



**Republic v Thuva alias Charo Mwalimu & another (Criminal Case
17 of 2017) [2025] KEHC 15214 (KLR) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 17 OF 2017
RN NYAKUNDI, J
OCTOBER 27, 2025**

BETWEEN

REPUBLIC ACCUSED

AND

EMMANUEL MAKANGA THUVA ALIAS CHARO MWALIMU ... 1ST ACCUSED

KALAMA EDWARD KITSAO ALIAS SIMANYIRE KARISA 2ND ACCUSED

JUDGMENT

1. The court is hereby informed by the Director of Public Prosecutions on behalf of the Republic that the above-named accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63 of the Laws of Kenya.
2. The particulars of the offence are that Emmanuel Makanga Thuva alias Charo Mwalimu and Kalama Edward Kitsao alias Simanyire Karisa on the 23rd day of May 2017 at Kisimani village, Magarini sub-location within Kilifi County jointly with others not before Court murdered Lucas Bahati Baraka.
3. The Accused persons pleaded not guilty and at the trial they were represented by learned Counsels Mr. Gekanana and Ms Mona while the Prosecution was led by Mr. Mwangi.
4. In order to discharge the burden of proof of beyond reasonable doubt the Prosecution summoned six (6) witnesses and the summary of the evidence is as herein stated:
5. PW1 Shilingi Kazungu on oath told the Court that he is a sand loader within Malindi Sub County and the Accused persons before Court are his neighbors also working in the same industry of sand harvesting and loading it for sale to various destinations. It was also the evidence of PW1 that the deceased was his cousin who on 23rd May 2017 was at the Office located at Ngomeni. According to PW1 a meeting had been called involving loaders and owners of the sand at the quarry. It was about streamlining operations between the associations which co-manage the business of harvesting of sand



and loading it. As the issues were being discussed between the two parties PW1 told the Court that on or about 3.00pm the scheduled meeting was called off and immediately soon thereafter some three vehicles were driven in to the scene. He described them as two tippers and being 10-wheel lorries. In a little while there were screams from the loaders who were on board those vehicles as they drove towards the PW1 offices. On arrival the first vehicle braked and it happened that each of the persons on board was armed with stones and clubs and other crude weapons. Further it was the evidence of PW1 that the team which was driven to the Ngomeni Offices started pelting them with stones. As they took refuge for their own safety from the stones which were being thrown anyhow he could hear screams of 'kill', 'kill', 'kill'. From that hideout he checked and saw it was the deceased who was being pursued by this team towards his escape route but he managed to identify the 1st accused armed with a club and hitting the deceased with it. That was not the end of it according to PW1. The second accused also joined in to inflict further physical injuries to the deceased.

6. In cross examination, the witness confirmed how the accused persons pursued the deceased relentlessly as they inflicted physical injuries.
7. PW2 Katana Kazungu on oath also told this Court that he is a mechanic who services vehicles and he positively identified the accused persons as his neighbors. According to PW2 on 23rd day of May 2017 he was at Ngomeni where he witnessed a conflict between the Ngomeni and Chatungo group being sand harvesters and loaders. It was at that scene he saw the 1st accused who was the leader of the Ngomeni group who after sometime left and came back with three vehicles and the people on board were armed with wood and stones. In that commotion PW2 heard a voice say 'kill, kill, kill' which was aimed at the deceased who at the time was already lying on the ground. He confirmed to this Court that the 1st and 2nd Accused persons were part of the gang which were after the deceased in inflicting the fatal injuries.
8. PW3 Johnson Katana in his testimony on oath told the Court that he is a resident of Malindi and a sand loader at Ngomeni. He acknowledged having known the two accused persons as his neighbors including the deceased. Further in his testimony PW3 told the Court that on 23rd May 2017 there was a conflict between Mchanaheri and Ngomeni sand loaders. That the leader of Mchanaheri was the 1st Accused. There was an initial meeting which was aimed at ironing out some operational issues but the Mchanaheri Group later ganged up in big numbers and they made a comeback to Ngomeni area armed with pieces of wood and stones whom PW3 estimated to be about 300 men in number. There was therefore a fierce fight which broke up but he was able to identify the first accused heading towards the direction where the deceased had gone to seek safety while armed with a piece of wood. In that confusion of creating disturbance and escalating the conflict PW3 also suffered some injuries from the dangerous weapons thrown at him by the Mchanaheri group. It was his evidence that the deceased was inside the quarry before the fight broke out. He however left the scene quite early for his own safety and could not confirm who hit the deceased to sustain the injuries which later became the cause of his death.
9. PW4 Anthony Kaponda also on oath told this Court he is a resident of Ngomeni and a sand loader who knows both the accused persons and the deceased. He was able to recall that on 23rd May 2017 at around 1.00 pm was in the Office waiting for the loaders from the Association waiting to solve differences between the two associations. The Accused persons' association were left to go and consult their colleagues and in a short while they came back in a fleet of vehicles armed with stones and pieces of wood. They shouted 'kill, kill'. That is when he was able to see the deceased fall down in the quarry. According to PW4 the two Accused persons descended on the deceased inflicting the injuries which might have contributed to his death.



10. PW5 was Detective PC Mawazo Abdullahi who told the Court that a report was made to the Police Station regarding the conflict between two associations of sand loaders which had involved a fight and the Deceased Lukas Bahati met his death. In his investigations he recommended that the two accused persons be charged with the offence of murder for being part of the ring leaders of the Mchanaheri sand harvesters who triggered the fight and the deceased became the victim.
11. PW6 was Chief Inspector Patrick Mwanyale. He also testified as one of the investigating Officers of this incident of 23rd May 2017 involving sand harvesters and loaders at Mchanaheri and Ngomeni sand groups. According to PW6 it was initially a general meeting which turned chaotic. In course of his investigations he received intelligence that the Accused persons were involved in being part of the suspects who caused the death of the deceased. In PW6's testimony he recovered some pieces of wood and stones which he recommended to be the murder weapons and had them produced as Exhibit 1(a)-(b), a sketch plan of the scene was drawn and admitted as Exhibit 3 and post mortem report as Exhibit 4.
12. It was at the close of Prosecution's case when each of the accused persons was placed on his defence under Section 306 of the Criminal Procedure Code.

The Defence case

13. The 1st Accused person elected to give a sworn testimony and he denied being at the scene of the homicide on 23rd May 2017. He gave a chronology of the event that on the morning of the fateful day he left home in the morning and there were some issues to be sorted out between Timboni and Ngomeni Group regarding sand harvesting and deliveries. According to the 1st Accused at 9.30 am he received a phone call from Kahindi with regard to the ongoing issues with the Ngomeni Group. That is when he instructed him to go to the Office as the Vice Chair of Timboni Group so that they could discuss further on the outstanding issues which was work related. According to the 1st Accused to the best of his recollection when they arrived at the place there arose a conflict between the two groups which required to be settled. There were some efforts made to settle the issues but at the same time the Officer Commanding Police Station was also busy mediating the issues. The OCS took long to come out of the meeting and hence they did not achieve the intended objective of fully settling the conflict. The 1st Accused vehemently denied as being the person culpable in causing the death of the deceased.
14. The second Accused gave evidence on oath and denied the offence of assaulting the deceased and he did inform the Court on 23rd May 2017 he left his house for Timboni. On his way to the Office he received a telephone call that he was required to accompany the officials so that a meeting could take place with the other Group. The said meeting according to the 2nd Accused was about harvesting of the sand, loading and transporting to various destinations. He denied that he participated in assaulting the deceased person.
15. The defence further in support of their case called DW3 Rodgers Karisa who testified that on the material day he went to attend a meeting at Magarini as a member of the sand harvesting association. He recalled that at 12p.m there was a scuffle between the two Groups and the Officer Commanding the Station had also arrived and was the one trying to mediate between the two Groups. He denied that any of the two accused persons caused the death of the deceased.
16. The other witness was DW4 Moses Jilo. In his evidence on oath he told the Court that most of the time he spent with the 1st accused as they waited for the OCS to finalize the meeting that they were holding so that he can assist them remove barriers which had barricaded along the route they were using to transport the sand to various destinations.
17. The last witness was DW5 was Elphas Kaindi whose evidence was similar with that of DW3 and DW4.



18. Given that background, the lead Prosecution Counsel Mr. Mwangi in his submissions invited the Court to make a finding that the Prosecution had established its case beyond reasonable doubt for each accused to be found guilty and convicted for the offence of murder contrary to Section 203 of the Penal Code. In furtherance of his submissions, learned Prosecution Counsel urged the Court to place reliance on the evidence adduced from PW1 to PW4 in support of the elements of the offence. The Prosecution further relied on the authorities in the cases of Anthony Ndegwa Ngari vs Republic [2014] eKLR and Rex versus Tubere S O Ochen 1945 12 EACA 63.
19. On the part of the defence Counsel Ms Mona in her written submissions she had the view that the Prosecution did not discharge the burden of proof of beyond reasonable doubt given the alibi defence given by DW3, DW4 and DW5. She placed reliance on the following authorities: Mumbi Musau v Republic and Erick Otieno Meda v Republic CRA No. 55 of 2015.
20. This evidence before Court from both the Prosecution and defence shall form the basis upon which the findings against the Accused persons will be made either in favour or against the verdict contrary to Section 203 of the Penal Code.

Analysis and determination

21. First and foremost, under Article 50(2) (a) of *akn ke act 2010 constitution the Constitution* every Accused person is presumed innocent until the contrary is proved by the Prosecution on initiating the charges within the penal law as mandated under Article 157 (6) & (7) of *akn ke act 2010 constitution the Constitution*. Therefore, the burden of proof is stipulated in Section 107 (1), 108 and 109 of the *akn ke act 1963 46 Evidence Act* is vested with the Prosecution and it never shifts to the Accused at any one given time even in the exceptions created under Section 111 of the *akn ke act 1963 46 Evidence Act*. The law is now settled on this area as articulated by the House of Lords in Miller vs Minister of Pensions (1947) 1 All E.R. 372 at page 373 to page 374; Thus;

“The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; but nothing short of that will suffice.”

22. It is also on this same strand on the burden of proof the court in Andrea Obonyo & Ors. V R. [1962] EA 542 stated as follows:

“As to the standard of proof required in in Criminal Cases Denning, I. J. (as he then was) had this to say in Bater v Bater [1950] 2 All E.R. 458 at 459:

'It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great Judges have said that, in proportion as the crime is enormous, so ought the proof to be clear'



23. Reference may also be made in the case to the case of *Queen v Home Parsons & Others BVI Criminal Case No. 9 of 2005* where it was held:

“The Judge does not have to consider whether the crown have proved the case beyond reasonable doubt as if the Judge is required to do so, then that will amount to usurpation of the Judge’s functions which, it follows, it strictly to be guarded against. ”The real question is to decide whether there is sufficient evidence on which a reasonable Judge properly directed might convict.”

24. The offence of homicide as defined in Section 203 of the Penal Code is proven beyond reasonable doubt under the following sub-heads commonly known as elements of the offence:

- (i) That the deceased is dead.
- (ii) That the death was unlawfully caused by the accused persons.
- (iii) That besides the unlawful act or omission there was malice aforethought and
- (iv) Finally there is prima facie evidence directly or circumstantially placing the accused persons at the scene.

25. With regard to the first element there is no dispute that the deceased Lucas Bahati Baraka is dead. The post mortem report admitted in evidence as Exhibit 4 dated 2nd June 2017 confirmed the death of the deceased and the injuries suffered which formed the proximate cause from which he succumbed to death. The Death Certificate number 1105957 was confirmed to have been issued as credible evidence to prove the death of the deceased.

26. The second element is that the death was unlawfully caused. The right to life is protected under Article 26 of *akn ke act 2010 constitution the Constitution*. It is now settled law that every homicide, murder or manslaughter are offences presumed unlawful unless they fall within the exceptions of the law as stipulated in Article 26 (3) of *akn ke act 2010 constitution the Constitution* thus:

“A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.”

27. The use of actual violence armed with an offensive weapon or not against the alleged victim to inflict grievous harm or cause death is significant to prove a charge of murder under Section 203 of the Penal Code. The Court in *Juma Lubanga v R [1972] HCD – 225* held that:

“Grievous harm as defined in the Penal Code involves a consideration whether the harm is such as seriously to interfere with health or comfort, and answer to the question may depend on the nature of the injury and the circumstances of the case.”

28. The evidence from PW1, PW2, PW3 and PW4 shows that prior to the 23rd May 2017 and the early hours of the same day the deceased was in good health until the conflict between the members of Ngomeni and Mchanaheri sand harvesters and loaders took toll over them resulting in the fatal injuries suffered by the deceased. The facts upon which the accused criminal liability must be judged can be summarized as follows:

- (a) On 23rd May 2017 at Kisimani village Magarini a fight ensued between Ngomeni and Mchanaheri sand harvesters and loaders.



- (b) In the course of the attack the members of Mchanaheri drove their tippers full of armed men with stones and pieces of wood to the Ngomeni area where the conflict was escalated and various members dispersed in different directions to secure their right to life.
 - (c) It was at that juncture that the evidence from PW1 and PW2 shows that the deceased who was at the quarry was pursued by the accused persons while armed with stones and pieces of wood which were used to inflict the fatal injuries as confirmed by the Pathologist in his Post mortem report.
 - (d) That this incident took place in broad daylight and it so happened that the witnesses and the accused persons are neighbors and known to each other as operating in the same occupation as sand harvesters and loaders.
 - (e) That apparently as other members of the Ngomeni Group sought refuge in safe havens, the deceased hideout was in the quarry.
 - (f) The post mortem report shows that the deceased suffered the following injuries: Blunt trauma noted on the right of the head, deep cut on the sculp, periorbital swelling, fractional trauma noted on both lower limbs. The inference that the assailants were armed with blunt objects is supported by the post mortem report and the general tenor of the evidence.
 - (g) There is direct and circumstantial evidence specifically linking the accused persons individually on this particular crime of murder.
 - (h) Culpable homicide is murder If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person though he may have desired that his object should be effected without hurting anyone.
29. It seems obvious that the fault-based approach requires the starting point of any inquiry into concurrence to be at the time when the initial act was performed. Should the requisite fault for murder or manslaughter then the present, the approach regards the acts which follow as part and parcel of the initial act since they were motivated into being by the fault element accompanying the initial act. Accordingly, the approach does not inquire specifically into whether the requisite fault was present when the later fatal act was performed nor does it require this to have been the case. This inquiry into fault accompanying the later fatal act is performed only when it cannot be proven that the accused had performed the initial act with the requisite fault.
30. It is trite that the offence of murder is only sustainable when there is proof of malice aforethought whose coded meaning is well set out in Section 206 of the Penal Code thus:
- (a) "An intention to cause the death of any person, or grievous harm to another, whether such person is the person killed or not or
 - (b) Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused." On manifestation of malice aforethought the Court in *David Onyango Omoyo v R* [2015] eKLR the court held:

"It is to be noted that once the prosecution proves one or a combination of the above circumstances, malice aforethought, will be deemed to have been established and in such a situation, there would be no escape route for the accused person."



31. Further in answering the question as what constitutes malice aforethought as no man has a scientific device as a barometer to read the intention of another. The Court in *Ahmed Mohammed Saeed v R* [1956] 23 EACA 396 held inter alia that; the intention to kill is inferred from the evidence tendered in support of the charge. That it is the duty of the Court to determine whether on the facts adduced, it could reasonably infer either that the accused intended to kill or that he at least know what he was doing so eminently dangerous that he must in all probability cause death or such bodily injury as was likely to cause death." (See also text book by William Musyoka on Criminal Law 2nd Edition 2016 Law Africa Publishing House pg. 329 paragraph (c)."

Whereas in *Rex vs Tubere s o Ochen* [1945] 12 EACA 63 the features of malice aforethought were highlighted as follows:

"The nature of the dangerous weapon used or manipulated to inflict harm, the violent and serious injuries inflicted against the parts of the body of the victim, the vulnerable part of the body targeted by the assailant. The unlawful acts of omission before, during and after the commission by the accused."

32. From this perspective of the law, malice aforethought is deemed to be established from evidence of circumstances of the intention to cause the death of any person or of the knowledge that the act or omission causing death would probably cause the death of some person. In the instant case, the circumstances of the death of the deceased flows from the testimony of PW1 and PW2 as corroborated by PW3, PW4, PW5 and PW6 respectively. The assailants in this case were armed with stones and clubs which they used to target the vulnerable part of the deceased body being the head. This confirmed from the Post Mortem Report as opined by the Pathologist the cause of death was severe head injury secondary to trauma. When the accused persons targeted this vulnerable part of the body, their intention was to cause death or had knowledge that the act of hitting the head with the stones would cause death. On this basis alone, I would find that the prosecution has proved malice aforethought beyond reasonable doubt.
33. The Prosecution evidence in regard to participation is based entirely on direct evidence of PW1 and PW2 under circumstantial evidence of PW3, PW4, PW5 and PW6. The accused persons are charged jointly with the offence of murder. In determining whether or not they are the ones who killed the deceased Section 20 & 21 of the Penal Code provides as follows on common intention and criminal responsibility:

"When an offence is committed, each of the following persons is deemed to have taken part of the offence and to be guilty of the offence and may be charged with actually committing it-

- (a) Every person who actually does the act or makes the omission which constitutes the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) Every person who aids or abets another person in committing the offence.

Any person who procures another to do or omit to do any act of such nature that if he or she had done the act or made the omission the act or omission would have constituted an offence on his or her part is guilty of an offence of the same kind and is liable to the same punishment as if he or she had done the



act or made the omission; and he or she may be charged with doing the act or making the omission."

34. Whereas Section 21 of the Penal Code provides 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 that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence." This doctrine was revisited by the Court which construed guidelines as follows in the case of *Ismael Kisegerwa & Anor vs Uganda*; Crim. Appeal No. 6 of 1978:

"In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions, and the omission of any of them to disassociate himself from the assault ... it is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence. Where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death."

35. The prosecution in proving common intention adduced evidence of PW1 and PW2 to demonstrate that they participated in fatally assaulting the deceased with others not before court. According to PW1, PW2 and PW3 the chronological events were clearly explained placing the two accused persons at the scene of the crime. The testimonies of PW1 and PW2 was very specific that the accused persons are well known to them as sand harvesters and loaders being the same occupation they also participate in earning an income. It was further the evidence of PW1 and PW2 that the accused are neighbors within the same locality where they are also domiciled. In my considered view, the offence having taken place during the day there were no barriers for PW1 and PW2 to occasion mistaken identity of the accused persons.

36. However, the accused persons vehemently refuted the allegations raising an alibi defence. On this issue the court in the case of *Wesonga v Republic* (Criminal appeal 179 of 2020) [2023] KECA 1302 (KLR) the Court held:

"With respect, we think that the prosecution did not entirely discharge its duty of dislodging the appellant's defence of alibi. This is especially so because the appellant's alibi seemed plausible. We think the prosecution should have called the two witnesses who supported the alibi to testify so that it could test the corroborative effect of the statements that they had given. Having failed to do so, a reasonable doubt has been cast in our minds as to whether the person identified at the scene of crime on the material night was actually the appellant. In this respect we are persuaded by the reasoning of this court in *Erick Otieno Meda v Republic* [2019] eKLR; In alibi defence based on witness testimony, the credibility of the witness can



strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie – v- Republic* [1984] KLR, this court stated: An alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

37. An alibi defence must be proved on a balance of probabilities and requires of the prosecution to disprove of it by way of evidential material. The key guiding principles being: Proof on a Balance of Probabilities: An accused person raising an alibi does not have to prove it beyond a reasonable doubt. It is enough for them to create a doubt as to the prosecution's case. Evidential Burden: The accused has the "evidential burden" to raise the defence of alibi by adducing evidence. Shifting Burden: Once the accused has discharged this evidential burden, the duty shifts to the prosecution to disprove the alibi beyond a reasonable doubt. Timely and Specific Presentation: For the alibi to be effective, it must be raised promptly and specifically. Credibility of Evidence: The court will weigh the alibi evidence against the prosecution's evidence. An alibi that is credible and creates a reasonable doubt in the mind of the court will be resolved in the accused's favour.
38. In light of the law the accused persons chose to set up a defence of alibi together with their three witnesses but on weighing it with the testimonies of PW1 and PW2 the Prosecution managed to rebut it conclusively without any iota of doubt. For those reasons I find that the prosecution has discharged the burden of proof of beyond reasonable doubt for the formulated offence of murder contrary to Section 203 of the Penal Code. In view of that fact, I enter judgment in favour of the prosecution by finding the accused persons guilty of the offence and in pursuance of it convict each one of them according to the provisions of the law.
39. In terms of identification, the evidence is to be tested within the guidelines set out in the case of *Turnbull and others* (1976) 3 ALL ER 549, and English case Lord Widgery C.J had this to say: "First wherever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? "At what distance" In what light was the observation impeded in any way, as for example by passing traffic or a press of people. Had the witness ever seen the accused before?" How often if only occasionally, to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance"
40. From the prosecution case, a careful analysis of the evidence shows that the incident occurred between broad day light and the surrounding circumstances of the crime being tried are that there were no barriers or obstruction to defeat positive identification of the accused persons. Incidentally, prior to this incident, the accused persons were well known to the witnesses more so by PW1, PW2, & PW3. The evidence that the accused persons and the witnesses are involved in the occupation of sand harvesting and loading has not been controverted by the defense. The offence having been committed during the day there was good lighting at the scene and further the witnesses knew the accused persons before the



fateful day. Taking into account the entirety of the chronology of events there is no doubt in my mind that this element of identification also destroys the alibi defense raised by the accused persons.

41. Finally, this offence is based on the doctrine of common purpose and intention under Section 21 of the Penal Code. In this respect where two or more people agree to commit a crime or actively associate in a joint lawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.
42. The definition embodies two elements or stages. The first stage refers to the conditions which must be fulfilled before the principle of imputation of conduct can operate, and the second stage refers to the scope and extent of imputing the conduct of one party to the others. The second stage, to repeat, only comes into operation when the conditions of the first stage are fulfilled.
43. To sum up this case, there is evidence from the prosecution beyond reasonable doubt that the two accused persons at all material times were together at the scene and had foreseen that by assaulting the deceased, the possibility of him suffering grievous harm or death was not farfetched. They engaged in this mission with a common purpose and with that foresight were reckless as to whether such death occurred. What is the effect of this is that of the rule of common intention being established by the prosecution beyond reasonable doubt.
44. It is therefore my respectful view that the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code has been proved beyond reasonable doubt and with this approach, each accused is found guilty and subsequently convicted of the offence as per the law established.

Ruling On Sentence

45. The accused persons herein Emmanuel Makanga Thuva alias Charo Mwalimu and Kalama Edward Kitsao alias Simanyire Karisa have been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Vide the judgment of this court dated 29th September, 2025, the accused persons were found guilty and convicted accordingly.
46. Before passing an appropriate sentence, this court called for a presentence report for both parties whose details have been captured as hereunder:
47. The pre-sentence report for Emmanuel Makanga Thuva alias Charo Mwalimu covered his family background, personal profile, circumstances of the offence, attitude towards the offence, victims' concerns, community ties, and recommendations. The report reveals that the accused person has no criminal history and does not abuse any drugs. Significantly, the report notes that he was the sole breadwinner for his family.
48. As to the circumstances of the offence, the report indicates that the offence was committed over a dispute involving sand loaders concerning employment opportunities. Due to lack of anger management skills and poor dispute resolution mechanisms, the two groups clashed, leading to the tragic death of the victim.
49. Regarding the offender's attitude towards the offence, the report indicates that he is remorseful and acknowledges the magnitude of the offence and its effect on the victim's family and the community at large. He has pleaded for leniency, urging the court to consider his family responsibilities. Notably, he has expressed willingness, if given the opportunity, to explore Giriama traditional mechanisms to reconcile with and possibly compensate the victim's family for their loss.
50. According to the victim's family, they have been psychologically affected and feel desperate following this unexpected loss, particularly as the deceased was in his prime years. While the family has indicated



that they have come to terms with the loss, they left the matter entirely at the court's discretion. They further stated that there have been no reconciliation efforts initiated by the offender's family.

51. The Probation Officer concluded by recommending that, from the findings gathered during the social inquiry, the offender requires counselling on anger management and guidance on life skills. The officer further recommended that the offender can be placed on a non-custodial sentence on a probation order for a period of three years.
52. Turning to the pre-sentence report for Kalama Edward Kitsao alias Simanyire Karisa, the report highlighted similar circumstances of the offence as outlined above. As to the offender's attitude towards the offence, the report indicates that he too acknowledges the magnitude of the offence and its effect on the victim's family and the community at large. He has pleaded for leniency, urging the court to consider his family responsibilities, and has similarly expressed willingness, if given the opportunity, to explore Giriama traditional mechanisms to reconcile with and possibly compensate the victim's family for their loss.
53. Regarding community attitude towards the offence, the local Assistant Chief stated that the accused person has no previous criminal record, nor does his family. He confirmed that the offender is well known to him and that he has never received any complaint in respect of the offender. The Assistant Chief described the offence as unfortunate and attributed it to poor conflict resolution mechanisms. Significantly, after the incident, local administrators led several peace meetings between the two groups, and the matter was resolved at the community level.
54. The Probation Officer, after considering the findings gathered during the social inquiry, recommended that the offender requires counselling on anger management and guidance on life skills. She similarly recommended that the offender can be placed on a non-custodial sentence on a probation order for a period of three years.
55. The sentence for murder has clearly been spelt out under Section 204 of the Penal Code. It has however been argued in a number of cases that a death sentence contravenes the Constitutional provision under Article on 26(1) which states that: 'Every person has a right to life' see Godfrey Ngotho Mutiso –vs- Republic [2010] eKLR.
56. As regards the sentence to be imposed, the Court of Appeal in the case of Charo Ngumbao Gugudu Vs. R [2011] eKLR held as follows:

“Further, the law is that sentence is imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is not proper exercise for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See *Ambani Vs R* [1990] eKLR.”

57. In *R v Engert* (1995) 84 A Crim R 67 at 68, Gleeson CJ observed:

“Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of this facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment

In a given case, facts which point in one direction to one of the consideration to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean



that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.”

58. In *Veen v. The Queen (No. 2)* (1988) 164 CLR 465, it was stated:

“Sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.”

59. The court is equally guided by the fundamental purposes of sentencing as provided for in the sentencing policy guidelines of the Judiciary, 2023 which can be pursued by the court in applying one or more of the following eight objectives:

- a. “Retribution: to punish the offender for his her criminal conduct in a just manner.
- b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- c. Rehabilitation: to enable the offender reform from his her criminal disposition and become a law-abiding person.
- d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- e. Community protection: to protect the community by incapacitating the offender.
- f. Denunciation: to communicate the community’s condemnation of the criminal conduct.
- g. Reconciliation: To mend the relationship between the offender, the victim and the community.
- h. Reintegration: To facilitate the re-entry of the offender into the society.

60. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR declared the mandatory death sentence for murder unconstitutional and provided guidelines for courts to consider when determining appropriate sentences in murder cases. These factors include:

- “(a) Age of the offender;
- (b) Being a first offender;
- (c) Whether the offender pleaded guilty;
- (d) Character and record of the offender;
- (e) Commission of the offence in response to gender-based violence;



- (f) The manner in which the offence was committed on the victim;
 - (g) The physical and psychological effect of the offence on the victim's family;
 - (h)) Remorsefulness of the offender;
 - (i) The possibility of reform and social re-adaptation of the offender;
 - (j) Any other factor that the Court considers relevant.
- ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in *Muruatetu*.”

61. During the sentencing hearing, learned counsel Mr. Gekanana and Ms. Mona, representing the accused persons, made oral submissions urging the court to consider several mitigating factors. Counsel submitted that both accused persons are first offenders with no previous criminal records. They further highlighted that the accused persons have expressed remorse and acknowledge the gravity of their actions. Counsel emphasized the family responsibilities of the accused persons, noting that they have dependents who rely on them for support.

62. On behalf of the prosecution, learned counsel Mr. Mwangi submitted that while the court must consider the mitigating factors advanced by the defence, it must equally weigh the serious nature of the offence. Counsel urged the court to impose a custodial sentence that reflects the gravity of the offence and serves the interests of justice.

63. In determining an appropriate sentence, this court must carefully balance the aggravating and mitigating factors present in this case. The Constitutional Court of South Africa in *State v. Makwanyane* (1995) CCT 3 94 provided guidance on this balancing exercise, stating that:

“mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.”

64. Turning first to the aggravating factors in this case, I note that this was a case involving group violence or mob action arising from a labour dispute among sand loaders. The evidence established that the two accused persons, along with others not before the court, arrived at the scene in a number of vehicles armed with crude weapons including stones and clubs. The prosecution witnesses testified to hearing chants of "kill, kill, kill" as the group descended upon the deceased. This represents a particularly disturbing form of violence where individuals acting in a mob embolden each other to commit acts they might not commit individually.



65. Second, the manner in which the offence was committed demonstrates a high degree of violence and brutality. The prosecution evidence, as found by this court in the main judgment, established that both accused persons actively participated in assaulting the deceased with clubs and other crude weapons. The post-mortem report (Exhibit 4) confirmed that the deceased sustained multiple injuries which ultimately caused his death. The accused persons pursued the deceased relentlessly even as he attempted to flee for safety, showing a callous disregard for human life.
66. Third, the psychological impact on the victim's family has been profound. As noted in the pre-sentence report, the family has expressed feelings of desperation following this unexpected loss. The deceased was in his prime years and his death has left a void in the family structure. While the family has stated that they have come to terms with the loss and left the matter at the court's discretion, their pain and suffering cannot be overlooked in the sentencing process.
67. However, the court must also give due weight to the significant mitigating factors present in this case. First and foremost, both accused persons are first offenders with no previous criminal records. This is a significant factor that weighs in their favor, as it suggests that they do not have established patterns of criminal behavior and that this incident represents an aberration rather than a pattern of conduct.
68. Second, the pre-sentence reports indicate that both accused persons have expressed genuine remorse for their actions. They have acknowledged the magnitude of the offence and its effect on the victim's family and the community at large. Notably, both accused persons have expressed willingness to explore traditional Giriama reconciliation mechanisms to compensate the victim's family for their loss. This willingness to make amends, though it cannot undo the harm caused, demonstrates a level of contrition that must be considered.
69. The Probation Officers, after conducting thorough social inquiries, have recommended that both accused persons can be placed on non-custodial sentences in the form of probation orders for a period of three years. The officers noted that the accused persons require counselling on anger management and guidance on life skills. These professional recommendations, made by officers trained in assessing offenders' suitability for rehabilitation, should also count in the nature of sentencing to be passed.
70. This court recognizes that murder is among the most serious offences known to law, and ordinarily attracts severe punishment. The taking of human life cannot be treated lightly, and society has a legitimate interest in seeing that those who commit such offences are appropriately punished. The objectives of deterrence, both specific and general, are particularly important in cases involving mob violence and vigilante justice, which represent serious threats to the rule of law and social order.
71. However, I am equally mindful that sentencing is not purely a mathematical exercise, but rather requires the application of judicial discretion informed by all relevant circumstances. The purposes of criminal punishment; protection of society, deterrence, retribution, and reform must all be considered, but they may point in different directions. As stated in *Veen v. The Queen (No. 2) (1988)* 164 CLR 465. In the present case, after carefully weighing the aggravating factors against the substantial mitigating circumstances, and having considered the professional recommendations of the Probation Officers, I find that the interests of justice would be best served by a sentence that balances punishment with rehabilitation. The accused persons' lack of prior criminal records, their genuine expressions of remorse, their willingness to pursue traditional reconciliation mechanisms, the community-level peace that has already been achieved, and their family responsibilities all weigh heavily in their favour. At the same time, I cannot overlook the seriousness of the offence and the need to send a clear message that the offence of murder will not be tolerated. The sentence must reflect society's condemnation of such conduct while also providing an opportunity for the accused persons to reform and reintegrate into



society. The court must also consider that both accused persons have already spent a substantial period in custody since their arrest in 2017, which period now exceeds seven years.

72. Having taken all these factors into account, and in exercise of the discretion vested in this court by the Supreme Court in the Muruatetu case, I hereby sentence each of the accused persons, Emmanuel Makanga Thuva alias Charo Mwalimu and Kalama Edward Kitsao alias Simanyire Karisa, to fifteen (15) years imprisonment for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. In consideration of the provisions of Section 333(2) of the Criminal Procedure Code, the sentence shall run from the date of arrest being 11th December, 2017.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OCTOBER, 2025

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R. NYAKUNDI

JUDGE

