REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. E029 OF 2022

STATE……

….PROSECUTOR

VERSUS

SAMMY OBONYO OWINO……1ST

ACCUSED

NANCY AKINYI OBONYO……2ND

ACCUSED

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JUDGMENT

1. The accused persons herein Sammy Obonyo Owino and Nancy Akinyi Obonyo have been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal

Code. The particulars are that on 28th day of October 2022 at Yualuanda village, Pap Oriang sub location in Siaya County jointly with others not before court murdered Clinton Odhiambo.

2. The prosecution called eleven witnesses in support of its case.

3. **Victor Ouma Juma (PW1)** testified that on 28-10-2022 at about 12.00 noon, he was in the house when he heard someone making noises from outside while saying, “let him remove the phone, let him remove the phone”. That he went out to check and found that it was Clinton who had been tied. That he stood at the fence and saw that Clinton had been tied using a rope at the home of Nya Ugenya, the home of Samson Obonyo. That he found Clinton being beaten by many people. That he saw quite well people beating him and who included Omune, Jared, Odhiambo and Geoffrey. That Nancy who is an accused herein was also there but Obonyo (1st accused) was not there. That they beat him and brought him to the road. That he went to the road to see. That they had been demanding that the victim produces a phone belonging to Nancy. That he was present when Sammy (1st accused) came. That when Clinton was brought to the road, Nancy claimed that Clinton had taken her phone and Kshs. 600/= and that Nancy informed Clinton to go near her kitchen and that he was left there. That it was then that Obonyo (1st accused) came and

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who placed a panga on the fire place. That Obonyo (1st accused) burnt Clinton with the hot panga. That he saw him holding a panga on his hand and that he did not know from where he had gotten the panga. That Obonyo burnt Clinton with it all over the body and used the hot panga which came off with his skin. That it was Nancy who lit the fire Obonyo used in heating the panga. That after he was burnt, Clinton attempted to stand but fell besides the kitchen. That Obonyo again brought him back and continued burning him. That Clinton's mother even came and pleaded with him to leave Clinton but he insisted that he would only leave him if he produced the phone. That he continued burning him as Clinton insisted and informed him that he had not taken the phone. That all this time Clinton was screaming. That it reached a time when Clinton could not scream any more. That he watched this incident until about 3.00 PM. That when Obonyo left him, Clinton stood up. That he saw him falling down beside their house. That he did not intervene. That when he checked on him later, he found him asleep, and that he left him still sleeping as he went to water cattle. That when he came back, he found Clinton had died. That Nancy and Obonyo are in court and that they are the two accused persons in the dock.

On cross examination, he stated inter alia; that he found a crowd had tied Clinton and that they were caning him; that he knew Sammy Obonyo quite well; that Sammy Obonyo was not among those who had tied and were beating the deceased;

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that he knew Nancy as one of those who had been beating the deceased; that the crowd comprised of five people who were Odhiambo, Omune, Jared, Geoffrey, Marcellus, Kowiti, a total of seven as in his statement. That they were all caning him. That the 1st accused came after the seven had beaten and left the deceased; that he knows the seven men well; that all of them except one still stay in the village; that they were caning him and also slapping him, but not on the head; that Obonyo burnt him and that after he left him, he saw the deceased bleed from the mouth; that Nancy did not beat him as she only called the people to beat him.

4. **Mary Atieno Okeyo (PW2)** testified that she recalls on 28-10-2022, on Friday, she woke up feeling unwell. That she and her cousin Clinton used to sleep in their grandmother's house. That she woke up to go and fetch water leaving him still sleeping; that when she came back, Nancy came home and heard her speaking her my mother and uncle and that she was asking the whereabouts of Clinton. That Nancy informed her that Clinton had stolen her phone and 600/=. She then left and came back at 11.00 am and found her and her mother taking tea and that she asked them for slippers before taking one from her mother and left while claiming that Clinton had been found drinking at Mabati Tatu. That the said Nancy went and came back with Clinton on a motor cycle and then took him to her home. That since they were neighbours, she rushed to go

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and see and that she found Clinton being beaten at the door as Nancy was washing her baby. That he was being beaten by Geoffrey, Ouma, Jaro, Odhiambo, Osawa, Omondi and Obonyo. That Odhiambo was giving the wood they used in beating Clinton. That the assailants were Nancy's friends as she had called them and told them that she would pay them. That she knew it is Nancy who called them because they are all riders of Obonyo's motor cycles as his employees. That when she first went there, Obonyo was not in and when she went a 2nd time, she found him with a panga on the hand. That Obonyo himself told her that Clinton had stolen a phone and that he had burnt him severally using a hot panga. That Clinton was later found besides their home while lying down and that she went and found that he had died and that Nancy then went away while Obonyo kicked him two times on the head. That Nancy and Sammy Obonyo are the accused persons in the dock.

On cross-examination, she stated inter alia; that she witnessed how the deceased was beaten; that Victor Ouma was also present; that they were six in total; that she saw them also hitting his head with sticks, panga and stones; that Moses Oure also beat him as well as Ouma; that her witness statement says that they took Clinton from Nancy's home; that is true that she did not know what they did to him when they took him away; that she did not see the accused persons burning the deceased; that she saw 2nd accused beating the deceased who

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fell down as she kicked and also punched him; that Victor Ouma was with her.

5. **Sophie Anyango Okelo (PW3)** testified that on 28-10-2022 at 8.00 AM, Nancy Obonyo came to her home and asked her if she had seen Clinton Odhiambo. That she told her that she had last seen him during supper. That she told her that Clinton had stolen her phone and 600/=. That at about 11.27 am, she again came and asked her and Mary for slippers. That she gave her Sandak slippers and that she would bring Clinton from Mabati Tatu. That after some minutes, she heard motorcycles pass towards Nancy's home. Then she heard noises and screams from the direction of Nancy's home. She asked Mary to go and see as she remained behind. That Mary came and told her that Clinton had been badly beaten. That she did not go to see. That by 2.00 pm the noises were still on. That at about 3.00 pm, she found Clinton dead at a deserted home next to her home. That she does not know how the body found itself there. That she reported to the village elder who in turn called the chief. That the police arrived and took the body away.
   On cross-examination, she stated that she did not see the accused persons beating and burning the deceased. That Mary Atieno was her child and who came to the scene where the body was and found me. That both accused also came to the scene.

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6. **Jackson Odeny Okello (PW4)** testified that he knew the late Clinton as he was his nephew. That on 9-11-2023, he was at Siaya Referral hospital with his brother Alex Okello and police officers for postmortem and that he identified the body to the doctor. That he saw the body had burnt scars all over the body and that the body was also swollen at various spots. That he witnessed the postmortem.

On cross-examination, he stated that the head also had injuries.

7. **PW5 on Oath Pamela Apondi Ogoma (PW5)** testified that on 28-10-2022 at about 10:00 am, she was at home washing when a boda boda and Nancy came to her home and enquired if Clinton was in her home and that she answered in the affirmative. That they then called out Clinton who had been seated outside my house. That Nancy asked Clinton for her phone and Ksh. 700 and that Clinton informed her that he had not taken her phone nor her money and that she ordered Clinton to get onto the motor cycle. That Clinton obeyed and climbed onto the motorcycle and they rode off with him. That later at night, she heard that a young man had been killed at Yao Luanda. That the following day, he heard that it was Clinton who had been killed. That Nancy is the one who took Clinton away and pointed her out as the 2nd accused in the dock.

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On cross-examination, he stated that he does not know the accused. That she only knows that the deceased was removed from her home by Nancy and the boda boda man. That she did not witness how Clinton was killed.

8. **Irene Anyango Ooko (PW6)** remembers that on 28-10-2022, she was at home at about 12:00 pm when a lady whose name she did not know came and told her that a young man was being beaten down at the road for stealing a phone and money. That she rushed to go and see and on arrival, she found that it was Clinton whose both hands had been tied and was was bleeding. That she asked as to Nancy what Clinton had done and who informed her that Clinton had stolen a phone and money while she was away at the river fetching water. That she found when they had stopped beating him. That she then left for her home to cook lunch. That in the afternoon, she went back to the scene and found that Clinton had been untied and that she enquired from him as to where he had taken the phone if indeed he had taken it and who denied. That she then went back home. That in the evening at about 4:00 pm, she heard that Clinton had died while at the home of Nancy whom she identified as the 2nd accused in the dock.

On cross-examination, she stated inter alia; that she found Clinton beaten between 11:00 am and 12:00 pm; that she

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knows Nancy Akinyi; that the said Nancy never came to her as she is the one who went to her home when she heard that Clinton had been beaten. That Nancy informed her that she had gone to fetch water when Clinton stole her phone and cash; that she does not know Pamela Otieno; that when she visited the scene, she found a large crowd; that does not know who beat him, as they had stopped beating him; that her statement states that he was tied and was being beaten; that she found that the deceased had been beaten; that she did not see both accused burning him; that she saw Clinton had injuries on the hands and legs.

9. **Alex Okello Daye (PW7)** testified that on 9-11-2022 he and his brother Jackson Okello and DCI officers went to the mortuary at Siaya and identified the body of the late Clinton Odhiambo. That the body had many injuries and burns on the private parts, thighs, shoulders and tongue. That he witnessed the post mortem examination. That they then wrote statements at the police station and then went home.

10. **Michael Ouro Ochieng (PW8)** testified that he is the village elder and remembers on 28-10-2022, a Friday, he left home for a meeting at Pap Nyadiero and that when he came back home at about 4.00pm, he got a call from Joseph Adienge who enquired on his whereabouts and that he briefed him and who alerted him that Clinton was dead behind and that his

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body lay behind Nyar Luanda's home. That on entering his house, he found his wife and another lady and that his wife informed him about the matter and that he went to scene and found Clinton already dead. That there was nobody nearby. That on his way back, he met the wife of his uncle who informed him that she had not seen the deceased. That he decided to call his assistant chief who came after about ½ hours later. That he called the OCS of Kogelo police station. The police came and alerted officers from Siaya who came and took the body away.

On cross-examination, he stated that he did not witness the accused persons attacking the deceased. That he found the deceased already dead.

11. **Caroline Awuor (PW9)** testified that on 28-10-2022 she went to see Irine when a lady informed them that a young man had been found next to the home of Obonyo's mother. That she went and found Clinton had been beaten and tied. That the people who had assaulted him had left. That she did not find anyone there and went back home. That she had earlier seen Clinton with a young man she did not know. That she knows the accused persons. That she did not know how they were connected to the death of Clinton.

On cross-examination, she stated that her statement says that she found a mob at the home of 2nd accused. That she wrote it at the police station. That she did not tell police that

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she found a mob at the home of Nancy Obonyo. That she found the deceased beaten and tied. That she did not see accused persons beating the deceased.

12. **No. 49804 Cpl Evans Banana (PW10)** testified that he remembers on 29-10-2022 his DCIO assigned him the case and further informed him that two suspects were already in custody. That he took witness statements. That the 2nd accused claimed that she had gone to fetch water and on getting back, she saw a man dash out from her house and run away and that on entering, she found everything scattered. That she found her Itel phone and Ksh.600 missing. That she tried chasing the man while raising alarm. That she also informed her neighbors. That when the husband came back, he found the suspect had been apprehended by members of the public and subjected to mob justice.

That the next day, he and other officers visited the scene and recorded witness statements. That the statements they got were different. The witnesses alleged that Nancy went to the home of the deceased looking for him while claiming that he had stolen her phone. That she went back and came back. That Clinton was seen at a changaa den that she took a boda boda to where Clinton was and she carried him back home. That when boda boda operators heard that he was a thief, they followed her home and beat him. That when the husband

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came back home, he found Clinton had been severely injured and that he also beat and assaulted him using a hot panga. That the deceased succumbed to the injuries. That the two accused were released pending further investigations. That the ODPP later recommended that the two accused be charged with others not before court. That a post-mortem was conducted on the body of deceased. That he identified the post mortem report which was marked as MFI -1. That they did not recover any exhibits at the scene. That he identified the two accused before the court.

On cross-examination, he stated that he is the investigating officer in this case. That he recommend that the two accused be charged. That the death was out of mob justice. That the post mortem report shows that the deceased died due to severe head injuries. That the body had multiple injuries. That the injuries were caused by mob and that he could not say which ones the accused caused. That other persons were to be charged. The six were suspects and who disappeared have not been traced. That Nancy is the one who took Clinton from the changaa den to her home, leading to the death. The witness who said this was Mary Atieno, the owner of the changaa den. That Sammy Obonyo burnt the deceased. This was stated by Mary Atieno. The implement used was not recovered. By the time Sammy Obonyo came, deceased had been injured.

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13. **Dr Okongo Eric (PW11)** testified that on behalf of Dr Mbeki with whom he had worked for three years and was familiar with his handwriting and signatures and who was away in Australia undergoing studies. That the autopsy was conducted on 9/11/2022 at Siaya County Referral Hospital. That there were multiple bruises on the body which appeared to be superficial burns on lower part. That the burns were on both upper arms on wrist joint areas. That there were bruises on the abdomen and the parietal temporal region. That the brain had subdural hematoma on the parietal region. That the cause of death was severe head injury secondary to blunt trauma to the head. He produced the autopsy report dated 9/11/2022 as exhibit 1.

On cross examination, he stated inter alia; that the body appeared to have been burnt though he cannot confirm that the same had been burnt; that the cause of death was severe head injury secondary to blunt trauma.

14. At the close of the prosecution's case, this court ruled that a prima facie case had been made out against the accused persons to require them to make a defence. They opted to tender sworn testimonies and called four witnesses.

15. **Sammy Obonyo Owino (DW1)** testified that he is a fish monger and that on 28/10/2022 he had gone to Bumbe beach

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to collect fish supplies and then proceeded to distribute the fish to his customers and later received a call from his wife (2nd accused) who informed him that she had gone to the river to fetch water and on coming back she found the door open and that an intruder emerged from the house and escaped after stealing her phone and money. That on arrival home, he did not find the intruder and that he did not burn the intruder as alleged. That the witnesses are family friends of those who are against him in the area. That he was not at the scene of crime as he was away selling fish.

On cross-examination, he stated inter alia; that he had known the deceased as a person who hailed from his village; that he did not burn the deceased as alleged by the witnesses; that mobile phones were stolen from his house and that he had lost a sum of Kshs 100,000/ which he had borrowed from his Sacco; that he did not assault the deceased.

16. **Nancy Akinyi Obonyo (DW2)** testified that on 28/10/2022 at 10.00AM, she had gone to fetch water from a certain homestead and on her way back she found the door had been opened and suddenly somebody emerged from inside and ran away. That she raised alarm and gave chase and later requested boda operators to pursue the intruder and who managed to subdue and attacked him and that he released one mobile phone make Itel. That she requested the crowd to

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leave him and who managed to run away and that at around 11.00 AM she called her husband (1st accused) and briefed him on the incident. That she and her husband went to the office of the assistant chief and while on their way, they saw the body of the deceased near their home. That she did not assault the deceased as alleged and that she did not witness her husband burning the deceased with a red hot panga.

On re-examination, she stated inter alia; that her door padlock was damaged but had not availed the damaged piece; that she had known the deceased for three years; that it is the boda operators who attacked the deceased; that she did not direct the boda operators to attack the deceased; that she did not report about theft of her goods; that she did not light the fire used to make the panga red hot for use in burning the deceased; that Victor, Mary and Sophie told lies to the court; that she has no dispute with Mary (PW2) and cannot tell why could lie against her; that she did not borrow sandals from Mary (PW2).

17. **Francis Ochola Odero (DW3)** testified that on 28/10/2022 he heard noise from a certain lady who was claiming that a certain person had stolen from her. That he rushed to the scene and found the victim being attacked by members of public and that the victim released an Itel phone which the 2nd accused identified as hers and that the said 2nd accused

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pleaded with the irate public to leave the victim as she had already recovered here phone. That the victim then managed to escape and run away. That later in the evening he learnt that the victim had died near his home.

On cross-examination, he stated inter alia; that he was not at the home of both accused between 3.00-4.00 PM; that he saw the body which had injuries on the head and bruises on the body; that he did not see any burn injuries on the body.

18. **Samson Ouma Olwanda (DW4)** testified that he was at his home around 10.00 Am when he heard noise from the 2nd accused who is her neighbour and who wanted to be assisted as a thief had stolen from her. That he rushed to the scene and found members of public had overpowered the suspect. The 2nd accused claimed that the suspect had stolen her phone and money. That the members of public assaulted the suspect and ordered him to surrender the stolen phone and money. That the suspect handed over one phone make Itel which was identified by the 2nd accused who told the irate public to leave the suspect and that the suspect managed to run away.

On cross-examination, he stated inter alia; that he has not seen the recovered phone from the deceased; that he did not visit the place where the body of deceased lay.

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19. **Michael Sande Ombul (DW5)** testified that on the 28/10/2022 that he went to the home of the accused persons to collect fish which was to have been delivered to him by the 1st accused.

On cross-examination, he stated that he did not witness the incident.

20. **Collins Ouma Onyango (DW6**) testified that on 28/10/2022 he was at his place of work namely Alwala area and that the 1st accused who is his customer arrived at the carwash at 3.00 PM and requested him to wash his motorcycle as he chatted with a friend. That the 1st accused informed him about the incident and that he left around 5.00 PM.

On cross-examination, he stated that he was not with the 1st accused at his home and thus cannot tell what took place there.

21. **Stephen Oduol Olwande (DW7)** testified that on 28/10/2022 he went to Port Victoria to buy fish for his customers and that he completed the task of supplying the fish around 3.30 PM and then took his motor bike to Alwala carwash where he bumped onto the 1st accused who is his colleague in the fish business. That they chatted with him until 5.00 PM when he received a call from the area asst chief who informed him that a certain young man who had earlier stolen items from his house had died. That they rushed to

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where the body lay and that police later arrived and collected the body and took the 1st accused and his wife to the police station.

On cross-examination, he stated inter alia; that he was not with the 1st accused from 8.00 AM to 3.30 PM and thus cannot tell where he was all that time; that the body of the deceased was outside their home and near the road; that he saw injuries on the head and legs.

22. After the close of the defence case, parties were directed to file and exchange submissions. However, it is only the defence that complied.

23. I have given due consideration to the evidence tendered by both prosecution and defence and the submissions filed. I find the issue for determination is whether the prosecution proved its case against both accused herein beyond any reasonable doubt.

24. This being a charge of murder, the burden of proof lay upon the prosecution to discharge and that the standard of proof is one of beyond any reasonable doubt. See **Woolmington Vs Dpp [1935] AC 462.** The offence of murder is provided for under Section 203 of the Penal Code which is to the effect that **“any person who of malice aforethought**

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causes the death of another person by an unlawful act or omission is guilty of murder." Hence, in order for the prosecution to secure a conviction for the offence of murder, it must establish certain ingredients inter alia; the death and the cause of that death; that the accused committed the unlawful act which caused the death of the deceased; that the accused had malice aforethought. Throughout the trial, an accused who has denied the charge remains innocent until proved guilty and that he /she is under no obligation to prove his/her innocence.

25. As regards the aspect of the death of the deceased, the pathologist Dr Okongo Eric (PW11) stated that the body had multiple bruises which appeared to be superficial burns on both upper and lower part and that the burns were on both upper arms on wrist joint areas. That there were bruises on the abdomen and bruises on the head and parietal/temporal regions. That the brain had a subdural hematoma. That he formed the opinion that the cause of death was severe head injury secondary to blunt trauma to the head. He was categorical on cross-examination that the body appeared to have been burnt. It is therefore not in dispute that the deceased died. the autopsy report dated 9/11/2022 was produced as Exhibit No.1 I find that this ingredient was proved by the prosecution beyond any reasonable doubt.

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26. As regards the aspect of the unlawfulness of the death, it transpired from the evidence that the deceased was a young man aged about 22 years old and in good health at the time of the incident. It also transpired from the evidence that the deceased had been subjected to mob justice following allegations that he had stolen mobile phones and money from the home of both accused herein. Even if the deceased had been a thief, he deserved to be taken through the legal process and not to be subjected to mob killing and hence his killing was unlawful in the circumstances. I find that this ingredient was proved by the prosecution beyond any reasonable doubt.

27. As regards the aspect of malice aforethought, Section 206 of the Penal Code provides that the same shall be deemed to have been established by evidence proving any one or more of circumstances inter alia; an intention to cause death or to do grievous harm to any person, whether that person is the person actually killed or not; knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not, accompanied by indifference whether death or grievous injury occurs or not by a wish that it may not be caused; an intention to commit a felony; an intention by the act or omission to facilitate the flight or escape from lawful custody of any person who has committed or

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attempted to commit a felony. It is trite law that in offences of murder this ingredient is quite crucial and must be proved by the prosecution beyond any reasonable doubt. In the case of **R Vs Tubere S/o Ochen [1945] 1 EACA 63** the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused during and after the attack. In the present circumstances, it is not in dispute that the alleged theft of mobile phones and money took place at the home of both accused. The evidence of the prosecution's witnesses and the defence is that the deceased is alleged to have entered the home of the accused persons while the 2nd accused had gone out to fetch water and that she is the one who raised alarm attracting members of public who pursued the deceased and administered mob justice on him. The prosecution witnesses stated that there was a large crowd at the scene and that about seven persons were named as having been involved but who were not arraigned in court. It is clear that the circumstances leading to the commission of the offence were rather spontaneous following the alleged theft and that it was not planned beforehand by the mob or the accused persons to seek the elimination of the deceased. I find that there is absence of premeditation This thus suggest that the circumstances point to an offence of manslaughter. Under

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those circumstances, iam of the considered view that the prosecution did not surmount or marshal sufficient evidence in that regard to prove this ingredient beyond any reasonable doubt.

28**.** As regards the participation of the two accused persons in the crime, learned counsel for the defence has submitted that his clients have been fingered out due to suspicion and that the said suspicion if any should not be a basis of conviction against them. Reliance was placed in the case of **Mary Wanjiku Gichira Vs R Criminal Appeal No. 17 of 1998** where the Court of Appeal held that suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence and that before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. The 2nd accused in her defence evidence has given her own version of the events leading to the killing of the deceased herein while the 1st accused has also given his version and further availed witnesses to support his alibi defence that he was away at the time of the incident and only came home at around 5.00 PM. The prosecution's witnesses namely PW1, PW2 and PW5 presented evidence which placed the two accused at the scene of crime. PW1 stated that the deceased was first attacked by a group of people who included the 2nd accused around 12.00 noon and

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that the 1st accused came later on and burnt the deceased using a red hot panga after the 2nd accused lit a fire for that purpose and that she did not beat the deceased but called upon the others to assault him. Pw2 stated that the 2nd accused came while looking for the deceased and claimed that he had stolen he mobile phone and Kshs 600/=. That the 2nd accused picked up a pair of sandals and left while claiming that the deceased had been spotted at a changaa drinking den. That the 2nd accused later came back with the deceased while atop a motorcycle and took him to her house where the deceased was assaulted through her supervision as she promised to pay the boda boda operators and that on cross-examination she added that the 2nd accused kicked and punched the deceased while the 1st accused upon arrival proceeded to burn the deceased with a red hot panga. It was also the evidence of Sophie Anyango Okelo (PW3) stated that the 2nd accused went to her home and enquired on the whereabouts of the deceased and that she gave her a pair of sandals. Again, the evidence of Pamela Apondi Ogoma (PW5) a changaa dealer placed the 2nd accused at the scene of crime since she had visited the home of PW5 while in company of boda boda operators and forced the deceased to accompany them to the home of the 2nd accused. Much as both accused deny involvement in the crime, i find the evidence of the prosecution to be overwhelming. The 2nd accused is the one who went and fetched the deceased from

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the home of the changaa dealer (PW5) and took him to her home where he was assaulted. The alibi by the 1st accused is not convincing since all his witnesses were unable to account for the 1st accused's whereabouts between 9.00 AM to about 3.30 PM. This period is highly likely to have been the time the 1st accused had joined his wife (2nd accused) in dealing with the deceased. Further, the 1st accused stated that his wife called him around 11.00 Am and briefed him about the incident. It was therefore unusual for the 1st accused to continue with his business of supplying fish to his customers up to around 3.00 PM without rushing home to find out about the matter despite being alerted of the serious incident that took place at his home. It was natural for him to have rushed home as the issue was serious and to assist his wife and thus his claim that he nonchalantly went about his business as if nothing serious had happened is not believable. I have evaluated the 1st accused's alibi defence and find that the same does not dislodge the prosecution's evidence as presented by PW1, PW2, PW3 and PW5. It is noted that the defence of alibi has been raised at the tail end of the proceedings. The courts have held that an alibi defence should be raised at the earliest opportunity possible and that it is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution but that the defence is obliged to raise it at an early stage in the case so that it can be tested by those

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responsible for investigating and thereby prevent any suggestion that the defence was an afterthought.

It is noted that the 2nd accused together with boda boda operators seized the deceased from the home of the changaa dealer (PW5) and took him to her home where he was interrogated, assaulted and later burnt by the 1st accused in a bid to force him to surrender the stolen mobile phones and money. Indeed, from the descriptions by the prosecution witnesses, the deceased was subjected to torture by the accused persons in cahoots with others not before the court. It would appear that the interrogation went awry and after the demise of the decased, the rest of the members of public who had also participated in the assault vanished and could not be traced. It is clear that the accused persons and their accomplices literally took the law into their hands and purported to deal with the deceased by use of jungle law yet they were under obligation to hand him over to the authorities so that the alleged thief could be dealt with in accordance with the law of the land. The defence counsel has submitted that the prosecution has made the accused persons as the fall guys while the real culprits are at large and roaming freely in the village. Iam not persuaded by that assertion in view of the fact that the accused persons participated in the assault and supervised the irate members of public in joining the fray. The two accused persons appear

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to seek to leave the blame upon the irate members of public who are still at large yet they themselves participated in leading the irate mob and assaulting the deceased. As noted above, it was the 2nd accused who went to the home of a changaa dealer (PW5) and had the deceased seized by a group of boda boda operators and took him to her home where the assault took place. It is instructive that none of the accused persons ever lodged any report of theft of mobile phones and money and that none of the alleged recovered mobile phone was availed to the police as having been recovered from the deceased. I have no doubt in my mind that the two accused persons are among the assailants and thus identified by the witnesses. The defence suggestion that the issue of burns was not the cause of death of the deceased is not convincing in view of the fact that the pathologist confirmed the presence of superficial burns. I find that even if the said burns have not been indicated as the cause of the deceased's death, the said injuries still matter as part of the sequence of the assault before the deceased died as presented by the witnesses. The 1st accused was seen burning the deceased with a red hot panga in a bid to force the deceased to surrender the alleged stolen phone and money. Even if the deceased died due to blunt trauma to the head and not burns does not relieve the accused persons from blame as they were among the assailants. Further, the 1st accused's assertion that they

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have been framed up due to hostility from his neighbours over land disputes is not believable as nothing in that regard emerged from the entire evidence. The evidence tendered by the prosecution clearly placed the two accused herein at the scene of crime as having been among the deceased's assailants. I find this ingredient was proved by the prosecution beyond any reasonable doubt.

29**.** In view of the foregoing observations, it is my finding that the prosecution has not proved the charge of murder against the two accused, herein Sammy Obonyo Owino and Nancy Akinyi Obonyo beyond any reasonable doubt. However, I find that the prosecution has proved a charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code against the accused persons herein beyond any reasonable doubt. I find each of the accused persons herein **Sammy Obonyo Owino** and **Nancy Akinyi Obonyo** guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and are convicted accordingly.

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Dated and delivered at Siaya this 25th day of November 2025.

D.KEMEI

JUDGE

In the presence of:

Sammy Obonyo Owino……..1st Accused

Nancy Akinyi Obonyo……2nd Accused

Oduol……for Accused

Soita……for Prosecution

Maureen/Kimaiyo……..Court Assistant

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