



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL CASE NO. 3 OF 2017 [MURDER]**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**PATRICK STEPHEN MADARA.....1<sup>ST</sup>ACCUSED**

**NICKSON OCHIENG OPONDO.....2<sup>ND</sup>ACCUSED**

**ABRAHAM ONYANGO OGONGA.....3<sup>RD</sup>ACCUSED**

**JOSEPH OCHIENG ONYANGO.....4<sup>TH</sup>ACCUSED**

**JUDGMENT**

1. The four accused persons namely **Patrick Stephen Madara, Nickson Ochieng Opondo, Abraham Onyango Ogonga and Joseph Ochieng Onyango** are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of Information dated 22<sup>nd</sup> February 2017 signed by Eliphias O. Ombati Principal Prosecution Counsel are that the accused persons herein on the 28<sup>th</sup> day of January, 2017 at around 1700 hours at Lana Market, Nyabeda Sub location in Gem Sub county within Siaya County they jointly with others not before court murdered one **Ismael Nyamwaya**.
2. The accused persons took a plea before Hon. Justice James Makau on 22/2/2017 and pleaded not guilty to the charge. The hearing commenced before me on 22<sup>nd</sup> May 2018 after the transfer of Hon Mr. Justice J. Makau.
3. The prosecution's case was as follows: **PW1 Roselyne Salome Ouma** from Lana Area and operating a busaa-traditional liquor club called Kadinya Busaa Club testified on oath and recalled that on the 28/1/2017 the deceased **Ismael Nyamwaya** who was her customer went to her premises at about 4.30 pm. That at that time she did not know his name although he was a regular reveler in her club. He ordered for a Sh. 20/= Busaa which the witness supplied him and he drank it. She stated that one **James Onyango** who also owns a club nearby called her on phone requesting for a supply of Busaa to his business premises as he had exhausted his stock.
4. PW1 then requested one of her customers who had a motorbike to assist her deliver the 20 litre Busaa to James Onyango. she stated that it was after delivering the Busaa that she heard somebody shouting and saying, "**this is the person who beat us the other day**", while pointing at the deceased customer. She stated that the person shouting went and slapped her customer and that her customer escaped and hid into the club. That many people gathered and Police from Nyabeda were called by Ogola. When police officers arrived, they found a rowdy crowd so they went for reinforcement from Mutumbo Police Station, but that the crowd was so big to contain so the police sought for further reinforcement.
5. According to PW1, the enraged crowd broke into her club door to bring out her customer who had hidden therein, pulled him out and started beating him as she watched but because it was painful for her to watch, she moved to a distance and saw the people who beat her customer but that those people were not before the court.
6. PW1 further stated that the crowd beat up her customer using stones and clubs/rungus and dragged him towards the main road.
7. On cross examination by Mr. Kowino Advocate for the first accused, PW1 stated that she had operated the club for one year and that she was with the deceased from the time she was removed from his hideout and beaten up.. she reiterated that she had not seen any of his assailants or those who broke the door to the club before the court.
8. **PW2, James Otieno Onyango** from North Gem testified that he was a businessman engaged in the sale of Busaa at Lana Market. He

recalled that on 28/1/2017 at or about 3.00 pm he left Mutumbu SDA Church and proceeded to his business place. After a while, he proceeded to the Village elder Mr. Job's place and that shortly thereafter, he heard people shouting at his club so he rushed back and found people fighting. He found **Juma and another person** whom he did not know assaulting one of his customers. That they were kicking and boxing him and the customer managed to escape and entered behind the club. They followed him. PW2 asked Juma why he was beating the customer. He stated that Juma and his friend who were assaulting the customer were not before the court.

9. PW2 further stated that when he questioned Juma why they were assaulting the customer, Juma said that it was because the customer is one of those who had beaten his (Juma's) father who was in the mortuary, dead, and that Juma stated that he had identified the customer by the Jacket that he was wearing.

10. That PW2 then called **Wilson Ogola Onyango** who was his Club Manager who came and spoke to the crowd begging them not to harm the customer and that Wilson Ogola called APs from Nyabeda. He stated that two APs came and spoke to the crowd who refused to bulge. That one of the men slapped one AP officer. The APs retreated and returned with guns which they fired in the air but the crowd refused to bulge. He stated that the APs requested him to tell them to calm the crowd but the crowd refused so the APs called more police officers from Ratumbu. Two more police officers came but the crowd insisted, daring the police to shoot at the crowd and threatening the police with death and to set the club house ablaze. The police left and returned with more police officers in a vehicle but the crowd which was now over 200 people dared the police. They broke into the club which prompted the police to leave the club. PW2 stated that he saw Onditi A1, Nick A2, 'Mwalimu' A3 and Ochieng A4. *(All the 4 accused persons were identified in the dock by the witness by pointing at them).*

11. He stated that the 3<sup>rd</sup> and 4<sup>th</sup> accused persons were drinking from his club. He further stated that he tried to intervene but the police officers told him not to do so and so, with others, they just stood by and watched what was happening.

12. PW2 further stated that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons entered the club and that at that time he had asked Salome (PW1) to bring him more Busaa so he saw her inside the club talking to the crowd telling them not to harm the customer, but that Onditi A1 held her and pushed her outside and PW2 pleaded with Onditi not to harm her. He stated that he saw them break the lock to the door to where the customer had hid himself. That he saw Onditi enter the room where the customer was and pulled him out, then A4 Ochieng came with a metal rod and hit the deceased on the head. He then stated that all the 4 accused persons together with Juma carried the customer onto the road and hit him and killed him using metal bars, clubs and stones. He identified one of the stones which he said was used to hit the deceased.

13. PW2 further testified that after the customer was killed as they watched, the assailants left and the police took away his body to Yala Police Station. He stated that he had never disagreed with any of the accused persons and that they were all his customers as they all, except NICK frequented his Busaa Club.

14. On being cross examined by Mr Kowino Advocate for the 1<sup>st</sup> accused, PW2 stated that before the incident, he only knew the accused persons by appearance and by one name each. He stated that when he recorded his statement with the police on 1/2/2017, the incident and information were still fresh in his mind. He reiterated that Juma whom he found assaulting the deceased and his colleague, were not before court. He also stated that he did not see the person who was using the big stone to assault the deceased when he got into the club. He also stated that he saw Salome talking to the crowd. And that he saw Onditi assault Salome by pulling her and throwing her onto the seat. He also threatened to kill PW2 together with police officers.

15. He stated that in his statement to the police he never stated that he saw Onditi assault Salome because he expected her to say so by herself. He also stated that in his statement he did not say that he was threatened by Onditi, but that he saw Juma slap one police officer once.

16. He stated that the crowd that was gathered at the club where the deceased's body was, were about 200 but those who beat up the deceased were the 4 accused persons. He identified Nick as a *boda boda* rider.

17. On being cross examined by Mr. Ooro Advocate for the 2<sup>nd</sup> accused, PW2 confirmed recording his statement with the police (*shown his statement*) adding that prior to the writing of the statement, he knew the accused No. 3 as "*Mwalimu*" which is a nick name but that he never mentioned A3 in his statement to the police. He stated that before the incident, he entered the club and found the 3<sup>rd</sup> and 4<sup>th</sup> accused persons inside the club. They were drinking Busaa. He stated that the 3<sup>rd</sup> accused did not have a metal rod when he saw him drinking in the club, but that he later emerged and hit the deceased with a metal rod, while others used stones and clubs to hit the deceased. He reiterated that Nick was a *bodaboda* rider and that they nicknamed the 3<sup>rd</sup> accused "*Mwalimu*" because he used to assist teaching in a local school. He stated that the crowd was wild and did not want to listen to the police so the police decided to leave **the crowd do what they wanted to do.**

18. On being cross examined by Mr. Odongo Advocate for the 4<sup>th</sup> accused person, PW2 stated that on 1/2/2017, he recorded his statement with the police, but that he never mentioned the name of the 4<sup>th</sup> Accused Joseph Ochieng Onyango, albeit he knew Joseph very well. He stated that he saw Juma and his friend assault the deceased, and that when asked them why they were assaulting the deceased they claimed that the deceased had killed Juma's father. He stated that Juma and his friend entered the club but that PW2 never got inside the club with the assailants. He instead stood outside about 20 metres away.

19. He stated that the club was next to the gate and that he saw Salome being assaulted when he was outside but he was pushed outside while the deceased was pulled from the club and taken to the roadside. He maintained that he was at the gate near the road so he saw the deceased being assaulted by the crowd which was over 200 people. He maintained that he saw the deceased being assaulted in the presence of seven police officers.

20. In reexamination, PW2 stated that when he recorded his statement with police, his memory was fresh and that it was still fresh. He stated that he told the police that *boda boda* riders assaulted the deceased, and maintained that the people he saw assault the deceased were before the court.

21. On being asked by the court, PW2 maintained that at the time of recording his statement with the police, he did not say that he knew the deceased's assailant.

22. **PW3, Wilson Ogola Onyango** a businessman and a Busaa Club operator at the Lana Market recalled that on 28/1/2017 at or about 4.30 pm, he had attended a funeral. He then received a telephone call from his employer PW2 **James Onyango** who told him to rush to the club because there was something happening and that PW2 needed help. He stated that he rushed to the club and found a crowd. On inquiry, he was told that a person was hiding inside the club and it was alleged that he was a thief. That the crowd was rowdy and swelling. PW3 called police officers who arrived and spoke to the crowd but the crowd could not listen. The police went away and returned with guns. The crowd continued swelling. The police fired in the air but part of the crowd insisted that they must get out the thief. That the police were overwhelmed by the bulging crowd so they retreated and returned with 2 more police officers from Rutumbu while other police officers came from Yala in a landrover but still they could not manage the crowd even after firing in the air in order to scare them and TO get the suspect to safety.

23. He stated that the said crowd struggled with the club door and broke it, Pulled out the suspect from the club and threw him onto the road. He stated that those who were pulling the suspect were 'Mwalimu' the 3<sup>rd</sup> accused person and Madara the 4<sup>th</sup> accused person. Further, that as they continued pulling the suspect, some people pleaded with the crowd not to kill the suspect as the police also tried to save him to no avail. PW3 then ran away and only returned when the 'suspect' who was dead was being carried away by the police officers.

24. On being questioned by Mr. Kowino Advocate for the 1<sup>st</sup> accused, PW3 stated that he ran away when he saw the deceased being pulled onto the road and only returned when the police were carrying away the deceased.

25. He added that him and James Onyango were outside the club so they could not see who was breaking the door to where the deceased was hiding. He stated that the crowd was charged and were about 200 and not all were wild as others were spectators. Further, that there were 7 armed police officers keeping vigil.

26. On being cross examined by Mr. Ooro Advocate for the 2<sup>nd</sup> accused, PW3 stated that the room where the deceased hid and the club were separate rooms but that from the hideout of the deceased, one could see the Busaa Club. He stated that from where they stood, they could not see what was happening in the said room. Further, that if one was outside the club, they cannot see if the deceased was being beaten. He stated that in his statement with the police, he never mentioned the name of the third accused "mwalimu" but that he mentioned some names of persons that he knew.

27. On cross examination by Mr Odongo Advocate, PW3 stated that when he was called by James, PW2, he found him outside the club and that they could not access the inside of the Club. He stated that Juma was also present.

28. PW4, NO. 233456 Chief Inspector Kirwa Tarus stationed at Yala Police station testified that on 16/2/2017 immediately he reported to the Yala Police Division, he was requested by Inspector Kahiga to conduct an identification parade of suspects held at Siaya Police Station. They proceeded to Siaya Police Station and made arrangements for the identification following the force Standing Orders. He informed suspects why he was conducting the parade identification and each of them conceded to participate. That members of the parade fitted the description of each accused person in height and physique. He conducted the parade one at a time and as per the parade identification forms which he identified in court. He stated that at 3.30 pm, he conducted an identification parade on one Nixon Ochieng Opondo. That he had 8 members of the Parade and witnesses so he asked the accused on where he wished to be placed and he chose to be between number 5 and 6 and the 1<sup>st</sup> witness identified him by touching his shoulder. He stated that witnesses were accommodated at the Police Canteen before and after identification parade, they were kept at the police garage.

29. That after the first witness had identified him, the 1<sup>st</sup> accused selected to stand between No. 2 and 3 and the 3<sup>rd</sup> witness identified him. That on the 4<sup>th</sup> witness, he chose to remain in the same position and so was for the 5<sup>th</sup> witness. That he asked the witness if he was satisfied with the manner the identification parade was conducted and he said he was satisfied. PW4 produced the Police Identification parade as PEX 1.

30. PW4 then followed the same procedure and conducted an identification parade for the 2<sup>nd</sup> accused who chose to stand between number 5 & 6. That the 1<sup>st</sup> witnesses never identified the accused. The accused chose to remain in the same position for the 2<sup>nd</sup> witness who positively identified him by touching. For the 3<sup>rd</sup> witness the accused went to position 4 and 5 and he was positively identified by touching. The 4<sup>th</sup> witness came in when the accused was between 6 and 7 and the witness positively identified the accused by touching the shoulder.

31. On the 5<sup>th</sup> witness, the suspect was between 1 and 2 and was positively identified by touching on the shoulder. He asked the accused if he was satisfied with the conduct of the parade ID and he responded in the affirmative. PW4 produced the identification parade for the 2<sup>nd</sup> accused as PEX 2.

32. PW4 also arranged for identification of Abraham Onyango Oginga using 8 members of the parade. When the 1<sup>st</sup> witness came, the suspect was positioned between 7 & 8. The witness could not identify him. The suspect chose to remain in the same position and was identified by the 2<sup>nd</sup> witness by touching, when the 3<sup>rd</sup> witness came in, the suspect was between 5 & 6 and was positively identified by touching. That the fourth witness came in when the suspect was between No. 1 and 2 and he positively identified the suspect by touching and he said the suspect held his hand during the incident. The 5<sup>th</sup> witness identified the accused at the same position between 1 and 2 by touching. When he asked the accused if he was satisfied with the conduct of the parade and he answered in the affirmative. He produced the Parade Identification form as Exhibit 3.

33. Later at 4.48 pm PW4 conducted an Identification parade on Kennedy Ooko Odongo. He had 8 members of the parade and 5 witnesses. He explained to him the purpose of the Parade and he consented to appear as others before him. Witnesses were accommodated at the same areas before and after the exercise. On the first witness, the suspect was between 6 and 7. He chose to remain there throughout the parade

and no witness identified him, he said he was satisfied with the parade. PW4 produced the ID form as Exhibit 4. He thereafter handed over forms to the Investigating Officer. He identified all the accused persons as the suspects he conducted identification parade on.

34. On being cross examined by Mr. K'owino for 1<sup>st</sup> and 2<sup>nd</sup> Accused, PW4 stated that when he conducted the ID parade he could not tell how long the suspects had been in custody. That the other members of the parade were prisoners in custody and other members of the public and that he could not tell how many were in custody and how many were ordinary members of the public. He stated that he ensured that the height and physique were close to those of suspects but that it was impossible to get the same resemblance. He stated that he was not told that witnesses came from the same area as the suspects and added that there were remarks on what each witness stated.

35. On being cross examined by Mr. Ooro Advocate for the third accused person, PW4 stated that he signed a Certificate showing compliance with Force Standing Orders. He identified parts A, B, C, D and stated that members of the parade included suspects. He stated that in Part D, there are 8 members of the parade. He stated that the 3<sup>rd</sup> accused was not listed among 8 members of the parade adding ***that an identification parade is for witnesses who do not know the accused but in this case some witnesses said they knew the accused persons but that the police could not exclude them from the ID parade.***

36. On being cross examined by Mr. Odongo advocate for the 4<sup>th</sup> Accused he stated that he could see 3 accused persons on whom he conducted an identification parade. That the 5 witnesses were all the same and that he did not conduct any Identification parade on the 4<sup>th</sup> accused person.

37. **PW5, No. 1987084239 Corporal George Henry Ogola** from Mutungu AP Post recalled that on 8/11/2017 he was in the camp at 5pm when he was called by his boss from Yala DAPC and directed to go and deal with an issue at Yabeda Post, he left in the company of APC Judy Adhiambo and on arrival at Yabeda Lana Stage they found people gathered. On inquiry he was told of a suspect who had locked himself in a house and the public were baying for his blood. He was shown the hideout and found a suspect. He begged the public and requested them to allow him to arrest the suspect but they refused saying every time they allowed suspects to be arrested, they were released. That when the mob saw a vehicle with police from Yala, they became more rowdy, pulled out the suspect and killed him. The police removed the body to Yala. He identified the accused persons as the people who were baying for the blood of the deceased, and that he spoke to the 2<sup>nd</sup> and 4<sup>th</sup> accused persons as he knew them and that they killed the deceased using clubs, stones and fists. He identified a big stone MFI as the one used to kill the deceased.

38. On Cross Examination by Mr. K'owino for 1<sup>st</sup> and 2<sup>nd</sup> Accused, the witness stated that in his statement to the police he never mentioned the weapon used by accused to kill the deceased. He stated that he knew some of the accused persons and members of the public that he found at the scene for over one year. That includes the 2<sup>nd</sup> accused herein. He stated that the crowd was big of over 50 people.

39. On being cross examined by Mr. Odongo for the 4<sup>th</sup> Accused, the witness stated that he saw accused No. 2 and No 4 who were known to him for over 1 year and that he recorded his statement saying he knew them by appearance although he did not describe the two accused persons' appearances. He stated that although he arrested the 4<sup>th</sup> accused person, he did not state that he arrested the 4<sup>th</sup> accused when he wrote his statement with the police.

40. **PW6, No. 2011312304 APC Nicholas Muriithi Maruta.** Attached to Yabeda AP Post Yala Division recalled that on 28/1/2017 he was in the camp, when he received a call from one Mr. Ogola a Club Manager saying some people were arguing at Lana Centre in his club. PW6 notified his Commander CPL Ojwang and they proceeded to the scene. On arrival, they asked to find out what was happening. He stated that Fred faced him with my Commander wanting to fight the two so they shot in the air to scare them. He stated that Fred was not one of the accused persons. PW6 then called his DAPC Gem, Wafula who sent reinforcement of 2 officers. He stated that the more the crowd saw more police come, the more rowdy they became. Sergeant Kamau and 2 other officers joined to assist but the crowd became more rowdy. Nicholas picked a metal rod and Abraham brought another metal rod, Patrick picked a rungu, overpowered the police officers, broke the door, removed the deceased whom they later learnt was Nyamwaya, cut him up, beat him up and pierced him. Ochieng Onyango lifted the stone, [MFI 1], danced with it and hit the deceased on the head. The deceased died and his body was taken to Siaya.

41. **According to PW6,** The first accused had a rungu which he used to beat the deceased and that PW6 was 20 metres away from him so he could not identify what part of the body the accused hit the deceased. That the 2<sup>nd</sup> accused used a metal rod and so was the 3<sup>rd</sup> accused. The 3<sup>rd</sup> accused used the iron rod to pierce the deceased with while the 4<sup>th</sup> accused lifted a big stone and hit the deceased on the head. PW6 was later asked to record a statement and he went to Siaya Police Station and identified Nicholas, Patrick and Abraham.

42. On being cross examined by Mr. K'owino Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Accused, the witness stated that prior to this incident he knew Nicholas a boda boda person while Patrick was a worker in a farm tending to cattle. That he used to see the said accused persons at Nyabeda. He added that he started living in Nyabeda in August 2016 while the incident took place in January 2017. He also stated that upon his arrival at the scene, there were very many people who repulsed the police who were trying to rescue the deceased. They were about 50-100 in number.

43. On cross Examination by Mr. Ooro Advocate for the 3<sup>rd</sup> Accused, the witness stated that as at the date of the incident he had known accused persons by single names and that he knew the 3<sup>rd</sup> accused as "Mwalimu" which was his nickname. He however stated that in his statement which he recorded on 1/2/2017 he never said, "it was Mwalimu." He stated that he inquired of their names that is why he wrote their 3 names in his statement.

44. On being cross examined by Mr. Odongo Advocate for the 4<sup>th</sup> Accused, the witness stated that when he arrived, he found fewer people but it swelled and became rowdy. He also stated that the deceased was killed beside the road which was about 8 metres from the shop where he had locked himself in and that the road is next to the shop. He denied arresting the 4<sup>th</sup> accused or identifying him at a parade identification.

45. **PW7, No. 236014 Inspector Bagle Khaika** attached at Yala Police Station investigated the case. He recalled that on 28/1/2017 after receiving information from Lana in Nyabeda sub-location that there was a suspect almost being lynched by the public, they proceeded to the scene and found APs from Nyabeda and Mutumbu. They found the suspect now deceased locked up in a room next to Busia Road Busaa Club. The crowd was very huge and uncontrollable. The public broke the door of the room, removed him therefrom and administered mob injustice. The body was moved to Siaya Level 4 Hospital for an autopsy and investigations commenced and on 9/2/2017 some suspects were arrested and brought to court on the same day. Another suspect was arrested on 2/6/2017 and brought to court on 5/6/2017. He produced exhibit 5, a stone which was allegedly used by one of the suspects to hit the deceased .

46. On being cross-examined by Mr. Kowino advocate, the witness owned up that he never went to the scene and that he was briefed by officers who went to the scene of crime.

47. On cross examination by Mr. Odongo Advocate, the witness stated that the stone was recovered on the date of the incident by Sergeant Kamau. Further, that the crowd was big and so they held an identification parade but not for the 4<sup>th</sup> accused person because he was very well known and seen by people well known to him. He stated that they only perform Identification parades if they have doubts as to the identity of the suspect(s).

48. In reexamination, he stated that the stone was recovered by an eye witness at the scene although he had not testified.

49. **PW8, Doctor Allan Rapul** a Medical Doctor at Siaya Referral Hospital produced a post mortem report by Dr. Hassan Abdifatah who had since left Siaya Hospital for Garrissa County and who was very well known to the witness as they were in medical school together and worked together at Siaya Referral from 2015-2017 for about 1½years in the same department so he was conversant with his handwriting as contained in the autopsy report of Ismail Nyamwaya carried out on 9/2/2017 at Siaya Referral Hospital.

50. On general observation of the body, the deceased was an African male, 30 years old and well-nourished with well-built body, a height of 5'8". The post mortem changes had set in but the body was well preserved. Time of death could not be determined due to preservation of the body. He stated that Formalin changes the body so postmortem should be done prior to preservation. On external appearance of the body, there was no cyanosis (discoloration of skin due to lack of oxygen). There was a cut wound on the left side of the skull at the back of the skull towards the left meaning ≈6.2cm. The right humerus, ulna and radius had multiple fractures, the jaw bone had fractures, a deep cut on the right side of the mouth. On internal appearance of the body.

- **Respiratory system had multiple fractures of ribs on right and left sides of chest cavity. On the right side, rib 7-9 on the left side, rib 5-8. On the cardiovascular system, there was no abnormality.**

- **The digestive system had no abnormality.**

- **Genitals - no abnormality**

- **On the head, there were multiple fractures of occipital and frontal bones.**

- **Nervous system - no abnormality.**

- **On the spinal column - no abnormality was detected.**

- **No abnormality on the spinal cord.**

51. As a result of the examination conducted, it was found that the cause of death **was internal bleeding due to the multiple injuries to the head.** A death certificate No 0056275 dated 9/2/2017 was issued by Dr. Hassan. He signed the Post Mortem Form. The witness produced the Postmortem report as PEX No. 2.

## **DEFENCE CASE**

52. On being placed on their defence, the 3rd accused person testified on oath as DW1 and stated that he was Abraham Onyango Obunga from Lana Market, Nyabeda sub-location and a former teacher at Miro Primary School. He denied committing the charge and stated that on 28/1/2017 at about 5pm, he was in his rental house at Lana Market when he heard noise from outside. He got out and realized that the noise was coming from a certain Busaa Club and that out of curiosity, he rushed to the direction of the club and found members of the public gathered outside the club. He enquired from them and they told him that there was a suspect who the public wanted to lynch. DW1 stated that he tried to establish who the suspect was but nobody gave him his identity. That he actively queried members of the public who wanted to lynch the suspect. He denied being a participant in beating the suspect. PW6 claimed that he saw me carrying an iron rod on that day. He denied carrying any weapon from his house or picking any at the scene.

53. On being cross examined by Mr. Okachi SPPC for the Republic, DW 1 stated that it was nearing dark but it was not dark. He stated that he saw some of the people at the scene who were beating the deceased but were not arrested and or charged before the court. He stated that he could have called his grandmother as a witness but she had since died.

54. The 4<sup>th</sup> accused Joseph Ochieng Onyango testified as DW2 and stated that he did not kill the deceased. That on the 28th January 2017 he was in his room. That he was arrested on 2/6/2017 at about 6.00 am in the morning and escorted to Mutumba Police Camp then to Yala Police Station where he saw the Investigation Officer (I/O) who told him that he had a statement saying the accused person had killed Ishmael Nyamwaya. He denied being present when the deceased was killed.

55. He denied knowing PW2, Wilson Ogola and CPL George Henry Ogola who claimed seeing the accused at the place where the deceased was being assaulted. DW2 also alleged that the Investigating Officer asked him for a bribe of Kshs. 50,000/= but when he declined is when he charged the accused and so the accused decided to come to court so that his innocence is determined.

56. The first accused person Patrick Stephen Madara testified as DW3 and denied committing the offence charged. He recalled that on 28/1/2017 at about 3 pm he was taking firewood to a customer by the name Patrick Oyugi Omollo and that he passed through Lana Market center but that he never saw anything unusual. That when he reached Oyugi's home, we started arranging for him the firewood and took about 40 minutes then he heard noises at the Lana Market and him and Patrick Oyugi Omollo went to find out what was happening.

57. That On reaching the tarmac road, they saw a police vehicle and on inquiry they were informed that a thief had been killed at the Lana centre so the police had come to collect the body. He saw about 200 people. He went his way as Oyugi returned to his home. He was surprised to be arrested in connection with the deceased's death and denied being at the place where the deceased was killed.

58. On being cross examined by Mr. Okachi for the state, DW3 reiterated his evidence in chief and denied knowing Roselyne Salome Ouma or James Otieno Onyango saying that the latter lied if he told the court that he saw DW3 at Lana market on the material date. He also denied knowing PW5.

59. **DW4 Patrick Oyugi Omollo** testified on oath that he knew Patrick Madara, the 1<sup>st</sup> Accused. He recalled that on 28/1/2017 he had asked Madara, the 1<sup>st</sup> Accused to supply him with firewood at his home. That DW3 arrived at the home of DW4 at about 4 pm and that they were together until about 5.15pm offloading firewood after which he escorted DW3 and enroute they heard noises from Lana Market. As they progressed, they met about on asking the people, they were informed that a person had been killed at the busaa Club at Lana Market and that the police vehicle had come to collect the body. The rest of his testimony reiterated the evidence adduced by DW3.

60. On being cross examined by Mr. Okachi counsel prosecuting, DW4 reiterated that DW3 had brought him a supply of firewood and maintained that he was with DW3 when they received information that a person had been killed at Lana Market a Busaa Club.

61. **DW5 Nickson Ochieng** Opondo testified and recalled that on 28/1/2017 at about 3 pm he was doing his usual boda boda work of carrying a customer and that he rode her to Lana stage. On arrival at the Lana stage the customer alighted and paid him. He looked for change as she waited for a matatu. That he heard noise from Lana Market so he went to find out and on arrival he found very many people beside the club and near the rough road. On inquiry he was informed that a person had been detained on suspicion of being a thief. That he received a telephone call from a customer so he sought clearance of the route for him to leave. He turned towards the stage while horning. Many people were at the club. He went and picked Nyaugenya and that when he reached the club, people were talking in groups. He made inquiries about the alleged thief and he was told the suspected thief had been killed. That he went with his customer and when he returned, he found the deceased's body already taken away so he continued with his work. On 9/2/2017 he was arrested. He denied killing the deceased.

62. On being cross examined by the prosecution counsel, DW5 stated that he was at Lana market as a motorcycle rider at about 5pm and that he did not know the name of the customer who called him to go and pick him. He stated that he picked the customer at Nyabeda at a funeral, taking him to the stage and that Nyaugenya Ben also called seeking a ride and he went for her. He stated that on being arrested, his phone remained at home. He also denied knowing the deceased Ishmael Nyamwaya or James Onyango. He stated that pw5 SAID Lies about him.

## SUBMISSIONS

63. The advocates for the accused persons filed written submissions urging this court to find that the prosecution did not prove their case against the accused persons beyond reasonable doubt and acquit them. Of significance was the submission that the witnesses who claimed to have witnessed the incident never gave the names of the suspects to the police yet they alleged in their testimonies that they knew the accused persons prior to the incident. Further, that it therefore follows that the so called identification parades were a nonstarters and non-consequential.

64. The prosecution did not submit.

## DETERMINATION

65. I have considered the evidence adduced by all prosecution witnesses and the respective defence cases. I have equally considered the submissions by counsel for the accused persons. There is no dispute that a life was lost as shown by the post mortem report produced in evidence as an exhibit. The only question is who killed him and whether all elements of murder namely, *actus reus*, *mensrea* and malice aforethought are proved beyond reasonable doubt.

66. The prosecution witness PW1 was clear that none of the accused persons were at the scene of crime and neither did she see them assault the deceased.

67. PW2 stated that he saw the accused persons assault the deceased and so did PW3, 5, 6. However, they stated clearly that they never mentioned to the police the names of the accused persons whom they saw assault the deceased. PW4 conducted identification parades but he was clear that the witnesses knew the suspects before the incident, which then renders identification parade a worthless exercise.

68. The police officers who went to the scene to rescue the deceased but were repulsed never gave any description of the appearances of the accused persons herein. They were clear that the mob was big and chaotic and the investigating officer did not tell the court how he arrived at charging the accused persons herein having received information that the crowd was very huge and uncontrollable and that the mob broke the door to the room, removed the deceased and administered mob injustice. The investigating officer never mentioned that the witnesses told him that they saw the accused persons herein break into the club room remove the deceased and administer mob injustice on him. He

produced a stone but there was no full proof evidence that it was the stone used and by who to kill the deceased.

69. The accused persons could have been at the scene but there is no sufficient evidence to show that they were the persons who killed the deceased. There is evidence that the crowd which was gathered baying for the deceased "suspect" was so large, between 50 and 200 people. The prosecution witnesses who testified stated that although they attended a parade identification parade for the 1<sup>st</sup> to 3<sup>rd</sup> accused persons, they knew the said accused persons prior to the incident.

70. The case of *Simiyu & another v Republic [2005] 1 KLR 192* espouses the principle that there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises.

71. In *Republic v Alexander Mutwiri Rutere alias Sanda & others – H.C.C.R.C No. 15 of 2001*, it was held that **if a witness is known to an accused but no name is given to the police, then a subsequent giving of the name is either an afterthought or the evidence given is not reliable.** See also *Lesaran – v- R (1988) KLR 783*.

72. Thus, the critical factors which are relevant in this case are three namely: what is the legal consequences of the failure by the prosecution witnesses who included police officers who went on a rescue mission and who knew the accused persons before the incident but they did not give the names or description of the accused to the police or to indicate the names or description of the appellants in their statements?; second, what is the legal consequence of failure to give names or description of a suspect at the earliest opportunity; and third, whether the identification parade that was conducted was proper considering or significant, considering that all the identifying witnesses claim to have known the suspects prior to the alleged commission of the offence.

The High Court in the *Simiyu*[supra] case in considering the issue of failure to give the names of suspects at the earliest opportunity expressed itself as follows and I concur:

***“It cannot be either an absolute rule of law, evidence or precedent that in order for the evidence of the complainant to be free from the possibility of error, that the complainant or victim must mention the name or names of suspects in the first instance when reporting the incident to the police or other authority such as the local headman, elder or chief. In our view, the effect of non-disclosure or failure to name the suspects in the first instance must be weighed against the entire evidence of the complainants or victims vis-à-vis that of the defence or the accused.”***

73. In *Wamunga v Republic (1989) KLR 424* it was stated that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

74. Police identification parades are conducted for those people who could not be identified at the time the offence took place. If the witnesses told the police that they knew the accused persons prior to the alleged murder, in my humble view, the identification parade was inconsequential. See also *Charles Gitonga Stephen v Republic [2006] e KLR*.

75. In *George Bundi M'Rimberia v Republic, Criminal Appeal No. 352 of 2006*, it was stated that a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence.

76. In my humble view, failure by the prosecution witnesses who purported to identify the accused persons at a parade identification to give or mention in their statements to the police the names of the accused persons as the people they had seen assaulting or baying for the blood of the deceased weakened their testimony. Being persons known to them, these prosecution witnesses should have given the names or description of the appellants as was stated in the cases of *Moses Munyua Mucheru v Republic, Criminal Appeal No. 63 of 1987* and *Juma Ngondia v Republic, Criminal Appeal No. 13 of 1983* and *Peter Njogu Kihika & Another v Republic Criminal Appeal No. 141 of 1986*.

77. Further, in *Lesarau v Republic, 1988 KLR 783*, the Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In *R v Turnbull (1976) 3 All ER 551*, Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.

78. In *R – v- Alexander Mutwiri Rutere alias Sanda & 8 others* (supra), the High Court observed that:

***“PW1 and PW2 and several other witnesses claimed they gave the names of the attackers whom they claimed to know before the incident to the police; the Police Occurrence Book did not have any entry of the names of the attackers, ... a reasonable conclusion is that the names of the accused persons were not given because they were not known by the witnesses who therefore lied before the trial court.”***

79. In the *Simiyu & another v Republic [supra]* case, the Court faced with facts similar to the instant case expressed itself as follows:

***“If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them” In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R – v- Kabogo s/o Wagunyu 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a***

*perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe.... Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification.... In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory."*

80. Further, in *James Omondi Onyango v Republic, Criminal Appeal No. 27 of 2012*, the court observed as follows:

***"If indeed Otieno and Odongo had recognized the appellant at the scene as they alleged in their evidence, why was the name not given to the police when Otieno reported the matter the next morning."***

81. The Court further held that:

***"On our part, we are persuaded by the High Court dicta in R – v- Alexander Mutwiri Rutere alias Sanda & 8 others (supra) and we apply the decision in Simiyu & another – v- R (supra) and James Omondi Onyango –v- R (supra) to the facts of this case. The failure by the High Court to consider quality of the evidence of identification of each of the appellants; failure to weigh that the complainants knew the appellants prior to the alleged incident yet no name or description of the appellants was given to the police by PW1, PW2, PW3 and PW4 leads to our finding that the learned Judges erred in law in re-evaluating the quality of evidence on identification; the Judges erred in that there was no exhaustive appraisal of the evidence tending to determine whether each appellant was connected with the commission of the offences. We find that the identification evidence was not proper and safe....[Emphasis added].***

82. From the prosecution evidence as a whole, and based on the above case law, I am unable to find that the prosecution proved its case against all the accused persons for the offence of murder to the standard required by law. I find and hold that the accused persons were not properly identified as the persons who assaulted the deceased thereby occasioning him fatal injuries. The accused persons are found not guilty of the offence of murder and I acquit them under section 324 (3) of the Criminal Procedure Code and discharge them from the Information of Murder.

83. Accordingly, all the four accused persons are hereby discharged from the Information for murder. They are set at liberty unless otherwise lawfully held.

84. Orders accordingly.

**Dated, signed and delivered at Siaya this 22nd day of January 2020**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Okachi Senior Principal Prosecution Counsel for the State

Mr. Ochanyo h/b for Mr. Kowino Advocate for the 1<sup>st</sup> and second Accused, for Mr. Ooro Advocate for the 3<sup>rd</sup> accused and for Mr. Odongo Advocate for the 4<sup>th</sup> Accused

All accused persons present

CA: Brenda and Modestar