



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 8 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

IBRAHIM BUSOLO SALEH.....1ST ACCUSED

MOHAMED CHITECHI WATAKO.....2ND ACCUSED

OMAR MUSUNGU JUMA.....3RD ACCUSED

THOMAS AKOKO NABUKO.....4TH ACCUSED

JUDGMENT

1. Ibrahim Busolo Saleh, Mohamed Chitechi Watako, Omar Musungu Juma and Thomas Akoko Nabuko are charged with murder, contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 27th August 2012, at Bulimbo Village, Cholera Sub-Location, Matungu District, within Kakamega County, jointly with another not before court, they murdered The deceased Wandati Ngosia, hereinafter referred to as the deceased. They pleaded not guilty to the charge on 27th February 2013. The hearing of the case by the prosecution commenced on 26th October 2015. The prosecution called four witnesses.

2. Chrispinus Talitwa Wangatia testified as PW1. He testified that on 27th August 2012 at about 9.00 PM, he was at home with his wife and child, when he heard screams outside. He stepped out to investigate. He found the deceased lying down, surrounded by many people. It was about 100 metres from his house. There were about fifteen people at the scene, and among them he identified Ibrahim Busolo (Accused I), Chitechi Watako, Juma Musungu and Suleiman Hassan. Juma Musungu had a *panga*, while Suleiman Hassan Chitechi and Thomas had *rungu*, while Accused I had a torch. They were armed with *rungus* and *pangas*. He also saw children that he identified as Juma Musungu's, but he did not know their names. He found the people asking the deceased the people that he was with. Deceased did not answer as he was badly injured. PW1 asked them why they were beating deceased, but instead of responding to him, they dispersed. There were neighbours, such as Robert Okumba, Caroline Okumba and Sebastian Ngosia. PW1 left the scene to get help, leaving the deceased with the village elder, Accused I. When he got back he found that the police had arrived at the scene, and the deceased was removed to Matungu Sub-District Hospital. He noted that the deceased had cuts on left hand, between the thumb and the first finger, and on the back of the head. He died at 4.00 AM, while undergoing treatment. PW1 identified the accused as his relatives. He said Accused I was his cousin, Accused IV was his nephew, Juma Musungu his cousin and Suleiman Hassan Chitechi was his neighbour. He described the deceased as his nephew, on account of being a son of his brother. He said that the persons who were beating the deceased caused his death, being Accused IV, Juma Musungu, Chitechi Watako and Suleiman Hassan. He said that Accused I was standing at the scene with a torch. He said that the deceased had a dispute with his brother Dennis, but that he was not aware of any dispute between the deceased and the accused persons. He said that there was moonlight and he had a torch, and Accused I also had a torch.

3. On cross-examination, he said that he knew Accused I well, and had given his name to the police as Ibrahim Busolo. When shown his statement, he conceded that he only referred to him as Busolo. He said that he saw Accused I and Accused II assault the deceased. He said that Accused I was standing, holding a torch. He said that in his statement he had said that John Busolo was carrying a torch. He described Accused I as his brother. He got to the scene at 9.00 PM, and he did not know who had called the police. He said that the police found Accused I, who was also the village elder, at the scene. He said Accused I was not among the people who took the deceased to hospital. He described Accused II as Chitechi Watako. He said that he had mentioned him in his statement, saying that he was carrying a *rungu*. When shown the statement he said that the statement did not say so. He said that there were other people at the scene that he was not able to identify. He said the night was dark and he did not know where the deceased had been before he found him at the scene. He said that he did not know whether he went to the home of Dennis, but he had heard from Robert Okumba that the deceased and Denis had had a disagreement. He said he did not know whether Dennis assaulted the deceased. He said that when he got to the scene the deceased had already been assaulted. He said Accused III, who he referred to as Musungu Juma, was carrying a *panga*, while Accused IV had a *rungu*. He said he was not sure if the deceased had quarrelled with his brother Dennis, and said he could not agree that the deceased was a thief. He said

when he arrived he found Accused IV assaulting the deceased, but added that he arrived after he had been cut.

4. PW2 Wangatia Ngosia testified as PW2. He testified that on 27th August 2012, he was at home, around 7.00 PM, with the deceased Ngosia. who asked PW2 to escort him to the shops at Madambisia market. On the way out, Denis joined them. They went up to the shops, the deceased bought sugar, and they turned back. On getting back, Denis asked to be escorted home to meet Beatrice, their sister. Then Denis asked PW2 to slaughter for him a chicken, which PW2 refused to do. Dennis then asked the deceased to do it, and he agreed, and slaughtered the chicken. Denis was angry at PW2 for being rude, in refusing to slaughter the chicken. PW2 told the deceased that they should leave. Denis entered his bedroom and came out with a bicycle lock. PW2 asked the deceased to hurry so that they could get away, but Dennis followed them, and at his gate he hit the deceased on the shoulders and at the back. PW2 tried to separate them. As they struggled, the deceased kicked the wife of Dennis, who screamed. After that they left. At about 9.30 PM, they entered the house of PW2 and were served food. Before the deceased started to eat, PW2 heard voices outside. The wife of PW2 told him that Accused I was outside. Then Accused I and the people that he came with started beating the deceased. He said that they were more than eight, and they came armed with *pangas* and *rungu*. He said that Accused I had a *rungu*, Accused IV had a spear, Musungu Juma had a *panga*, and Mohamed Chitechi had a *panga*. He said that he was standing at the door to his house, when the beating was happening. Mohamed Chitechi cut the deceased with a *panga* on the right side of the head. Accused IV speared him on the back of the head. They then took him away, and threatened to beat him, PW2. PW2 then ran to PW1's home, screaming, PW1 responded, and came out to where the deceased was lying. PW2 was at the scene when PW1 came to the scene. PW1 asked what they were doing, some people left, while others remained at the scene. The police later came and took the deceased away.

5. During cross-examination, he said that there was a disagreement between him, the deceased and Denis over the slaughtering of a chicken. That was at 7.30 PM. Denis then beat the deceased with a bicycle lock, which had a metal coated with rubber. Denis thrashed the deceased thrice, twice on the shoulder and once on the back. He said that he separated them, and took the deceased away. He stated that Denis was not arrested, and that he was with him when he went to record his statement, and Denis also recorded his. He said that when Accused I came to their home, with others, they had a small torch. The person with it was Accused I. He identified the accused persons as Accused II Chitechi, Accused III Omar Musungu, and Accused IV Thomas. He said that he knew all the accused persons. He then went on to describe how they were dressed that evening. He said that there was moonlight, which he said was $\frac{3}{4}$ full. He said that it had not rained. He said he saw them beat the deceased. He said Accused I hit him with a *rungu*. Accused I telephoned the police. He said that Accused II had a *panga*, and he saw him cut the deceased with it on the head. He said that the deceased had many injuries, for there were many people beating him. When his statement was read to him, he confirmed that it did not mention the names of Accused I and II. He said he could not tell why the police did not record those names in the statement. He said that he was present when Denis beat the deceased, and that villagers came, but since it was a family affair, they did not intervene. He said that he was not aware that Denis had reported to the police that he had been attacked by some people, who included the deceased. He also stated that some eight people came to the scene, but he could not tell whether they had come to assist Denis. He said that it was the wife of Denis who screamed after the deceased kicked her. He said the full name of Accused III was Omar Musungu Juma. He had a *panga*. Accused IV had a spear. He said that PW1 came after the incident had taken place. He said he was present when it happened, and that Accused III cut the deceased on the left side of the neck, while Accused IV speared him on the back of the head. He said he was able to identify the assailants with the help of moonlight. He said the events happened between 9.00 and 10.00 PM. He said that the people were some twenty metres from where he was, and he could tell each one by face, as he knew them from birth.

6. Dismas Ngosia Wangatia testified as PW3. He was the father of the deceased. He said that he was informed by PW1 on 27th August 2012, at about 6.00 AM that his son had been killed. He and PW1 then went to Harambee Police Station, at the police station where they were referred to Mumias Police Station, to record statements. He said that PW1 told him that Accused I had led the gang that killed his son. He saw the body at St. Mary's Hospital Mortuary. The body had cuts on the head, which looked like they had been inflicted with *pangas*. He described Accused I as a village elder. He said that he did not know whether PW1 had any relationship with the deceased. He said he did not know why his son was killed. During cross-examination, he said that what he told the court was what PW1 had told him. He said Carline Okumba was his sister-in-law. He said that he did not know that it was she who had gone to call Accused I with a report that Denis and the deceased were fighting. He said he did not know Accused III and IV. He said he did not witness the incident.

7. Paul Kweyu Ngosia was PW4. He said that on 27th August 2012, he was at the home of his brother, PW2 having supper with his sister in law and her family. It was around 7.00 PM. He then left to sleep at the home of PW1, his uncle, which was some 500 metres away. He passed by the house of Denis Ngosia. He heard his brothers talking inside the house, and he entered. He found Denis, his wife, PW2 and the deceased, and their sister Beatrice. After about half an hour, a dispute arose. Denis wanted the deceased to slaughter a chicken for him, but their sister stopped it. Denis got angry, feeling slighted. He banged the table, and then entered the bedroom, and came out with a bicycle chain, and hit the deceased once with it at the top of the head. They then got out of the house, while trying to take the deceased away to safety. Denis followed them, seeking to fight the deceased again. The deceased hit him with a fist and he fell down. The wife of Denis started to scream. Neighbours came, one of them, Robert, went and called Accused I, the village elder, to come and try to resolve the dispute. When Accused I came, the fighting had stopped, but he asked Robert to tell him where the combatants were. Accused I and his group then left for the home of PW4. He accompanied them, walking ten or so metres behind them. It was a group of about ten people. The deceased came out of his house, and at which point PW4 heard a whistle. The deceased then started calling PW2 and running towards the house of PW2. The group followed him. PW2 ran in the opposite direction. Accused I and his group then brought the deceased back to the compound. They had beaten him and were still beating him. They cut him. Accused IV speared him at the back of the head. The deceased screamed and started bleeding. They then took him near the gate to the compound of Denis. The deceased fell down because he was bleeding. PW4 ran there and heard Accused III asking for water to wash his hands. PW4 then ran to call PW1. PW1 came and took the deceased to hospital. When he got to the home of PW1 he told him that Accused I had attacked their home.

8. During cross-examination, he stated that Denis had asked the deceased to slaughter a chicken, but PW2 had refused, saying that it was too late for that. Whereupon Denis got annoyed and armed himself with a bicycle chain and hit the deceased with it on the head. He stated that the deceased was hurt on the head by that hit. He said that he saw the body of the deceased while inside a coffin and it had injuries on the head. He stated that after they got outside the house Denis followed the deceased and still wanted to fight him. He said he did not know why Denis was not arrested. He said that the wife of Denis, Zaituni, screamed, saying that the deceased and PW2 were killing her husband. He explained that the deceased and PW2 were not fighting, and that the fight was between the deceased and Denis. He said that he and Beatrice were present. He said that a child within the compound was trampled upon. He said that Accused I came to the scene half an hour after the fight. He came with many people. Mainly villagers. He said he did not know who called them. He said that Accused I was the commander of

the group, in his capacity as village elder. He said that were it not for Denis the deceased would not have died. He blamed Denis for causing the dispute, and Accused I for the killing. He said that the police came as the deceased was being taken to hospital. He said he did not know who called the police, and was certain it was not Accused I because he was with them. He said that by the time the group led by Accused I came to the scene, the deceased had been injured by Denis, but those injuries were not life-threatening. He stated that he saw Accused III beat the deceased. He cut him on the back with a *panga*, while Accused IV speared him at the back of the head. He said PW2 was not present when the deceased was being beaten. He said the accused persons had torches, which they flashed on the deceased as they were beating him. He said that he was able to see the deceased and his attackers. He said that he did not know whether any of his brothers were drunk, but he and Beatrice were not.

9. No other witness testified after PW4. The matter came up several times, and was adjourned for lack of witnesses. Eventually the court gave the State a last adjournment on 25th April 2019. The Prosecution closed its case on 30th October 2019, and on 19th December 2019 I ruled that the accused had a case to answer, and I put them on their defence.

10. There were delays in the commencement of the defence hearing, on account of challenges posed by the Covid-19 pandemic. Eventually, the defence hearing happened on 2nd June 2021. The accused gave sworn statements.

11. Accused I, Ibrahim Busolo, testified as DW1. He confirmed that he had been a village elder, and that the deceased, the deceased Andati, was a resident of his village. He said that he was at his home on 27th August 2013 at 9.30 PM, when two people came to his compound. They informed him that there was a breach of the peace, and people were being killed outside. The reportees were Caroline Okumba and Robert Ouma Okumba. He said that they informed him that robbers had attacked their neighbour. He rushed outside, and heard screams, coming from the direction of the homes of Caroline Okumba, Robert Ouma and Dennis Mwimali Ngosia. He said that he went to make a report at Harambee Police Post. Two police officers accompanied him to the scene. They found the deceased lying on the ground. He said that there were no people around, except for him and the two officers. The deceased was in an injured state, but he called his name. He got a bicycle and was assisted by the police officers to get him to the road. A police vehicle later came, and he was taken to hospital at Matungu. He said that he did not get to know how he got injured, nor who was responsible for his injuries. He said that he did not get a report that he later died, and he did not know about the charges that he faced. He identified his co-accused as residents of his village, but said that he did not find them at the scene. He said that he only helped to take the deceased to hospital.

12. During cross-examination, he said that he did not attend the burial of the deceased, although he had not been arrested at the time. He said that he had been told robbers had invaded the villages, and he was the one who went out looking for help. He said that he did not see the deceased before he went out looking for assistance. He said that he went with the police to the scene. The deceased was lying on the ground, but he, Accused I, was not able to see clearly, so he could not describe his injuries. He said that the two people who came to call him did not testify, and they could not come to court as his witnesses as he did not know where they went. He said he did not get to the police post. He met the police on the way. He said that he was not armed with any weapon. He described the deceased as a *mkorofi*, who had previously injured a *mzee*, a report was made, and the deceased disappeared. He said the prosecution witnesses were his relatives, and that there could be differences between them and him, although he had no grudge against them. During re-examination, he said he had a grudge with PW1, he had been found with a stolen motorcycle.

13. Accused II, Mohamed Watako Chitechi, testified as DW2. He said that he was sleeping on 27th August 2017 at 9.00 PM, and, therefore, he did not hear anything. The following day he heard screams at 12.00 noon at the home of Denis Mwimali. He went there and heard that the deceased Andati had died at Matungu. He said that he had not beaten him. He said that he did not know why he was arrested and charged with killing the deceased. He said that he had heard that some people had invaded the deceased beat him and killed him. He said he did not know why they did so. During cross-examination, he said that he could hear screams from his home, but he was sleeping. He had retired to bed at 8.00 PM. Then again he said the screams he heard were on 28th August 2012 at 12.00 noon. He said that he knew Denis, but he told him nothing about the death. He said that he attended the burial.

14. Accused III, Omar Musungu Juma, testified as DW3. He said that he was at home on 27th August 2012 at 9.00 PM. He did not hear any screams or anything that night. The next morning he got a telephone call from a relative who informed him that robbers had attacked the village and killed someone. He said that he was not involved in the killing. He said that he was arrested on 8th February 2013. He said that he was arrested at the instigation of PW1, with whom they had a dispute over some money that he owed him. He said he was shocked to be charged with the murder of the deceased. He said that he knew PW1 and he knew PW1's brother, who was the father of the deceased, but he did not know the deceased himself.

15. Accused IV, Thomas Akoko Nabuko, testified as DW4. He said that on 27th August 2013, at 9.00 PM, he was at home sleeping, and he did not hear anything. The next morning at about 10.00 AM, he got information that robbers had beaten a child, who was taken to hospital by the police. At 12.00 noon he got information that that child had died. He said that he was arrested after the burial of the deceased, on 8th February 2013, at the behest of PW1, over some dispute that they had.

16. None of the parties submitted at the close of the oral hearing, and none of them filed written submissions.

17. The elements of the offence of murder, as defined in section 203 of the Penal Code, are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought. See *Republic vs. Stephen Sila Wambua Matheka* [2017] eKLR (Nyakundi J) and *Republic vs. Andrew Mueche Omwenga* [2009] eKLR (Maraga J). Section 203 of the Penal Code states as follows:

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

18. On the fact of the death of the death, it should be pointed out that the pathologist did not testify, and, therefore, there is no medical or scientific proof of the death. However, although the usual way of proving death is through medical evidence, death can, on the authority of *Republic vs. Cheya and another* [1973] EA 500 (Mfalila Ag J) and *Benson Ngunyi Nundu vs. Republic* Nairobi CACRA No. 171 of 1984

(Nyarangi JA, Platt & Gachuhi Ag JJA) also be proved by other means. It can be established from the testimonies of the witnesses, and where the body was missing for whatever reason, death may be presumed or proved by circumstantial evidence. There is overwhelming evidence that the deceased died. He died in hospital, and his death was confirmed by PW1, his uncle, who was among those who took him to hospital. PW3 was his father, he saw his body at the mortuary at St. Marys Hospital at Mumias. PW2 and PW4 were his brothers, they also confirmed that he died. Indeed, PW4 talked of observing the injuries on the body of the deceased when he looked at it as it lay inside a coffin. There is, therefore, evidence beyond any reasonable doubt that he died.

19. On the second aspect of the crime, on the cause of the death, again no medical evidence was provided, as the pathologist did not testify. However, lack of medical evidence to prove cause of death is not fatal to the prosecution cause. The cause of death can be established by other means, such as testimonies of the witnesses, where it is possible to presume the cause from the circumstances of the death. See *Republic vs. Cheya and another* [1973] EA 500 (Mfalila Ag J), *Benson Ngunyi Nundu vs. Republic* Nairobi CACRA No. 171 of 1984 (Nyarangi JA, Platt & Gachuhi Ag JJA) and *Ambari Gandani Konde vs. Republic* Mombasa CACRA No. 103 of 1999 (Gicheru, Shah & O’Kubasu JJA). PW1, PW2 and PW4 testified that they were with the deceased when he was alive. PW2 and PW4 were with him when he was in good health, and when he got into an altercation with their brother Denis, when he got some non-life-threatening injuries. They described in detail the invasion that happened thereafter, when Accused I led a group into their compound who attached and caused injury to him. PW1 saw him after that injury was inflicted, and it would appear that the deceased went on to die after that. The cause of death was, no doubt, the injuries that were inflicted after Accused I and his group came to the scene, given that the deceased was in good health before then. PW4 testified that the strike with the spear at the back of his head appeared to be the decisive blow that weakened him, and eventually led to his death.

20. The third aspect is whether the death was caused by an act of the accused persons. PW2 and PW4 testified that they were present when the accused persons attacked the deceased, and they described the roles played by each one of them in the attack. They were eyewitnesses. They both said that they saw each of the accused persons strike the deceased at various parts of his body, but the more decisive blow appears to be that struck by Accused IV, with a spear at the back of his head. PW1 testified also on the assaults, but the impression that I got, from the evidence of PW2 and PW4, was that he came to the scene after it was all over. The accused were described by the three witnesses as a next door neighbours. Accused I was said to be even a villager elder. They said they saw them clearly as there was moonlight, and torchlight, and in any case these were people they knew very well, being neighbours.

21. The fourth factor relates to malice aforethought. Malice aforethought is defined in section 206 of the Penal Code, as follows:

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

- (a) an intention to cause the death of or to do grievous harm to any person, where that person is the person actually killed or not;
- (b) 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;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

22. Malice aforethought is the intention to be inferred from either some conduct or facts. Malice aforethought is linked to the third factor, the role of the accused in the causation of the death of the deceased. It was stated, in *Matovu Vincent vs. Uganda* Kampala HCCRC No. 1362 of 2000 (Lugayizi J) and *Chesakit Matayo vs. Uganda* Kampala CACRC No. 95 of 2004 (Mpagi-Bahigeine, Engwau and Twinomujuni JJA), that malice aforethought can be deduced from such factors as the weapon used, the part of the body injured, the extent of the bodily injuries, the manner of the killing and the conduct of the accused.

23. In this case, the act or conduct leading to the death of the deceased is the assault on the person of the deceased by the accused persons after that incident with Denis. The four accused persons were all said to have rained blows on the deceased, but it was the attack by Accused IV that appears to have been the most lethal. PW4 testified that he saw the accused strike the killer blow. The strike was strong enough to cause the injuries on the head, which caused the death of the deceased. PW4 stated that the deceased screamed after that blow, and bled badly, and fell down shortly thereafter. The attack must have been vicious for it to have inflicted injury leading to death. The person inflicting the injury, that is to say Accused IV herein, must have intended to cause death or do grievous harm to the deceased, or he must have had knowledge that a strike on the head of the deceased with a spear with the force applied in the circumstances would cause death or grievous harm on the deceased, or he was indifferent whether death or grievous injury would be caused. The act or conduct of the accused person of striking the deceased in the manner described by PW4, must have had an intent to commit a felony. The said act or conduct, or that set of facts, would bring the matter within section 206(a)(b)(c) of the Penal Code.

24. However, I am alive to the fact that the circumstances leading up to the incident were prompted by a family altercation between Denis, the deceased and PW2, which was narrated in detail by PW2 and PW4. The accused persons were not party to that altercation, and they would not have been at the scene, and party to the events that led to the death of the deceased were it not for the fact of that altercation. The facts, as they emerged at the trial, did not create a profile of the accused as random criminals who were on the prowl, waiting to commit a crime or offence of one kind or other. They came to the scene for purposes of containing a situation that had arisen, after an alarm was raised. They were responding to a distress call. Unfortunately, things got out of hand, ending with the death of the deceased.

25. The dispute that set in motion the events that culminated in the death of the deceased was between Denis and his brothers, and it arose over a flimsy matter. Indeed, so flimsy that Sitati J, who handled the matter at some stage, enquired whether those involved were drunk. Denis was demanding that a chicken be slaughtered, ostensibly for his dinner. That proposal was shot down, PW2 said by himself, PW2,

while PW4 said it was by their sister, Beatrice. They had a plausible reason, it was too late to start slaughtering chicken. Denis, who appears to have been the oldest in the group, felt slighted, that his juniors were turning him down. He got angry, armed himself, ready to attack them. He hit the deceased on the head with what was described as a bicycle chain. The deceased, PW2 and PW4 then scrambled out of his house, to escape his wrath, but he still followed them. He caught up with the deceased, who tried to fight him off, and PW2 moved in to separate them. In that struggle the wife of Denis, Zaituni, was kicked, and she screamed, that her husband was being killed, attracting neighbours to the scene, some of whom reported the matter to the village elder, Accused I. That was how the accused persons happened at the scene. They had come to answer a distress call, prompted by the actions of Denis and his wife. Indeed, PW4 stated that were it not for that incident, the deceased would not have died. From that set of facts, it can be deduced that the accused persons had no intent to kill the deceased, for they had no issue with him that night, were it not for the distress call. The screams that attracted neighbours were by the wife of Denis, Zaituni, who was alleging that her husband was being killed. The altercation was between Denis and the deceased, and the accused, no doubt came to the scene to deal with the person who was a threat or danger to the life of Denis, and that was the deceased, and that would explain why they came straight for him, and not Denis or PW2 or PW4, who were also at the scene.

26. Was there justification for the conduct of the accused? As stated above, the accused came the scene to contain a situation. PW2 and PW4 were specific that as Denis and The deceased tussled, Zaituni screamed, according to PW4 saying that her husband was being killed. Neighbours responded to the distress call, according to PW2 and PW4, and that one or more of them went out to inform Accused I, in his capacity as village elder, something that Accused I confirmed in his defence. The distress call that went out from Zaituni was that a murder was about to be committed on her husband, and those who answered to it must have come prepared to deal with potential murderers. That would explain why they came armed with assorted weapons, being clubs and machetes, to deal with the persons who were said to be about to commit murder. However, when they got to the scene, the situation, according to PW2 and PW4 had calmed down, the fighting had stopped and everyone had retreated to their houses. Hell broke loose, literally, however, when the deceased emerged from his house, a whistle was blown, he ran, and the accused chased him in hot pursuit, caught with him, set upon him and assaulted him with weapons, inflicting injuries that culminated in his death. Were their actions reasonable? I do think not. It is true that they were coming to deal with a potential murder case, but when they got to the scene they should have realised that the fighting had stopped. They should have left it at that. The emergence of the deceased from his house and his running away may have provoked them, but then there is no evidence that he was a danger to them in any way. After catching him, there was no justification for them to assault him, in the manner they did, for he was, at that time, not a danger to anyone.

27. When the accused persons were given a chance to defend themselves, they all said that they were not at the scene. Accused I conceded that a report was made to him, of some trouble in the village, and that he went to report to the police, and by the time he got to the scene, the deceased was already badly hurt. The other accused persons all said that they were fast asleep at 9.00 PM of 27th August 2012, and heard nothing of the commotion that led to the death of the deceased. I found the testimonies of PW1, PW2 and PW4 fairly straight forward and candid. The accused persons were clearly persons known to the witnesses. They were neighbours, relatives even. They had dealt with each other previously, and, therefore, the possibility of the witnesses being mistaken should not arise. The three witnesses said there was moonlight, and there were torches. The accused were responding to a danger call, and must have come with torches. They were at the scene for quite some time, and interacted with the witnesses for a while. The issue of identification should not even arise, for this was a clear case of recognition. The witnesses clearly placed the four accused persons at the scene. The *alibi* defences of Accused II, III and IV were flimsy, and I reject them.

28. Overall, I find, the evidence falls short of establishing an intent to kill anyone on the part of the accused, for they appear to have had come into the scene to neutralise a situation, but ended up using more force in the process than was necessary in the circumstances. The *actus reus* for the offence of murder was established, but not the *mens rea* required for it. I shall accordingly, therefore, in exercise of the power of discretion in section 179 of the Criminal Procedure Code, Cap 75 laws of Kenya and find the Accused persons guilty of the lesser offence of manslaughter, and I hereby convict them accordingly, under section 322 of the Criminal Procedure Code, of the manslaughter of George Wandati Ngosia, contrary to section 205 of the Penal Code.

29. For the purpose of determining the sentence or sentences most appropriate to mete out in the circumstances, with respect to the accused persons, I hereby direct the County Director of Probation and aftercare services, to prepare a pre-sentence report, after interviewing the accused persons and the affected families. The matter shall be mentioned thereafter for mitigation and sentencing.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE