



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 27 OF 2018[MURDER]

STATE.....PROSECUTION

VERSUS

BENJAMIN ELI ODHIAMBO (Alias Ben).....1ST ACCUSED

VINCENT OWUOR OPONDO (Alias Rasta Daddy).....2ND ACCUSED

JUDGMENT

Introduction

1. The two accused persons **BENJAMIN ELI ODHIAMBO alias BEN** and **VINCENT OWUOR OPONDO alias DADDY** are 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 Information dated 1st December 2018 are that on the 30th day of November 2018 at Sigomere Trading Centre along Sigomere-Ugunja road in Ugunja Sub County within Siaya County they jointly with others not before court, murdered one **RONALD ODHIAMBO OTIENO**.

2. The accused persons pleaded not guilty to the Information. The prosecution called thirteen (13) witnesses to establish a prima facie case upon which this Court found the accused persons with a case to answer and placed them on their defences. The accused persons elected to give sworn testimonies.

Evidence

3. **PW1 Raphael Odhiambo Obonyo**, a boda boda rider from Sigomere, Ugunja Sub County testified that he is the deceased's uncle. It was his testimony that on the 30/11/2018, he woke up as usual and when he switched on his phone, he found missed calls. He then received a call from the deceased's sister who informed him that her brother had died. He called his sister, the deceased's mother, Rose Aoko and told her that the deceased had died at the Catholic Church junction.

4. It was PW1's testimony that he proceeded to the scene in the company of the deceased's mother and 2 others where on arrival he saw the deceased lying in the middle of the road covered in a pool of blood. He testified that there was a motorcycle lying beside the road appearing as if it had been knocked from behind.

5. PW1 testified that they met the deceased's brother Rodgers Ochieng who informed them that he was in the company of the deceased when they were knocked. It was his testimony that the police came to the scene and took away the deceased's body to Siaya mortuary and on the 8/12/2018, they went to the mortuary and he identified the deceased's body to the doctor who performed a post mortem.

6. In cross-examination, PW1 stated that he did not witness the deceased being killed but that he received information from the deceased's sister that the alleged accident took place.

7. **PW2 Florence Odhiambo Onyango** who initially testified that he had known the deceased before stating that she had not known him testified that 30/11/2018, she was in her house, when she heard that someone had been murdered at the junction. She rushed to the scene where she saw a young man lying on the road in a pool of blood. She further testified that the young man had been knocked by a vehicle and that there were many people at the scene.

8. **PW3 Rodgers Ochieng Otieno**, the deceased's younger brother testified that on the night of 29.11.2018 he was with the deceased on a motorbike on their way to go and pick Mercy so as to go with her to Bungasi for a disco. He testified that when they arrived at Mercy's place she was reluctant to leave as her children were not yet asleep forcing him and the deceased to leave. They therefore left but at about 9pm,

after they had reached Sigomere Police Station, Mercy called the deceased using PW3's mobile phone telling the deceased to go and pick her up as the children were now asleep and she could join them so they did so and on their way back with Mercy, upon reaching Sigomere Police Station, Mercy informed them that she could not go with them without her best friend one Ms. Akinyi, so they went and picked Akinyi before proceeding to Bungasi.

9. It was his testimony that on arrival at the disco, the deceased had not money to pay for their entry into the disco so PW3 paid for the deceased and the two ladies while he stayed outside as he had no extra money. He further testified that at around 2 am, the deceased went informed them that he wanted to go home so PW3 told the deceased to get Mercy and Akinyi so that they could leave together but that when the deceased returned with the ladies, the two ladies stated that they wanted to board a vehicle which was parked nearby.

10. PW3 testified that there were security lights on a post on the road so he could see the vehicle well, which vehicle he identified as a double cabin although he could not tell its registration number. He testified that Mercy and Akinyi went and entered the vehicle and the deceased went near the vehicle and started talking to the people who were in the vehicle. He further testified that the deceased then threw the motor cycle keys at him and told him to ride the motorcycle up to where the vehicle was, on the road to which PW3 responded by saying that he could not see well at night so he could not ride.

11. It was PW3's testimony that the vehicle took off and the deceased started the motorcycle and together, they headed for Ugunja where the deceased had rented a house. He further testified that the vehicle was ahead of them going in the same direction towards Ugunja and on reaching Sigomere it slowed down. PW3 testified that on passing the bumps at Sigomere, they were at the same speed and driving side by side with the vehicle and he heard one of the people in the vehicle saying that 'here they are passing.'

12. PW3 testified that the vehicle's driver applied breaks and started swaying from its side to their side at high speed and eventually hit them causing them to fall whilst the vehicle took off. He testified that he fell on the right side of the road while the deceased fell in the middle of the road. He further testified that he then heard the vehicle's doors being opened and he heard someone say "*this one is already dead but 'Odhis' is not yet dead,*" after which he heard the deceased also known as Odhis being pulled backward towards the vehicle and that he also heard one person in the vehicle say "*finish this person completely so that we have no case*". PW3 testified that it was a bit dark so he raised his head and saw the said vehicle crush/run over the deceased several times. He testified that the driver ran over the deceased's body about 3-4 times after which the vehicle was driven off towards Ugunja.

13. PW3 testified that he was injured so he stayed at the scene for about 30 minutes before he got the strength to walk to the bodaboda stage where he did not get a bodaboda so he called his sister Mary Anne Akoth and informed her that he had had an accident so she could call their Uncle Raphael Odhiambo. It was his testimony that he stood at the stage until at about 7.30am – 8.00am when his mother Rose Aoko, and uncle, Raphael Odhiambo, arrived after which he took them to the scene where the deceased lay dead on his stomach. He further testified that the deceased's slippers were at the scene.

14. PW3 testified that his uncle then called the Police from Sigomere Police Station who came and he explained to them what had happened. He testified that the police took the deceased's body to Siaya Mortuary and that he was later called to identify the body of the deceased. It was his testimony that he was injured and treated at Sigomere Hospital and that he reported to the police at Sigomere who issued him a P3 form dated 30/11/2018.

15. In cross-examination by Mr. Oduol counsel for the 1st accused, PW3 reiterated that he recorded his statement to the police on the night of 29th November 2018. He stated that he told the police that the motor vehicle and motorcycle were passing the bumps in slow speed and that he did not see the driver of the subject motor vehicle which was being driven side by side with them. It was his testimony that when the vehicle passed the last bump, it increased speed and crushed into them on their side of the road. He further stated that their motor cycle was ahead of the vehicle when they were crushed.

16. PW3 further stated that they did not have any protective clothing, including any helmet when they were hit and that he fell on the right side of the road where the motor cycle fell while the deceased fell in the middle of the road. He further stated that on their way to the disco, the deceased did not drink any alcohol but at the disco he took some little alcohol while PW3 did not take alcohol. It was his testimony that at the disco, the deceased threw the keys at him urging him to ride the motor cycle but PW3 declined stating that he could not ride it at night because he could not see very well at night especially if there were lights from another vehicle ahead.

17. On being cross examined by Mr. Ochanyo counsel for the 2nd accused, PW3 stated that after being hit by the vehicle, he fell on the right side of the road and that he saw what happened at the scene. He reiterated that they were knocked at night but it was not very dark so he could see what was happening. He stated that when Mercy and Akinyi were talking to the people who were in the vehicle, he could not see them but heard their voices and one voice was of 'Ras'. He reiterated that he heard the person pulling the deceased on the road saying "*this one is not yet dead*".

18. In re-examination, PW3 stated that he knew 'Ras' because 'Ras' used to repair phones. He identified 'Ras' in court as the 2nd accused in the dock.

19. **PW4 Elvis Odhiambo Ochieng** testified that on the evening of 29/11/2018 he was at the video show at Sigomere at about 4.30pm. It was his testimony that a friend of his called Eric went and asked him to contribute money for fuel so that they could go for the entertainment at Bungasi where there was disco and some chang'aa. PW4 testified that Eric used to drive a matatu Nissan. He further stated that they left for Bungasi in the company of other two youths so they were with Okatch, Dan and Eric.

20. PW4 testified that it was at about 9 pm when they reached the disco where they were served with chang'aa drink. It was his testimony that sometime between 10p.m. -11p.m., another vehicle, a double cabin arrived at the disco with the two accused persons herein being the occupants of the said vehicle. He testified that the 1st accused is 'Odhis' and the 2nd accused is 'Daddy' and that he knew them because they used to visit Sigomere Center and at the bar (pub) where he used to frequent 'kwa soyi.'

21. It was PW4's testimony that he and the accused persons were acquaintances and that they used to buy beach one another. He stated that when 'Odhis' and 'Daddy' arrived at the Bungasi disco, they were carrying Adhiambo and that 'Odhis' – the 1st accused person was driving the vehicle. He stated that the accused persons sat at the veranda and that after sometime, PW4 saw a certain young man also arrive on a motorcycle carrying 2 ladies, ordered for chang'aa and took for some time. It was his testimony that when the accused persons arrived, he was inside the Bungasi disco but that on seeing the light of the vehicle outside, he got out and saw them walk out of the vehicle and sit at the veranda.

22. He testified that he then went inside the house of Ouda where he continued taking chang'aa but when his money got finished, he went outside and sat with the 2 accused persons at the veranda where they were with Adhiambo. It was his testimony that after sometime, Adhiambo said that she was tired and wanted to go and sleep and that he also requested for a lift to go home so that he could be dropped off at Sigomere. PW4 testified that he was given a lift in the vehicle up to Sigomere near the hospital gate and that later he was asked to go and record a statement on what he knew about this case. The witness stated that he could not recall the registration number of the accused persons' vehicle and neither did he know the registration number of the vehicle that he had boarded to Bungasi.

23. On cross-examination by Mr. Oduol counsel for the 1st accused, PW4 stated that he knew the deceased Ronald Odhiambo as 'Odhis'. He stated that on 29/11/2018 he had no conversation with the deceased but they drunk together chang'aa at Bungasi. He reiterated that he was with Eric, Okatch and Dan then the deceased came and found them at the venue. He stated that he did not witness the accident and that when he left the deceased at Bungasi, the deceased was not drunk.

24. **PW5 No. 71710 PC Eugene Masika** attached to Ugunja Traffic base testified that on 30/11/2018 at about 7 am he was at the police station when his in-charge received a telephone call of a hit and run fatal road accident from Sigomere Police Station. He stated that they proceeded to the scene at the Sigomere town junction to Yala, and on arrival with Sergeant Robert Mosesti, they saw a pool of blood on the road, with the motor cycle and motor vehicle missing. He testified that he drew the road view of the scene, did a fair draft and made legends and measurements.

25. It was his testimony that the blood was immediately after the bumps towards Sigomere direction. He further stated that from the bump to where the blood was, was 4.3 meters and that on the points of impact is where the blood was. He produced the sketch plans as Exhibits 1(a), 1(b) and 1(c). It was his testimony that he traced the motor cycle at Sigomere Police Station and that the motor vehicle did not stop after the accident. He stated that the motor cycle was registration NO. KMDQ 475X.

26. On cross-examination by Mr. Oduol for the 1st accused, he stated that on Exhibit 1(c) he formed the opinion that Ronald Odhiambo died on the spot because his body had been collected by officers from Sigomere Police Station. He stated that "E" was the point of impact. Upon cross-examination by Mr. Ochanyo for the 2nd accused, he stated that when he arrived at the scene the motor cycle and body were not there and that Sergeant Ngure showed him the scene.

27. **PW6 Steven Mwaura** testified that he was a businessman in Nairobi with a hotel and a tourism business with 9 years' experience in the business. He stated that he leased vehicles and offers transportation of visitors/tourists at a fee. He recalled that on the 5th day of November 2018, a friend of his, Robert Kingori had a project in Ugunja, so he rented PW6's vehicle, a double cabin Toyota Hilux, registration number KCG 209M, for 2 months. He stated that he usually leases out vehicles with his own driver and that Eli Odhiambo the 1st accused person herein was his driver and had been his driver for about 5 years so he gave him the vehicle KCG 209M to use on lease by Robert Kingori.

28. It was his testimony that on 30/11/2018, Eli Odhiambo called saying he was coming to Nairobi on 30th Nov. 2018 or 1/12/2018 and that later a person calling himself a police officer called him and asked him where the motor vehicle Toyota Hilux double cabin was to which he responded by saying it was in Ugunja on site. It was PW5's testimony that the police officer told him that the vehicle had been involved in a fatal accident at Ugunja so he responded by asking the officer to be patient as he looked for vehicle's driver.

29. PW6 testified that the driver, Eli Odhiambo, arrived in Nairobi and PW6 called the OCS Kikuyu Police Station who went and arrested the said Eli Odhiambo. It was his testimony that Eli came with the vehicle which was damaged with a broken bumper and twisted bonnet. He stated that when he gave out the motor vehicle it was not damaged. PW6 testified that upon inquiry on what had happened to the vehicle, Eli informed him that he had accidentally knocked a motorcycle. It was his testimony that after Eli was arrested, he was taken to Kikuyu Police Station and later escorted with the vehicle to Ugunja Police station by the DCIO Ugunja.

30. PW6 testified that he was aware that the said motor vehicle was inspected at Kikuyu Police Station and photographs and forensic examinations on the said motor vehicle done. He further stated that there were blood stains at the front part of the said vehicle. He identified the log book for the motor vehicle KCG 209M Toyota Hilux, white, owned by Equity Bank (K) and Steven Mwaura and stated that he had bought the vehicle on a loan from Equity Bank. He further stated that he ensured that Eli Odhiambo had a driving license and that Eli was introduced to him by his uncle Tom who was and is still his good friend.

31. He testified that he witnessed the said motor vehicle being photographed which photographs he identified in court as follows:

- a) MFI 5(a) shows front broken bumper and grill,**
- b) MFI 5(b) is another photograph showing front windscreen,**
- c) MFI 5(c) shows the inside - Steering,**
- d) MFI 5(d) shows inside of driver's door.**
- e) MFI 5(e) shows whole vehicle right side from outside,**

f) **MFI 5(f) shows front side of the vehicle;**

g) **MFI 5(h) shows front bumper with dent - broken.**

32. PW6 confirmed that all the photographs he had identified were for his vehicle which he had leased to Robert Kingori and driven by Benjamin Eli. PW6 further identified Benjamin Eli as the 1st accused person. He further stated that he saw the 2nd accused when he went to his Hotel in Nairobi in the company of Eli so this was the second time seeing him.

33. In cross-examination by Mr. Oduol, PW6 stated that he was in Nairobi when the accident occurred and as such, he could not tell who was driving the vehicle then. When cross-examined by Mr. Ochanyo, PW6 stated that the 2nd accused was not his employee and that only authorized drivers drove his motor vehicles. He stated that he was seeing the 2nd accused for the second time in court and that he had earlier seen him when he went to his hotel in Nairobi with Eli, during which time Eli was driving the said vehicle.

34. In re-examination PW6 stated that it was Eli who was driving the vehicle when he went with it to Nairobi and that Eli knew the policy that only an authorized driver would drive PW6's vehicle.

35. **PW7 No. 73439 CPL John Mburu** attached to Kikuyu Police Station in Kiambu County testified that on 1/11/2018 he was on duty at Odiri in Kikuyu when he was called by Inspector Mwangi informing him that he had received a call from Siaya Headquarters informing him that a vehicle had ran over a motorbike rider and killed him and the driver was suspected of Murder. He testified that he was told that the suspects were hiding at Kikuyu along the Kikambura-Kamangwa road and he was thus directed to go and arrest the suspect and the vehicle they were driving. He stated that he was given backup of PC Kemboi and PC Kim, the police driver, and they proceeded to the hotel where the suspect was and arrested him and took him to Kikuyu Police Station pending action by Siaya Police Station regarding the alleged offence.

36. It was his testimony that on the 3rd day, the OCS CIP Lampas invited experts from CID headquarters for photography and documentation of the motor vehicle which was done. He stated that the motor vehicle was also inspected.

37. PW7 testified that he was instructed by the OCS to hand over the motor vehicle with suspects to Siaya DCI for further action. He stated that the suspects that he arrested were identified to him by Stephen Mwaura the owner of the Hotel. He further stated that the vehicle was parked outside the hotel and the suspects were within the locality. It was his testimony that the vehicle was Toyota KCG 209M double cabin which he saw was damaged but with no unique marks. It was his testimony that the suspects he apprehended were the two accused persons in the dock.

38. In cross-examination by Mr. Ochanyo, PW7 stated that he was instructed that the 2 suspects were in **'Hideout' Hotel** owned by Stephen Mwaura. He reiterated that he received information on 1/11/2018 and handed over the vehicle for photography and inspection on 3/11/2018.

39. **PW8 Pauline Akinyi Ouma** testified that on 21/11/2018 at 10. a.m. she was in a Busaa Club and at 4 pm, the deceased went to the club, bought them Busaa and as there was music at Bungasi which she was to go to, she requested him to return later, pick them and take them to Bungasi for a dance. It was her testimony that she was with Mercy, whom she called at 7 pm so that they could go for the dance only to learn that she was with the deceased on their way to pick her up with the deceased's brother, whose name she could not recall.

40. PW8 testified that on reaching Bungasi, the deceased told them that he wanted to take them where Chang'aa was being sold and on reaching the homestead, they found Chang'aa. She testified that the seller sold to them only one glass of Chang'aa, after which they went to the dance place and danced until 2.30 am, when the deceased told them that they should leave to which she replied by stating that once she was in a dance mood, she could not leave until morning. It was her testimony that the deceased insisted and they left with him, his brother and Mercy.

41. It was her testimony that on reaching the road, she was shocked to see a motor vehicle coming fast and heard a person she knew to be Jacinta calling her and imploring her to hike a lift in the vehicle. She stated that Mercy also wanted to hike a lift but she hesitated so the 2nd accused, "Daddy" got out of the vehicle and pulled Mercy into the vehicle. It was her testimony that on reaching Sigomere she told the driver that she had arrived but the driver refused to stop and before reaching Ninga, a motor cycle came from behind them and passed them and went ahead of the vehicle she was in.

42. PW8 testified that she heard the driver of the motor vehicle say "shit" and Jacinta said "ua" - "kill" and the driver drove and knocked the motor cyclist who was ahead of them. She testified that the driver stopped, came out of the vehicle, went and kicked the motorcyclists who had fallen down and came back into the vehicle. She further stated that "Daddy", the 2nd accused then got out of the motor vehicle went and pulled the motorcyclist and placed him in front of the vehicle near the tyre and beckoned at the driver with his hand to drive on and crush the motorcyclist.

43. It was her testimony that "Daddy" stood at the door of the vehicle as he directed the driver to crush the deceased which the driver did and drove, crushing the deceased. She stated that the driver of the vehicle she was in reversed the vehicle and crushed the deceased and he proceeded on. She further stated that she screamed and said, "wuuu, my God" after which they proceeded onto the home of the driver and on arrival, the driver drove them to near his uncle's home where she told Mercy that they could alight and use a certain road to her home which they did.

44. PW8 testified that early in the morning, she saw many people go to where she lived asking her to go to the police station regarding the deceased. She stated that after the driver had crushed the deceased to death, he told them that in case they were asked to say what they had crushed, they should say that they had crushed a dog. It was her testimony that she knew both the driver and "Daddy". It was her testimony that the motor cycle which their driver crushed was with Odhis and his brother. She stated that in the motor vehicle she was seated behind with Mercy, "Daddy" and one "Mwalimu" whereas Jacinta sat in front with the driver. She identified "Daddy" in court as the 2nd accused and

the driver who was driving the offensive vehicle crushing the deceased as the 1st accused.

45. In cross-examination by Mr. Ochanyo PW8 stated that she had no blood relationship with the deceased and only knew him because he was Mercy's boyfriend. She stated that they took Busaa from 10 a.m. with Mercy and that the deceased went to where they were at about 4 pm. She further stated that she gave her statement as it was being recorded and that the police officer read it to her. It was her testimony that it was recorded that they left with another young man with whom they returned with Simba Waragi packet which they took some time before taking the chang'aa. She denied that they were drunk that night.

46. PW8 reiterated that as they were proceeding in the vehicle, the motor cycle overtook them and the driver said, "Shit". She admitted that the motor cycle was driven ahead of them so she could not tell if the rider was careless. She maintained that the 2nd accused went out of the vehicle and dragged the motor cyclist from the road to where the vehicle was at the front tyre and stood near the rear door of the vehicle as he directed by hand the driver to reverse and then to drive on and crush the deceased. It was her testimony that when she boarded the vehicle, she never saw the 2nd accused drive it but only the 1st accused. She further stated that a crowd came to her residence and told her to go to the police station and record her statement as they wanted to burn her in the house.

47. In re-examination PW8 stated that the 2nd accused was the one who pulled the deceased into the drive way of the vehicle and that he was standing near the rear door. PW8 stated on being asked by the Court about her age that she was 32 years old.

48. **PW9 Mercy Anyango** testified that the deceased was her boyfriend. She stated that on 29/11/2018 at about 10 a.m. she went to the home of her sister assisting her to sell Busaa when the deceased went there to buy Busaa. She stated that PW8, Akinyi, also went and took Busaa. It was her testimony that they had planned to go to a disco dance at Bungasi with Akinyi, the deceased and his brother. She further testified that at about 7.30 pm the deceased arrived with his brother and they found her cooking. She stated that she gave them food which they ate after which they all went to Akinyi's place where they found her cooking.

49. PW9 testified that Akinyi cooked, ate with her children and they all left for the disco. She stated that they were told to pay Kshs. 150/= each to be allowed to dance so the deceased told them to go and drink some alcohol. It was her testimony that the deceased bought Simba Waragi and she tasted but because she has ulcers, she stopped while the deceased took some but said he wanted bhang. She stated that they went to the Disco but the price was still high so the deceased took them to a chang'aa place and bought them one glass which they drank outside before returning to the disco where they found that the entrance fees was now discounted to Kshs. 50/= each which they paid and danced until morning.

50. PW9 testified that she told PW8 that since the deceased appeared drunk, he should not carry them so they opted to hide and leave. She stated that they went to the road and on checking they saw a vehicle come from behind in which Jacinta was in. She stated that Jacinta called Akinyi to enter the vehicle which she did but when the vehicle moved close to PW9 and she was asked to board the vehicle she told them that she opted to walk as her home was nearby but that when 'Daddy' heard her resisting, he got out of the vehicle and went to where PW9 was and pulled her into the vehicle by force before the vehicle drove off.

51. PW9 testified that when they reached near Akinyi's home, they asked the driver to let them alight but he refused and said that they would only alight when he reached his destination. She stated that the vehicle drove on and on reaching the junction going into the Catholic Church, bumps were ahead, the motorcyclist, Odhis, overtook them from the right and the driver said, "ai, shit" while Akinyi screamed. She testified that she closed her eyes while Jacinta said, "uua" – "kill".

52. It was her testimony that the driver stopped and got out of the vehicle, went and kicked the deceased and returned into the vehicle then 'Daddy' also got out of the vehicle, went and pulled the deceased, brought him to the front tyre and beckoned the driver to drive. She testified that the driver entered the vehicle, closed the door then crushed into the deceased and then drove off. PW9 testified that the driver then drove them to a certain home, left them there and told them to wait for him from there and told them in case they were asked on whether they crushed a person, they should say they had crushed a dog.

53. PW9 testified that she and PW8 were scared and contemplated how to find their way home but when the driver overheard them, he told them to board the vehicle and drove off with them to another homestead and left them there saying they could go to their homes. She testified that they stood not knowing where and how they would go and that the driver came back and warned them not to reveal that they had killed a person but a dog. It was her testimony that PW8 knew some shortcuts so they went away. She revealed that she told PW8 that she was scared. It was her testimony that she went and knocked on her cousin, Ken's house and told him that they had returned but that the driver who gave them a lift from the disco had crushed 'Odhis'.

54. PW9 testified that in the morning, the police called her and asked her if she knew of an accident on the road in the night which she admitted. She testified that she was very scared and thus when she went to the police station and was asked she initially denied being in that vehicle so she was placed in the cells with Akinyi and Jacinta waiting for the owner of the vehicle to arrive but he never came after which they were released. She testified that she had previously not known the driver of the vehicle but got to know him that night. She stated that she knew 'Daddy' as they used to meet and she used to greet him whom she identified as the 2nd accused. She identified the driver who drove the vehicle as the 1st accused in the dock.

55. The court noted that PW9 looked emotional and very scared when identifying the 1st accused and allowed her to take a rest to compose herself after which PW9 stated that she was very scared of being victimized for telling the court what transpired as she hailed from the same place as the accused persons while PW8 came from far off. It was her testimony that although the accused or their relatives had not threatened her, she had lots of fear in her heart that they were likely to victimize her.

56. In cross-examination by Mr. Ochanyo, PW9 stated that PW8 went to where PW9 was assisting her sister to sell Busaa between 10 - 11 a.m. while the deceased went there at 2 pm and told them that there was a disco at Bungasi. She admitted that she and PW8 took Busaa, and that when the deceased got to her place at 2 pm, he bought them Busaa but did not take it himself as he disliked it. It was her testimony that

the deceased also used to smoke bhang and that on the disco day, he did not want to take alcohol saying he wanted to get bhang which he went to look for but did not succeed in finding it.

57. PW9 reiterated that the deceased went and bought Simba Waragi as they waited for the price at disco to be discounted and that they also went to a chang'aa den but found only one glass available. She stated that they were not drunk and that she had Malaria and was on drugs so she did not take much of the alcohol.

58. PW9 stated that her statement to the police was not read back to her but she signed it. She admitted that they took Simba Waragi together but that it was not much, being only 2 packets and that she told PW8 that the deceased could have been drunk hence he should not carry them because the deceased had also taken the drink "Empire" so she feared that he could cause an accident in case he carried them on the motorcycle. She admitted that the deceased also gave them 'Empire' and they took some. PW9 further stated that the deceased had a disagreement with PW8 before they left though she could not recall if she recorded that part with the police.

59. PW9 admitted that it was true that when the vehicle came and stopped near them, the deceased came nearby and asked whether they wanted to board that vehicle and that it was ok but that he said that he would go with his brother. She further stated that the motorcycle passed them suddenly and went ahead of them as it drove off but the driver said 'shit'. It was her statement that it appeared like an accident when the driver knocked the deceased.

60. **PW10 No. 75922 Senior Seargent Javan Tom Ndege** testified that in November 2018 he was at Sigomere Police Station. It was his testimony that on 30/11/2018 at 6 a.m. or thereabouts he was the acting in charge, Sigomere Police Station and that as he was outside the police station, a motorcyclist passed by and shouted that there was a dead body on the road nearby. He testified that he got the driver and went to the scene where they found the body lying in the middle of road and covered in a *Maasai shuka*.

61. PW10 testified that the deceased's relatives were present and that when he opened the shuka, he saw the head was smashed. He testified that he asked people to move away and he examined the body and saw blood stains in front and backwards, on level ground, and noted that there was a motorbike, registration number KMDG 437S in a ditch off the road, on the left facing Ugunja. He noted that the motorbike was slightly far in the ditch and could not be seen. PW10 testified that he concluded from his 17 years' experience that it was not a hit and run accident so he asked the DCIO to investigate further.

62. It was his testimony that the blood on the road showed that the deceased was crushed then the vehicle moved backwards and crushed the deceased again and ran off. He further testified that at about 9.00 am, members of the public went to the station with 3 girls Pauline, Mercy and Jacinta and said that the 3 girls were in the "accident motor vehicle". He testified that the girls were drunk and so he booked them in for investigations into the accident after which the DCI took over investigations.

63. PW10 testified that they removed the body to the morgue at about 6.30. He stated that the deceased was a motorcyclist whom he knew before and that despite being crushed badly and disfigured he knew him as Ronald Odhiambo.

64. In cross-examination by Mr. Ochanyo PW10 stated that the blood was on the front and rear of the road. He stated that he questioned the tyre marks going back with blood that he saw which meant that the vehicle reversed after crushing the deceased. He further stated that initially, it appeared to be a road accident. PW10 admitted that the 3 ladies were led to the police station by force by members of the public.

65. **PW11 No. 79063 CPL Derricks Kiprono** testified that he was based at DCI HQ Nairobi as Crimes Scene Investigator, a position he still held in 2018. It was his testimony that he was gazetted vide Gazette No. 407 dated 18/1/2010 and that he was specialized in crime scene investigation which entailed visiting crime scenes and capturing the information.

66. It was his testimony that he participated in the investigations and captured the vehicle which was used to carry out the murder, as an offensive weapon. He stated that he took photographs in a sequence. He further stated that he arrested the vehicle Reg. No. KCG 209M in Nairobi after receiving a phone call from OCS Kikuyu Police Station and noted that the vehicle had blood stains on the front bumper. He stated that he took the ten photographs from various positions which showed blood stains and a mopping cloth, used for mopping or cleaning the stains in the vehicle. He produced the 10 photographs of motor vehicle KCG 209M as PEx 2 a -j.

67. PW11 testified that the second set of photographs was a close up view of the vehicle' underside body with blood stains and suspected brain matter that were spread all over underneath the body of the vehicle which he produced as PEx 3a - h. He further testified that the third set of photographs were taken at Sigomere Police Station of a red TVS motorcycle registration number KMDQ 437S that showed extensive damages with badly torn parts and he produced them as PEx 4 a - p.

68. It was his testimony that the fourth set of photographs showed the postmortem scene capturing the physical appearance of the body which showed the discolourations and physical injuries. He produced the 24 photographs PEx 5 a - x. He further testified that the next series of 50 photographs showed scales on every wound that identified on the body of the deceased. He produced them as *PE 6 a - z* and *6 aa - 6xx*. He further produced photographs of closer view of samples collected from the known organs as PEx 7 a & b.

69. PW11 also produced 27 photographs of general view of the incident scene during reconstruction at the Sigomere area on the road which showed blood flow directions and original point of impact and positions, and broken parts of the motor cycle as PEx 8 a- z and 8 aa. He testified that he prepared his report after developing the photographs and did a certificate of photographic evidence which he signed. He produced the report dated 10/1/2019 and Certificate of photographic evidence as PEx 9. He further testified that he had been a scenes of crime expert from 2010 and that when he visited the scene and reconstructed the scene, he could tell that this was not an ordinary accident because the blood patterns did not go in all directions but were confined to and near the same point where the deceased was found.

70. In cross-examination by Mr. Ochanyo PW11 stated that he reconstructed the scene within 2 weeks starting with the secondary scene then proceeding to the primary scene. He further stated that there were blood stains at the scene when he took photographs of the scene.

71. **PW12 Dr. Thadeus Jude Massawa** a Pathologist by profession working at Kisumu County Government testified that he examined the body of the deceased on 8/12/2018 at Siaya Referral Hospital Mortuary at 9.00 am to ascertain the cause of death as requested by DCI HQ Homicide Department.

72. His general observations were that the body was of an African, 28 years, of good nutrition, well-built and 6.4 ft. tall

73. The post-mortem changes he noted were rigidity and colouration present in the lower limbs. Externally he noted that there were multiple bruises on the forehead, the largest bruise being 30 mm in diameter from the left eye, abrasion on the right chin of 20 mm and 4 cm from the right corner of the mouth. Other injuries he noted were; deformed skull with frontal depression skull of 70 mm in diameter, broken lower jaw with 3 loose teeth, bruises with tyre marks on the thorax and abdominal region measuring 300 mm (30 cm) diameter bruise on left side of the abdomen 160 x 120 mm; multiple degloving lesions due to poor preservation, peripheral cyanosis in upper limbs, abrasion on both knees 100 x 70 mm right and 25 x 35 mm left knee, displaced right hip fracture.

74. On the systematic examination he noted that; The Respiratory system both lungs were grossly normal with noted bruises on the right lung, fibrous adhesions on the left side of the rib cage, thorax; haemothorax on the right side – 600cc; multiple bruises on the sternum, multiple fracture of 2nd and 3rd ribs of the right side of the chest and left chest 6th rib fracture. In the cardio vascular system the heart and major vessels were grossly normal - no blood in the heart chambers while in the digestive system, he noted the liver was grossly normal with bruises on the right lobe spleen, the pancreas was grossly normal and the stomach was empty. He stated that the genito urinary system was normal and that the urinary bladder was empty.

75. On the head he noted that it was deformed due to multiple comminuted fractures of the skull with multiple brain tissues draining actively through the orifices. He further noted that the spinal code was not exposed.

76. It was his testimony that as a result of his examination, he formed the opinion that the cause of death was due to crash injuries to the head with multiple injuries due to blunt force. He stated that the following specimens were collected for further examination – blood, liver tissue, stomach, both kidneys, vitreous humour and spleen. He produced the post mortem Report as PEx 10.

77. On cross-examination by Mr. Ochanyo he stated that the only aspect on the examination that linked death to a road accident was presence of tyre marks. He further stated that as a Pathologist, he found/established the cause of death which was the severest of all the injuries being on the head.

78. **PW13 No. 78556 PC Nick Karani** from DCI Headquarters and the investigating officer in this case testified that on the 3.12.2018, while at his office at Nairobi, he was instructed by his in charge to go to Kikuyu Police Station and take up a matter involving murder by the 2 accused persons at Sigomere in Siaya County. He testified that together with his team of Inspector Wahome, they proceeded to Sigomere Police Station and met the OCS who introduced the witnesses whom they interrogated.

79. He testified that they found out that the 1st accused Benjamin Eli Odhiambo was a resident of Kikuyu and Vincent Owuor Odongo lived in Sigomere. He further testified that vide Misc. Application No. 77/2018 at Kikuyu Law Courts they sought to have the accused persons arrested and detained at 2 different stations namely Muthaiga Police Station for the 1st accused and Pangani Police Station for the 2nd accused. He further testified that on 5/12/2018 they escorted the 2 accused persons to Siaya County where they booked the 1st accused at Siaya Police Station while the 2nd accused was booked at Ugunja Police Station after which they interrogated witnesses and recorded their statements then proceeded to visit the scene to ascertain how it looked like and reconstructed it.

80. It was his testimony that from the statements of witnesses, on the 30/11/2018, the deceased together with his younger brother left while in the company of the deceased's girlfriend and went to Bungasi Night Club and enjoyed themselves until late around 2.00 am in the morning when they decided to return home. He testified that the girlfriend of the deceased did not want to return with the deceased but wanted to board the 1st accused person's motor vehicle. He further stated that the 1st accused was accompanied by the 2nd accused and 2 other ladies and they all proceeded towards Sigomere, the home of the 2nd accused.

81. PW13 testified that the deceased was not happy so, with his brother, they tried to chase the 1st accused's motor vehicle and on reaching Sigomere at a bump, the deceased rode a motorcycle ahead trying to stop the motor vehicle where his girlfriend was being carried so he was overrun by the 1st accused. He further testified that the deceased's brother landed in a ditch while the deceased fell on the road. He testified that the 1st accused stopped the motor vehicle then the 2nd accused got out of the vehicle and confirmed that the deceased was still alive so he signaled the 1st accused and the 1st accused engaged reverse gear, drove and overrun on the deceased again killing him.

82. PW13 testified that they visited Siaya County Mortuary and saw the deceased's body, post mortem was done and they took samples from the deceased's body and took to Government Chemist to establish if the deceased was intoxicated. It was his testimony that according to Dr. Otieno, the Government Analyst, there was no intoxication of the deceased. He produced the exhibit Memo dated 8/12/2021 and Government Analyst Report dated 5/2/2019 as PEx 10(a) and 10(b) respectively.

83. PW13 further testified that the incident involved Motor Vehicle Reg. No. KCG 209M Toyota double cabin, white in colour and Motor cycle registration No. KMDQ 437S TVS. He testified that they had the vehicle and motorcycle inspected and stated that the motor vehicle was inspected on 3/12/2018 at Kikuyu Police Station by Muigai Kagia based in Nairobi who concluded that there were no pre accident defects noted. PW13 produced the Motor vehicle inspection report as Exhibit 11. He further stated that the motorcycle was inspected on 10/7/2019 by officers from Kisumu and the report revealed that the motorcycle was damaged extensively at the rear end and front though no pre-accident or mechanical defects were noted. He produced the motor cycle inspection report as exhibit 12.

84. PW13 testified that after recording statements of witnesses, they charged the 2 accused persons with murder. He identified the 2 accused persons before court.

85. On cross-examination by Mr. Oduol, PW13 stated that he caused certain specimens to be taken to the Government Chemist for analysis as he was interested in knowing whether the deceased was drunk or not since the witnesses had told him that the deceased did not take alcoholic drinks. He further stated that if the deceased was drunk, the specimens would have revealed this. He further stated that the Inspection Reports did not say and did not tell about speed. He stated that from the extensive damage on the motor cycle, there was a force applied.

86. On cross-examination by Mr. Ochanyo PW13 stated that he visited the scene one week after the incident. He further reiterated that from the witnesses' statements the deceased was not happy that his girlfriend had left with the 2 accused persons so he followed them on his motorcycle. He further stated that the witnesses also said that the deceased rode ahead of the motor vehicle so that he could stop the motor vehicle so that he could get his girlfriend out of the vehicle. It was PW13's testimony that he did not think that the deceased was provoking the accused person but that it was the 1st accused who provoked the deceased by knowingly taking away the deceased's girlfriend into the motor vehicle.

87. He further stated that it was the 2nd accused who, after the 1st accused had knocked the deceased, got out of the vehicle, confirmed that the deceased was alive then called the 1st accused and directed him to engage reverse gear and crush/overrun the deceased. It was his testimony that according to his investigations the 2nd accused did not drive the motor vehicle KCG 209M.

Defence Case

88. Placed on their defence, the accused persons both elected to give sworn evidence and stated that they did not intend to call any witnesses. The 1st accused testified as DW1. He stated that he was Benjamin Eli Odhiambo. It was his testimony that on 28/11/2019 at 1.00 am he was at work and returned home at about 7 pm where he met his grandmother who made dinner for them which they ate. He testified that a friend of his called and told him to meet at Sigomere area, "Kwa Mwalimu Chips". It was his testimony that he left home at 9 pm and went to look for Vincent who told him that his friend was opening a restaurant at Bungasi where they proceeded in the company of DW1 lady friend, Maurine, as well as his uncle and his girlfriend.

89. He testified that they reached Bungasi at the Restaurant where loud Music was being played and as he was a stranger to the place, Vincent called his friend who came, welcomed them and gave them seats and a table to sit after which he proceeded to serve them with plastic bottled soda. It was his testimony that Vincent joined them and his friend came with 2, 750ml bottles of vodka which they all took with his exception as he was on drugs. DW1 further testified that at about 11 pm, his uncle's girlfriend came and said that she wanted to return home because she had to open the shop early so he went and started his vehicle when one Mapesa Alex came and asked for a lift. He testified that Maureen joined them and they left towards Sigomere shops where he dropped Mapesa and proceeded to take his uncle home. He stated that he then dropped Adhiambo and Bob and returned to Bungasi with Alex Mapesa and Vincent.

90. DW1 testified that on arrival at Bungasi, he remained in the vehicle as Vincent, Bob and Maureen went to the restaurant. He stated that later on Maureen came to the vehicle saying she wanted to return home as she would open her shop early so he told Vincent to let them go and Vincent came with Alex and his friend who got into the vehicle and they left. He stated that Maureen was his co-driver while Vincent and Alex sat behind.

91. It was his testimony that on reaching the road, after the restaurant, Maureen told him to stop after she saw 2 girls on the road whom she knew and who wanted to go to Sigomere. He stated that one of the girls was very drunk and that Vincent opened the rear door and the 2 girls got in and he drove towards Sigomere. He stated that as Vincent's home was far off, they decided to escort him first.

92. DW1 testified that as he drove off, opposite the Catholic Church, a motorcycle came from behind and got in front of his vehicle and despite applying breaks, it was too close and he hit it from its rear. He stated that he stopped the vehicle ahead and went to check and saw a motorcycle on the side of the road before returning to the car where he told Vincent that the people on the motorcycle could be carjackers. He testified that he told Maureen to take his phone and call his father to inform him that he had caused an accident at Sigomere and was afraid for his safety. He further testified that he went home where his father told him to go and report at Ugunja Police Station.

93. It was his testimony that he dropped off Vincent and his colleagues and went to Ugunja Wells Filling Station as he did not know where the police station was and since the petrol station was closed, he parked and slept until 6.am. when his father called him and told him that the bodaboda people were at his home and wanted to burn their homestead claiming that DW1 had knocked down their colleagues. He stated that he panicked and called his boss Steven Mwaura who told him to go and fuel the vehicle at Dominion Farm and drive it to Nairobi as it was on loan hence it must be safeguarded. He stated that he found no one to give him fuel so he came to Siaya at Awelo and charged his phone.

94. DW1 testified that he later found missed calls from his boss Steven and Vincent. He further stated that Vincent told him that people of bodaboda were at DW1's home and wanted to burn their home and so he wanted to go to his sister's place in Nairobi. DW1 testified that he was confused and called his friend Luke Odongo at whose place in Siaya he went and slept. He testified that the following day he went to Siaya stage, got some 3 passengers and charged them Kshs. 1,000/= each and drove to Nairobi where he arrived at 3 pm with Vincent and went to **Hide out Hotel** where he found his boss and handed the vehicle to him.

95. It was his testimony that his boss called one Mburu, a police officer from Kikuyu Police Station who went and arrested both Vincent and himself and took them to Kikuyu Police Station where they were placed in cells and were told to wait for a signal from Siaya as he had killed someone. He testified that the following day, DCI officers went and asked him to open the vehicle for them which he did and they took photographs of the vehicle after which they were taken to Kikuyu Law Courts and later he was taken to Muthaiga and Vincent was taken to Pangani Police Station. He stated that after 14 days they were brought to Siaya Police Station where after 3 days, the DCI came, they were processed and taken to court where they were charged with Murder.

96. DW1 testified that he did not know how many people were on the motorcycle that he crushed from behind and that when he got out of the vehicle, after knocking the motorcycle, he only saw the motorcycle lying off the road but did not see any person. He stated that he did not

reverse the vehicle but just stopped and got out to check on what had happened. He further stated that no other passenger alighted from his vehicle. It was his testimony that he only knocked the motorcycle because it suddenly appeared in front of his vehicle. He stated that he was driving at about 60km/hr as he was in gear No. 4. He further stated that he did not intend to cause the accident but that it was an accident.

97. In cross-examination by Mr. Kakoi for the state, DW1 stated that he has been a driver for 16 years and that he knew that after causing an accident he had to report to the police however he did not inform police because he did not know where Ugunja Police Station was and that he did not inquire of the same from his fellow occupants or his father who called and advised him to report to the police station at Ugunja. He further stated that the following morning he came to Siaya but did not report or look for Siaya Police Station as he was confused though he looked for passengers to take to Nairobi. He stated that he did not report to the police even on the 3rd day as he was told by his boss to take the vehicle to Nairobi and because he was panicking. He further stated that he carried Pauline Akinyi and Mercy Anyango whom Maureen called so that he gives them a lift.

98. On cross-examination by Mr. Ochanyo, DW1 stated that he was the one who was driving the vehicle at all times. On inquiry by the court, DW1 stated that the Registration No. of the vehicle he was driving was KCG 209M.

99. The 2nd accused testified as DW2 and stated that he was Vincent Owuor Opondo a computer technician at Sigomere. He testified that he did not know the deceased. It was his testimony that on the 28/11/2018 at 6.00 pm, he was at Sigomere when Eric his client called him saying that he was launching his restaurant in Bungasi and invited him and some friends to the launch. He stated that he called Alex his friend who agreed to accompany him so he rode his motorcycle to his home to pick a jacket after which they went to "Teachez" a joint owned by a mutual friend.

100. He stated that they ordered sodas as they discussed their poultry rearing business started 3 months earlier. He testified that they stayed until 8 pm when he called Benjamin, the 1st accused, who told him that he was coming to Sigomere and he informed him about the party and the 1st accused agreed to join them.

101. It was his testimony that at about 9 pm, Benjamin came driving a white double cabin and parked it then greeted them and returned to the vehicle. He further stated that Benjamin was with his Uncle Bob, and another lady whose name he could not recall, who sat at the rear. He further testified they left for the party at 9.45pm after being joined by Maurine, Bob's girlfriend and the 6 of them proceeded to Bungasi.

102. DW2 testified that on reaching the restaurant, at 10.15 pm, he called Eric the owner of the restaurant who gave them directions to where he was, at cousin's house near the restaurant, where he welcomed them and gave them sodas and 2 whisky bottles. He testified that they took their drinks until 11 pm when the lady who was with Bob said she wanted to go home so Benjamin was called and told to take her home. He further stated that he told Eric and accompanied Benjamin, Bob, Maureen and the lady and as they were leaving, Mapesa was given a lift to Sigomere Sub County Hospital where he alighted from the rear cabin.

103. DW2 testified that they then proceeded to Bob's place, where they left Bob and his girlfriend and returned to Bungasi, where Erick and his friends were. He stated that they continued taking their drinks until midnight when Maureen told Benjamin that she was tired and they left for Sigomere. He stated that on their way back, Maureen saw 2 ladies walking beside the road, one of whom was drunk and was supported by the other lady so Benjamin gave them a lift.

104. He further testified that on reaching Sigomere market, Benjamin decided to take him up to his home since it was the closest, when a motorcycle travelling at a very high speed overtook them then got in front of them and Benjamin said 'oh shit' then knocked the motor cyclist. It was his testimony that Benjamin stopped the vehicle, got out checked and returned, **reversed the vehicle then drove off to Got Osimbo**, his father's place where his father told him to go and report to the police. It was his testimony that they drove back to Sigomere and past the scene of accident, and went to Bob's place and alighted. He stated that Ben and his girlfriend got into that home while the rest of them went on their way on foot. DW2 testified that he later received a call from Florence his sister who told him that he should be careful because bodaboda operators had gathered at their home to burn their houses because they had information that DW2 was one of those who were in a vehicle that had killed someone.

105. DW2 testified that he saw motorcycle operators coming his direction and shouting. He stated that he was scared so he got into the kennel which had open spaces. He stated that the boda boda operators had metal bars, and smashed windows to Alex's house but once the noise subsided, he got out and called Benjamin who told him that his boss had told him to take the vehicle to Nairobi. He stated that he called Kevin who drove him to Siaya to meet Benjamin and also spoke to his sister in Nairobi who told him to go and hide in Nairobi until matters cooled down.

106. It was his testimony that at noon, 'Ben' called him to join him at Awelo in Siaya where he had gone to fuel the vehicle at Rwambwa but was not successful as he did not get a lady who was to sign for him the fuel. He stated that they went and slept at his friend's, Luke, place and early the following morning they left for Nairobi. He stated that they reached Kikuyu at "**Hideout**" where they met Ben's boss who called police who came and took them to Kikuyu Police Station and placed them in custody. He stated that the DCI came and took photographs of the vehicle after which they were taken to Kikuyu Law Courts and he was remanded at Pangani Police Station. He further stated that they were later brought to Siaya and charged with Murder.

107. DW2 testified that he heard witnesses say he got out of the vehicle and beckoned Ben to reverse and crush the deceased which was a lie. He further stated that Mr. Wahome had told him to lie and be a state witness but he refused so Mr. Wahome told him he would be charged.

108. On cross-examination by Mr. Kakoi for the State, DW2 testified that he had a diploma in ICT and Computer Maintenance and was well educated. He further stated that he saw the accident happen and knew that someone had died as a result thereof and that people wanted to burn their homes. DW2 admitted that they should have gone to report to the police however, he was frightened and Benjamin had told him that he would handle the matter; as the driver of the vehicle.

109. No submissions were filed.

Analysis & Determination

110. I have considered all the evidence adduced by the 13 prosecution witnesses and the two accused persons in their sworn defences. The accused persons are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Legally, an accused person is held culpable for murder when he unlawfully and with malice aforethought causes the death of the deceased. In this connection the State has a duty to prove beyond reasonable doubt the following ingredients of murder:

- a) *That the deceased Ronald Odhiambo Otieno is dead and the cause of death is established beyond reasonable doubt*
- b) *That the death was due to unlawful acts or omissions on the part of the accused persons or any one of them*
- c) *That in causing the unlawful death of the deceased, the accused persons were actuated with malice aforethought*
- d) *That the accused persons' joint action satisfies beyond reasonable doubt the element of common intention under Section 21 of the Penal Code.*

The death of the deceased and its cause

111. There is ample unquestionable evidence that the deceased died on the night of 30th November, 2018 PW3, the deceased's younger brother testified that he was with the deceased prior to his death and that they were involved in an accident when they were knocked down by motor vehicle KCG 209M driven by the 1st accused and after the accident, the 1st accused on direction from the 2nd accused ran over the body of the deceased. The evidence of PW3 was corroborated by that of PW8 & PW9 who were some of the occupants in motor vehicle registration No. KCG 209M and who also witnessed the accident and the subsequent death of the deceased. PW1, PW2 & PW10 also visited the scene on the 30.11.2018 and saw the deceased's body on the ground in a pool of blood.

PW12, Dr. Massawa examined the deceased's body during postmortem and compiled the post-mortem report which he produced as P Exhibit 10, concluded that the cause of death was due to crash injuries to the head with multiple injuries due to blunt force. Post mortems are not undertaken on dead bodies. Therefore, without a shadow of a doubt the aforementioned witnesses and their evidence proved beyond any reasonable doubt that Ronald Odhiambo Otieno died and the cause of death was established.

Was the death of the deceased caused by an unlawful act or omission and were the accused persons herein or any one of them identified positively as the perpetrator(s) of the said unlawful acts or omissions?

112. The prosecution witnesses PW3, PW8 and PW9 supported the uncontroverted narrative that the 1st accused person knocked down from the rear, the motorcycle which the deceased was riding after which under direction from the 2nd accused, the 1st accused ran over the deceased by reversing into his body and running over the said deceased before driving away. PW3 was the passenger on the deceased's motorcycle while PW8 & PW9 were occupants of the motor vehicle driven by the 1st accused, where the 2nd accused too, was a passenger. Further, both accused persons admitted in their testimonies in chief that the 1st accused then driving the subject motor vehicle indeed knocked down the motor cycle ridden by the deceased. They however claimed that this was an accident as the deceased rode in the way of the 1st accused.

113. The testimony of PW3 was rather chilling, he stated that after the accident, having been thrown into a ditch, he saw the 2nd accused come out of the vehicle which had stopped, drag the deceased near the vehicle's tyre before directing the 1st accused to run over the deceased so as to leave no witnesses. This testimony was corroborated by that of PW8 & PW9 who were passengers in the vehicle driven by the 1st accused and who both testified that after the accident, the 1st accused alighted from the vehicle and kicked the deceased as if to check whether he was still alive, before getting back in to the car whereupon the 2nd accused also alighted from the car and went out, dragged the deceased near the car and directed the 1st accused to drive over the deceased.

114. The post-mortem report by Dr. Massawa produced as P Exhibit 10, concluded that the cause of death was due to crash injuries to the head with multiple injuries due to blunt force. Dr. Massawa testified in cross-examination that he linked the deceased's injuries to a car accident as he discovered tyre marks on the deceased's body on the thorax and abdominal region.

115. PW10 also testified that at the scene he saw the deceased's body and concluded that it was not a case of hit and run as there were bloodstains in front and backwards that showed that the deceased was crushed then the vehicle moved backwards and crushed the deceased again. PW11, the crime scene photographer similarly testified that this was not an ordinary accident as testified by the accused persons in their defence as the blood patterns at the scene did not go in all directions but were confined to and near the same point the deceased's body was found.

116. PW11 also produced photographs from various positions which showed blood stains and a mopping cloth, used for mopping or cleaning the stains in the vehicle KCG 209M as PEx 2 a –j. He further testified and produced a set of photographs of a close up view of the vehicle's underside body with blood stains and suspected brain matter that were spread all over underneath the body of the vehicle produced as PEx 3a – h, which vehicle was driven by the 1st accused during the incident.

117. The basis of the prosecution's case on the charge against the accused persons is amply supported by the direct and indirect evidence of PW3, PW8, PW9, PW10 and PW11 on causation and unlawful acts of assault. This was a plain case. The aspect of when an act causing

death can be said to be lawful has been recognized in the case of **Gusambizi Wesanga v Republic [1948] 15 EACA 65** and reiterated by this court in the case of **Republic v WOO [2020] eKLR** where the Court stated:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

118. The evidence before this court irresistibly and beyond reasonable doubt points to unlawful acts that led to the death of the deceased, Ronald Odhiambo Otieno, acts which were caused by the two accused persons herein jointly, with the 1st accused person driving motor vehicle registration number KCG 209M and crushing the deceased while the 2nd accused person aided and abetted the unlawful killing of the deceased by the 1st accused, by getting out of the vehicle, dragging the deceased onto the road and directing the 1st accused to drive over the deceased.

Whether the unlawful killing of the deceased was with malice aforethought

119. The question is whether the unlawful killing of the deceased was with malice aforethought. Section 203 of the Penal Code defines the offence of murder to be the unlawful killing of a human being with malice aforethought with additional elements of willfulness, deliberation and pre-meditation for the commission of the crime.

120. The manifestation of malice aforethought is an enumerated under Section 206 of the Penal Code. It may be express or implied to prove any one or more of the following circumstances:

- a) ***An intention to cause the death of or to do grievous harm to any person whether such person is the person actually killed or not.***
- b) ***Knowledge that the act or omission cause the death of or grievous harm to some person. Whether such person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused.***
- c) ***Intent to commit a felony.***
- d) ***Intention to facilitate the escape from custody of a person who has committed a felony.***

121. In **People v Robertson {2004} 34 Cal 4th 156** the Court held:

“That malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.”

122. The other cases have affirmed findings of express or implied malice from the nature of the weapons used, the gravity of the injuries and parts of the body targeted by the perpetrators. (**Rex v Tubere S/o Ochen {1945} 12 EACA 63**). The Court of Appeal in the case of **Nzuki v R {1993} KLR** stated:

“The prosecution has to prove an intention to cause death, intention to cause grievous bodily harm and if the accused knew that there was a serious risk that death or grievous harm could result or accused proceeded to do so without any lawful excuse.”

123. As expressly stated under Section 206 (b) of the Penal Code knowledge that the unlawful act or omission will cause death imports the element of recklessness to malice aforethought.

124. In the instant case the evidence so sufficiently establishes malice aforethought came from PW3, PW8 & PW9 which provided a narrative on how the deceased died. In each of their testimonies, the aforementioned witnesses testified that after the accident occurred, the 1st accused driver of the offensive motor vehicle stopped, got out, went and kicked the deceased and returned into the vehicle. Thereafter, the 2nd accused got out of the said vehicle, went and dragged the deceased up to near the vehicle's tyre before directing the 1st accused to drive over the deceased. This narrative was further given credence by the evidence of PW12, Dr. Massawa who carried out the post-mortem on the deceased and noted tyre marks on the deceased's abdominal and thorax regions. Further PW11, the crime scene photographer testified that he took photographs of the vehicle involved in the accident which showed blood stains on it as well as suspected brain matter spread all over underneath the body of the car.

125. It is my opinion that this evidence left no gaps the accused persons were intent on killing the deceased, through unlawful acts and with malice aforethought as defined in Section 203 of the Penal Code.

126. I observe that in the instant case, each of the accused person was involved in one way or another to do the unlawful acts which constitutes the offence of murder. The case brings into play parties to a crime as provided in Section 20 of the Penal Code. That is, when an offence is committed jointly and each of the accused person is deemed to have taken part in committing the offence and are held to be guilty of the offence. Such elements on common intention and enterprise include where:

- (a) ***Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.***

(b) Every person who aids or abets another person in committing the offence.

(c) Any person who counsels or procures any other person to commit the offence.

127. There is sufficient evidence from PW3, PW8 & PW9 that such persons include the accused persons who dragged the deceased next to the vehicle registration number KCG 209M and ran drove over him which led to his death. Simply stated, under Section 21 of the Penal Code the accused person's unlawful acts have been positively identified as the cause which gave rise to the crime, the fatal harm suffered by the deceased.

128. The defence that the deceased died as a result of an accident which the accused either failed to report due to fear and confusion on the part of the 1st accused and *because the 1st accused told me he'd take care of the same* on the part of the 2nd accused crumbles against the strong and credible evidence adduced by the prosecution in the testimonies of PW3, PW8, PW9 and the indirect but corroborative evidence adduced in the testimonies of PW11 & PW12. To my appraisal of the evidence, the defence by the accused persons consisted of mere denials and was an afterthought. The intentions of the accused persons was to deprive the deceased of life and not merely to cause him grievous harm. Had this been an ordinary accident, the accused could have stopped at knocking the motorcyclist which driven ahead of them. Instead, even after knocking down the deceased rider who was carrying his brother PW3, the 1st accused stopped the vehicle and went to check on whether the deceased was dead and after satisfying himself that PW3 was probably dead as he was far off in the ditch, he returned into the vehicle and that is when the 2nd accused assisted him to eliminate the deceased completely by dragging the deceased onto the tyres and directing the 1st accused to drive over the deceased.

129. In **R v Seme & Another {1887} 16 COX C.C. 311** as cited in the case of **Republic v Chengo Kazungu Kadenge & 2 others [2020] eKLR** the Court held interalia that ***any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death should be murder.***

130. I find that not only did the accused persons bring their acts within Section 206 (1) (a) and (b) of the Penal Code but also under Sub - Section (c) dealing with knowledge that their acts would cause death. It follows that the accused persons had the capacity to form the intent necessary for the unlawful act and also from the evidence on the relevant facts that show their acts were likely to cause the death of the deceased. The photographic evidence of the deceased's body as shown to this court is in itself evidence of malice aforethought. The photographs show a mutilated body of the deceased only seen in horror movies. The vehicle's tyres did not just hit the deceased, they crushed his body and internal organs. There is every evidence that the deceased was not just hit but crushed over his body to ensure he was completely done like a dog as the accused wanted some of the witnesses to say that they had hit a dog. It was horrifying and traumatizing to look at those photographs yet I had to examine them closely to establish the tyre marks on the body of the deceased.

131. In the case of **R v Upton Gutteridge [1851] 5 Cox C.C. 298** the Court of Appeal of Ontario dealing with the words knowledge to know and for stability held that:

“The test is whether a reasonable person with knowledge of the surrounding circumstances which make the situation dangerous to life should have foreseen that it was likely to cause death. what would a reasonable person, which is an ideal person in the community, not necessarily one of us, but what we think that a reasonable, prudent, responsible person in our society, who knew the surrounding circumstances rendering the situation dangerous, what would they have foreseen. Would they have foreseen that it was likely to cause death.”

132. In construing this interpretation, and the guidance given it keeps the prosecution case within the bounds of Section 206 of the Penal Code in such a manner that malice aforethought is proved beyond reasonable doubt. I therefore find and hold that the two accused persons herein formed the intent or knowledge necessary for the unlawful killing of the deceased and with malice aforethought.

133. Did the prosecution prove common intention as set out in Section 21 of the Penal Code?

134. Section 10 of the Evidence Act provides that:

“Anything said, done or written by any of the persons deemed to have a common intention in reference to their common intention is relevant of such common intention.”

135. In **Wanjiro d/o Wamario v R 22 EACA 521** the Court found that:

“Common intention developing in the course of events though it might not have been present to start with.”

136. Having regard to the facts of this case, the doctrine of common intention applies to both accused persons. It flows from the evidence of PW3, PW8 and PW9 that the accused persons jointly designed and purposed to commit the unlawful act of assault against the deceased. From the evidence of PW3, PW8 and PW9, the accused persons purposely drove over the deceased so as to ensure he is dead and completely dead so that he and would not be in a position to bring a case against them. The deceased died from the wounds as tabulated in the post-mortem report done by Dr. Massawa.

137. I am satisfied that the evidence by the prosecution meets the case of a crime executed as an incident of the common unlawful enterprise by the accused persons. The accused persons in this case have been shown to have consciously shared a common purpose on the night of 30.11.2018 to coordinate the commission of the crime of murder as defined in Section 203 of the Penal Code beyond reasonable doubt.

138. Another relevant factor to this trial is that of identification of the accused persons by the witnesses as the ones who committed the

murder. In the case of **R v Eira Sebwato [1960] E.A 174**, the holding is:

“Where the evidence alleged to implicate the accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction. The Law regarding identification is well set out and the Courts are mandated to adhere to the procedure and great care is needed particularly where conditions are unfavourable.”

139. In this regard see the principles elucidated in **Wendo v R [1953] 20 EACA 166**, **Roria v R [1967] E.A. 583**. Applying the principles in the above cited authorities according to PW3, PW8 and PW9’s evidence it was clear that they were able to identify the accused persons. PW3 stated that he knew the 2nd accused because he used to repair phones. PW8 identified the 2nd accused and the 1st accused. PW9 testified that she hailed from the same village as the accused persons and was even afraid of being victimized by their relatives for testifying against them.

140. I am satisfied on assessment of the evidence in this case as adduced by both the prosecution and defence that the reception of the evidence as to recognition is correct and safe to place the accused persons at the scene.

141. In the end, and from the evidence adduced by the prosecution witnesses and the defense and from my analysis of the said evidence and the law, I find and hold that the prosecution proved all the elements of murder beyond reasonable doubt against the two accused persons herein. I find that the two accused persons had a common intention of eliminating the deceased. I find that there was an execution of joint plan with malice aforethought proved beyond reasonable doubt.

142. Accordingly, I find the accused persons herein Benjamin Eli Odhiambo alias Ben and Vincent Owuor Opondo alias Rasta Daddy guilty of the Information of murder as charged. I convict them accordingly under section 203 of the Penal Code. Sentence shall be pronounced after records and mitigation.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF NOVEMBER, 2021

R.E.ABURILI

JUDGE