



**Republic v Anduru alias Otina & another (Criminal Case 31 of 2021)
[2025] KEHC 17401 (KLR) (24 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 31 OF 2021
JN KAMAU, J
NOVEMBER 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

ELPHAS OTIENDE ANDURU ALIAS OTINA 1ST ACCUSED

LILIAN ANGISO ROBERT 2ND ACCUSED

JUDGMENT

1. The Accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the 15th day of October 2019 at Mundavala Village, Ipali Location, Emuhaya Sub-County within Vihiga County jointly murdered Gilan Arunga.”
2. The Accused persons had initially been charged separately in Kakamega HCCRC 65 of 2019 Republic vs Elphas Otiende Anduro alias Otina and Kakamega HCCRC No 76 of 2019 Republic vs Lilian Agiso Robert before both matters were consolidated by Musyoka J on 13th October 2019 with Kakamega HCCRC 65 of 2019 Republic vs Elphas Otiende Anduro alias Otina being the lead file. When the matter was transferred to Vihiga High Court, it was assigned the case number herein.
3. The Prosecution’s case was heard on diverse dates between 18th May 2021 and 15th November 2023 when it closed its case. On 25th June 2024, this court found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence. The defence case was heard on 18th November 2024.
4. This matter was partly heard by Musyoka J. He took the evidence of Adams Ochami Namyaga (hereinafter referred to as “PW 1”), Alfred Amuga (hereinafter referred to as “PW 2”), Rebecah Ayuma Ngaa (hereinafter referred to as “PW 3”), Dr Dixon Mchana (hereinafter referred to as “PW 4”),



Hezron Arunga (hereinafter referred to as “PW 5”), No 29394 PC Ronald Ngala Olweno (hereinafter referred to as “PW 6”) and Joel Nanjelo John (hereinafter referred to as “PW 7”).

5. This court became seized of this matter on 8th March 2023 when both parties indicated that they wished to proceed with the matter from where it had reached. This court, therefore, took the evidence of Richard Kimutai Lang’at (hereinafter referred to as “PW 8”), No 661566 Corporal Pascal Syombua (hereinafter referred to as “PW 9”), the 1st and 2nd Accused persons who testified as “DW 1” and “DW 2”, Thomas Robert Mukhobi (hereinafter referred to as “DW 3”) and Mary Khabuye (hereinafter referred to as “DW 4”).
6. The Prosecution’s Written Submissions were dated and filed on 5th March 2025. The 1st Accused person’s Written Submission were dated 20th January 2025 and filed on 7th February 2025 while those of the 2nd Accused person were dated 18th March 2025 and filed on 20th March 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

7. The issues that were placed before this court for consideration were as follows:-
 - a. Whether or not Gilan Arunga (hereinafter referred to as the “deceased”) died?
 - b. If so, was his death caused by an unlawful action(s) and or omissions?
 - c. If so, who caused the unlawful action(s) and or omissions?
 - d. Was there malice aforethought in the causation of the deceased’s death?
8. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof Of Death Of The Deceased

9. The 1st Accused person submitted that the Prosecution witnesses who witnessed the autopsy proved that the deceased herein died. The 2nd Accused person submitted that there was no doubt that the deceased died.
10. On its part, the Prosecution submitted that the witnesses testified that the deceased died on 15th October 2019 and that PW 2 testified that the deceased had passed on by the time they arrived at Coptic Hospital. It added that there was no dispute that the deceased was dead as the same was confirmed by the Prosecution witnesses and the autopsy report.
11. As both the Prosecution and Defence witnesses alluded to the deceased’s death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

Ii. Proof Of Cause Of The Deceased’s Death

12. The 1st Accused person submitted that the medical expert who conducted the autopsy confirmed the cause of death of the deceased. The 2nd Accused person did not submit on this issue.
13. On its part, the Prosecution submitted that PW 4 testified and produced a Post-mortem Report as exhibit which indicated the cause of death as internal bleeding secondary to penetrating chest injury (stab wound) following assault.



14. The cause of the deceased's death was a pertinent issue. PW 4 tendered a Post-mortem Report dated 16th October 2019 in respect of the deceased herein as an exhibit in this matter. After conducting the post-mortem examination, he formed an opinion that the cause of death was internal bleeding secondary to penetrating chest injury (stab wound) following assault.
15. It was therefore clear from his evidence that the deceased's death was not as a result of natural causes. Rather, it was due to having been assaulted. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

iii. Identification Of Perpetrator(s) Of Deceased's Death

16. The Accused persons did not deny having been with the deceased on the material date of 15th October 2019. However, they denied injuring and or beating him.
17. The 1st Accused person invoked Section 21 of the Penal Code and placed reliance on the case of Eunice Musenya Ndui vs Republic[2011]eKLR where the ingredients of common intention were that there had to be two (2) or more persons, who had to form a common intention, the common intention had to be towards prosecuting an unlawful purpose in conjunction with one another, an offence had to be committed in the process and the offence had to be of such a nature that its commission was a probable consequence of the prosecution or the unlawful purpose.
18. He further relied on the case of Ismael Kiseregwa & Another vs Uganda Criminal Appeal No 6 of 1978 where it was held that in order to make the doctrine of common intention applicable, it had to be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose. He argued that the Prosecution relied on common purpose and, therefore, had the onus of proving beyond reasonable doubt that each accused had the mens rea concerning unlawful outcome at the time the offence was committed.
19. He contended that for the Prosecution to secure a conviction on the charge of murder, it had to prove that the death of the deceased was the direct consequence of an unlawful act or omission of the accused which constituted the actus reus of the offence.
20. He denied having committed the offence. He pointed out that the 2nd Accused person also denied handing him the murder weapon. He asserted that the Prosecution witnesses did not see him armed with a knife until allegedly after the deceased had been stabbed. It was, therefore, his contention that the court was left with no option but to make reasonable deductions only based on the available circumstantial evidence.
21. He further contended that if the court was compelled to believe the Prosecution's case, then the evidence tended to point more towards provocation and self-defence. He further invoked Section 207 and 208 of the Penal Code and placed reliance on the case of Guzambisi s o Wesonga 1948 15 EACA 65 where it was held that death was excusable or justified in self-defence, defence of property, life third party in imminent danger of in advancement of administration of criminal justice or that which was accidental in nature.
22. He further cited the case of Okwany & Another vs Republic[2005] 1 KLR 833 where it was held that as there was provocation, the conviction of murder could not be sustained. He further relied on Section 17 of the Penal Code and submitted that at common law, the defence of self-defence allowed a person to use reasonable force to defend himself, prevent attack of another person and defend his property.
23. To buttress his point, he relied on the case of Mohammed Omar & 5 Others[2014]eKLR where it was held that the essential element of self-defence was that the Accused believed that he was being attacked



- or in imminent danger of being attacked but this belief should be based on reasonable grounds. In this regard, he also relied on the case of *Palmer vs Regina* (1971) All ER 1077 where it was held that where the evidence was sufficient to raise the issue of self-defence, that defence would only fail if the prosecution shows beyond reasonable doubt that what the accused did was not by way of self-defence.
24. He questioned whether the Prosecution satisfied the court that his actions were not in self-defence or not as a result of provocation. He was categorical that from the evidence on record, the Prosecution had not adduced evidence to establish that, in stabbing the deceased, he was not acting in self-defence. He added that no such rebuttal evidence had been adduced and for that reason, this court could only be led to the conclusion that his act was excusable and justifiable and thus not unlawful.
 25. He referred to Sections 107 (1), 108 and 109 of the *kenya act 1963 46 Evidence Act* and asserted that the standard of proof expected of the prosecution case was as set out in the said sections. He relied on the case of *Miller vs Ministry of Pensions* 1947 2 All ER 373-375 where it was held that the proof of beyond reasonable doubt must carry a high degree of probability. He was emphatic that the Prosecution had not proved the offence of murder against them beyond reasonable doubt. He urged the court to acquit him and his Co-Accused person.
 26. On her part, the 2nd Accused person submitted that the Prosecution witnesses gave varied versions of the commission of the offence and that regarding the murder weapon, PW 1 and PW 9 contradicted themselves as one version was that she handed over the knife to the 1st Accused person while at the same time admitting that he did not know how the knife had passed over to the 1st Accused person. She added that on the other hand, PW 9 claimed that the said knife belonged to her which she denied.
 27. It was her contention that the testimonies of the Prosecution were choreographed to implicate her to serve ulterior motive. She contended that the standard of proof in criminal matters was that of proof beyond reasonable doubt and that through its witnesses and police officers, the Prosecution had a common intention of punishing her and her husband for being good to the 1st Accused person's family by offering consolation and standing as a surety for him. She added that no one had demonstrated that she had participated in the land dispute between the 1st Accused person and the deceased's family.
 28. She said that DW 4 testified that she was with her near the 1st Accused person's house while the incident took place near the main Luanda-Siaya Road and that since there were many people, they would have seen her hand over the knife to the 1st Accused person. She was emphatic that the burden of proof rested on the Prosecution and that he who alleged had to prove. She further argued that other than alleging that he saw something like a knife, PW 1 said that he did not see how the knife moved from the 2nd Accused person to the 1st Accused person.
 29. She pointed out that the timing and manner in which she was arrested way after the 1st Accused person had been arrested and arraigned in court, suggested that there was a common intention to harm, harass, intimidate and embarrass her family. She added that no witness identified the knife as belonging to her or if it was a common kitchen knife or pen knife.
 30. She asserted that if the court entertained doubt as to whom the knife belonged to or how it looked like, whether she went back to her house to fetch the same and of what interest would that be to her, how the said knife passed from her to the 1st Accused person, why she was arrested with her husband who was later released and the fact that she walked to the Police Station to see her husband if at all she had participated in the murder, then the benefit of doubt was available for her. She urged the court to acquit her and set her free.
 31. On its part, the Prosecution submitted that the identification of the Accused persons was proper because it was clear from the evidence of the Prosecution witnesses that it was the Accused persons



- who inflicted the injuries on the deceased. It added that PW 1, PW 2 and PW 3 stated that they were at the scene and saw the Accused person (sic) stab the deceased.
32. It was its case that the Accused persons were well known to the witnesses and that the incident occurred during daytime. It was emphatic that the case was based on the evidence of eye witnesses and, therefore, it had proved its case beyond reasonable doubt. It added that the Accused person did not give any tangible defence and having failed to dislodge its case, they were thus guilty as charged. It urged the court to convict them and sentence them accordingly.
 33. The 1st Accused person testified that on the material date of 15th October 2019, he woke up and prepared to go to work at around 9.00-10.00a.m. On his way to work, he met PW 5, son to the deceased, at the gate of his compound with two (2) policemen and more than fifteen (15) men who were armed with rungas and pangas. PW 5 told him that he had come to sub-divide the land so that they could know each other's portion.
 34. He further stated that PW 5 had a Title Deed 256 Itumbu West Bunyore which he claimed was in his father's name and not in PW 5's name. He pointed out that PW 5 never used to cultivate the land and that he had inherited the same from his father for cultivation. He added that they neighboured each other but there was no boundary on the land.
 35. It was his further evidence that PW 3 also came from behind and was also accompanied by about fifteen (15) armed youth. They told him that they were waiting for the Land Registrar to come and show them the boundaries. PW 5 went and came with the Land Registrar who showed them the boundary by hand and insisted that he should not trespass on PW 5's land. He pointed out that the boundary was next to his house and that the Land Registrar gave the side that had his father's, mother's and children's grave to PW 5.
 36. He told the court that he had planted napier grass, maize, trees, beans and that PW 5 instructed the youth to uproot them. He told the Land Registrar that he would have waited for them to finalise with the matter in court. He asserted that PW 5 was too agitated. When he tried to stop the youth, they started chasing him with pangas. He told the police who were present how people wanted to kill him. He added that his wife and children started crying which attracted a mob of people. He stated that the mob was made up only of passers-by and not villagers.
 37. He further testified that the police arrested him because he was disturbing the youth who were uprooting his maize. He stated that PW 2 charged at him with a panga wanting to slash his neck saying he had killed his father but one of the policemen put his gun on his chest to stop him while the other policemen had hold him. They took him to Luanda Police Station. He denied knowing the deceased and whether he was PW 5's father. He denied ever having a case with the deceased. He further denied being given a knife by the 2nd Accused person. He added that he did not see the 2nd Accused person at the scene and that he only learnt of the knife when it was produced in court. He pointed out that he was not given any summons and or court order to show that the Land Registrar would come to his farm.
 38. The 2nd Accused person testified that on the material day of 15th October 2019, she woke up and went to the shamba (sic). At about 12.00 noon she heard people screaming. She restrained herself from going to where they were. When she went to the scene, she found it was the 1st Accused person's wife, Martha Otina and one Mama Lorraine, her in-law, who were crying saying who would feed their children as their crops were being slashed. She consoled them and they stopped crying. She went back towards her gate where there were several people standing. They were looking to see how many youths were cutting down the trees.



39. She further told the court that the 1st Accused person was his child, step-son. She denied handing him the knife. She pointed out that she did not have any interest in the land that was being disputed and, therefore, did not understand why she was before the court. She denied that the knife belonged to her. She averred that the incident occurred on the road and that she did not know who committed the offence because it was far from where she was. She suspected that she had been framed in the matter because his husband stood surety for the 1st Accused person. Her evidence was corroborated by that of DW 4.
40. DW 3 testified that he was the husband to the 2nd Accused person and a neighbour to the 1st Accused person. It was his evidence that he was a business man and that on the material day of 15th October 2019, he was at his shop when the incident occurred. He only heard the commotion as people entered into the 1st Accused person's land but that he could not see what was going on. He stated that on the same time, the 2nd Accused person was weeding in the farm but he was aware that she went to where the noises were coming from.
41. He stated that he never understood how his wife came to be involved in the offence but was only told that she handed a knife to the 1st Accused person. He denied that the said knife belonged to them.
42. Notably, PW 1 who was the deceased's nephew testified that on the material day, he went to the home of the deceased as he had called him. The deceased served him tea and took him to the fence where he told him to put up a wall. He said he found the 1st Accused person and the Village Elder and together they waited for Surveyors from Mbale.
43. He stated that there was a land dispute between PW 5 and the 1st Accused person and that the Surveyors placed beacons on the land and told them to live in peace. He asserted that after the surveyors left, some youths began to remove the plants to start construction while some women who came from the home of the 1st Accused person began to shout. When he sensed the tension, he got hold of the deceased to take him to the road towards Siaya.
44. He further said that the 2nd Accused person also emerged from her home screaming and joined the group. She then went back to her home and came back with a knife and gave it to the 1st Accused person. He stated that the deceased was standing at the edge of the farm. He said that the 1st Accused person passed where he was standing with other people then he stabbed the deceased with the knife. His further testimony was that he called a son of the deceased, Fred (PW 2) and they carried the deceased and placed him on the roadside and later took him to Coptic Hospital.
45. PW 2 corroborated PW 1's evidence. He testified that on the material day of 15th October 2019, the deceased told them that PW 5's land case had been determined and that Surveyors from Kakamega were to come and he wanted them to witness the subdivision. He said that they went to the farm at around 9.00 am. He contended that the Surveyors, Police Officers from Luanda, the Chief and Assistant Chief and Village Elders came and the exercise went on well and after it was concluded, the Surveyors left.
46. He further testified that the 1st Accused person was not in a good state. He kept telling him, "Hao watu wataona" (Those people will see) and "Leo mtu ataaga" (Today, someone must die). He explained that three (3) women came from the 1st Accused person's home and headed to the land that belonged to PW 5. The 2nd Accused person came from her home and joined the said women as she shouted, "Otiende, shamba haiwezi enda bure lazima mtu alale" (Otiende, the land cannot go for free. Someone must sleep).
47. He stated that there were youth who were cutting napier grass so that they could fix a fence and they did not know what the 1st Accused person intended. His evidence was that the deceased was standing



- with them when the screams began and that PW 1 took him away from the land towards Siaya road. He said that the Accused persons followed the deceased's son and surrounded the edge of the farm. He averred that the 2nd Accused person pulled the 1st Accused person aside and then went to her house. He stated that she came back and started to scream that someone must die and appeared to have carried something. He contended that she went to the 1st Accused person and they appeared to be talking after which they parted.
48. It was his further evidence that he heard the 2nd Accused person saying, "Otiende unachelewa, mtu lazima akufe" (Otiende, you are delaying. Someone must die). He said that the deceased was standing with PW 1 about fifty (50) meters away and that the 1st Accused person and his team went for them. He said that the 1st Accused person pretended to be walking but after a short while, he heard someone calling out his name. He said that when he turned, the 1st Accused person said that the deceased had been stabbed. PW 1 told him that the 1st Accused person was running away. He said that the deceased had been stabbed on the chest with a knife with a black handle about a foot long that was lying there.
 49. PW 3's evidence corroborated that of PW 2. She was categorical that she saw the 1st Accused person walk past the deceased and stab him. She added that she saw the 2nd Accused person give a knife to the 1st Accused person. She was emphatic that the deceased was stabbed in the middle of the chest and died while in hospital.
 50. PW 5 confirmed that he had a land issue with the 1st Accused person and that on the material day of 15th October 2019, the Surveyors had come to identify the beacons. He stated that after the beacons had been identified, they began clearing of the land and he shortly went to the market to buy soda and bread for the people who were working. He said that he was then called and was informed that his father, the deceased had been stabbed. When he followed him in the hospital, he found that he had died. He confirmed that he was stabbed on the chest.
 51. PW 6's evidence corroborated that of PW 1, PW 2 and PW 3. He added that when he and PC Ramoi saw the commotion where the 1st Accused person was, they went to see what was happening. On reaching there, they saw someone lying on the ground. The 1st Accused person came running towards them and told them that he had killed him so they should kill him. He said that he ordered the 1st Accused person to drop the knife which he did and he called for reinforcement from Luanda Police Station.
 52. PW 7's evidence also corroborated that of PW 1, PW 2 and PW 3. He confirmed that he was the Assistant Chief and was present on the material day at the scene of crime. He said that the Accused persons came from their side of the land and moved towards PW 5's land where the deceased was and that the 1st Accused person fished out a knife and stabbed the deceased on the chest. He stated that the 1st Accused person tried to run away but was arrested by police officers.
 53. PW 8, the Government Analyst, testified that he received an Exhibit Memo forwarding items for purposes of establishing the origin of the blood stains, being nail clippings from the deceased and a knife with a black handle. He confirmed that after his examination, he established that the extracted DNA from the nail clippings and the blood on the knife matched the DNA of the deceased.
 54. PW 9 was the Investigating Officer. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 8.
 55. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 and PW 7 saw the 1st Accused person stab the deceased with a knife on the material date. It



- was also clear that PW 1 and PW 3 saw the 2nd Accused person hand over the knife to the 1st Accused person.
56. PW 2 heard the 2nd Accused person shouting the following words, “hao watu wataona”, “leo mtu ataaga”, “Otiende shamba haiwezi enda bure lazima mtu alale” and “Otiende shamba haiwezi enda bure lazima mtu alale”.
 57. PW 1 told PW 2 that the 1st Accused person had stabbed the deceased and was running away. The 1st Accused person told PW 2 that the deceased had been stabbed. All Prosecution witnesses confirmed that the deceased was stabbed on the chest and that he died while in hospital. They also saw the crude weapon, knife, that the 1st Accused person used to stab the deceased and identified the same in court.
 58. PW 1, PW 2, PW 3 and PW 7 all placed the Accused persons at the scene of crime. The incident happened during daytime. There was, therefore, sufficient light that was favourable for the positive identification of the 1st, and 2nd Accused persons. PW 6 stated that the 1st Accused person rushed towards him and his colleague and he told them that he had killed and so he should be killed too.
 59. This court was thus persuaded to find and hold that the 1st and 2nd Accused persons were positively identified by PW 1, PW 3, PW 6 and PW 7 as aforesaid. They each spent sufficient time communicating with the Accused persons who were with the deceased at the material time. PW 1, PW 3 and PW 7 and the 1st and 2nd Accused persons were neighbours and knew each other. This could not have been a case of mistaken identity. Identification was by way of recognition.
 60. The Accused persons did not demonstrate that there was any motive for PW 1, PW 2, PW 3 and PW 7 to have colluded to frame them as the people who unlawfully caused the deceased’s death on that material date. Their evidence that they only saw the knife in court was not fatal to the Prosecution’s case.
 61. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find their evidence to have been watertight enough to have weakened the inference of guilt on their part. Their assertions that the Prosecution’s evidence was inconsistent thus fell on the wayside.
 62. Consequently, it was this court’s finding that the 1st and 2nd Accused persons’ defence was mere denial and did not displace and or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 5, PW 6, PW 7, PW 8 and PW 9.

IV. MALICE AFORETHOUGHT

63. Having found and held that the Accused persons’ defence was not sustainable as they were positively identified as the perpetrators of the deceased’s death, the next pertinent question that arose was whether or not they had malice aforethought in causing his death.
64. The 1st Accused person invoked Section 206 of the Penal Code and relied on the case of *Nzuki vs Republic* (1993) KLR 171 where it was held that malice aforethought was where there was intention to cause harm, intention to cause grievous bodily harm, where the accused knew that there was a risk that death or grievous harm would ensue from his acts and committed the acts without lawful excuse with an intention to commit a felony.
65. It was his contention that the Prosecution failed to prove that he had malice aforethought as no evidence was adduced to show that he had any reason to murder the deceased.



66. On her part, the 2nd Accused person contended that she did not meet the 1st Accused person to kill the deceased. She argued that they did not hatch a common intention to murder the deceased. It was her case that the Prosecution failed to prove malice aforethought on their part.
67. The Prosecution also placed reliance on the case of *Nzuki vs Republic* (Supra) and submitted that assault on someone resulted in bodily harm. It asserted that the extensive assault on someone results to bodily harm and that the grazes and bruises on the neck, face, all four (4) limbs and the entire back indicated severe and merciless beating.
68. It asserted that assault on an individual, results in bodily harm and that the internal bleeding and chest injury witnessed by the pathologist was due to assault which resulted into death. It added that the harm was brought about by the actions of the accused persons whose intentions was to cause death.
69. In this regard, it relied on the cases of *Republic vs Ongowo & 2 Others*(2022) KHHCIO KLB and *Dickson Mwangi Munene & Another vs Republic* [2014]eKLR where the common thread was that where more than one (1) accused person was charged with the same offence of murder, Section 21 of the Penal Code provided that when two (2) or more people formed a common intention to prosecute an unlawful purpose in conjunction with another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution, the same constituted a common intention.
70. It argued that the evidence that was adduced proved common intention by the Accused persons from their conduct. It submitted that the actions of the accused persons prior to the assault of the deceased pointed to their guilt.
71. It further cited Section 206 of the Penal Code and relied on the case of *Republic vs Tubere S O Ochen*[1945] 12 EACA 63 where it was held that an inference of malice aforethought could be established by considering the nature of weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after attack.
72. It was emphatic that it had adduced evidence showing that the aim of the Accused persons was to kill as that was seen in the nature of injury they inflicted on the deceased. It added that the attack on the deceased's chest was also an attack on his life and that the weapon used also spoke to malice. It further asserted that it had relied on direct evidence and had established malice aforethought due to the injury occasioned on the deceased.
73. This court had due regard to the case of *Morris Aluoch vs Republic* [1997] eKLR which cited the case of *Rex vs Tubere s o Ochen* (Supra).
74. PW 1, PW 3 and PW 7 confirmed that the 1st Accused person stabbed the deceased on the chest with a knife he had been given by the 2nd Accused person. The stab on the deceased's chest could only have been intended to kill him for boundary dispute.
75. The seriousness of the injuries the deceased sustained was confirmed by PW 4. Upon conducting the post-mortem examination, he observed that the deceased had minor bleeding into left chest with upper lung collapse, two (2) perforations on the heart covering one above and one below, perforations of the heart on the left and right upper chambers and bleeding around the heart. The extensive injuries all over the deceased's body and the fact that he did not die immediately were evident that he suffered greatly before he died.
76. There was evidence of common intention between the Accused persons as the 2nd Accused person handed over the knife to the 1st Accused person who in turn stabbed the deceased. The utterances by



the 2nd Accused person to the 1st Accused person which he actualised and or acted upon were further proof of their common intention and or malice to cause the death of the deceased at the material time.

77. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case as the Accused persons had asserted. The assault the deceased suffered at their hands was not only unlawful but could not be said to have been bereft of malice aforethought on their part. It was clear that they acted in concert with each other and hence had common intention to cause the deceased harm which led to his death.
78. Having analysed the evidence that was adduced by both the Prosecution and 1st and 2nd Accused persons and their respective Written Submissions, this court came to the firm conclusion that the act of unlawful killing of the deceased herein the 1st and 2nd Accused persons herein was accentuated with malice aforethought. The Prosecution had, therefore, demonstrated beyond reasonable doubt the ingredients that had been set out in Section 203 of the Penal Code as having been:-
- a. Proof of the deceased's death;
 - b. Proof that the deceased's death was a result of unlawful actions and or omissions; and
 - c. Proof of malice aforethought in the unlawful actions and or omissions.

Disposition

79. For the foregoing reasons, the upshot of this court's decision was that the 1st and 2nd Accused persons herein be and are hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
80. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF NOVEMBER 2025

J. KAMAU

JUDGE

