 Sharley Adhiambo** a wife to PW5 was similar to that of PW5. She added that on the material night at about 1am she heard dogs barking but could not see anything from the window. She further stated that she then opened the door and she was able to see people whom she could not recognize standing outside. She stated that her vision was unhindered as there was moonlight. It was her testimony that her husband and her had moved out to the veranda and she noticed that the said people had a spotlight and that one wore a red T-shirt and a maroon mavin. She stated that one of the persons threw a stone at her husband and he fell down so she started screaming loudly. She further stated that the assailants lit the torch in their face so she could not identify them.

38. It was the testimony of PW6 that neighbours were alerted by her screams and they rushed to the home prompting the assailants to run away. She stated that they discovered the kitchen door partially open and inside was the deceased who was he sister's son lying in a pool of blood with three cuts, on the head, neck and thigh. She stated that prior to the neighbours arriving, she heard the sound of a moving motorcycle that seemed to have been switched off then on again and it started moving. She stated that they called the Area Chief and Police. It was her testimony that she had a court case with the 2nd & 4th accused and one Alfred Wahanda who had set fire to her house in an attempt to kill her and her family and further that prior to the incident, they had attacked the deceased at his home forcing the deceased to come and live with PW6 and her family. She stated that on the material night, the 2nd accused was brought to her compound as one of the suspects with a Honda motorbike.

39. In cross-examination, PW6 reiterated that she heard the sound of a Honda motorcycle at her home as the assailants escaped which was a peculiar time to hear a motorcycle as she had not heard any before. She further stated that she did not recognize any of the assailants on that material night. She also stated that she knew the dispute over the mine site land which dispute was pending in court together with the arson case and that her husband was the site manager of the land in dispute. She stated that she knew the sound of the Honda motorbike that moved at night was for Boniface. Further, that she had no issue with the accused over her marriage. She stated that she had not yet testified in the arson case. She also maintained that the attackers had spotlights and they lit at her and her husband and stoned him before they escaped as she screamed and neighbours started going to their rescue.

40. **PW7 Wilson Ouru Mbara**, a brother and neighbour to PW5 testified that he lived about 50 metres away from PW5. It was his testimony that on the material night at about 1am, he heard screams emanating from his brother's [PW5] home forcing him to rush there and when he arrived he found PW5's wife, PW6, on the veranda still screaming and when he enquired from her, she told him that people had attacked them and hit PW5 which he noticed that PW5 had an injury on his Left eye.

41. He testified that he and other neighbours who had gathered noticed the partially open door of the kitchen and when they looked inside they saw blood stains as well as somebody lying on the stomach in a pool of blood with a cut on the head, neck and the thigh. He stated that at that time he did not know who killed the deceased but later on PW5 told him that he knew the people responsible.

42. In cross-examination, PW7 stated that he had bought land from the 1st accused vide an agreement dated 24/4/2010 and subsequently a land dispute had arisen between the 1st accused and himself, which dispute was before Bondo Law Courts. He stated that the instant case was not an effort to frustrate the 1st accused. He denied the suggestion that he had vowed to eliminate the 2nd accused even if he won this case. He stated that when he ran to the home of PW5, he was with a torch and that he also saw people having torches. He stated that the land he bought from accused 1 had gold so they wanted to repossess it and that PW5 manages the said land for him.

43. **PW8 Francis Odhiambo Luke** testified that on the 29/2/2020 at about 8 am he received a call from Wilson Ouru Mbara to the effect that they had been attacked at night by unknown people and that Jackton Odhiambo Ojuok had died. He stated that he went to Bondo Police Station to establish whether they had received the report and managed to speak to the OCPD Office, the late Mr. Antony Wafula and that as they spoke, Wilson called him saying that villagers had arrested three suspects in connection with the offence.

44. He testified that the OCPD gave them a police vehicle and escort and they proceeded to the scene where they found the 3 people of whom one was the 3rd accused after which they left for PW7's home to condole with him. He further testified that while at PW7's home, the village pastor informed them that one of the suspects, PW1 had informed him that they had killed somebody. He testified that PW1 was well known to him and had even worked for him. PW8 testified that they were able to track PW1 to Osindo Beach and PW1 agreed to accompany them to Bondo Police Station to shed light on the matter.

45. PW8 testified that on their way to Bondo, PW1 informed them that the 4th accused had taken away his phone and that the 4th accused sent him to the place where the deceased died to execute the murder. PW8 stated that he later learnt that the 4th accused was the mastermind of the killing and that he had escaped to Lolwe, Uganda but as they made plans to have him arrested, covid-19 set in and the borders were closed. He stated that he later learnt that the 4th accused had sneaked back into the country and he informed the DCIO who arrested him. He further stated that he also helped the police in arresting the 5th accused.

46. In cross-examination, PW8 stated that he knew that PW1 had participated in the murder because PW1 had confessed at the police station. He further stated that the 4th accused only went to Uganda after the murder had been committed and not prior to it.

47. **PW9 No. 215800 Sgt Okado** testified that on the 29th February 2020 at around midnight he was in the office when a member of the public called saying he had been attacked by some people after which he proceeded to the scene in the company of his superior whereupon they found a man lying in a pool of blood dead with about 5 cuts to the head-face, limbs and other parts. Sgt Okado testified that the caller lived with the deceased. It was his testimony that they then heard a motorcycle taking off and the home owners also told them that a Honda

motorbike had been used and was taking off.

48. PW9 testified that the same motorbike came back and the crowd arrested the rider, who was the 2nd accused and was surrendered to PW9 and his colleague. He further stated that the OCS and Investigating officer arrived and the suspect, the motorbike and the body of the deceased were taken away. It was his testimony that he was later called by DCIO Bondo to help in the investigations and they came across PW1 who told them what had happened on the material night. It was his testimony that they recovered a panga and a torch after the information by PW1. He testified that the 5th accused was arrested at Mfangano.

49. In cross-examinations PW9 reiterated his evidence in chief and stated that PW1 did not tell him that he participated in the deceased's killing. He further stated that the 2nd accused was arrested at the scene and that despite there being no curfew at the time, it was strange for a motorcycle to be moving around at that time of the night. In re-examination, he stated that members of the public heard the sound of the motorbike and they went and brought the 2nd accused to the scene.

50. **PW10 No. 50823 Cpl Suleiman Opondo** of Bondo DCI testified that on the night of 28th and 29th/1/2020 he received a call from the OCS who informed him of an alleged murder at Yamoloko village, Wuyawi sub-location where he proceeded in the company of his fellow officers to the home of Andrew Mbara. He testified that on arrival they found a crowd of people gathered after an alarm was raised that the home had been attacked by armed people. He further stated that he met the owner of the home who told him that one of the attackers hit him with a stone on the head.

51. It was his testimony that they went to the kitchen which was closed and saw blood coming from the house and upon opening the door they saw a person lying in a pool of blood with several cut wounds on the shoulder, neck and thigh. He stated that the 2nd accused was handed over to them by the crowd who stated that he knew the murderers because he used his motorcycle to assist the murderers to escape. He further testified that while at the station he received a report from the 1st accused that neighbours were threatening to kill him because he knew the deceased's killers after which PW10 interrogated the 1st accused and placed him in custody pending further investigations. He further stated that they then received information that the 3rd accused was linked with the murder and his life was in danger so they went to the scene and arrested him.

52. PW10 testified that in the course of investigations he confirmed that the 2nd accused saw his cousin at the 1st accused's home in the company of 4 other people. He further stated that he confirmed that the 4th accused, PW1 and others had lunch with 3 other strangers including the 5th accused at the home of the 1st accused. He further stated that he established that the main target to be murdered was PW7 Wilson Ouru Mbara who bought land from the 1st accused which land was found to have gold deposits. He testified that the suspects went to the home of PW7 but were repulsed by security and fierce dogs barking so they regrouped in a dark place and agreed to go to the home of PW5, PW7's brother. He further testified that on 5/3/2020, PW1 was brought to them by among others, PW9 and they interrogated him and he gave them all the information that led to the arrest of the accused persons as well as the recovery of the weapons used in the attack. PW10 produced the following exhibits in court;

- i. Panga (rusty) produced as PEx 2
- ii. Red torch produced as PEx 3
- iii. Honda Motorbike Reg. No. KMEY851S with Green seat with red and yellow stripes produced as PEx 4.
- iv. Mobile data for Tel. 0741121651 showing that 1200/= had been received on the 28/2/2020 from 0791786328 registered in the name of Kelvin Otieno Ogejo produced as PEx5
- v. Charge sheet for the offence in Bondo Cr. Case No. 138/2020 against Alfred Odhiambo Wahanda, Boniface Otieno Wahanda and Kelvin Otieno Ogejo produced as PEx 6.
- vi. P3 Form dated 29/2/2020 and issued to PW5 produced as PEx 7.

53. In cross-examination PW10 reiterated his evidence in chief affirming that he had not been compromised by PW7 and his family. He further stated that they only recovered the panga after receiving information from PW1 as to where to search for the panga. It was his testimony in cross examination that DNA test was not necessary on the recovered panga as it was recovered several days after the crime took place and was not in a condition for retrieval of DNA. He stated that PW1 was not present when the 1st accused and his grandson plotted the murder. He further stated that he was not aware of an alleged confession by PW1 but rather that PW1 went to a priest and informed him that he was a witness to a murder. PW10 further stated that PW1 knew the 1st, 4th and 5th accused whom he described to them. He stated that the 2nd accused was arrested by members of the public and surrendered to the police.

54. In re-examination, PW10 stated that when they reached the scene, they discovered that Sgt Okado from Kopolu Police Post had reached the scene first. He further stated that he did not subject the panga to DNA testing because it was rotten due to exposure to dust and rain.

Defence Case

55. Placed on his defence, the 1st accused elected to give a sworn statement. He testified that he was known as Michael Wahanda Abidha, a farmer who lived in Yamoloko. He denied having committed the murder and further stated that on the material day he received information at 7.30 am. He stated that he heard noise when his wife was calling a certain boy, son of Uhuru called 'Bon', his grandchild and the 2nd accused herein. He stated that the family of his neighbour Wilson Uhuru Mbara had taken the motor cycle of the 2nd accused and were

escorting him to their home.

56. He further testified that the children of Wilson Uhuru Mbara came, took Bon's motorcycle and took Bon himself to their home. He stated that it was then that he heard of the murder. DW1 testified that at about 9.00am, his son Nicholas Owaga, the 3rd accused was picked up from his home which prompted DW1 to follow them to Bondo to know why they were arrested whereupon arrival he was also arrested and charged with Murder.

57. DW1 testified that the CID told him that he and his sons had committed the murder. DW1 denied seeing PW1 at his home or eating lunch with him as he was sick. He further denied cutting anyone with a panga. DW1 stated that he was not arrested but went to the police on his own volition. He denied knowing or ever seeing the deceased.

58. In cross-examination, DW1 stated that the 3rd accused was his son whereas the 1st, 2nd and 4th accused were his grandchildren. He stated that on the evening of 27/2/2020, Bon and his sons were in his home with whom he shares the homestead. He stated that the only person who went to his house was one Otis who learnt that he was sick and had come to take him to hospital only to find that Bon had already taken him to hospital. He testified that Bon, Nicholas and Otis went to his house at around 1pm.

59. He further stated that he recorded his statement with the police but failed to state that he had seen Otis and other people. He stated that he had dinner with Bon, Otis and Lenard his herds boy. It was his further testimony in cross examination that he had sold ¼ plot to Wilson Mbara and that there was a case pending in court wherein the 2nd and 4th accused were facing arson charges. He stated that the land he sold to Wilson had gold and that is why they had a dispute as Wilson wanted to take away the entire land. He stated that he did not know why the deceased lived with the caretaker of that land nor did he know the deceased or where he lived. It was his testimony that they did not step on the land having been stopped by a court order.

60. In re-examination, DW1 stated that he did not have any bitterness over the gold and that he was waiting for the court to decide. He stated that he used the land before being stopped by court and that Wilson had the intention of jailing him and his family so as to get the whole land.

61. DW2 Boniface Otieno Wahanda also elected to give a sworn statement. He testified that on the 26th, 27th and 28th February 2020 he was at his workplace at Yamoloko area having reported to work at 2 pm since he was to work overnight. He stated that he left work at 7 pm to go and give an injection to his grandfather, the 1st accused. He testified that he found his grandfather in his bedroom and that dinner had been prepared.

62. It was his testimony that he met other people at home including Kelvin Ogejo, the 4th accused, the herds boy and three others whose identity he was not familiar with. He testified that he only spoke to his grandfather, ate dinner and went back to work. He stated that he worked until 28th February 2020 when he returned home and went to bed as he was tired but was woken up at 7.30am by some people who arrested him and told him that he would know why they were arresting him.

63. DW2 testified that he was led to the home of 'Ogambi' and on arrival he found a police vehicle and a deceased person being placed in the vehicle. He denied being involved in the killing of the deceased and further stated that his motor cycle did not carry the killers. He stated that his motorcycle was muddy because it was raining and the path he used when going to work was muddy. He further denied that his house was used as the venue to plan for the murder although he was not sure of this as he stated that he never locked his house door when he went to work as the chairs of his grandfather used to be kept therein. He further testified that to date he did not know the identity of the 3 people whom he found having dinner with the 4th accused.

64. In cross-examination by the state, DW2 stated that he had dinner with Ogejo, the 4th accused, Lenard and 3 other people in his grandfather's house during which time his grandfather, the 1st accused, was in his bedroom as he was unwell. He further stated that the 3rd accused was not present at the dinner.

65. He further stated that he could not tell whether one of the 3 people was a DJ-Disco Jockey and further that he could not recall what he told the police concerning a DJ as he had been beaten and when he told the police to take him to hospital they refused. He further denied talking to the 4th accused concerning a DJ. It was his testimony in cross examination that he did not inquire on who those strangers were as he was in a hurry to return to his workplace. He stated that he left for work at about 7.30 – 7.40 pm and returned between 4 - 5 am. It was his statement that he could not recall what he wrote with the police although his statement stated that he left work at 11 pm.

66. DW2 further stated that nobody went to him at 5 am but that Uhuru's sons went to him at 7.30 am. He denied that the 4th accused requested him to take the 4th accused on a motorcycle at 11.00 pm. He identified the Honda Motorbike Reg. No. KMEY851S produced as PEx. 4 as his motor cycle which he stated was inside his house.

67. Upon cross-examination by Mr. Nyanga counsel for the 1st accused, DW2 stated that he had gone home to take early dinner and inject his grandfather, the 1st accused, with insulin which he had been given for diabetes. He stated that they did not discuss anything about murder as he just injected him after waking him up then left.

68. DW3 Nicholas Owaga Wahanda also elected to give a sworn testimony in which he stated that on the 27th, 28th February 2020 he was at his home which is different from the 1st accused's home. He denied ever meeting the 2nd or 4th accused persons. He stated that on the night of 27th and 28th February 2020 he was in his house sleeping with his wife Emily Otieno and the children. He further testified that he woke up early in the morning and saw the children of Uhuru Mbara going to his father's homestead. He stated that he followed them because they had arrested 'Bon' and were beating him as they led him to a nearby home.

69. DW3 testified that when family members of that home saw him they chased him forcing him to flee to his father's home where he told his father what had happened but before his father could go report at Kopolo Police Station, the people arrived in the company of a village elder and informed him that he was also a wanted person. He testified that at the time he did not know why he was wanted but later while at Bondo CID, learnt that it was in connection with the deceased's murder. He denied any knowledge of the panga produced in court and further denied that he was the one who removed and gave out the panga.
70. On cross-examination by the prosecutor, DW3 stated that on 27/2/2020 he saw Kelvin Otieno Ogejo, the 4th accused passing by going to his grandfather's house and as he was in a motor vehicle he could not tell with whom the 4th accused was with when he passed by and greeted him as the vehicle had dark glass windows which prevented him from seeing the people inside. He stated that he knew Wilson Mbara to whom his grandfather had sold land. He further denied the fact that on the night of 27th February 2020 the 4th accused brought strangers to his house. In re-examination, DW3 stated that he did not meet the 4th accused on the night of 27th and 28th February 2020
71. DW4 Kelvin Otieno Ogejo testified on oath that he lived at Uyoma, Rarieda and was a farmer in tomatoes as well as a dealer in motorcycle spares and hiring of a public address system namely Hot 96 Sound System. He also testified that he had a taxi which he ran.
72. It was his testimony that on the night of 27th and 28th February 2020 he was in his house in Uyoma Rarieda. He further stated that the 1st accused was his maternal grandfather and that during the day of 27/2/2020 he had gone to visit him as he received information that his grandfather was unwell and he wanted to take him to hospital. He testified that he arrived at the 1st accused's home at 1 pm and that he was in the company of Amose Okode, Onyango Sewe and Dick Obila.
73. It was his testimony that after seeing his grandfather whose feet and face he noted had swollen and after confirming that he had been taken to hospital, he left the place at around 8 pm and returned back to his house at Uyoma where he found his wife still watching news. He further testified that PW1 was his DJ in charge of his music system and that he was not in the company of PW1 on the night of 27th and 28th February 2020. DW4 stated that he was with PW1 on the 20/2/2020 when they discussed the issue of hire of the music system to a far off place.
74. DW4 admitted sending PW1 Kshs. 1,200 as PW1 had informed him that he had been hired to go and perform somewhere. He further admitted that he was facing an arson case at Bondo which case is still pending. He further stated that PW1's testimony was a lie as he never anticipated or participated in the deceased's murder.
75. Upon cross-examination by Mr. Kakoi for the state, DW4 reiterated that he had a farm at Uyoma and that the three people in his company on the day of 27/2/2020 were his workers/gardeners. He further stated that the workers/gardeners hailed from Nyabera sub-location and that he had their phone numbers. He stated that his phone was confiscated by CID officers.
76. DW4 further stated that he was well acquainted with PW1 and that on the 27/2/2020 PW1 was in possession of the music system and that PW1 ever came for payment of some money. He reiterated that PW1 approached him on the 20th saying that he had been hired to go far but he refused and they parted. DW4 further testified that PW1 was not to be trusted as he could be paid and withhold the money. He further testified that the Kshs. 1200 he sent PW1 was for fuel for the Music system. He stated, noticeably fumbling, that he took away his music instruments from PW1 on 2/3/2020.
77. On cross-examination by Mr. Nyanga for the 1st accused, DW4 stated that he never discussed harming Wilson Mbara with the 1st accused when he visited his grandfather on the 27/2/2020.
78. Upon re-examination DW4 stated that the names he gave namely; Amos, Dick and Onyango Sewe were not fictitious. He further stated that his phone was confiscated by the police and had not been returned. It was his statement that he sent PW1 money because PW1 informed him that he had been hired. DW4 stated that he had forgiven PW1 for previously stealing money from him.
79. DW5 gave an unsworn statement and stated that he was a fisherman from Rusinga and did not know anything concerning the current case. It was his testimony that on 21/6/2020 whilst fishing in the lake, a speed boat patrol stopped him looking for those without life jackets. He stated that they were 4 occupants in his boat with 2, including himself, without life jackets.
80. DW5 stated that the two of them joined 4 others already in the speedboat and they were each fined Kshs. 6,000 which three of them could not pay and as such they were taken to Kotiende Police Station where 2 of those he was arrested with were released after paying the fines but that he was unable to raise the funds. He further stated that he stayed at the station for 3 days after which he was taken to court and charged with Murder instead of failing to wear a life jacket. He denied ever meeting his co-accused.
81. DW6 Joseph Odongo Awuor from Central Sakwa testified that on the night of 27/2/2020 he was at his home with his family namely; Josephine Odongo, Margaret Odongo and others. He testified that Boniface, the 2nd accused arrived at his home at 2pm and stayed there until about between 6.30 – 7pm mining gold when he left to go and inject his grandfather.
82. He further testified that the 2nd accused later returned to his mining work at 7pm and worked until around 2 – 3am when cocks were crowing when the 2nd accused woke up DW6 and returned the keys to the mine to him.
83. On cross-examination by Mr. Kakoi for the state, DW6 reiterated that the goldmine was his however he did not have any documents proving his ownership. He stated that Boniface left his home around 7pm to go inject his grandfather and returned around 7:15pm.
84. DW6 further stated that he went to sleep at around 11pm and woke up at around midnight and went to the mine where he found Boniface and the other miners where they chatted then returned to the house. He further reiterated that Boniface woke him up at 3am to surrender the

keys to the goldmine.

85. On cross-examination by Mr. Owenga who watched brief for the family of the deceased, DW6 reiterated that Boniface went to his home at about 2pm and left between 6-7pm to go and inject his grandfather.

1st Accused's Submissions

86. It was submitted on behalf of the 1st accused that the prosecution has failed to prove its case against the 1st accused as it has failed to link him to the said offence. That for the prosecution to secure a conviction on the charge of murder against the 1st accused, it has to prove the ingredients of murder against the 1st accused, which ingredients were set out in the case of **Anthony Ndegwa Ngari v Republic [2014] eKLR**.

87. Further submission on behalf of the 1st accused was that the prosecution only proved that the deceased died whereas on the other ingredients constituting murder the same is based purely on circumstantial evidence which has not satisfied the requirements set out in the cases of **Sawe v Republic [2003] KLR** and **Abanga alias Onyango v R C.R.A No32 of 1990 [UR]** where the court held that reliance on circumstantial evidence solely as a base for conviction only arises where it is the only rational inference that can be drawn from the circumstances. The 1st accused further relied on the cases of **Omar Mzungu Chimera v R Criminal Appeal No 56 of 1998** and **Rex v Kipkerring Arap Koske & 2 Others [1949] EACA 135** where the aforementioned principles were applied.

88. It was further submitted that none of the prosecution witnesses saw the deceased being killed and further that none of the witnesses placed the 1st accused at the scene of crime.

89. Regarding malice aforethought and the testimony by PW1 that the 1st accused's house was used to hatch the plot to kill the deceased, it was submitted that the same was not confirmed and did not amount to a confirmation that he committed the offence. In conclusion it was submitted that the prosecution failed to prove all the ingredients of murder to sustain a conviction against the 1st accused beyond reasonable doubt.

4th Accused's Submissions

90. It was submitted that the evidence against the 4th accused rested on the testimony of PW1, an alleged protected witness, whose evidence he submitted ought to be treated with immense caution as its probative value was wanting. Relying on Sections 3 and 16 of the Witness Protection Act it was submitted that there was no evidence placed before the court to demonstrate or prove that PW1 was under threat or risk on account of him being a crucial witness and that PW1 merely negotiated his way out of prosecution.

91. It was further submitted that the evidence of PW1 had no probative value as his evidence was unbelievable as he admitted to having participated in the commission of the offence as he had told the religious elder, further as he did not report the offence to the police until he was offered a deal to protect him from prosecution and as his evidence was contradictory hence unreliable.

92. Reliance was placed on the case of **MBA CA NO. 273 of 2006, Shida Kazungu Baya & 4 Others v Republic** wherein the court held that in relying on evidence of an accomplice, a court must make sure that the accomplice's evidence is credible and the same is corroborated. It was submitted that the evidence of PW1 was not corroborated by the other prosecution witnesses.

93. It was further submitted that no forensic examination was done on the weapon allegedly used, which investigation if done would have yielded a result pointing to the culprits of the deceased's murder and that contrary to the evidence of PW10 that the weapon had already been exposed to the elements thus eroding the evidence to be collected through forensic examination, in forensic examinations, time is not really a factor as the evidence is properly collected and preserved.

94. The 4th accused submitted that the evidence adduced by the other prosecution witnesses did not carry weight so as to assist the prosecution's case whereas that of the 4th accused remained unchallenged.

Analysis & Determination

95. I have considered the evidence adduced by the prosecution witnesses, the defences proffered and the written submissions as filed on behalf of the 1st and 4th accused person's counsel supported by legal authorities. The main issue for determination is whether the prosecution has proved the guilt of the accused persons herein or any of them the offence of murder beyond reasonable doubt.

96. The offence of murder is defined under section 203 of the Penal Code thus:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

97. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

- a) ***The fact of the death of the deceased.***
- b) ***The cause of such death.***

- c) *Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly*
- d) *Proof that said unlawful act or omission was committed with malice aforethought.*

Fact of Death

98. On the fact of the death of the deceased there cannot be any doubt. PW5, PW6, PW7, PW9 & PW10 all saw the deceased's body at the scene of crime, lying in a pool of blood with multiple cut wounds. The eyewitnesses to this incident, PW1, (whose evidence I shall analyse later) testified that he was in the company of the deceased's assailants when they began cutting him with a panga. PW9, a police officer testified that on the material night, at around midnight, he received a call while at the office from a member of public stating that they had been attacked by some people after which he proceeded to the scene in the company of his superior officers whereupon they found a man lying in a pool of blood dead. The investigating officer PW10 testified that on the material night he received a call from his OCS of an alleged murder that had occurred and when he arrived at the scene of crime, he found the deceased lying in the kitchen in a pool of blood with multiple stab wounds. All these witnesses spoke of having seen multiple stab wounds on the deceased's head, neck and thigh. On the fact of death therefore, this court entertains no doubt whatsoever. PW2 testified that he carried out a post-mortem on the body of the deceased. Post-mortem cannot be undertaken on a live person.

Cause of Death

99. As stated earlier the prosecution evidence was to the effect that the deceased sustained multiple deep stab wounds to the head, neck and thigh. The effect that these injuries had on the life of the deceased was testified to by PW2 Paul Oloo, a Medical Officer at Bondo sub-county Hospital and Medical Superintendent. PW2 told the court that on 4/3/2020 he carried out a post-mortem on the deceased's body. Upon examination, he noted the following relevant external injuries;

- i. *a 6cm cut wound, 5 deep cut wounds and one superficial cut wound.*
- ii. *a deep cut wound running from the right side of the eye extending across the right cheek, the right earlobe to the back of the neck which wound extended deep into the skull and measured about 20 cm.*
- iii. *a cut wound at the back of the right shoulder measuring 12cm*
- iv. *a deep cut on the left side of the neck extending laterally measuring 11 cm.*
- v. *a deep cut wound laterally on the right thigh measuring 12 cm and a deep cut wound on the back of the forearm measuring 8cm, a*
- vi. *superficial cut wound on the inner part of the right forearm measuring 10 cm.*

100. From this examination PW2 formed the opinion that the cause of death was *due to multiple cut wounds.*

101. On the element of unlawful killing, I am satisfied that there was no justification given for the killing of the deceased who was not armed and neither has any defence of provocation or self-defence been proffered.

The Actus Reus

102. Having sufficiently proved the fact as well as the cause of the death of the deceased the prosecution is under a duty to prove that the accused persons before the court are criminally culpable for the act leading to the death of the deceased. This is what in law is referred to as the '*actus reus*' of the offence.

103. **Websters New World Law Dictionary** defines '*actus reus*' as "*The voluntary and wrongful act or omission that constitutes the physical components of a crime*". Thus the prosecution must adduce evidence to prove that the five (5) accused persons were guilty of a wrongful act or omission, the direct consequence of which was the death of the deceased.

104. In this instance, there was only one witness to the offence, PW1 who gave direct evidence on what he saw and heard. The evidence of PW1 has been cited to lack probative value on largely two grounds namely that PW1 was not a protected witness as provided for under section 3 and 16 of the Witness Protection Act and that PW1 was an accomplice to the alleged crime whose evidence was given to save his own skin and further was not corroborated.

105. This court is also alive to the dangers of relying on a single identifying witness and warns itself of such dangers in the instant case. **In Jackson Githui Wanjeri & another v Republic [2016] eKLR**, the Court of Appeal had this to say concerning reliance on evidence of a single identifying witness:

“The test for admissibility of evidence of a single identifying witness is what has been refined by case law some of which were highlighted by the learned judges in the judgments and of which we fully associate ourselves with as stating the correct principles of law governing such admissibility of evidence of a single identifying witness.

The parameters for testing such evidence were set out by the court in Ndungu Kimani versus Republic [1979] KLR 282 where in the court inter alia stated that:-

“the witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness; or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

106. In the case of **Benson Mugo Mwangi versus Republic Criminal Appeal No. 238 of 2008** the Court observed inter alia thus:

“Thus on the issue of identification provided that the trial court tests the evidence of a single witness with the greatest care, a conviction can be based on the evidence of a single witness. What then is meant by the clause “testing the evidence of a single witness with the greatest care”

“In our view the first consideration on testing the evidence of a single witness is to consider as to whether the witness is honest and reliable. The integrity of the witness is of paramount importance before a court directs its mind to his evidence. If the witness gives the impression at the time he is testifying that he is not an honest witness or is a witness of doubtful integrity then without much ado the court cannot rely on his evidence to convict ---”

107. In the same Benson Mugo Mwangi case (supra) the court further added thus:-

“Once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstance prevailing at the time and place of the incident favoured proper identification.”

Some of the factors that a court of law should bear in mind when determining whether circumstances prevailing at the scene of the incident favoured positive identification of the perpetrator or not are some of those set out by the court in the Maitanyi versus Republic [1986] KLR 198, namely that a court of law should be cautious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for such a court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect.”

108. In the same Court of Appeal decision, the superior Court considered what the learned judges of the High Court had stated in relation to reliance of evidence of a single identifying witness and stated thus:

“The learned judges before affirming the first appellants’ conviction and sentence reasoned thus:-

The evidence of PW5 was clear and consistent. PW5 was a secondary school student in Form 3. She spent one hour with the appellant in a well lit room throughout the incident. This is while the appellant and his colleague were looking for money. At one time this appellant wanted to hit her with a panga. She knew the appellant before having met him at the schoolmate’s home.

We are aware that this being identification by single witness there is of necessity need to warn ourselves on danger of basing a conviction on the evidence of identification by a single witness. It is indeed possible for a witness to believe quite genuinely that the attack was by someone she knew and yet being mistaken. In the case of Abdalla Bin Wendo versus Republic [1953] 20 EACA 166, the Court of East Africa said

“--- but on identification issue a witness may be honest yet mistaken and may make our erroneous assumption particularly if he believes that what he thinks is likely to be true...”

We have accordingly warned ourselves and find that the identification of the appellant by PW5 was without error. This witness displayed clarity in the description of her contact with the appellant. They were together for one hour in a house well lit by fluorescent light. Throughout this time they were in close proximity. Apart from the clarity of the witness we do also find that the conditions of the identification were favourable.”

Whereas before affirming the conviction and sentence of the 2nd appellant they reasoned thus:

We are in agreement with that finding of the learned magistrate. PW5 came across as a very forthright, clear and truthful witness. She had seen the appellant earlier in the day. She spent ten minutes with him during the robbery. She observed that he was still dressed the same way that he had been during their encounter in the day. We are aware that on the evidence of identification by a single witness in difficult circumstances it is important to warn ourselves of the dangers of relying on that evidence. A case in point is the Court of Appeal CLEOPHAS OTIENO WAMUNGA versus REPUBLIC Criminal Case No. 177 of 2004. The court stated as follows:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of Republic versus Turnbull (1976) 3 ALL ER 549 at page 552 where he said:

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

We have warned ourselves of reliance on that evidence but we find that it is safe to rely on the identification evidence of PW5. That identification on the night of the robbery was corroborated by the identification of the appellant on the identification parade by PW5.

It is not disputed that the convictions of the appellants by the trial court and the affirmation of those convictions by the first appellate court were anchored on the testimony of PW5 as a single identifying witness both on the recognition of the 1st appellant and the identification of the 2nd appellant at the scene of the robbery. As submitted by Mr. Kaigai the learned Assistant Director of Public Prosecutions, a conviction on the basis of evidence of a single identifying witness is sustainable in terms of section 143 of the Evidence Act Cap 80 Court of Appeal Rules so long as it meets the test for its admissibility. Section 143 of the Evidence (supra) simply makes provision that

“no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact”

109. I wholly agree with the above decisions that no number of witnesses shall be required to prove any fact. A single identifying witness, once established by the court to be credible and truthful, the evidence of that witness can be relied upon to found a conviction especially if corroborated by other independent evidence.

110. On the other hand, the protection of witnesses is no longer a matter of statutory expressions only; it is now derived from the Constitution. The Constitution mandates Parliament to enact legislation to provide protection, rights and welfare of victims of offences. This is a milestone and relevant to the subject under discussion for victims may also be witnesses. See Article 50(9) of the Constitution which provides:

“(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”

111. Therefore, the constitutional foundations of witness protection cannot be questioned. The purpose of witness protection is not only to protect the witnesses but to ensure due administration of justice to all which is a tenet of justice in a society governed by the rule of law. Notably, the restrictions that may be imposed by the need for protection of witnesses and victims fall under Article 50 ‘Fair Hearing’. Accordingly, it is not defensible to state as a general proposition that witness protection is detraction from fair trial.

112. The Witness Protection Act is the substantive statutory law on witness protection as the preamble states:

“An Act of Parliament to provide for the protection of witnesses in criminal cases and other proceedings to establish a Witness Protection Agency and provide for its powers, functions, management and administration, and for connected purposes.”

113. The High Court has the power to make a witness protection order by taking into consideration certain factors which are stated in **Section 16 of the said Act** as follows:

“The High Court may make a witness protection order if it is satisfied that-

(a) the person named in the application as a witness-

(i) was a witness to or has knowledge of an offence and is or has been a witness in criminal proceedings relating to the offence; or

(ii) is a person who, because of his relationship to or association with a person to whom subparagraph (i) applies, may require protection or other assistance under this Act;

(b) the life or safety of the person may be endangered as a result of his being a witness;

(c) a memorandum of understanding has been entered into by the witness in accordance with section 7; and

(d) the person is likely to comply with the memorandum of understanding.”

114. In the instant case, this court made protection orders on 13th July 2020 after hearing all parties herein and allowed the prosecution to organize the witnesses who are under protection or whom he intends to place under protection well in advance before 9.00 am on 14/7/2020. Consequently, it is my opinion that the protected status of PW1 does not in any way denigrate PW1’s evidence.

115. On the issues raised by the 4th accused that PW1 was an accomplice to the offence herein and that his evidence lacks probative value as it is uncorroborated, the Court of Appeal expressed itself as follows in the case of **Karanja & another v Republic[1990]KLR:**

“Although there may be cases of an exceptional character in which an accomplice’s evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons. The accomplice is likely to swear falsely in order to shift the guilt from himself. As a participator in the crime, he is an immoral person who is likely to disregard the sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution – see Asumani Logoni s/o Muza v Rex (1943) 10 EACA 92. An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based upon it. The corroboration which should be looked for is, as laid down in the case of R v Baskerville [1916] 2 KB 658, some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime.”

116. I shall briefly reiterate the evidence adduced by PW1 in brief which is that on the 27/2/2020, in the company of the 3rd, 4th & 5th accused, they proceeded to the 1st accused’s home. This was corroborated by PW4, an in-law to the 4th accused, who testified that on the same day, she returned home and found the 4th accused and 3 young boys sitting under a tree. It was PW1’s testimony that at around 6.30pm the 2nd, 3rd, 4th and 5th accused converged at the 2nd accused’s house where the 5th accused and another not before court stated that they had to return home only for the 4th accused to state that he would not pay them for work not done.

117. PW1 proceeded to state that at around 7pm, they gathered at the 1st accused’s house for dinner however, the 2nd accused joined them 10 minutes later where he once again conveyed to the 4th accused his desire to leave to no avail. He stated that he then left for the 3rd accused’s house where he witnessed the 3rd accused remove 2 pangas and hand them to the 5th accused and another not before court. He stated that at around 10pm, they left the 3rd accused’s house and proceeded to a posho mill which was about 150 metres away. I note that at this time it seems the 2nd accused was not in the group as PW1 noted that the 4th accused called the 2nd accused to inquire as to how he was doing.

118. PW1 testified that the 2 visitors (5th accused and another not before court) then told the 4th accused that “the home had security lights and barking dogs” and so the group walked towards Yamoloko and on the way they met the 2nd accused riding a red motorbike which had a green seat. At this point PW1 testified that he once again stated that as the 2nd accused had come he should have taken him home only for the 4th accused to state that the motorbike lacked enough fuel and implored him to escort them to a certain place to have a talk with a certain man. He further testified that after walking for about 100 metres, the 4th accused identified a house and informed them that they had arrived at their destination. He testified that as the house was locked, they walked up to the kitchen store where the 4th accused informed them that the watchman used to stay and when the watchman opened the door the two visitors (5th accused and another) started cutting him with the pangas before passing the panga to the 4th accused who also cut the deceased before they ran away.

119. He further testified that the following day, the 4th accused sent him money totaling Kshs. 1,200 through PW3’s mobile phone, which money PW1 was to give to the 5th accused and his colleague.

120. The question before this court is whether the evidence of PW1 a single identifying witness should be regarded as that of an accomplice. PW8 testified that PW1 who was well known to him as he had fished for him severally, confessed to being part of the group that murdered the deceased. He reiterated his statement under cross-examination. PW10 also testified that PW1 revealed to him that he was with the 4th and 5th accused and another not before court when the offence was committed. However, there is no confession on record of PW1 admitting to having been one of those who killed the deceased. There is evidence on record, of PW1 having witnessed the deceased’s murder. Even if he was an accomplice, there are aspects of his testimony that have been corroborated by other prosecution witnesses specifically PW4 who testified that on the 27/2/2020 at 7pm she saw the 4th accused and young boys sitting under a tree within the 1st accused’s home corroborating PW1’s testimony that they had assembled at the 1st accused’s home for dinner on the 27/2/2020.

121. Turning to the probative value of PW1’s testimony, it is not uncommon for the defence to attack and deride circumstantial evidence in criminal cases, almost suggesting that it has little probative value or at the best, rate such evidence as weaker, in comparison to direct evidence. This was the submission of the 4th accused.

122. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, the Court of Appeal had this to say on this point:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

123. See also **Musili Tulo v Republic Cr. App. No. 30 of 2013.**

124. The Court of Appeal laid down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the 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.

(see also Sawe v Republic (2003) e KLR and GMI v R Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

125. Set against the testimony of PW1, the defence given by the accused persons was as follows: The 1st accused denied seeing PW1 on the 27/2/2020. However, he corroborated PW1’s testimony that Bon, the 2nd accused, and his sons were in his home with whom he shares the homestead. He stated that the only person who went to his house was one Otis, his grandchild and the 4th accused, who learnt that he was sick and had come to take him to hospital only to find that Bon had already taken him to hospital. He testified that Bon, Nicholas and Otis went to his house at around 1pm. In cross examination he also admitted that he ate dinner at his house but with Bon, Otis and Lenard his herd’s boy. DW2 also admitted in cross examination that he had dinner in the house of DW1 his grandfather, with the 4th accused, Lenard and three other people. The court indeed saw DW1 who is an old man and sickly and this case hearing was adjourned severally because he could not attend court on poor health grounds. This testimony corroborated that of PW4 who stated that the 1st accused was a sickly man and further that she returned home to find the 4th accused sitting under a tree with 3 young boys.

126. The 2nd accused on his part testified that he was not present when the deceased was killed as he was at work at a goldmine owned by DW6. He stated that on the 27/2/2020 he left work at 7 pm to go and give an injection to his grandfather, the 1st accused. He testified that he found his grandfather in his bedroom and that dinner had been prepared and also met other people at home including the 4th accused, the herd’s boy and three other people whose identity he was not familiar with. He testified that he only spoke to his grandfather, ate dinner and went back to work. He stated that he worked until 28th February 2020 when he returned home and went to bed as he was tired but was woken up at 7.30am by some people who went to the home and arrested him and told him that he would know why they were arresting him. He further stated that the 3rd accused was not present at the dinner.

127. DW6 corroborated the testimony of the 2nd accused by stating that the 2nd accused used to work in his goldmine and that on the material day the 2nd accused arrived at work at 2pm and stayed there until about 6.30 – 7pm mining gold when he left to go and inject his grandfather before returning back to work where he worked until around 2 – 3am when he returned the keys to the mine to him.

128. The 3rd accused testified that on the night of 27th, 28th February 2020 he was at his home which is different from the 1st accused’s home sleeping with his wife Emily Otieno and the children. He testified in cross-examination that on 27/2/2020 he saw the 4th accused passing by going to his grandfather’s house and as he was in a motor vehicle, he could not tell with whom the 4th accused was with when he passed by and greeted him as the vehicle had dark glass window which prevented him from seeing the people inside. He denied meeting the 4th accused on the night of 27th and 28th February 2020. It is worth noting that on cross-examination by Ms. Abir, PW1 testified that the 3rd accused was not present when the deceased was murdered.

129. The 4th accused testified that that on the night of 27th and 28th February 2020 he was in his house in Uyoma Rarieda and that earlier in the day he had gone to visit his grandfather, the 1st accused as he had learnt he was unwell and left the place at around 8 pm to return back to his house at Uyoma where he found his wife still watching news. He denied being with PW1 on the 27/2/2020 stating that he was with PW1 on the 20/2/2020 when they discussed the issue of hire of the music system to a far off place. The 4th accused stated that he sent PW1 KShs. 1,200 on the 28/2/2020 as PW1 had informed him that he had been hired to go and perform somewhere.

130. On his part the 5th accused testified that he was not involved in the deceased’s murder and only became aware of it when he was arrested and for lacking a life jacket whilst fishing and as he lacked the fine required by the police officers he was charged with the murder.

131. It is noteworthy that in law criminal culpability does not visit only the person who committed the act in question, equal criminal culpability lies with any person or persons who aided, abetted or were in any other way complicit in the illegal act or omission.

132. In this regard section 20(1) of the Penal Code Cap 21 Laws of Kenya provides as follows:

“20(1) When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it that is to say

- i. Every person who actually does the act or makes the omission which constitutes the offence***
- ii. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence***
- iii. Every person who aids or abets another person in committing the offence***
- iv. Any person who counsels or procures any other person to commit the offence.....”***

133. Before I proceed to address my mind to the question of whether the accused persons were involved in executing a common intention, I deem it to be necessary to settle the question of whether there has been a clear positive and reliable identification of each of the accused persons, as having been present at the scene on that fateful day and night as having participated in the attack on the deceased and his team.

134. The testimony of PW1 was that only the 4th and 5th accused persons, as well as another, presently not before court, were at the scene. PW1 specifically testified that the 3rd accused was not at the scene and the evidence adduced herein clearly exclude the 1st and 2nd accused from the scene. However, PW1 testified that he saw the 3rd accused hand the 5th accused and his colleague (not present before court) a panga each. In my opinion, no evidence has been adduced by the prosecution to show that the panga produced as PEx. 2 was indeed the panga that the 3rd accused handed over to the 5th accused. The police investigators did not even take photographs of the panga at the recovery scene. This is not to say that a murder weapon must be produced, as non-production of or recovery of a murder weapon is not fatal to the prosecution case.

135. Still on the said panga, it was submitted by the 4th accused that no forensic examination was done on the weapon allegedly used, which investigation if done would have yielded a result pointing to the culprits of the deceased's murder and that contrary to the evidence of PW10 that the weapon had already been exposed to the elements thus eroding the evidence to be collected through forensic examination. In addition, the evidence of PW5, PW6 and PW9 on where the 2nd accused as arrested from is contradictory. PW5 said the 2nd accused was arrested at 8.am and brought to the scene while PW6 said that he was arrested that night. PW9 stated that the 2nd accused was arrested at midnight at the scene. These contradictions create doubt on whether the 2nd accused person was at scene or not as stated by PW1 that he was not at the scene of the attack on the deceased.

136. PW1 positively identified the 4th and 5th accused and testified that he was well acquainted with the 4th and 5th accused persons as he had been employed by the 4th accused as a DJ since 2014 and as the 5th accused whom he referred to as “Ja’ homabay” visited them regularly.

137. I am thus convinced that the 4th and 5th accused persons were properly identified by PW1. I am further persuaded that the detailed testimony of PW1 was credible and believable. It was well corroborated in material particulars by PW3 and PW4 on the events of the day and night of the killing of the deceased and the morning after.

138. Based therefore on the foregoing it is my view that the alibi defences raised by the 4th and 5th accused persons are a sham. I am satisfied that they all participated and were actively involved in the attack against the deceased on the night of 27th February 2020.

139. With regard to the 1st, 2nd and 3rd accused the evidence linking them to the offence is not sufficient to sustain a charge of murder. The prosecution did not adduce watertight evidence against them. There were glaring gaps that create a cloud of doubt which doubt must go to the benefit of the accused. The 1st, 2nd and 3rd accused persons are therefore found not guilty of the charge of murder and are hereby acquitted of the Information of murder and set at liberty forthwith unless otherwise lawfully held.

Malice aforethought

140. Back to the 4th and 5th accused persons, the prosecution is under a further duty to prove beyond reasonable doubt that the two unlawfully killed the deceased with malice aforethought, for a conviction against them to be sustained.

141. Section 206 of the Penal code defines ‘malice aforethought’ as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

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

Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

An intent to commit a felony.

An intention.....”

142. From the above definition specifically section 206(b) and section 206(c) of the Criminal Procedure Code, malice aforethought comprises not only intentional acts, but also comprises reckless acts likely to cause death and/or grievous bodily harm with indifference of the consequences of such acts. In the case of **Republic v Rahman & Others 2008 (UKHL)45** while describing the *mens rea* required for a party in a crime of common intention Lord Neuberger of Abbotsbury gave the following illustration:

“If B realizes (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A with the requisite intent, kills in the course of the venture.....”

143. Likewise, in the case of **Njoroge v Republic [1983] KLR 197** the Kenya Court of Appeal held that:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

144. The 4th and 5th accused and their cohorts were armed with dangerous and offensive weapons in the form of pangas. They set upon the deceased who was unarmed. The attack was unprovoked. The 5th accused and his co accused at large after cutting the deceased, handed the panga to the 4th accused who completed executing the killing of the deceased. This was a cold blooded murder. The deceased died as a result of multiple cuts on his body, as per the postmortem report. Such action in the minds of the accused persons would clearly have no outcome other than grievous harm or death to the victims, regardless of the motive as motive is not a mandatory requirement to establish murder.

145. The deceased was fatally cut during the attack. From the evidence on record as a whole, the accused intended to eliminate PW7 but the barking dogs scared them away. They then turned to the home of PW5 and PW6 who are related to PW8 and decided to execute the murder because of the land dispute between DW1 and PW7. Accused 4 was the mastermind of the gruesome murder. He was the master planner while the 5th accused was a gang for hire. PW1 who was an employee of accused 4 was roped in but did not cooperate fully and his conscience pushed him to reveal what had happened. The deceased suffered death because of transferred malice. The two accused persons and their accomplice intended to eliminate anybody related to PW7, and 5 on site. They accomplished their mission. **Peter Kiambi Muriuki v Republic [2013] eKLR** where the Court of Appeal stated the doctrine as follows:

“18. The learned Judge also referred to transferred malice and stated that the deceased was a victim of transferred malice because of intervening in a fight between the appellant and Mutegi. What is the law on transferred malice? Where a person intends to commit a particular crime and brings about the elements which constitute that crime, he may be convicted notwithstanding that the crime takes effect in a manner which was unintended or unforeseen. The intent and the act must coincide. Under the doctrine of transferred malice, where a defendant fires a gun intending to kill X, but misses and instead kills Y, he will not be able to escape liability for the murder of Y simply because it was his intention to kill X. The defendant has still committed the actus reus that he intended, namely to cause the death of a human being. It is then said that the malice against X can be transferred to Y. The basis for this is the principle in R – v- Latimer (1886) 17 QBD 359 in which the defendant struck a blow with his belt at Horace Chapple which glanced off him, severely injuring an innocent bystander, Ellen Rolston. The defendant was convicted of maliciously wounding the woman and appealed on the ground that it had never been his intention to hurt her. The court affirmed the conviction stating that the defendant committed the actus reus of the offence with the necessary mens rea i.e he had acted maliciously. In R –v – Pembliton (1874) LR 2 CCR 119, the defendant threw a stone at another person during an argument. The stone missed the intended victim, but instead broke a nearby window. He was charged with malicious damage to property and the court, in quashing the conviction held that the doctrine of transferred malice is inapplicable where the defendant’s intention had not been to cause the type of harm that actually materialized; his intention to assault another person could not be used as the mens rea for the damage that he had caused to the window.” see also Wakiaga J in Republic v Ngoria Taman Njoru [2021] e KLR.

146. I am satisfied that the prosecution has proved that the 4th and 5th accused persons formed a common unlawful intention, acted on this common intention with malice aforethought. The ingredients of the offence of murder against the two accused persons have therefore been proved beyond a reasonable doubt. I find that the 4th accused Kelvin Otieno Ogejo and the 5th accused Kelvin Otieno Onjiko are guilty of the offence of murder contrary to section 203 of the Penal Code. I convict them accordingly.

147. Sentence shall be after mitigation.

148. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF SEPTEMBER, 2021

R.E. ABURILI

JUDGE