



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE NO. 46 OF 2014
(FORMERLY KISII HCCRC NO. 96 OF 2013)

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID OCHIENG AJWANG alias DAUDI.....1ST ACCUSED
ERIC OTIENO OJWANG alias FORD2ND ACCUSED
NICHOLAS OTUNGA OTIENO alias ONEKO3RD ACCUSED
BERNARD SAMUEL MBOYA alias BERNARD HUSSEIN4TH ACCUSED
DANIEL OWINO OGANYO5TH ACCUSED
JULIUS MAKAMBO OBADE6TH ACCUSED
KENNEDY KISA OMWERI7TH ACCUSED
JULIUS OTIENO DEYA alias OGENDO8TH ACCUSED
JANES OGALO OKETCH OLENDO9TH ACCUSED
JOSEPH ODHIAMBO MAJIWA alias JOSY10TH ACCUSED
JOSEPH KEYA OMWERI11TH ACCUSED
PAUL KOI ODEKO12TH ACCUSED

JUDGMENT

1. The 12 accused persons, **DAVID OCHIENG AJWANG** alia **DAUDI** (A1), **ERIC OTIENO OJWANG** alias **FORD** (A2), **NICHOLAS OTUNGA OTIENO** alias **ANEKO** (A3), **BENARD SAMUEL MBOYA** alias **BENARD HUSSEIN** (A4), **DANIEL OWINO OGANYO** (A5) **JULIUS MAKAMBO OBADE** (A6), **KENNEDY KISA OMWERI** (A7), **JULIUS OTIENO DEYA** alias **OGENDO** (A8), **JANES OGALO OKETCH OLENDO** (A9), **JOSEPH ODHIAMBO MAJIWA**

(A10), JOSEPH KEYA OMWERI (A11) and PAUL KOI ODEKO (A12) were charged with three counts of murder contrary to **section 203** as read together with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The information stated that on 12th August 2013 at Nyarongi sub-location in Migori County they jointly, with others not before the court, murdered **ELIKANA GONDI SYONGOHO (“Syongoh”), MOSES MAGIRI AMEK (“Amek”) and SIMON GOMBE KALKACHA (“Gombe”)** (all collectively referred to as the ‘‘deceased’’ where the context admits).

2. A synopsis of the case is as follows. Syongoh, who used to work in Nairobi, had come to Migori to deal with his business affairs. On the evening of 12th August 2013, he went with his driver Amek to Migingo Village, Nyarongi. The purpose of the visit was to purchase quail. Gombe, who was from the area, accompanied them and directed them to the local seller. As they were leaving, word spread in the village that they were cattle thieves. People raised alarm and several villagers, including the accused, waylaid the vehicle and forced the driver to go to Migingo centre. While at the centre they were forced out of the vehicle, assaulted severely and then set on fire. The accused were thereafter arrested and arraigned in court for murdering the deceased. After the accused pleaded not guilty, the prosecution marshalled 23 witnesses to prove its case. The evidence emerging was as follows.

3. On 12th August 2013 at about 8.00pm, the deceased visited **Nerbert Lubanga (PW 2)** to buy quail. He sold them 8 birds and escorted them out of his compound. PW 2’s wife, **Vinike Gashiara (PW 8)**, who was present at the time, confirmed that two visitors came to visit. She knew one of the visitors, Gombe also known as Moi, as he came from the area. PW 8 testified that PW 2 saw them off. She further recalled that **John Ojok Deyangwa (PW 1)** and **Peter Onyango Makambo (PW 7)** came to their house later to get PW 2. She further stated that PW 2 returned later in a state of shock.

4. PW 2 recalled that while escorting the visitors, he met one Ngesa who inquired about his visitors as people were claiming that they were cattle thieves. Ngesa seemed to know Gombe and the two conversed for a while and he left. In the meantime, PW 2 escorted them to their car and returned home. As he was walking back home, he started hearing screams from Migingo. Since he was with his children, he decided to drop them home. PW 1 and PW 7 arrived at his home and told him to go and assist his visitors who had by that time been removed from their vehicle. He proceeded with PW 1 and PW 7 towards the scene. As they approached the scene, they met some people who got hold of him and started beating him. As someone was trying to force him to sit down, another person pushed him and he fell and rolled into the nearby bushes whereupon he fled the scene. PW 2 told the court that he recognised the people he had sold quail to earlier seated next to a vehicle.

5. On that fateful evening, PW 1, who was living near Migingo centre, recalled that he heard screams coming from the Centre. He rushed there and saw a car, with head lights on, coming from the direction of the local school with a group of people following it and others using stones and logs to barricade the road. He enquired from the group why they were barricading the road and was informed that the people in the car were thieves. Among the people who were following the vehicle were A1, A3, A5 and A10. PW 1 testified that the driver of the car was driving at a slow pace while trying to evade the barricades. He saw A1 cut the left hand of the driver with a panga. The driver nevertheless continued driving until he stopped the car at the junction of the main road headed to Migori. After the car stopped A10 began pulling the driver and passengers out of car with the help of A3. The crowd present began beating them indiscriminately. PW 1 told the court that A1, A2, A4 and A7 were involved and that they used rungu, stones and pangas to assault the deceased.

6. As the crowd was very hostile, PW 1 decided to go and call PW 2 as the deceased claimed that they had come from his home to buy quail. He met PW 2 and they left together in the company of PW 7, the son of A6, to go to the scene. While on the way, they met with some people who frogmarched PW 2 to the scene where they began beating him and accusing him of conniving with the deceased to steal cattle. A2 was among those who assaulted PW 2 who, however, managed to escape.

7. PW 1 further testified that as the beatings continued, the deceased tried to escape. Amek tried to run but A2 cut him with a panga on the waist while A5, A7, A10 and others dragged him back to the vehicle. Syongoh also attempted to run but A1 struck him with a panga on the back while other people beat him

with rungu. He got weak and was carried back to the vehicle. Gombe ran into a neighbouring homestead and the crowd followed. PW 1 also followed them into the homestead. The crowd caught up with Gombe, A12 tied him with a rope and dragged him back to the scene where the beatings continued. A2 hit him on the head with a rungu with a bolt and he fell. He tried to raise his head but A2 hit him on the head again and he collapsed.

8. PW 1 further told the court that when the deceased three were all down, the mob attacked the vehicle, they removed two batteries from the car bonnet, two jackets from the passenger seat and a pair of open shoes and then set it on fire. They then gathered twigs and grass heaped the deceased together and set them on fire.

9. **Peter Kaugwe Kalkacha (PW 3)** recalled that on that evening, at about 7.00pm, he had met his brother, Gombe, with Syongoh and Amek as they passed by to go and purchase quail. While having dinner, he started hearing alarm in the village. When he went out, he noted that the screams were coming from the direction of PW 2's home. He called Gombe who told him that they were being accused of stealing cattle. PW 3 took his panga and went to call his other brother **Stephen Ademba Kalkacha (PW 4)** and they hurried to where the screams were coming from. They found Gombe, Syongoh and Amek seated by the vehicle. He recalled that Gombe had been hit on the head, Syongoh had been cut on the left hand and Amek had been cut on the right hand. PW 3 tried to speak to Gombe but A3 and A5 threatened him and told him to leave the scene. A8 held a spear, he tried to spear Gombe but was restrained.

10. To save the situation, PW 3 decided to go and call PW 2 to confirm that the three deceased had come to purchase quail. On the way with, he met PW 2 coming to the scene. When PW 2 arrived at the scene A2 hit him with a rungu but PW 2 managed to escape. PW 3 told the court that he saw Amek and Syongoh trying to run away but they were caught. Gombe escaped and ran into a nearby homestead where he was flushed out. PW 3 told the court that he saw A12 dragging Gombe with a rope while he was being beaten by other assailants. PW 3 became afraid and left for home. He later decided to go back to the scene with another brother to see what had transpired and on the way, they met A9 who told them that Gombe had been killed together with the rest.

11. PW 4 recalled that on the material night he heard alarm in the village. He met his brother, PW 3, and they proceeded to the scene where he saw three people seated next to a car with lights on. He recognised his brother, Gombe, and Syongoh but not the third person. When they got to the scene with PW 3, he saw A10, A3, A6 A8 and another person conversing. When he tried to get near, A3 threatened to cut him and so turned and went to stand behind the crowd. PW 4 told the court that A6 moved towards the deceased and cut Syongoh with a panga on the head. Amek tried to run but he was caught, brought back and beaten. PW 4 identified A2 as one of the people who cut him with a panga. He further testified that Syongoh tried to run away but before he crossed the road he was beaten and brought back. He stated that A2 hit Syongoh with a panga and another assailant speared him on the left side of the abdomen. PW 4 testified that he was so afraid that he fled the scene. Later PW 3 called him and informed him that Gombe and the rest were dead. The next morning, he met A10 who told him to go and bury his brother and threatened him about making a statement with the police.

12. One of the residents of Migongo centre, **Peter Auko Obiayo (PW 5)**, responded to the alarm that night and when he went out he found three people sitting by a double cabin car with headlights on. He met PW 3 and talked to Gombe who told him that he had come with his boss to buy quail from PW 2. At the scene, he was informed that some people had gone to look for PW 2. He left the scene to go and close his shop. **John Adebe (PW 6)** was also at the scene but he told the court that he was not able to identify the people beating the deceased.

13. The Chief of Suna Otacho Location where Migingo is located, **Tobias Oloo Oloo (PW 9)** testified that after he received news about the incident, he asked his brothers to accompany him to the scene. He called his superiors including **Festus Kiambi (PW 19)**, the District Criminal Investigation Officer (DCIO). When PW 9 arrived at the scene, police officers including the Commanding Officer (OCS) Migori Police Station were present. He found three burnt human bodies and a burned Double Cabin pickup at the Centre. As the fire was still smouldering, they put it off and removed the bodies to Migori

Level 4 Hospital. By the time he arrived there at about 12.30am, there were no other people apart from the police officers.

14. A friend of Syongoh, **David Otieno Olando (PW 10)**, testified that he had been with him on 12th August 2013. He assisted the Police in identifying the burnt Double Cabin Pick registration number KAQ 603U which belonged to Syongoh. Syongoh's employee, **Willis Opiyo Obondo (PW 11)**, testified that he last saw him on 12th August 2013 when left with his driver, Amek whom he knew as Jakarungu, and Gombe. He assisted the police in identifying one of the jackets won by Syongoh when he left home in the vehicle number KAQ 603 U.

15. **Dr Vitalis K'Ogotu (PW 16)** testified that he examined the accused and confirmed that they were mentally fit to stand trial. He also performed a post mortem on the body of Amek at the Migori District Hospital Mortuary on 15th August 2013 after it was identified by **Caleb Amek Aluoch (PW 14)** and **Jombo Aluoch Otieno (PW 15)**. PW 14 told the court that he mistook the body the first time but he was later able to identify his son through his face as it was not disfigured. PW 16 noted that the body had deep burns with a fracture of the feet from the ankle due to burns and that the other parts of the body were severely burnt although the left part of the face was recognizable. He observed two deep cuts on the back and another cut wound about 10cm in length and 5cm deep cutting through the spinal vertebra and severing the spinal cord. The skull had 5 deep cuts and two penetrating wounds and there was intracerebral haemorrhage. PW 16 reached the conclusion that the cause of the deceased death was cervical spinal cord injury secondary to assault.

16. Before the post-mortem was conducted by Dr Ndege, Syongoh's body was identified by **Zacharia Masaka Odingo (PW 12)** and **Omwiti Johnson Wa Syongoh (PW 13)**. They stated that they identified the body by the teeth formation and the appearance of finger nails. **Dr Obuon Dennis Odiwuor (PW 21)** produced a post-mortem report prepared Dr Ndege under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. Dr Ndege's observations were that the body was charred except the palms due to 4th degree burns. He noted that the deceased had a skull fracture at the back of the head, there was a penetrating injury near the nose dislodging the upper incisors, the right tibia was split with sharp edges and the lower part of the tibia missing. He further noted that there was fracture of the right ankle joint and the whole right foot was mangled. Dr Ndege concluded that the cause of death was the result of multiple body injury secondary to a mob attack before being burnt.

17. **Dr James Amenga (PW 23)** conducted the post mortem on the body of Gombe after it was identified by **Tito Chakuza Kabuye (PW 17)** who told the court that he identified Gombe through his genitalia as he was circumcised. PW 23 observed that Gombe's body was charred and burnt beyond recognition due to 4th degree burns. The skull was open and brain tissue missing with sharp edges indicating deep cuts. The forearms were mangled with missing hand digits. The right knee joints were exposed with sharp cut edges. He stated that from his observations, PW 23 concluded that the cause of death was multiple, blunt and deep penetrating injuries before being burnt.

18. The investigating officer, **Chief Inspector Evans Sang (PW 20)**, testified that he received instructions from PW 19 to conduct investigations into the three murders. He recorded several statements from the various witnesses, collected exhibits and accompanied the bodies for post mortem. PW 20 was also able to recover the two jackets that were stolen from scene from A 11. PW 11 identified the jacket found in possession of A11 positively as one belonging to Syongoh and one which he took with him on the day the day he was killed. One of the Chloride Exide battery from the home A7. The other battery was recovered from the home of another person who had fled the area. Later on, and together with other officers, they arrested the accused persons and arraigned them in court for murder. He told the court that from the statements several suspects were named and some were arrested while others remain at large.

19. **Corporal Benson Igesi (PW 22)** testified that, he accompanied PW 19 to the scene of crime, where he recovered motor vehicle registration Number KAQ 603U and took photographs of the scene. He produced the photographs prepared under his supervision and the vehicle registration plates.

20. After the prosecution closed its case, the court found that the prosecution had made out a prima facie case against all accused and put them on their defence. The prosecution withdrew the charges against the **ERIC OTIENO** alias **FORD (A2)** and **BERNARD SAMUEL MBOYA** alias **BENARD HUSSEIN (A4)** under **Section 87A** of the **Criminal Procedure Code (Criminal Procedure Code)** as they had absconded during the trial and continued delay of the case in their absence would prejudice the other accused.

21. When put on their defence the accused persons opted to give sworn testimony in which they denied any involvement in the deceased's' death. A1 testified that he was far away on the date of the incident and PW 1 only implicated him because there was a land dispute between them. A3 told the court that on the fateful day he was at Macalder in Nyakite where he had gone to sell maize. He stated that PW 1 implicated him because there was a dispute over a road between him and PW 1. A 5 stated that he did not witness the killings and that he was implicated in the whole issue. A6 stated that he was at his home when he heard screams but did not respond to them. He stated that prosecution witnesses implicated him for political reasons. A7 also denied any involvement in the murders. He stated that on 12th August 2013 he was at Osiri building a house and only returned to Nyarongi on 18th August 2013. He also denied that he was caught in possession of any items looted from the motor vehicle. A8 stated that at the time of the incident, he was at his home. He heard the screams but he was down with malaria and too weak to get out of the house hence he was not at the scene. A9 also denied involvement in the killings, he stated that on that day he was away at Maberu attending his in-law's funeral and only returned to Nyarongi on 17th August 2013. A10 also stated that he was away when the killings happened. He told the court that he had to visit his brother in Kisumu and returned to Nyarongi on 16th August 2016. A11 and A12 also denied any involvement in the murder and also denied being caught in possession of any items from the scene of crime. The accused did not call any witnesses.

22. At the close of the defence case, defence counsel submitted that the prosecution had not proved its case beyond reasonable doubt. Counsel submitted that the prosecution case was that alarm was raised and several people rushed to the scene and assaulted the deceased. He posited that it was not possible to clearly point out who caused the death of the deceased from the mob. Counsel further submitted that the prosecution was under a duty to lead evidence as to the intensity of the light at the scene to satisfy the court that assailants were properly identified. Counsel argued that the evidence given by the prosecution was contradictory as some witnesses stated it was dark while others stated that there was sufficient moonlight. Counsel pointed out that the medical evidence was not conclusive as to the cause of death and could not corroborate the prosecution case against the accused. Counsel urged the court to acquit the accused persons.

23. **Section 203** of the **Penal Code** defines murder in the following terms, “*Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.*” To prove murder, the prosecution must establish three key ingredients beyond reasonable doubt: first, the *death* of the deceased and the *cause* of that death; second, that the accused *committed* the unlawful act that led to the death; and third, that the accused committed the unlawful act with *malice aforethought*.

24. The first issue is the fact and cause of death of the deceased. On the material day three people arrived in Nyarongi. Syongoh came with his driver, Amek, to purchase quail from PW 2. He was accompanied by Gombe, who was a native of the village and directed them to the home of PW 2. Syongoh had left home on that morning in his car registration number KAQ 603U which PW 10 confirmed belonged to Syongoh. At the village, PW 2 met Gombe, whom he knew and was introduced to Syongoh who purchased the quail. Before proceeding to PW 2's home, they had passed by PW 3's home who identified the three of them. PW 1, PW 2, PW 3 and PW 4 gave testimony that Syongoh, Amek and Gombe were the persons being assaulted next to the car. The three were confirmed dead and their bodies taken to the mortuary. The prosecution evidence excludes the possibility that any other persons other than Syongoh, Amek and Gombe were killed in Nyarongi on that day. The fact that each of them died was confirmed by the witnesses who identified each of the deceased even though the bodies of Syongoh and Gombe were burnt beyond recognition.

25. The three post mortem reports produced in court by PW 16, 21 and 23 are clear that each deceased

sustained various sharp and blunt injuries on various part of the bodies which supports the prosecution case that they were each assaulted with blunt and sharp weapons before they died and their bodies set on fire. The assaults are buttressed by the collective testimony of PW 1, PW 3 and PW 4 who testified that they witnessed the deceased being assaulted by a mob and later set ablaze.

26. The next and crucial issue in this case is whether it is the accused who caused the death of the deceased by their unlawful acts or omissions. The incident took place at night hence our courts have taken the position that evidence of visual identification, particularly by a single witness, in difficult circumstances should always be approached with great care and circumspection. Such evidence must be watertight before a court can return a conviction (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA166, *Wamunga v Republic* [1989] KLR 42 and *Maitanyi v Republic* [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (See *R v Turnbull* [1967] 3 ALL ER 549, *Ogeto v Republic* [2004] 2 KLR 14). This requirement is, however, relaxed when dealing with cases of recognition because, “*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*” (see *Anjononi & Others v Republic* [1980] KLR 59). However, even in such cases, the court must bear in mind that even where parties had prior or close relationship, mistakes can still be made in identification hence the court must still exercise a level of caution.

27. In addition, the name or description of the assailant given by the complainant is of great importance in weighing the evidence of identification. In *Simiyu & Another v Republic* [2005] 1 KLR 192, the Court of Appeal held that *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 the person or persons who gave the description and purported to identify the accused, and then by the person or persons to whom the description was given.*

28. In considering the evidence, I am also alive to the fact that the evidence shows that when alarm was raised, the villagers responded and swarmed towards Migingo where the deceased were taken, assaulted and set ablaze. In that melee, many people may be identified and mistaken for having been involved in the assault as it is not uncommon in a rural setting, as PW 3 and PW 4 stated, for people to come out of their homes with weapons to defend themselves. Thus, the prosecution must prove that the accused were actively involved in the assault as opposed to innocent bystanders.

29. PW 1 was the key witness, who was present at the scene, when the whole incident unravelled. In his testimony, he stated that A3 and A10 pulled the deceased out of the car and A1, A2, A4 and A7 among others began beating them indiscriminately using runigus and pangas. The deceased tried to escape. Moses ran for about 500 metres but A2 caught up with him and cut him with a panga on the waist and he was dragged back to the scene. When he was returned he appeared dead. Syongoh also tried to escape but A1 cut him with a panga while others beat him with runigus. He was brought back to the scene and he also appeared dead. Gombe also ran to a neighbouring homestead, A12 caught him and tied him with a rope which he used to drag him back to the scene. As he was dragged A9 used a big hammer to beat him. At the scene A2 hit him twice on the head using a nut and he collapsed. When the three were all down the mob attacked the car and later burnt it together with the bodies. This testimony of PW 1 was corroborated by PW 3 and PW 4. PW3 stated that he watched as the crowd chased Gombe and it was A12 who dragged Gombe back to the scene using a rope. PW4 saw A6 cut Syongoh with a panga while A2 cut Gombe. PW 5 admitted, in cross-examination, that he saw Gombe trying to run away.

30. Further evidence adding credibility to the testimony of PW 1 was that items from the Syongoh’s car were recovered from the homes of A7 and A11. They merely denied that they were found with the items. They did not furnish any explanation as to why they had these items nor lay claim to them leading to the irresistible inference that they were at the scene of the incident and that they participated in assaulting the deceased.

31. Were the conditions circumstances of favourable to the positive identification of the accused? When PW 1 first encountered mob following vehicle, it was proceeding to the Migingo. When cross-examined, he told the court he had small torch with an ordinary battery but that at the time the vehicle had the lights on as it was proceeding to the Center. He also stated that it was a dry night with a full-moon and that he was in close proximity when the incident was taking place. PW 2 testified that there was moonlight while PW 3 testified that though it was dark, many people had torches. PW 6, PW 7 and PW 9 all testified that it was a dark night.

32. While this evidence on the light conditions seems contradictory, I note that this case is one of recognition rather than identification of strangers. The witnesses and accused knew each other as they were from the same village. During the incident, the witnesses had the opportunity interact with the accused closely because they knew each other. PW 1 began following the car as it was being directed towards Migingo, he kept asking questions and he was in close proximity with the accused whom he knew. Though the night was dark, the car had the headlights on and the witnesses agree that when people began to gather they had torches. Given the fact that the accused and witnesses knew each other, their close proximity and the time of interaction, I exclude the possibility of mistaken identity.

33. All the accused raised alibis by stating that they were not at the scene on the material day. In my view, their defences lack any merit as the different prosecution witnesses placed them at the scene and even stated clearly what part they played in the whole ordeal and what type of weapon they used to assault the deceased. A1 and A2 stated that PW 1 implicated them because of land disputes however nothing of the sort was suggested to the witnesses in cross-examination hence I find the issue an afterthought.

34. I also found the testimony of PW 1 credible. He was fairly old man and there was no reason for him to lie in order to implicate the accused. Besides, no grudge, ill-will or malice against the accused was suggested to him in cross-examination. In relation to PW 3 and PW 4, who were brothers to Gombe, I am satisfied that their testimony was not coloured by the death of their brother and the need to implicate the accused. I do not find any hint animus against the accused from the evidence of PW 3 and PW 4. On the other hand, a climate of fear had pervaded the village where people known to each other murdered three defenceless people. It is understandable that witnesses would not come forward due to threats and indeed PW 1, PW 2, PW 3 and PW 4 all mentioned receiving threats. PW 20 testified that after the incident there was a lot of tension in the area and witnesses did not turn up when called for interview while other suspects implicated in the matter fled from the area.

35. Counsel for the accused took issue with the written statements recorded by the witnesses at the police station which omitted to state that they identified the accused at the scene. The witness statements of PW 1, PW 2, PW 3, and PW 4 were marked for identification by the defence but were never produced by the accused. PW 3 admitted to some differences in his statement and testimony he gave in court stating, *“There are differences between what I wrote in my statement and what I have testified in court. I have not lied. I was afraid when I wrote the initial statement that is why I did not include everything.”* As the statements were not produced in evidence, I did not have the advantage of reading them. What is clear to me is that the circumstances under which the crime was committed were such that there was grave tension in the village creating a climate of fear particularly for those who would come forward to record statements. Some of the witnesses clearly stated that they had been threatened hence it is possible that the initial statements may not have been comprehensive. Omissions in the original statements of some information including identity of the accused, cannot by itself, be sufficient to reject the evidence given in court particularly given the situation I have described. Having heard all their testimony and observed their demeanour, I am satisfied that PW 1, PW 2, PW 3 and PW 4 were telling the truth despite the threats to their lives. In any case, I find that the evidence, as a whole, weaves a seamless and logical account of what actually transpired on the fateful day of 12th August 2013.

36. Defence counsel also submitted that it was not clear from the evidence who killed the deceased as the mob that attacked the deceased was large and it was not established who hit the accused and administered the fatal blow. In such a case, the doctrine of common intention under **section 21** of the **Penal Code** comes into play. In ***Njoroge v Republic [1983]KLR 197*** the Court of Appeal explained the doctrine as follows:

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

37. The Court of Appeal of East Africa in ***R v Tabulayenka s/o Kirya [1943] EACA 51*** stated in the same vein that common intention may be inferred from the accused presence, their actions and the omissions of either of them to disassociate himself from the assault. All the accused were part of the orgy of violence that gripped Migingo on that night. Each played an active role in bringing the accused to their death.

38. Having analysed the evidence on record, I am satisfied that the prosecution proved beyond reasonable doubt that the deceased died through the unlawful and voluntary actions of the accused persons. From the time word spread in the village, that they had stolen cattle, the accused were part of the mob that barricaded the road, forced Amek to drive to the Center while assaulting him and the passengers. At the Center, the deceased were removed from car forced to sit while they were interrogated and assaulted viciously with pangas, rungas, sticks and stones. Each of the accused participated in the maelstrom of violence. Even when the deceased tried to explain that they were at the home of PW 2, the mob would have none of this. Their attempts to escape from the scene were thwarted as they were forcefully brought back and further violence inflicted on them until they succumbed to the injuries whereupon the now satiated mob proceeded to set them on fire. The accused, who were all present, wilfully participated in the unlawful acts and none of them disassociated themselves. They all acted in concert with common intention to execute an unlawful purpose which had fatal consequences. The savage way the accused inflicted the injuries on the deceased leave no doubt that they were inflicted with intent to cause grievous harm or death. I therefore find and hold that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the ***Penal Code***.

39. I find the accused, **DAVID OCHIENG AJWANG alia DAUDI (A1), NICHOLAS OTUNGA OTIENO alias ANEKO (A3), DANIEL OWINO OGANYO (A5) JULIUS MAKAMBO OBADE (A6), KENNEDY KISA OMWERI (A7), JULIUS OTIENO DEYA alias OGENDO (A8), JANES OGALO OKETCH OLENGO (A9), JOSEPH ODHIAMBO MAJIWA (A10), JOSEPH KEYA OMWERI (A11) and PAUL KOI ODEKO (A12)** guilty of the murder of **ELIKANA GONDI SYONGOH, MOSES MAGIRI AMEK and SIMON GOMBE KALKACHA** and I convict each of them accordingly.

40. I would like to apologise to the parties for the delay it has taken to complete this judgment. I commenced hearing this matter while at the High Court at Migori on circuit from Homa Bay where I was the Presiding Judge. I completed the matter after I was transferred to Kisumu as Presiding Judge. In the intervening period, apart from my normal judicial duties as Presiding Judge, I was also involved in other extra-judicial activities which took me away from my normal duties.

SIGNED AT KISUMU THIS 31st DAY OF MARCH 2017

D.S. MAJANJA

JUDGE

DATED and DELIVERED at MIGORI this 5th day of April 2017.

A.C.MRIMA

JUDGE

Mr Ondari instructed by Sonya Ondari and Company Advocates for the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th accused.

Ms Sagwe instructed by Ochoki and Company Advocates for the 4th accused.

Ms Owenga, Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.