REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 2 OF 2011

LESIIT, J

REPUBLIC …….PROSECUTOR

-VERSUS -

CAROLINE WAMBUI THAIRU ……1st ACCUSED

ELIUD NJIRAINI WAMBUI ……2ND ACCUSED

JACINTA WAIRIMU RUTH…….3RD ACCUSED

JUDGMENT

1. The accused person **CAROLYNE WAMBUI THAIRU,** hereinafter the 1st accused, **ELIUD NJIRAINE WAMBUI** the 2nd accused and **JACINTA WAIRIMU RUTH**, the 3rd accused are jointly charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.
2. The particulars of count I are as follows:

> **"On the night of 21st and morning of the 22nd December 2010 at Dagoretti Centre within Nairobi County jointly with others not before this court murdered JOHN KILONZO"**

3. The particulars of the offence in count 2 are as follows:

> **"On the night of 21st and morning of the 22nd December 2010 at Dagoretti Centre within Nairobi County jointly with others not before this court murdered PETER CHEMJOR"**

4. This case has been heard by 4 judges. PW1 was heard by Mwilu, J (as she then was) PW2, 3 and 4 by Kimaru, J PW5 to 10 by Muchemi J, PW11, 12 and 13 and the defence by myself. There was double numbering of some exhibits.
5. The facts of the prosecution case were that Kilonzo, hereinafter the deceased in count 1 and Chemjor, the deceased in count 2 were great friends according to PW3, wife of deceased Kilonzo, PW6 his father and PW2 his friend and colleague.
6. On the 21st December 2010, deceased Kilonzo was off duty and spent the whole day at home. At

8 p.m. he met PW2 at Mountain View Hotel and Restaurant where they took drinks until 8 p.m. PW2 and deceased Kilonzo proceeded to PW2's home where they ate supper and immediately returned to local pub where they drunk until 10 p.m. At 10 p.m. both of them parted company with PW2 going straight home.

7. PW3, deceased Kilonzo's wife testified how she last saw her husband at 2.p.m. at then home in Dagoretti Market. She left him home. At 8 p.m. when she returned deceased Kilonzo was not home. She waited for him until 9.30 p.m. when she called and spoke to him and to PW2's wife. She called him at 11.30 p.m. but he did not respond. In the morning at 5 a.m. when she woke up PW3 saw a missed call from deceased Kilonzo. She called him but he did not answer the call. She was later called to the scene where PW3 saw the dead body of the deceased and his great friend Chemjor.
8. Regarding the deceased Chemjor, PW5 was living in the same plot as him. PW5 told court that the deceased Chemjor returned to their plot at 6 p.m. from guard duties with KK Security who were his employers. He took the key to the water tap from PW5, drew water and went to his house. At 9.30 p.m., the deceased Chemjor bid PW5 bye saying he was going out to meet with a friend. PW5 testified that the deceased Chemjor never returned to the plot. At 6 a.m. he learnt of deceased Chemjor's death.
9. PW1 was the only eye witness to the incident leading to the death of both deceased persons. According to her evidence she was woken up from sleep at 3 a.m. on the night of 21 and 22nd December 2010. She heard voices of people beating others. She woke up her family and they went out to their gate to check. PW1 testified that she saw a group of about 15 people viciously beating 2 people calling them thieves.
10. PW1 testified that she recognized two people in that group as the 1st and 2nd accused. She said that she also heard both accused speak and she recognized their voices. She described the place where the group was beating two people as being well lit by the high rise street lights which illuminate a large area. PW1 testified that she heard the 1st accused asking the two people why they had entered her house to steal. Then she heard the 2nd accused saying that the deceased had stolen their DVD. The next morning she found out that the two people she saw being beaten in the night died and she saw their bodies lying on the same road the incident occured.
11. The investigating officer, PW13 testified that he visited the scene of crime which was at Dagoretti Market, next to a feeder road. He had the scene photographed on 28th December, 2010. PW13 attended the post mortem on both bodies and also received blood samples for both deceased for analysis by the Government Chemist. He also had the blood sample from the 2nd accused taken for analysis.
12. DR. Mungai PW8 performed the post mortem on the body of the deceased. The doctor formed the opinion that the deceased Kilonzo died as a result of head injuries due to blunt trauma by a sharp object. The said deceased had multiple cuts, 13 in all, on the head and face and abrasive wounds on the face and defence injuries on the forearm.
13. The deceased Chemjor was found to have a depressed jaw bone and fracture on the back of the right ear, multiple bruises on the face and abrasive wounds. The cause of his death was head injuries due to blunt trauma consistent with assault using a blunt object.
14. The results of the DNA profiling of the blood found on the DVD player against those from 2nd accused and the two deceased was that the blood matched the DNA profiling of the second accused. PW10 and 12 Government Analysts confirmed this in their evidence and the Report by PW10.
15. The 3rd accused was arrested on 3rd March, 2011 by PW13 the investigating officer of this case. PW13 had been tracking the handset (mobile phone) of the deceased Kilonzo using Safaricom. The handset was traced to the 3rd accused at Ongata Rongai who had given it to her son. The 3rd accused was eventually charged and later her case consolidated with that against the 1st and 2nd accused who were arrested one day after the incident in question.
16. The 1st accused gave an unsworn defence. In brief, the 1st accused said she lived with the 2nd accused as her boyfriend. The 1st accused said she was on duty on 21st December 2010 from 8 a.m. up to 2.45 a.m. when she closed down the bar and proceeded home with Eunice Konyo. She said that on reaching the gate to their plot she saw a man came out of the gate running. The two of

them hid. When he passed they proceeded into the plot where they found a large group of people including her neighbours. There was a lot of noise.

17. The 1st accused stated that she found a neighbour, one Mwangi who told her that thieves had attacked their plot. She also found her boyfriend the 2nd accused nose bleeding and having an injury on his hand. 1st accused said she called a police officer whom she knew. Eventually an officer picked her phone and she reported the matter then proceeded to sleep.
18. The 1st accused stated that members of public who had gathered took out the 2 thieves who had been cornered but she did not join them.
19. The 2nd accused gave an unsworn statement. He confirmed that he lived with the 1st accused. Regarding the events of the day in question, the 2nd accused said that he left his entertainment business at the club at 1.30 a.m. He walked home which was 10 minutes' walk to his house. The 2nd accused said that he found four men at the gate who attacked him and demanded that he opened his house for them which he did.
20. The 2nd accused stated that he was stabbed on the hand. He said that he then called for help and neighbours went to his aid. That is when two of the four men escaped while two were apprehended.
21. The 2nd accused stated that the two who were cornered were made to sit at the plot and that the 1st accused and her friend Eunice found them there. The 2nd accused said that after the 1st accused called police on phone and reported the matter, she took him into the house where she administered first aid on him and then they slept.
22. At 6.30 a.m. PW1 took 2 police officers to his house and he was interviewed about the incident. Later in the day he was arrested and charged with the two counts of offences. The 2nd accused stated that he did not identify any of the four men who attacked him because there was no form of lighting at the plot. He said that the only lighting in the area was 120 meters from the plot.
23. The 3rd accused also gave an unsworn statement. She told the court that she lived in Ongata Rongai where she carried out her businesses. The 3rd accused stated that she was in a Merry-Go-Round with some ladies in which they lend money as a business on interest.
24. The 3rd accused stated that on 31st December 2010 she lent a young woman KShs.3, 000/= and since she did not have any money to pay the 900/= which was the interest on the KShs.3, 000/= she took the young woman gave her a Samsung Cellphone as security. She tested it with her sim card and it was working.
25. The 3rd accused stated that the young woman did not go back to pay the debt and collect her phone as promised. She kept the phone for 2 months until 3rd March 2011 when she was arrested over the same phone. The 3rd accused said she was in Ongata Rongai on 21st December 2010 when the alleged incident occurred.
26. Mr. Masara defended the 1st and 2nd accused while Mr. Anambo defended the 3rd accused. Ms. Onunga learned Prosecution Counsel appeared for the State. None of the counsels in this case made any submissions both after the close of the prosecution case and the defence case.
27. I have carefully considered the entire evidence adduced in this case by both the prosecution and the defence, and have analyzed and evaluated the same.
28. The accused persons are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. **Section 203** of **Penal Code** defines murder as follows:

> **"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

29. Malice aforethought is an integral ingredient to the charge of murder. The legislators spelt out what constitutes malice aforethought under **Section 206** of the **Penal Code** as follows:

> **"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,**

whether 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."

30. The prosecution case against the 1st and 2nd accused is that they were the ring leaders in the assault against the two deceased persons, and that their deaths were associated with the said beatings. As for the 3rd accused the prosecution case against her is that she was found in possession of a hand set cellphone belonging to the deceased Kilonzo two months after the incident.
31. I will begin with the case against the 3rd accused. The investigating officer of this case PW13 told the court that he tracked down the handsets belonging to both deceased and was able to recover the one for the deceased Kilonzo. He recovered it on 3rd March 2011 from the 3rd accused. Although PW13 did not produce the Safaricom Data on the deceased Kilonzo's phone, he said that the 3rd accused started using it on 31st December 2010, 10 days after the said deceased was murdered.
32. The 3rd accused had the burden to explain how she came by the phone. The prosecution evidence is that when PW13 asked 3rd accused to explain where she got it from, PW6, deceased Kilonzo's father was present. According to PW6, 3rd accused told PW13 that she was given the phone by her daughter. PW6 testified that he heard that the said daughter is the 1st accused but that he, PW6, was not sure.
33. According to PW13 the 3rd accused gave two conflicting versions of where she got the phone. The first time she was asked the 3rd accused said that she bought it from a tout. After she was formerly arrested for the offence, the 3rd accused informed PW13 that she was given the phone.
34. The investigating officer's evidence in regard to the explanation given by the 3rd accused of how she came by the phone conflicts with the evidence of PW6 in a way the two versions are irreconcilable. Considering their evidence, PW6 was present when 3rd accused gave her initial explanation to PW13. PW6 said 3rd accused said she was given the phone by her daughter while PW13 said 3rd accused said she bought it from a tout.
35. The 3rd accused has a duty to give an explanation of how she came by the handset mobile phone. The Court of Appeal while considering the doctrine of recent possession in the case of **CHARLES OKELO OLALA VS. REPUBLIC Criminal Appeal Case No. 328 of 2008** stated thus:-

"***Police investigations ended in the arrest of the appellant who had no explanation for being in possession of the recently stolen vehicle***.

"In Ogembo vs. Republic [2003] 1 EA 222 at page 225 this Court said:-

"Dealing with a similar point, the Court of Appeal for Eastern Africa (as it was then) said as follows in the case of R. vs. Bakari s/o Abdulla [1949] 16 EACA 84.

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a

case point no other reasonable conclusion, the presumption can extend to any other charge however penal. This principle was quoted with approval in the case of <u>Obonyo vs. Republic</u> [1962] EA 592. In this case the court stated as follows:-

"If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal."

"In this we are satisfied the circumstances of the case did not point to any other reasonable conclusion other than the conclusion that the appellant was one of the six robbers that terrorized the two families in Bureti District and that he was arrested with some of the stolen property a day after the robbery in Kisii which is not far from Bureti considering the fact that the robbers had easy transport namely the stolen vehicle."

*"And in **<u>Matu vs. Republic</u> [2004] 1 KLR 510** this court was dealing with a similar situation in which it conducted its judgment thus:-*

The inevitable conclusion therefore, is that the appellant was in possession of the goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion and rightly so in our view, that the appellant was one of the robbers."

36. In the case of ***<u>ERICK OTIENO ARUM VS REPUBLIC, CA NO. 85 OF 2005</u>*** (unreported) the Court of Appeal dealing with the doctrine of recent possession stated:-

"In our view, before a Court of law can rely on the doctrine of recent possession as a basis of conviction in a Criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that, that property is positively the property of the Complainant, thirdly that the property was stolen from the Complainant, and lastly, that the property was recently stolen from Complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses……"

37. The 3rd accused own explanation in defence was that she was given the phone by a customer who took a loan from her and left the phone as security. That explanation is reasonable and plausible for two reasons. First PW13 established she got it 10 days after the incident. For a mobile phone, 10 days cannot be regarded as recent possession since mobile phones can easily be sold off. Secondly, both PW6 and 13 did attribute the 3rd accused explanation to them at one point as alleging that she was given the phone.
38. The twist in PW6's evidence that he heard it was the 1st accused who gave the 3rd accused the phone, and that the two were mother and daughter was not established as the source of the information was not disclosed and the same received no corroboration from any other evidence. That piece of evidence was therefore hearsay evidence and consequently inadmissible.
39. Regarding the 3rd accused the doctrine of recent possession does not apply. Further in regard to handling stolen property the 3rd accused discharged her burden by giving a reasonable and plausible explanation. For that reason, I find that the prosecution did not adduce any evidence to create a nexus between the 3rd accused and the deceased murder or between 3rd accused and the theft or guilty handling of the phone.
40. In the case against the 1st and the 2nd accused there is one eye witness testimony of the events leading to the death of both deceased. That was the evidence of PW1. She was the wife of the landlord of the rental houses in a plot adjacent to their home.
41. According to PW1 she was woken up by voices of people beating others. She said it was around 3 a.m. She went out of her house to the gate and saw a group of 15 people beating two people who

were kneeling down. PW1 testified that she could see the group from a street light a few meters from where they were and recognized the 1st accused who was her tenant of two years and 2nd accused who was her (1st accused) boyfriend.

42. PW1 stated that the group of people including the two accused were 10 meters from her while the security street lights were 40 meters away, were big, bright just like a stadium lights. PW1 was positive she saw the people clearly and was only able to recertify 1st and 2nd accused whom she knew before. She saw but did not know the deceased before.

43. PW1 testified that she also heard and recognized the voices of the 1st and 2nd accused. She said that 1st accused had been their tenant since 2009 to 2010 a period of two years and therefore she knew her voice very well.

44. PW1 testified that she knew the 2nd accused since 2009 because he worked in a salon where she frequented for hair services. She knew his voice quite well.

45. According to PW1 she heard the 1st accused asking the two deceased persons many times why they entered her house to steal. She also heard the 2nd accused asking them why they stole the DVD.

46. The prosecution is therefore relying on both visual and voice identification of both accused by PW1. Regarding visual identification I am guided by several authorities. In the celebrated case of **ABDULLAH BIN WENDO – VS – REX 20 EACA 166** the justices of the Eastern Africa Court of Appeal held:

> "**Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.**"

47. In the case of **CHARLES O. MAITANYI –VS – REP. [1985] 2 KAR 75** the Court of Appeal held:

> **"It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve.**
>
> **That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into. In days gone by, there could have been a careful inquiry into these matters by the committing Magistrates, State Counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care the evidence of a single witness?"**

48. I have warned myself of the fact that the eye witness evidence is by a single witness and that the identification was made at night. I have considered the descriptions given by PW1 of the nature and strength of the light *vis a vis* the distances of the light from both the persons identified and PW1. The light was described as being as powerful as stadium lights which illuminate a large area and far distance. The 2nd accused admitted in his defence this fact about bright lights being a distance from the plot they lived. The distances from the light to the group where 1st and 2nd

accused were when seen by PW1 was given by her as 40 meters and from the group to where PW1 was standing as 10 meters. Given the description of the light, its strength and distance from the witness and the accused, I am satisfied that the light was strong enough for a correct and positive identification of the two accused persons.

49. There was in addition evidence of voice identification. Regarding voice identification I relied on two cases. The case of **SIMEON MBELLE VS. REPUBLIC [1982] KLR 578** where the court held:

> **"a) That it was the accused person's voice;**
>
> **b) That the witness was familiar with it and they recognized it, and;**
>
> **c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

50. The second case is **CHOGE VS. REPUBLIC [1985] KLR 1** where the Court of Appeal held:

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.**

51. PW1 had demonstrated that she knew both the 1st and 2nd accused for about 2 years. Both lived in Room No. A2 in her plot and so were tenants. In addition the 2nd accused worked in a salon where PW1 frequented to make her hair. I have no doubt that PW1 knew the 1st and 2nd accused very well and could recognize them both visually and by voice. The two accused were only 10 meters from her when she heard them. PW1 said she heard them repeating the same phrase. I am satisfied that from the circumstances and descriptions given that PW1 positively identified the 1st and 2nd accused on the day in question.
52. The question is whether the prosecution has created sufficient nexus between the accused and the death of the deceased persons. The prosecution case is that the accused persons murdered the deceased with others not before the court.
53. There is no doubt that the deceased were under the attack of a group of people. PW1 the sole eye witness says she saw 10 to 15 people including the two accused.
54. PW1 described what she saw and heard. Regarding the roles played by the 1st and 2nd accused PW1 described both as having viciously attacked the deceased persons with sticks. According to PW1 the two accused persons were not the only ones beating the deceased; the others too also beat them.
55. It is clear from the evidence of PW1 that by the time she went out to witness the vicious beating of the two deceased persons as she put it, the group was rowdy making noise. In fact it is those noises which caused her to get out of her house to investigate what was happening.
56. PW1 did not witness what had transpired before the beatings started. She however heard the 1st accused asking the two deceased "why were you in my house stealing"? She also heard the 2nd accused saying "they stole a DVD". PW1 is however clear that what she witnessed was outside the plot where 1st accused had a room. How the group came to be outside there PW1 could not explain and neither is there any prosecution evidence to throw any light to that.
57. The 1st accused on her part said she came from work at around 2.30 a.m. to meet with a man running out of the plot where she lived. She had together with her friend Eunice Ngonyo to let him pass. The 1st accused said she could hear noise at her plot and found her plot neighbours outside complaining of having been attacked by thieves.
58. The 2nd accused on his part said he found four men at the gate to their plot who forced him to open his house. After he opened, he was attacked. He said that he was stabbed on his hand

prompting him to call for help. He said that his neighbours responded as a result of which the thieves attempted to escape. The 2nd accused said two left but two were cornered and the two were the ones who were taken outside the plot.

59. PW1 confirms that indeed she heard the words "mwizi, mwizi" "thief, thief" and then people being beaten. She also heard the two being questioned why they had gone to the house(s) to steal.

60. The prosecution had to show that the 1st and 2nd accused were executing a common purpose with those others with them at the time they beat up the deceased persons. **Section 21** of the **Penal Code** defines common purpose as follows:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"**

61. The Court of Appeal in the case of **NJOROGE VS. REP [1983] KLR 197,** considered the meaning of common intention and stated as follows :

> **"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.**
>
> **The appellants and Karuga set out to rob the deceased. All three were armed. Assuming that it was Karuga who killed the deceased with his axe the appellants joined him to dispose of the body by throwing it into a pit but changed their mind and threw it into the bush. Muiruri carried a big stone to throw it with the body into the pit. They brought the body out of the house. They were aiding Karuga in pursuance of a common purpose to rob which resulted in the death of the deceased which was a probable consequence which could necessarily ensue as a result of their unlawful design to rob, and each of them is deemed to have committed the act as provided in section 21 of the Penal Code (Cap 63). Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault** Rep vs Tabulayenka s/o Kirya (1943) 10 EACA 51**."**

62. It will be safe to conclude from all the evidence by the prosecution and defence that the 1st, 2nd accused and the others with them had formed an intention to assault the deceased persons for attempting to steal from them. In other words they were executing one common purpose which was to assault thieves. In the course of executing that purpose, the deceased persons were fatally wounded.

63. Was there an attempt to steal? PW1 did not know what had transpired before the attack. The 1st and 2nd accused claim both attempted to steal a DVD machine. The DVD was produced as an exhibit. The blood on the DVD was found to be that of the 2nd accused which confirms he was injured during the incident. The 2nd accused defence that he was stabbed during the attempted robbery is not controverted.

64. The evidence by PW2, deceased Kilonzo's friend, PW3, deceased Kilonzo's wife and PW4 deceased Kilonzo's father casts doubt whether the deceased Kilonzo was a thief. He was in gainful employment with an international school. He had spent the evening drinking with his friends, especially PW2. It is doubtful he could have gone to steal after taking so much alcohol between 8 p.m. to 10 p.m. with PW2 and with others probably including deceased Chemjor after 10 p.m. to 3 a.m. when they met their death.

65. PW5, deceased Chemjor's neighbour where they lived said the said deceased too was in gainful employment with a security firm. PW4 the cousin of the deceased Chemjor was in great shock to hear that his cousin had been murdered for being a thief.

66. There is evidence the plot where 1st and 2nd accused lived had no electric lights. This was the

evidence of PW1 and the 1st and 2nd accused. There is no evidence how the "thieves" were taken out of the plot and therefore it is not clear whether there may have been a chase then an arrest.

67. It is disturbing that the 2 accused and their neighbours at the plot decided to take the law in their hands after "cornering" people in poor conditions of light. It would have been a case of mistaken identity and PW1's evidence that the two pleaded innocence and even knelt down pleading for the beating to stop is testimony of that possibility.

68. Turning to the evidence and whether the case was proved, the evidence before court is clear that the 1st and 2nd accused with others attacked and beat up the two deceased persons. They did as a result of that attack?

69. As for malice aforethought, given PW1's evidence that the 1st and 2nd accused were dealing with people who had attacked them at their home with intention to rob them, I find the prosecution has not proved as against the two accused any malice aforethought.

70. I am aware that malice aforethought can be inferred from multiplicity of blows inflicted. [See **MORRIS ALUOCH VS. REPUBLIC CA NO. 47 OF 1996(UR)**]. The circumstances of this case are different as many people were involved. From the facts of the case, even though it is clear the 1st and 2nd accused were armed with sticks and also beat up the deceased, it is difficult to tell which one of the 10 to 15 people hit the fatal blow.

71. I am satisfied that the prosecution have proved beyond any doubt that the 1st and 2nd accused, together with others not in court beat up the deceased. The prosecution has proved the injuries inflicted caused their deaths.

72. I did note that the deceased Kilonzo had multiple cuts caused by a sharp object according to the doctor who performed postmortem. There is however no doubt the injuries were inflicted at the scene. PW1 did not see any one of the 10 to 15 people at the scene armed with a sharp object or anyone stabbing the deceased Kilonzo or even the deceased Chemjor.

73. The 1st and 2nd accused and all with them were executing a common purpose as provided under **Section 21** of the **Penal Code**. The act of anyone of them was the action of the rest. It is therefore irrelevant that deceased Kilonzo was injured by a sharp object and 1st and 2nd accused were only seen with a blunt object.

74. I find that both 1st and 2nd accused and others not in court caused the death of both deceased in the course of assaulting them. No one has a right to assault another, even by the guise of mob justice. No one has a right to take the law in their hands, whatever offence they feel the other committed against them. What the accused persons should have done is to take the deceased to the police for investigations and appropriate action. By assaulting them, the accused and the others with them were taking up the roles of complainant, police in arresting and charging the deceased and of judge, convicting them unheard, and of the executioner by causing their deaths. That is the law of the jungle and has no place whatsoever in a civilized country such as the Kenya we are trying to build. Their actions were barbaric, animalistic and quite loathsome. It ought not to happen in that way.

75. Turning to the case, in the absence of evidence to prove that the accused and those with them had an intention to cause death or grievous harm to the deceased persons within the meaning of **section 206** of the **Penal Code**, I find that the offence proved against them is that of manslaughter contrary to **Section 202** of the **Penal Code,** for causing the death of both deceased persons.

76. Having come to this conclusion I substitute the charge against them of **murder** contrary to **Section 203** of the **Penal Code** to **manslaughter** contrary to **Section 202** of the **Penal Code** under the powers provided under **Section 179(2)** of the **Criminal Procedure Code**.

77. **Accordingly, I find the 1st and 2nd accused guilty of the substituted charge of manslaughter contrary to Section 202 of the Penal Code and convict them accordingly.**

78. **For the 3rd accused I give her the benefit of doubt and acquit her of the offence charged under Section 322 of the Criminal Procedure Code.**

DATED AT NAIROBI THIS 16TH DAY OF JULY, 2015.

LESIIT, J

JUDGE