



**Republic v Mungai (Criminal Case E019 of 2021)
[2025] KEHC 16182 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE E019 OF 2021
CW MEOLI, J
NOVEMBER 6, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

BENSON MELONYIE MUNGAI ACCUSED

JUDGMENT

1. Benson Melonyie Mungai, the Accused herein faces a charge of Murder contrary to section 203 as read with section 204 of the penal code, the particulars stating that on 6th August 2021 at Nkamurieki village, Kitengela Township, Kajiado East Sub-County, Kajiado County, jointly with others not before court he murdered Micah George, Nicholas Mula, Victor Muriithi and Fredrick Muriithi.
2. The Accused denied the charge and the matter proceeded to full hearing with the prosecution calling 14 witnesses. After the close of the prosecution case, the court is called upon to determine whether the evidence adduced supports a prima facie case against. Pursuant to the provisions of section 306 of the Criminal Procedure Code which states :
 1. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
 - (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other



than the accused person himself; and upon being informed thereof, the judge shall record the fact.

(3)

3. The evidence by the prosecution was as follows. Stanley Moyo Sompiroio(PW 1) , the Chief of Sholinke Location, testified that on the evening of 7th August 2021, between 8–9 PM, he received a phone call from Bernard Mungai reporting the discovery of three bodies near Kitengela River, approximately 3 km from his home. Due to a leg injury, he was unable to visit the scene and instead attempted to contact Assistant Chief Isso and later the Deputy County Commissioner of Isinya, Mr. Musau. He did not follow up on the matter, send anyone to the scene, or investigate further.
4. During cross-examination, he acknowledged that the river mentioned was outside his jurisdiction and disputed certain details in the typed statement shown to him, including the time of the call and the name of the river. He however confirmed signing a handwritten version of the statement and attempted to correct the time discrepancy. Confirming that the Accused and his stepbrother Bernard Mungai were known to him, he said he was unaware of any dispute between them. He admitted that he did not advise Bernard Mungai, did not interview anyone about the incident, and was not informed of any involvement by the accused. He emphasized that his statement was about the presence of bodies and not the cause of death, and that he was not told about the presence of a motorcycle at the scene.
5. Mungai Kasio (PW2), a businessman and pastor at Free Pentecostal Church in Sholinke, testified that on the night of 7th August 2021, shortly before 8 PM, he saw what he initially thought was a church on fire but discovered it was three burning motorcycles. Proceeding to the scene located about 20 minutes from his home, he saw three bodies but did not approach closely due to shock and darkness. He could not identify the gender of the victims, did not inspect the motorcycles or observe any weapons, and did not see anyone else present. He immediately called the area chief (PW1) to report the incident and then returned home, choosing not to follow up further. Later, he learned that his stepbrother, the accused, had been arrested about a week after the incident and taken to Kitengela Police Station.
6. He stated he had no dispute with the accused whom he described as peaceful and of good character, and expressed surprise at the murder charge. He confirmed that the bodies were found at Enkamuriaki River, which he said is also known as Kitengela River, and clarified that the motorcycles were further from the river than the bodies. Though summoned by police to record a statement he was unaware of the details of the case.
7. The third witness, Daniel Issa Kilimane (PW3), was at the time the Chief Kitengela Town. He testified that on the night of 7th August 2021 at about 10:00 PM, he received a call from the Deputy County Commissioner informing him of a murder incident at Enkamuriaki. Upon arriving at the scene an hour later, he found four bodies, all males, lying in Kitengela River and three burning motorcycles about 30 metres away. Having contacted the OCS , Kitengela Police Station, Jennifer Mutuku, he returned to the scene accompanied by police officers and later scenes of crime personnel.
8. In cross-examination he said he had observed burning bushes, stones, and sticks, but he did not examine the bodies closely. He noted that the fire had not burnt the bodies, which he found surprising. He said he had recorded his statement on 22nd August 2021, but the date on the statement was indicated as 6th August 2021, which is a date before the incident occurred. He confirmed knowing the accused since childhood and though not a resident of his area and had no known criminal history. He said he did not witness documentation of the scene by police or collection of exhibits and was not shown the motorcycles before recording his statement. He acknowledged general rumours that the victims were suspected cattle rustlers but had no official information to confirm this. He also noted that no identification documents were found on the victims, and that he did not see any weapons at the scene.



9. James Anduso Zabrarisco, (PW4) a timber merchant from Mlolongo, testified that his younger brother, Moka (Micah) George, who was one of the deceased in the Kitengela river incident had completed high school in 2016 and later run a tattoo business in Nairobi with friends Nicholas (Mula) and one Wagoi, who were also victims. In July 2021, his sister, who resides in the United States, visited Kenya and stayed in her Kitengela home under construction. Moka volunteered to supervise the property after she left. On 6th August, 2021 Moka visited him but was unreachable thereafter.
10. Concerned, he reached out to his deceased brother's colleagues, then visited the sister's Kitengela house with his cousin Felix Daniel Ocharo (PW6), and found it locked, neighbors reporting last seeing the group of young men the previous day. Later that night, he received news of four dreadlock wearing young men having been killed in Kitengela. At the police station, he identified Moka's burnt motorcycle and confirmed the deaths at City Mortuary. He described the scene as a dry riverbed near a church and few houses, and without a public road access. He denied that the victims were cattle thieves, stating Moka was not involved in theft and that the burnt motor bikes being sport motor bikes, could not ferry livestock. He said Moka's body bore a head injury only, suggesting the deaths were not due to mob justice. He did not know the accused prior to the trial and was unaware of any connection between him and the incident.
11. Edward Mawiuyo Ngasiaka (PW5) introducing himself as a long-time resident of Namelok in Kitengela Reserve, testified that he knew one of the deceased persons, nicknamed Rasta, having met him at Kitengela River some time in 2021 and prior to the material date. He testified that the said Rasta and his companions had at the time introduced themselves as new to the area and expressed interest in buying building materials and milk. He had exchanged phone numbers with Rasta and saved his contact. About a week later, he saw them again riding two motorcycles, one of which was white.
12. Then, on 7th August 2021, he received a call from Rasta's number 0712531252, however the person who spoke on the phone was not Rasta, but the Accused, inquiring if the witness knew the number's subscriber, whom he accused of being a goat thief. PW5 said he got a second call from a woman using the same number, who also suggested that the young men were thieves and should be punished. He testified that he tried to dissuade them, by stating that the young men were good people and had bought land from his uncle, Chris Onke. He refused to go to the scene that evening on the advice of his parents and learned on the next day that the young men had been killed and their motorcycles set ablaze.
13. The witness confirmed that he knew the accused having grown up together and living about 2km apart. He stated he had no grudge against him and acknowledged that PW2, who was the brother to the Accused, was a pastor with his own home.
14. During cross-examination, he admitted that he did not witness the killings and did not see the Accused in the company of the victims. He maintained that the call from the Accused came through Rasta's Safaricom number 0712531252, and that the Accused also called him using his own number 0729774477, which he recognized.
15. He admitted having been arrested as a suspect in the murders and recording a statement under inquiry. He however denied fabricating evidence or making accusations against the Accused due to a land dispute between their families, which he said was resolved in the 1990s and did not involve him. He also admitted to hearing rumors that a person named Fred had fired shots at the scene, but he did not verify this information. Maintaining that he had no personal issues with the Accused, he affirmed the accuracy of his testimony under oath.
16. PW6, a timber merchant residing in Kitengela, testified that on 7th August 2021 around 6:00 PM, he received a phone call from his cousin Mike George (also known as Mika)(one of the deceased), asking



- for the name of the area where he was residing in his (Mika's) sister Edna's house; that Mika sounded distressed but abruptly switched off the call; that on the next day Edna informed him that Mika was unreachable; and that on visiting Edna's house, he saw evidence suggesting that the young men had been there, including a mattress and soda outside, but neighbors reported the men had gone out and had not returned.
17. On 8th August, he and Edna reported the matter at Kitengela Police Station. Later, Edna shared a news caption report regarding "four thugs killed," which prompted them to revisit the police station. There he identified three burnt motorcycles as belonging to Mika. He said he knew all four deceased persons, namely, Mike, Victor, Micky, and Nicholas and accompanied police to the crime scene in Mutunkei area, about 2 km from Edna's house. Where he observed burnt motorbike parts, phones, and blunt objects like rungas. According to the witness, Mika had not mentioned anyone during the distress call, and the news item did not name the suspects, and he did not know the purpose of Mika's visit to the area of the incident.
 18. Patrick Musa Kyengo, a retired government employee from Machakos, testified as PW7. To the effect that his son, Nicholas Kyengo Musa, was one of the four young men killed in Kitengela. On 11th August 2021, he received a call from Evaline Ngina informing him of Nicholas's death, and he later viewed the bodies at City Mortuary. The Directorate of Criminal Investigations (DCI) Kitengela informed him that the victims had been mistaken for cattle rustlers. He said his son was a tattoo designer working in Nairobi with the other deceased persons.
 19. He attended the postmortem examination conducted on 12th August 2021 and later recorded his statement at Kitengela Police Station. He confirmed that Nicholas did not own a motorbike and had never been seen riding one at home. He was aware that the group of friends had gathered for a birthday celebration, though he did not know the venue of the celebration. On his visit to the scene, he found it unsecured, with broken phones scattered around. He said he did not know the accused, had never heard of any connection between the Accused and his son, and was unaware of the motive behind the killing.
 20. According to Lucy Wanjiku Mureithi (PW8) of Syokimau, her two sons, Fredrick Mureithi and Victor Mwangi Wanjiku, were among the four young men killed in Kitengela on 6th August 2021, the two having earlier informed her of their intended trip to Kitengela to celebrate Victor's birthday. She was in the UK at the time, and when on 7th and 8th August she tried reaching them by phone, she was unsuccessful. By 9th August, she was concerned and contacted a neighbor who confirmed that her house was locked, only to later receive news from a family friend and her brother that her sons had died. Upon her return to Kenya on 15th August 2021, she viewed the bodies at the mortuary.
 21. During cross-examination, she stated that Fredrick had a shop and worked in animation, while Victor was in business. She denied that they were involved in tattoo work and confirmed that they each owned sports motorbikes, which had been burnt in the incident. She did not know the Accused herein or his connection to her sons.
 22. Jeniffer Chepkoskei, (PW9) a scenes of crime officer with the DCI testified that she was called to document a murder scene in Kitengela on 8th August 2021 at around 1:00 AM. On arrival at Kitengela Police Station, she joined a team led by IP Lempis and OCS CIP Mutuku and proceeded to the scene, where she found four bodies of young men lying on a dry riverbed. Her role was to photograph and document the scene, which she did extensively, capturing 33 images that were later processed and printed at DCI headquarters. She compiled a report dated 29th February 2024, which she produced in court along with the photographs and certificate (Exh 2, Exh 3(a) and 3(b) respectively).



23. She explained that photo 1 showed a general view of the four bodies; photos 2 to 12 captured close-up views of the victims' faces, bloodstains on their clothes, and other bodily details; photos 13 to 15 captured the burnt motorcycles at the scene; photos 16 to 18 showed broken sticks, Maasai rungs, and tree branches believed to be potential weapons; photos 19 and 20 documented broken mobile phones; photos 21 to 25 were taken during a daytime revisit and showed burnt items and the dry riverbed where the bodies had been found; while photos 26 to 33 focused on three burnt motorcycles, labeled A, B, and C, including a clear image of the chassis number for motorcycle A (JSISG12A912108780). She noted that some victims wore dreadlock hairstyles (photos 4, 9, 11), one had a tattoo and earrings (photo 6), while another had a covered head (photo 12).
24. PW9 stated during cross-examination that she did not personally cordon off the scene or prepare a sketch plan, although she believed the investigating officer had done so. Nor did she gather the physical evidence herself while she photographed items such as helmets and phones, leaving the task of retrieval to the investigating team. She said she did not see any registration plates or fingerprints and did not follow up on their collection. She acknowledged that the original report was undated, an omission she corrected on the morning of her testimony, but without countersigning the amendment. She confirmed that the scene was remote, and only accessible by a footpath, and the nearest homestead about 1.5 to 2 km away.
25. She asserted that the scene had not been interfered with and that she did not observe bullet wounds or determine the nature of injuries on the victims due to the presence of bloodstains. Nor find identification documents on the deceased or collect clothing or personal items, saying that she suspected that the victims might have been killed elsewhere and dumped at the scene but she did not investigate that possibility.
26. Dr. Johansen Oduor, a pathologist with the Ministry of Health, testified as PW10 on behalf of Dr. Njeru, who conducted the postmortem examinations on the four deceased victims, and prepared the reports on 12th August 2021 at the City Mortuary. The first report concerned Fredrick Mureithi Wanjiku, a 30-year-old male of good nutrition and medium build. He had deep bruises on both upper and lower limbs extending to the trunk, two forehead lacerations (4 cm and 7 cm), and fractures of the right tibia and right humerus. Internally, there was bruising of the chest wall, a scalp hematoma, and bleeding in the brain. The cause of death was determined to be head and soft tissue injuries due to blunt force trauma. The post mortem form was produced as Exh 4.
27. The second postmortem form related to Mika George, aged 29, also of good nutrition and medium build. He had deep bruising across limbs and trunk, a 2 cm laceration on the left leg, and a 4 cm forehead laceration. Internally, he had rib fractures, bleeding in the chest, and skull fractures extending to the base with associated bleeding. The cause of death was head, chest, and other extensive injuries due to blunt force trauma. The post mortem form was produced as Exh 5. According to the postmortem form in respect of Nicholas Kyengo Musa (Exh. 1), the victim was aged 28 years. The body bore multiple and extensive bruises on limbs and trunk, abrasions on the left side of the face, and internal bruising of the scalp with bleeding on the brain. The cause of death was also attributed to head and soft tissue injuries from blunt force trauma.
28. The final report was in respect of Victor Mwangi Wanjiku, aged 25. The body had extensive deep bruises on limbs and trunk, multiple facial injuries measuring up to 4 × 9 cm, and internal scalp bruising with multiple fractures and bleeding over the brain. The cause of death was due to head and soft tissue injuries due to blunt force trauma. The post mortem form was produced as Exh 6.
29. Under cross-examination, Dr. Oduor said he noted that for all the victims, the cause of death was blunt force trauma and that the injuries were consistent with mob justice making difficult to isolate a single



- assault. Explaining further that bruises on the hands and upper limbs could imply defensive injuries, although this was not explicitly stated in the reports. Stating that no burns were observed, and therefore no tests for smoke inhalation were deemed necessary and that all the bodies had been preserved by refrigeration. Moreover, beyond indicating the recovery of the bodies to be Kitengela, the reports did not include precise details of time or location.
30. Chief Inspector William Adhoca Ochieng, (PW11) formerly stationed at DCI Kitengela and currently serving in Garbatulla, testified as the investigating officer told the court that the bodies of the victims herein were found near Kitengela on 8th August 2021. Upon visiting the scene the following day, he found that the bodies had already been removed to City Mortuary, while three burnt motorcycles remained at the scene. He initiated witness interviews, beginning with PW6, who reported his cousin Mika's disappearance on 7th August and later helped trace his house and the crime scene.
 31. According to the witness, it emerged from witness accounts that the victims had encountered Maasai morans while in the area where the killing happened; that the morans suspecting them of being livestock thieves confrontation them; that Micah George reportedly called (PW5), a local resident, for help; that the Accused allegedly took Micah's phone and spoke to PW5, accusing him of bringing cattle thieves to the area; that PW5 pleaded for the victims' safety and later called the Accused directly; and that the communication between the Accused, PW5, and one of the victims were confirmed through Safaricom records, placing the Accused at the scene of assault; that IP Ochieng recovered two phones from the Accused, including an Itel (black) and a smartphone(S) both bearing his SIM card (Exh. 2 and 7 respectively).
 32. In answering questions during cross-examination, PW11 acknowledged that no weapons or blood-stained clothing were recovered from the Accused, and that no forensic voice analysis was conducted despite PW5 claiming to recognize the Accused's voice. He admitted that several individuals named by PW5, including Fred Ngangir, who was allegedly armed and fired shots at the scene were not charged and Fred upon being interviewed denied involvement. He also confirmed that PW5 had been arrested on 13th August 2021 but was later treated as a protected witness due to threats and that persons named by PW5 as suspects were not investigated, and no identification documents were recovered from the deceased persons.
 33. PW11 conceded that the absence of number plates on the motorcycles and the victims' unfamiliarity in the area may have contributed to the suspicion against them. He agreed that the murder of four individuals likely involved multiple perpetrators and took time, making it difficult to solely attribute responsibility to the Accused. He said he had relied on call records and circumstantial evidence to support the charges, noting that further investigations were ongoing.
 34. In re-examination, he clarified that the decision to charge was based on available evidence and instructions from the DPP, and that PW5 had contacted the Accused both through Micah's phone and his own. He also admitted that the fact that victims' physical appearance, including dreadlocks and their presence in a sand harvesting area may have heightened suspicion among locals.
 35. CPC Quinto Odeke testifying as PW12 introduced himself as a data analyst with Safaricom PLC, attached to the Crime Research and Intelligence Bureau. He stated that he received a police request on 13th August 2021, seeking subscriber details and call data for multiple phone numbers, including 0729774477, 0722142002, 0702064969, and 0712531252. He produced the call records and a certificate verifying the authenticity of the data under Section 65(7) of the *Evidence Act*. According to the records (Exh. 8- 10), the telephone line number 0729774477 was registered to Melonyie Mungai(the Accused). On 7th August 2021, this subscriber moved between several locations in



- Kitengela, including Olejoronyori, Thorn Grove, Nomad Hotel, Acacia, and back to Thorn Grove late at night.
36. The number 0722142002, registered to Fredrick Wanjiru, was located at Kitengela Thorn Grove between 3:28 PM and 5:07 PM. The number 0702064969, registered to PW5, was in Mlolongo at 6:47 PM and later at Kitengela Prison at 9:39 PM. The fourth number, 0712531252, registered to James Onduso, was also located at Kitengela Thorn Grove on the material date.
 37. During cross-examination, he clarified that his role was limited to retrieving and certifying data based on requests from investigators. He did not conduct independent investigations or receive any devices or SIM cards. He explained how subscriber location is determined using base transceiver stations and confirmed that the data does not include content of calls or messages. He acknowledged that while older analogue registration could allow misuse of identity cards, Safaricom's digital registration since 2018 ensures accurate subscriber identity. He also confirmed that although he generated data for additional numbers, investigators only selected records presented in court by the investigating officer.
 38. In re-examination, he confirmed that the number 0729774477 was registered to the Accused and that his movements on 7th August 2021 placed him at Kitengela Thorn Grove from 4:14 PM, later moving to Acacia, Olenjoronyori, and back to Thorn Grove at 11:31 PM. He noted that Fredrick Wanjiru's number was also at Thorn Grove between 3:28 PM and 5:07 PM, indicating both subscribers were using the same booster during that window. PW5's number appeared at Thorn Grove at 9:38 PM before moving to Kitengela Prison. He concluded that based on the data, the three subscribers were not together at Thorn Grove at the same time on 7th August 2021.
 39. PW13 was Vincent Mabu, a Lead Liaison Officer with Airtel Kenya . He too testified regarding call data records linked to the Accused. He explained that his role involves responding to police and court requests. In this case, Airtel received a letter from DCI Kitengela dated 30th August 2021, requesting subscriber details and call data for the telephone line number 0754440443 between 5th and 15th August 2021. He confirmed that the number was registered to Melonyie Mungai (the Accused) on 15th April 2021 . He produced the subscriber details, call data records, a certificate authenticating the data as electronic evidence and letter received at Airtel as Exh 11, 12, 13 and MFI 14 respectively.
 40. According to the witness, the call data showed five calls made on 7th August 2021: four outgoing and one incoming. Notably, the last two calls occurred around 6:57 PM and 6:58 PM, with the subscriber located near PCEA Kitengela at the night time. Other recorded locations included Kitengela town, Ashutosh, Muigai, Ostrich Farm, Prisons Kitengela, and Mpaayie stage. He explained that the data included IMEI numbers, call types, and location information based on base transceiver stations (BTS). He noted that calls are only recorded once communication is established and that no calls were made between 3:28 PM and 5:00 PM on that day.
 41. In particular, on 7/08/2021 only five calls were made to/from the subscriber.
 - Outgoing call to 0724754860 at 11:36am.
 - Outgoing voice call to 0791773524 at 11:38am
 - Outgoing voice call to 0719773524 at 11:38 47
 - Outgoing voice call to 0702064969 at 18:57pm lasted 65seconds.
 - Incoming voice call from 0702064969 at 18:58 that lasted 97 seconds
 42. PW14 was PC Felix Ojowi, currently based at DCI Kitengela, who testified that he took over the investigation from Corporal Adola. He formally produced the call data requests made to Safaricom and Airtel as exhibits 10a, 10b and 14 respectively.



43. At the close of the prosecution case, the accused filed his submissions dated 30.6. 2025. Starting from the premise that the prosecution has failed to establish a prima facie , counsel submitted that while the deaths of the four deceased and causes are undisputed, the prosecution failed to link the Accused to any unlawful act or malice aforethought. Citing the case of Anthony Ndegwa Ngari v Republic [2014] eKLR, outlining the ingredients of murder and the decision in Joseph Kimani Njau v Republic (2014) eKLR, Nzuki v Republic (1993) KLR 171, regarding the element of malice aforethought in particular.
44. The defence contended that none of the 14 prosecution witnesses placed the Accused at the scene of murder, PW1 to PW4 admitting that they did not know the Accused or his involvement in the murder. As for PW5, the sole witness who attempted to link the Accused to the crime, his claim to have received a call from the Accused using the deceased’s phone, call data (Exhibit 8D) contradicts this. Further his said claim was based on voice recognition unsupported by forensic evidence, and largely hearsay.
45. Moreover PW12 and PW13 from two Telcos confirmed that while the Accused’s line was in the general Kitengela ThornGroove area, it was not located at the actual crime scene, Enkamuriaki River, and no triangulation or site analysis was conducted to confirm the precise location. The defence further highlighted inconsistencies in the prosecution case, including failure to secure the crime scene, selective disclosure of call data, and reliance on uncorroborated testimony.
46. Citing the legal threshold as expressed in Ramanlal Trambaklal Bhatt v R (1957) EA 332 at 335, and DPP v Morgan Maliki and Nyaisa Makori, Criminal Appeal No. 133 of 2013 counsel submitted in conclusion that the prosecution evidence does not rise to the requisite threshold and urged the court to find that the Accused has no case to answer and to acquit him under Section 306 of the Criminal Procedure Code.

Analysis and Determination

47. As always, the onus was upon the prosecution to prove to prima facie standard the ingredients of the offence, namely, the fact and cause of the death of the deceased person, and that it is the Accused’s actions or omissions that led to the deceased’s death, and, that the said actions were accompanied by malice aforethought , as held in Roba Galma Wario vs. Republic [2015] eKLR. The undisputed circumstances of the incident are that the four deceased were murdered , apparently, by a group of people at Nkamurieki village on or 6th or 7th August 2021 and their bodies found near the river bearing the same name. Motorcycles allegedly belonging to the deceased had also been destroyed by fire. The cause of the death was ascertained to be due to various extensive soft tissue and skeletal injuries from blunt force trauma.
48. The prosecution called fourteen witnesses and at this stage, all that is required of the court is to consider whether a prima facie case has been made out against the Accused person. In the case of Wibiro alias Musa vs. Republic (1960) E.A. 184 the Court of Appeal for East Africa defined the term “prima facie case” as follows :-

“By his use of the phrase “prima facie case” the learned judge has left this court in doubt as to his precise meaning. It is a phrase more commonly used at the close of the prosecution’s case than at the end of the whole case at which stage the only question is whether the prosecution has proved its case, on the whole of the evidence, beyond reasonable doubt. The question of what constitutes a prima facie case was dealt with by this court in 1957 in the case of



Ramanlal Trambklal Bhatt V. R. (1957) EA 332 (E.A.) and the following passage was taken from the judgment of the court at page 334 and p. 335:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made; but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is ‘some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true as WILSON J, said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” (Emphasis added)

49. The prosecution case was based on circumstantial evidence , mainly through PW5 and call data from Safaricom and Airtel Telcos through PW12 and PW13, the latter in an attempt to place the Accused at the scene of crime. According to the charge sheet, the crime occurred at Nkamurieki village on 6th August 2021 while according to witnesses such as PW1 and PW3, the bodies were found on 7th August 2021 at Enkamuriaki river, also known as Kitengela river. The call data records indicate various locations of base stations or masts at which the Accused’s phone was active.
50. However, according to call data of 7th August 2021 tendered by PW12, the subscriber of the telephone line number 0729774477 , registered to Melonyie Mungai moved between several locations in Kitengela, including Olejoronyori, Kitengela Thorn Grove, Nomad Hotel, Acacia, and back to Thorn Grove late at night. The number 0722142002, registered to Fredrick Wanjiru one of the victims, was located at Kitengela Thorn Grove between 3:28 PM and 5:07 PM. Ditto for the number 0712531252 registered to James Onduso, who is not one of the victims, but apparently the same name used by PW4 a relative of one of the victims identified as George Michael alias Moka. The number 0702064969, registered to PW5, was in Mlolongo at 6:47 PM and later at Kitengela Prison at 9:39 PM.
51. During re-examination, he confirmed that the data in respect of number 0729774477 registered to the Accused indicated his movements on 7th August 2021 at Kitengela Thorn Grove from 4:14 PM, later moving to Acacia, Olenjoronyori, and back to Thorn Grove at 11:31 PM. He noted that the number registered to the deceased Fredrick Wanjiru number was also at Thorn Grove between 3:28 PM and 5:07 PM, indicating both subscribers were using the same booster during that window. Equally, PW5’s number also appeared at Thorn Grove at 9:38 PM before moving to Kitengela Prison.
52. According to PW13 the Airtel line number 0754440443 was registered to Melonyie Mungai (the Accused) on 15th April 2021 in Kitengela. The subscriber details, call data records, Exh 11, 12, 13 showed five calls made on 7th August 2021: four outgoing and one incoming. Notably, the last two calls occurred around 6:57 PM and 6:58 PM, with the subscriber located near PCEA Kitengela at the time.



53. Other recorded locations included Kitengela town, Ashutosh, Muigai, Ostrich Farm, Prisons Kitengela, and Mpaayie stage. Noting that calls are only recorded once communication is established and that no calls were made between 3:28 PM and 5:00 PM on that day, he listed five calls that were made to/from the Accused's line as follows:
- Outgoing call to 0724754860 at 11:36am.
 - Outgoing voice call to 0791773524 at 11:38am
 - Outgoing voice call to 0719773524 at 11:38 47
 - Outgoing voice call to 0702064969 at 18:57pm lasted 65seconds.
 - Incoming voice call from 0702064969 at 18:58 that lasted 97 seconds.
54. The exact date of the offence appears unknown ; while the charge sheet refers to the 6th August 2021, the key prosecution witnesses spoke of the 7th August 2021. As for the call data of the latter date, it does not at any point indicate the presence of the Accused at the specific location of the offence, namely Nkamuriek village or river on the material dates. As explained by PW12, the data merely reflects communication by a subscriber relative to the nearest base station or mast.
55. Secondly, while the 4th outgoing call above was made to PW5's line on the Accused's Airtel line at 18.57pm, the data records before the Court also indicates two calls made from the number 0712531252 to PW5, at 18.45 and 19.04 pm with a text message in between. The witness claimed that the latter number belonged to one of the deceased identified as Rasta. However, the real name of the alleged Rasta remained a mystery, and from the call data records the said line was registered to James Onduso, who was not one of the victims in this case. Indeed that name appears to be that of PW4 who was a brother to the victim, Micah George or Moka and who also identified his body during the post mortem examination. Raising the question whether PW4 was the alleged Rasta and had been in the company of the deceased at the material time, there being no explanation forthcoming from PW4's evidence. If indeed PW4 was Rasta, he was the best person to confirm the narrative of PW5 and other material events .
56. Equally, PW5 during cross-examination claimed that on the same date, he had spoken on Rasta's alleged line not just to the Accused, but also to Rasta himself, presumably earlier to discuss matters relating to sand. During which call he warned Rasta to be careful as a stranger in the area because there had been cattle rustling incidents. He claimed that when he spoke to the Accused on Rasta's line , the Accused had at the time indicated an intention to harm suspected cattle thieves, that is , the deceased persons, presumably including Rasta. If PW4 was indeed the alleged Rasta, he should have explained the circumstances of the calls on his number to PW5 and the presence of his line at the scene for long periods on the material date , as shown by Safaricom records.
57. Clearly, the evidence of PW5 when considered together with relevant data records raises more questions than answers , as to who Rasta was and whether the Accused was indeed the one who called PW5 on Rasta's line as alleged. All this goes to introduce grave doubts as to the alleged subject of PW5's discussion with the Accused allegedly on Rasta's line, or when the Accused, according to call data, did in fact call PW5 at 18.57 pm using his Airtel number. Additionally, call data records indicate intermittent activity of PW5's line at the general location of the incident on the evening of 7th August 2021, and given his evidence, it is no surprise that PW5 was himself a suspect arrested in connection with the offence and indeed recorded a statement under inquiry before turning prosecution witness. Is his narrative credible, or a concoction?



58. PW5 was the prosecution's star witness. In the court's view, his evidence appears dubious and self-serving. It must be recalled that from the particulars of the charge, circumstances of the case, and the evidence of the pathologist the deceased lost their lives at the hands of several assailants, which in this case may well have included PW5 hence his initial arrest. In the case of Anthony Kinyanjui Kimani - vs- Republic [2011] eKLR the Court of Appeal grappled with the definition of the term accomplice and observed inter alia that:-

“What legally constitutes an accomplice is not defined in our statutes but Section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime.

In the case of *Watete v Uganda* [2000] 2 EA 559, the Supreme Court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same Court in the case of *Nasolo v Uganda* [2003] 1 EA 181 where the court further stated:

“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In *Davies vs Director of Public Prosecutions* (supra), the House of Lords said at 513:

‘On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).’(emphasis added)

59. In one of the earliest cases on the subject, the Court of Appeal for East Africa in the case of *Republic -vs- Ndara s/o Kariuki & 6 others* (1945) 12 EACA 84, at Page 86 prescribed the correct approach in dealing with accomplice evidence as follows:

“A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.”

60. In reiterating the foregoing the same Court stated in *Kinyua -vs- Republic* (2002) 1 KLR 256 that:

“Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to



base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.”

61. This case was principally founded on the evidence of PW5 as supplemented through call data records, the latter which were essentially limited to the possible location of the Accused at material times, but not what he was doing there. The evidence of PW5 was intended to fill that gap. As indicated, the records concerning the alleged Rasta’s number have raised serious questions as to who he was, and specifically whether he was PW4, and why, not being one of the deceased, he was not a witness in the case. Ultimately, creating doubts as to the veracity of the narrative of PW5 . PW5, was undoubtedly a suspect in this case, hence an accomplice , a witness whose testimony, in the court’s view, appears lacking in credibility.
62. Thus, the prosecution evidence viewed in its totality can hardly qualify as prima facie circumstantial evidence as described in *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR), or pass muster the test in *Wibiro Alias Musa (supra)* as to what constitutes a prima facie case:-
- “A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true as WILSON J, said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”
63. It is tragic that four young men were apparently lynched by a group of people on suspicions that they were goat or cattle thieves. It behoved the police to conduct thorough investigations to identify the perpetrators of the gruesome killings. From the material presented by the prosecution, this was evidently not done, and the court sympathises with the families of the deceased. However, court decisions must be based on the law and evidence. Reviewing the prosecution evidence in this case against the law, the court finds it to be woefully wanting and no reasonable tribunal applying itself to the law and the evidence could call for an explanation from the Accused in the circumstances. The only reasonable finding that commends itself is that the prosecution has failed to establish a prima facie case against the Accused and the court must acquit him under section 306(1) of the Criminal Procedure Code. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 6TH DAY OF NOVEMBER 2025

C.MEOLI

JUDGE

In the presence of:

For the State: Ms. Halima h/b for Mr Kilunda

For the Accused: Mr. Naeku

Accused: present

C/A: Lepatei

