

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL CASE NO. 8 OF 2018**

REPUBLIC.....PROSECUTION

VERSUS

SAMUEL

OMONDI

ANDONGO.....ACCUSED

**JUDGMENT**

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 24/01/2018 at Moi University area, within Uasin Gishu County, he murdered one **Kenneth Kipchoge Koech**.
2. I had in my Ruling on “case to answer” delivered on 28/03/2025 recounted the chronology of events in these proceedings but I will again do so hereinbelow.
3. The accused, represented by **Ms. Karuga Advocate**, took plea on 20/01/2016 before **Hon. Lady Justice Githua**. He denied the charge and a plea of not guilty was entered upon which he was admitted to bond on 12/6/2018. The trial eventually commenced on 25/09/2018 in which the Prosecution called 9 witnesses and eventually closed its case after more than 6 years on 13/2/2024.
4. The evidence of the first 8 witnesses was taken before **H. Omondi (as she then was)** upon whose elevation to the Court of Appeal, I took over the case and took the evidence of the last, 9<sup>th</sup> witness. Upon the parties request, and in line with the requirements of **Section 200(3)** of the **Criminal Procedure Code**, I allowed the trial to proceed before me from where it had stopped. This was after the defence informed the Court that it would not seek recall of any of the witnesses for examination. After close of the Prosecution case, by my said Ruling rendered on 28/03/2025, I found the accused as having a case to answer and placed him on his defence.
5. I had also recounted the witness testimonies in the Ruling on “case to answer” but which I will again restate hereinunder.
6. **PW1** was **Emily Chelagat Rotich**. She stated that she works at Moi University, that on 24/01/2018 she was from her home on her way to collect milk when she heard noises from

the direction of the university main campus, she heard people shouting “*mwizi mwizi*” and some young people had apprehended someone who ran into her compound, that the alleged thief was a man and was naked, and it was alleged that he had stolen a phone. She stated that she addressed the group and requested that they reason together since she recognized the suspect, and that they negotiate. She added that one **Kipkorir** who was following the crowd also pleaded with the students not to harm the thief but someone from the crowd suddenly produced a knife and stabbed **Kipkorir**. She testified that she clearly saw the assailant and identified him as being the accused person before Court. She stated that she watched **Kipkorir** fall down and that she recognized the assailant (accused) as he was her customer to whom she used to sell grains, vegetables, and tomatoes since 2017. In cross-examination, she stated that the incident occurred around 4:00 pm and that the university students were 5 people, and that a few people chased the accused but he outran them. She also stated that she had never seen the other students before except the accused whom she recognized.

7. **PW2** was **Inspector Paul Kibor**, stationed, at the material time, at Langas Police Station. He stated that he was called upon in the afternoon of 12/02/2018 to conduct an identification parade in reference to **Samuel Adongo** (accused), which he did. He described how the parade was conducted, and stated that there were 9 people placed therein, that the accused, although he was granted the opportunity, did not ask for a friend or Advocate of his choice to be present, and that the accused chose his own positions in the parade. He then explained how two respective people, **PW1** and one **Titus Koskei**, both, on different occasions, pointed out the accused by touching him. He further stated that upon asking the accused whether he was satisfied with the exercise, the accused conveyed his belief that his positive identification may have been because he had been photographed at the scene, which remark, **PW2** stated that he recorded in the Parade Form which then produced as an exhibit. He testified further that in constituting the parade, he chose people of the same situation and complexion as the accused. In cross-examination, he also testified that the accused stated that he was not satisfied with the exercise because most of the people placed therein were taller than him.
  8. **PW3** was **Samuel Keter**. He stated that he lives at Moi University where he operated a hotel in the neighbourhood. He testified that he was at the hotel on 24/01/2019 at 4:00 pm when he noticed people running towards the market, he got out and followed them and he heard someone state that “*let’s return him and kill him*”, and he realized that someone had been apprehended by a group of university students. He stated further that the students were outnumbered by the crowd, part of which held the person who had been robbed, and others
- Eldoret High Court Criminal Case No. 8 of 2018**

held the suspected thief. He stated that the crowd was divided in opinion as some people, including himself, proposed that the matter be negotiated, but that suddenly, he heard a man screaming out that someone had been knifed and people then begun running after the assailant, and that he noticed someone lying on the ground, whom he then recognized to be one **Korir** whom he knew, and was bleeding. He stated that, with his assistance, **Korir** was then taken to the Moi Teaching and Referral Hospital (**MTRH**) but he later heard that he had died. He however stated that he did not see the person who fled after stabbing **Korir**. In cross-examination, he stated that the alleged thief broke loose during the commotion that ensued after the stabbing and fled.

9. **PW4** was **Daniel Korir**. He stated that while at the centre on 24/01/2018 at 4:00 pm, he noticed some people approaching while pulling each other, that members of the public were struggling with students who were proclaiming that they were going to kill a young man, and that he and others tried to negotiate with the students not to kill the alleged thief. He added that the crowd outnumbered the students, that he then heard that someone had been knifed, he rushed to check and realized that the victim was **Benjamin Kipkorir** who was known to him, and who was bleeding from the stomach. He, too, stated that with his assistance, the deceased was rushed to **MTRH** but he later learnt of his death, and that he did not know who had stabbed him as he went to the scene later on, although he heard that it was by a student. In cross-examination, he, too, stated that the university students were 5 in number.

10. **PW5** was **Henry Adera**. He stated that he lives and works at Moi University in the Catering Department, that he was at the Cheboiwo Centre on 24/01/2018 at 4:30 pm as he was off duty when he saw some students coming to harass a young boy whom they claimed was a thief and wanted to take him to the university. He testified that he tried to intervene by urging the students to let the police handle the matter but they ignored him, and that some young men and *boda boda* riders were pulling the boy to one direction and the students were pulling him to a different direction. He stated that the students claimed that the boy had stolen their phone, and that in the commotion, the alleged thief broke loose and fled, after a short while, he saw another young man running towards the hostel, followed by the crowd and he noticed "**Mzee Kipkoech**" lying on the ground bleeding, and who was then rushed to hospital but they later learnt of his death. He stated that he learnt that **Kipkoech** was stabbed using a knife but he did not see who stabbed him as he only saw the accused running very fast towards the hostel with the crowd behind. He testified that he was the chair of the Nyanza Group and because of this, he knew the accused as he (accused) used to speak to

him in the Dholuo language. In cross-examination, he restated that he did not see the stabbing and only saw the injured man on the ground.

**11. PW6 was Grace Kemei.** She testified that she lives within Moi University where she works in the security department, that on 24/01/2018 at 3:00 pm, while inside a shop within the centre, she saw a group of boys pulling and pushing, one group was pulling a young boy towards the students' hostel and another group was pulling him towards a different direction, and that a crowd gathered and she saw them going behind some building. She stated that shortly, she heard someone scream and shout "**ameuwa**", she got out to check and saw someone whom she recognized as **Kipkoech**, a businessman in the area, lying on the ground bleeding at the groin, who was then taken to hospital, but she later learnt that he had died. She added that she did not see who had stabbed the deceased.

**12. PW7 was Felix Kimurgor Malakwen.** He testified that he was at **MTRH** on 2/02/2018 at 10:00 am where he identified the body of the deceased (**Kipkoech**), his brother, to the doctor for post-mortem. He stated that the body had an injury at the left groin, and the doctor informed them that death was caused by excessive bleeding.

**13. PW8 was Dr. Macharia Benson**, a Pathologist at **MTRH**. He testified that he conducted an autopsy on the body of the deceased on 2/07/2018, identified to her by **PW7** and one **Mathew Kosgei**. He stated that the deceased was a 45 years old male dressed in a blood-stained t-shirt. Externally, he stated that there was a stab wound at the left thigh region measuring 3 cm long x 1 cm wide and 7 cm deep, which had damaged the main blood vessels to the lower limb, there was evidence of loss of blood as indicated by pale eyes, and the deceased did not have any defence wound. Internally, he stated that all organs were very pale, a sign of loss of blood. According to him, the cause of death was "**hypovolemic shock due to excessive bleeding due to single penetrating stab wound**", and he then produced the post-mortem Form. In cross-examination, he stated that the stab wound was inflicted by a sharp long object.

**14. PW9 was the Investigating Officer, Police Constable Geoffrey Kirambugu Avedi** who stated that he was, at the material time, attached at the Langas Police Station. He testified that a report was received at the Station on 25/01/2018 from Kesses Police Station of a murder, and tension between university students and Kesses residents as a result. He stated that with other officers, they proceeded to the scene, and established that the incident occurred on 24/1/2018 at Cheboiwo market, at the scene, they found blood which was

covered with sand, but they did not recover the murder weapon. He stated that they were informed that there had been a confrontation between university students and residents over a phone that had been sighted, and which had been earlier reported as robbed, and that the confrontation occurred at a Chemist by the name Eldospon.

15. He stated further that they met the owner of the chemist, who told them that someone by the name **Kevin** had brought the phone, an *Infinix Hot 4 Light*, for charging, that a university workers, upon sighting the phone, informed the chemist owner that the same had been stolen, and that the worker then went to the person whose phone had allegedly been stolen from, one **Walter Odhiambo**, and informed him about the recovery. He added that **Walter** then went to the Chemist and indeed confirmed that it was the same phone that had been stolen from him, that **Walter** checked and found one of his photos in the phone thus confirming that indeed it was the same phone. He stated that **Walter** then set a trap, they agreed that **Walter** would be informed when the customer who brought the phone returns to collect it, that indeed the customer returned and **Walter** was informed, **Walter** organized his friends to go to the Chemist to arrest the customer, and that among the people **Walter** organized was the accused. He stated that however, by the time that they reached the Chemist, they found that the customer had already collected the phone and left, the chemist owner called the customer back pretending that he had found a buyer for the phone, and that this is because although the customer had brought the phone for charging, he had also informed the chemist owner that he was looking for a buyer thereof.

16. He added that the customer returned and **Walter** started pretending to negotiate with him over the purchase of the phone, and it was at that time that they arrested the customer to take him to the University Security Office but in the process, members of the community stepped in and demanded that the customer be taken to the area Chief instead, and this was because previously when such suspects were arrested by the students, they would instead be beaten and killed before and/or without reaching the Security Office. He testified that a confrontation ensued and members of the community managed to snatch the customer from the students, released him and he ran away, that 2 witnesses stated that at that point they saw the accused removing a knife from his waist and said in Kiswahili that “*sababu mumemwachilia mwizi*”, and then stabbed the deceased, **Kenneth Koech** (who was among members of the public who had snatched the deceased) on the upper thigh using a knife, the deceased fell down and the students ran away because they were few and members of the public followed them but in vain since they also feared retaliation from other students. He testified that **PW3** informed them that, with the assistance of others, including **PW6**, they took the deceased to the Moi University Dispensary, and that the nurses at the dispensary

**Eldoret High Court Criminal Case No. 8 of 2018**

referred the deceased to **MTRH** since they had been unable to stop the bleeding but he died on the way. He testified further that he witnessed the post-mortem at **MTRH** and the cause of death was excessive bleeding due to a single penetrating stab wound that caused shock. He added that the accused escaped from the university and came back on 7/02/2018 when police arrested him.

17. He stated further that an identification parade was conducted on 12/02/2018, in which the accused was positively identified by 2 witnesses, **PW1** and one **Titus Kipkosgei**, upon which he charged the accused with the offence. He stated that the incident occurred at around 4:00 pm. In cross-examination, he stated that they did not recover the murder weapon nor the phone in issue, that among the students who had accompanied **Walter Odhiambo**, he only managed to get the name of one, **Bralington Onyango**, who was also a room-mate to the accused, that the stabbing occurred about 150 metres from the chemist, and that the accused was arrested when he presented himself to the University Security Office

18. As aforesaid, by my Ruling dated 28/03/2025, I found the accused as having a case to answer and placed him on his defence. Through his Counsel, he opted to give sworn testimony in his defence, which he then did as **DW1** on 9/07/2025.

19. The accused, in his defence confirmed that he was a 3<sup>rd</sup> year Psychology student at Moi University main campus, and stated that while he used to reside in the campus hostels, his friend, a fellow student, one **Walter Odhiambo Omollo**, used to live outside, at Cheboiywo, about 200 metres away, which was separated from the campus by a field, and that about a week before the incident herein, **Walter** had been robbed of his phone at the said field at night by an unknown person, which robbery had been reported to the university security office. He stated that after a few days, when **Walter** went to a Pharmacy/Chemist at Cheboiywo, he spotted the phone charging and upon inquiry, the owner of the Chemist informed him that the same had been sold to him by a customer known to the owner of the Chemist. He stated that the owner of the Chemist thus phoned the suspect and tricked him to go to the Chemist to collect his balance for sale of the phone. The accused stated that he was thus at the Chemist with **Walter** and 3 other fellow university students (thus 5 in total) when the suspect showed up at the Chemist to collect the balance but the suspect, upon sighting **Walter** tried to flee but they caught him. He stated that they intended to take the suspect to a police post within the campus, which act however created some tension, the villagers ganged up against them with weapons forcing them to flee towards the campus and let go of the suspect. He stated that later in the evening, information emerged that one of the villagers who had rescued the suspect from the students had been stabbed, and that he was arrested

**Eldoret High Court Criminal Case No. 8 of 2018**

about 2 weeks later. He denied knowing who stabbed the deceased and testified that upon his arrest, he was taken to the Police Station where he found **Walter** who had been arrested earlier, that an identification parade in which 6 of them, including **Walter**, were placed was conducted but he averred that, unlike him, the rest of the persons paraded were all light-skinned, and that he was visibly the youngest among them as they used to refer to him as “*mwanafunzi*” (student).

20. He confirmed that he was identified by 2 people one of whom he knew as he used to work at the university but whose name he could not recall, but denied knowing the second person whom he later came to know as **PW1**. In what appeared to be a contradiction from his earlier statement though, he then stated that **Walter** was not put in any identification parade. In the end, he attributed his arrest and implication in the charge of murder to the fact that at that point in time, there were political tensions in the country which resulted into ethnic animosity between the local Kalenjin community and his Luo tribe. To demonstrate this fact, he stated that as the villagers were attacking the students during the incident, they kept remarking that “*hawa wajaluo wametusumbua sana*” (these Luos have really disturbed us). In cross-examination, he stated that **Walter** had been his friend since their high school days, that he used to frequently visit **Walter** in Cheboiywo where **Walter** had been residing for about 3 months by then since relocating from the hostels. He stated that the other 3 students only learnt of the theft of **Walter**’s phone while at the Chemist, and that **Walter** only brought them because the owner of the Chemist had asked **Walter** to bring his friends who could identify the phone.

21. He insisted that no one had been stabbed by the time that they fled after the villagers came at them with weapons. He stated that he was not a common figure at the centre so he did not recognize the villagers, and denied that he fled campus after the incident and was only arrested upon his return 2 weeks later. He also denied having any knife at the time of the incident or that he is the one who stabbed the deceased. He also wondered why **Walter** was not called as a witness. When pressed about the Identification Parade, he conceded that he could not remember the number of the participants. He also stated that only he and **Walter** were arrested. He urged that the Identification Parade was not fair because the participants did not have similar physical attributes, and that **PW1** lied in alleging that it is he (accused) who stabbed the deceased. In re-examination, he stated that the villagers knew the students’ tribe (Luo) because the students used to speak that language. He denied that any of them (students) had any weapon and contended that it is in fact the villagers who approached them armed with weapons such as stones, pieces of wood, sugarcane and pangas. In conclusion, he clarified that **Walter** did not take part in the Identification Parade.

22. After close of the trial, the parties filed Written Submissions. The defence Submissions is dated 27/03/2025, while the State's is dated 4/07//2025.

### **Prosecution Submissions**

23. **Ms Muriithi, Principal Prosecution Counsel**, appreciated that for the Prosecution to secure a conviction on a charge of murder, it has to prove three ingredients against an accused person, namely, death of the deceased and its cause, that the accused committed the unlawful act which caused the death, and that the accused had malice aforethought. She cited the Court of Appeal case of **Anthony Ndegwa Ngari vs. Republic [2014] eKLR**. She then observed that the death of the deceased and its cause are not disputed and were proved by the post mortem Report. On whether the accused committed the unlawful act that caused the death, she submitted that **PW1** testified that she clearly saw the accused draw a knife and stab the deceased upon which the deceased fell down bleeding. She urged that the incident happened in broad daylight, and that **PW2** testified that he conducted an identification parade on 12/02/2018 in which the accused was positively identified by **PW1** and other witnesses.

24. Regarding the Identification Parade criticized by the accused, she cited **Section 5(d)** of the **National Police Service Standing Orders** requiring that the accused person be placed among at least 8 persons, "**as far as possible of similar age, height, general appearance and class of life as him or her**". He cited the Court of Appeal case of **David Mwita Wanja & 2 Others versus Republic [2007] eKLR**, and submitted that the phrase "**as far as possible of similar age, height, general appearance and class of life as him or her**" does not mean that all the members of the parade should be identical to the accused and that mere absence of such persons who were tall as or dark as the accused did not invalidate the Parade. She submitted further that lack of a prior description of the accused to the police before the Parade was conduction also does not render the same invalid. She cited the case of **Mueke v Republic [2022] KECA 934 (KLR)**. Counsel urged further that the evidence of visual identification at the Parade did not stand alone as there was evidence from **PW1** that she had known the accused since 2017 as he used to buy groceries from her. She then contended that the testimony by the accused was a mere denial and did not cast doubt on the clear and consistent evidence tendered by **PW1** and **PW2**.

25. On “*malice aforethought*”, she cited the case of **Republic v Tubere s/o Ochen [1945] 12 EACA 63**, and submitted that the accused used a knife to stab the deceased, that a knife is a lethal weapon, that the action of the accused was deliberate and a clear indication that grievous harm was intended.

### **Defence Submissions**

26. **Ms. Kemboi**, Counsel who for the latter part of the trial has been appearing in the matter holding brief for **Ms. Karuga** for the accused, urged that her Submissions was not deny that a crime had been committed but that the accused was innocent. She, too, recounted the ingredients of the charge of murder and cited authorities, and submitted that the accused stated that he had gone with his friend to recover a stolen phone from a villager, that the thief ran away and it is another villager who was killed. She submitted that even if the accused had an intention to kill, it would have been the thief and not the innocent villager, thus the murder was not premeditated and there was no *mens rea*. Regarding the Identification Parade, Counsel urged that the accused was the only tall and dark person placed therein thus breaching the requirement of similar appearance, and that the accused was not informed of his right to have a friend or Counsel as the standing orders demand. She cited the case of **Njihia versus Republic**, and also the case of **Matianyi versus Republic (1986)**.

27. Regarding the stabbing of the deceased, Counsel contended that it occurred amid chaos between villagers and students, the conditions were hardly ideal for clear observation of what transpired, no direct eyewitness saw the accused stab the deceased. She submitted further that there was no corroborating evidence as no murder weapon was recovered from the accused nor was there any blood or physical evidence linking to him to the killing, nor was there proof of any motive. According to her therefore, the evidence was entirely circumstantial and thus mere suspicion which is insufficient. She urged further that the accused must be given the benefit of doubt as any uncertainty on who inflicted the fatal knife should be resolved in his favour, and that reliance on a single unsupported identification especially one obtained under flawed conditions cannot justify a conviction. She cited **Criminal Appeal No. 17 of 1998, Mary Wanjiru Guchiva versus Republic**.

### **Determination**

28. **Section 203 and 204** of the **Penal Code** under which the accused is charged provide for the offence of murder and the punishment for it. The provisions are premised as follows:

**Eldoret High Court Criminal Case No. 8 of 2018**

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

**204. Any person who is convicted of murder shall be sentenced to death.”**

29. The Prosecution, to secure a conviction, has a duty to prove, beyond reasonable doubt, that the accused, by an unlawful act or omission caused the death of the deceased through “*malice aforethought*”. For the Court to make a finding that an accused person committed the offence of murder, the Prosecution must therefore establish the following elements; **(a) death of the deceased, (b) proof that the accused person committed the unlawful act which resulted in the death of the deceased: and, (c) malice aforethought.**

30. In this case, the death of the deceased and cause thereof are not disputed. According to the post mortem Report produced by the Pathologist, **PW8**, the cause of death was “*hypovolemic shock due to haemorrhage due to penetrating stab wound*”.

31. As aforesaid, being a criminal charge, the Prosecution bore the duty to prove the charge beyond any reasonable doubt. The term “*beyond reasonable doubt*” was described and/or explained in the leading case of **Woolmington v Republic 1935 AC 462**, as follows:

**“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”**

32. There is no dispute that the genesis of the incident herein was the quest by the accused and his 5 fellow university students to arrest a suspect alleged to have snatched a phone at night from one of them a few days earlier while the student was walking along a field separating the university main campus from a nearby local village known as “*Cheboiywo*”. The student is said to have sighted the phone charging at a chemist situated at **Cheboiywo** and upon

inquiry, the owner of the chemist informed him that the phone had been brought to him by a customer to either sell on his behalf or to source for a purchase. The chemist owner and the student then hatched a plan to call the suspect on phone and ask him to come to the Chemist to collect his payment for the phone, at which point they would arrest him upon arrival. The student brought with him “manpower” in the form of his 4 colleagues who included the accused person. It is thus this trap which the suspect unknowingly walked into. It is said that the suspect, upon noticing presence of the student from whom he had stolen the phone, attempted to flee but it was too late, as the students overpowered and nabbed him. This action is said to have attracted attention of the local community, resulting into tension and commotion as some locals, including the deceased, moved to try to reason with the students while some tried to rescue and free the suspect. An altercation seems to have thus arisen between the students and the locals and it is at this point that matters flared and, in the melee, the deceased was stabbed and fell down bleeding.

**33.** There is no doubt that the Prosecution’s star witness was **PW1, Emily Chelagat Rotich**, who is the only witness who testified that she actually saw the accused stab the deceased and also, later pointed him out at the identification parade. Although there is no doubt that the accused was placed at the scene of crime as he was clearly in the crowd and the midst of the melee, none of the other witnesses claimed that they saw the accused stabbing the accused. One **Titus Koskei**, who was said to have also pointed out the accused during the Identification Parade was never called as a witness herein. The only other witness who mentioned the accused was **PW5, Henry Adera**, who however only testified that he saw the accused running away with pursuers behind him. This was basically therefore a case of a single identification witness since it is only **PW1** who claimed to have seen the accused stab the deceased.

**34.** On this issue of a single identification witness, in the English landmark case of **R v Turnbull & Others (1976) 3 ALL ER 549**, the Court considered the factors that ought to be considered, and held that:

**“..... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way ...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and**

**the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

**35. Here at home, the Court of Appeal, in the case of *Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166*, followed in *Roria vs Rep (1967) EA 583*, guided as follows”**

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

**36. The Court of Appeal, again, in the case of *Cleophas Otieno Wamunga v Republic [1989] eKLR*, stated as follows:**

**“We now turn to the more troublesome part of this appeal namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (P.W.1) and Lilian Adhiambo Wagude (P.W. 13). Both these witnesses testified that they recognised the appellant among the robbers who attacked and robbed them. .... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. ....”**

37. The long and short of the above sentiments is that where the only evidence against an accused person is evidence of identification or recognition, the trial Court is enjoined to examine such evidence carefully to satisfy itself that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction. The decision in this instant case must therefore turn on the need for testing with the greatest care the evidence of **PW1** as the single identification witness.
38. Coming back to the testimony of **PW1**, she stated that she works at the university and she was from her home around 4.00 pm when she came across a commotion in which she learnt that some young men had apprehended a suspected phone thief who ran into her compound. She testified that she, among other people, pleaded with the group not to harm the suspect since she recognized him, and requested that they negotiate with him. She stated that in the course of the commotion, someone from the crowd suddenly produced a knife and stabbed the deceased who fell down bleeding. She stated that she used to sell grains, vegetables, and tomatoes at the Centre and she thus identified the assailant as being the accused since he was her customer whom she had known him since 2017. In cross-examination, she stated that a few people chased the accused but he outran them. She also stated that she only recognized the accused among the 5 university students as she had never seen the others before.
39. Applying the tests enunciated in the cases cited above, what I ask myself is, if indeed the stabbing of the deceased occurred at around 4.00 pm thus during broad daylight, and in the midst of a crowd comprising both students and locals, how come only **PW1** out of the whole crowd, saw the accused produce a knife and stab the deceased? **PW3, PW4, PW5** and **PW6** who all testified that they were in the crowd or in the vicinity, were all emphatic that they only heard shouting that someone had been stabbed and the deceased fell down bleeding but they never saw who stabbed him nor saw the knife. The process of fetching and producing the knife from wherever it was hidden, holding it carefully and then aiming it at the groin of the deceased and stabbing him could not, in my view, have been a split-second act, it must have taken some moments. How is it that no one else in the huge crowd, apart from only **PW1**, saw all this? The stabbing having occurred during a commotion or a melee with people shouting, pushing and shoving all over, is it possible that **PW1** may not have clearly seen the person who stab the deceased, and may thus have erroneously, but honestly, believed that it was the accused she saw doing it? Considering this state of the evidence, I find this to be a real possibility. Further, also considering the testimony by the accused that it is in fact the locals who approached the students while armed with stones, pieces of wood and pangas, is it possible that this was perhaps a case of inadvertent “friendly fire” in which

one of the locals could have perhaps, mistakenly, in the course of the melee, ended up stabbing one of their own, the deceased, with a sharp object?

40. I agree with **Ms. Kemboi** that the conditions prevailing during the commotion do not seem to have been quite ideal for clear observation of what transpired, particularly considering that no other eyewitness claimed to have seen the accused stab the deceased. There does not also seem to be convincing corroborating evidence as the knife/murder weapon was never recovered.
41. I also note that no witness has testified that he or she saw the accused with the knife either prior to the commotion, or even at the Chemist, or when the students were arresting the suspect, or even after the stabbing. **PW1**, the only witness who claims to have seen the accused producing the knife and stabbing the deceased did not at all even give its description. However, according to **PW8**, the Pathologist who conducted the post-mortem, the stab wound was inflicted by a “*sharp long object*”. If it was such a long knife, where and how was the accused hiding it during all this time? There was no testimony on how the accused was dressed on that day and so it cannot be speculated how he could have managed to hide it in his clothing, if at all, for all that long. It is only **PW9**, the Investigating Officer, who was not even at the scene, who claimed that **PW1** told him that the accused produced the knife from his waist. It is not lost on me that **PW1** herself never said so during her testimony. I also note that, in cross-examination, **PW9**, the Investigating Officer appeared to concede that out of the other 4 students who were with the accused, apart from the accused, he only recorded the Statement of the said **Walter Odhiambo**, who was not however called as a witness in this case. He however did not reveal why he never recorded Statements from all 5 of them. It is then possible that this omission may have denied **PW9** crucial information held by these other students?
42. As aforesaid, the alleged knife was also never recovered and **PW1** did not even say whether the accused, after stabbing the deceased threw it away or ran away with it or handed it to somebody else. Did the knife just disappear into thin air in the midst of the whole crowd? Granted, **PW1** testified that she used to sell groceries and vegetables and that she therefore recognized the accused because he had been her customer since 2017. The incident having occurred in January 2018 however, it is not clear from what date in 2017 **PW1** claims to have known the accused. She did not also state how frequently the accused used to visit her groceries stall for purchases. In any case, the question is not about whether she recognized the accused, but whether it has been proved beyond reasonable doubt that it is really the

accused she saw stabbing the deceased. I also note that the accused, in his defence, readily admitted knowing **PW3, Henry Adera**, but vehemently denied knowing **PW1**.

43. Under the above circumstances, the conclusion I have come to is that the identification evidence upon which the case against the accused is based is evidently shaky as it has not been demonstrated to have been completely free from the possibility of error. The evidence on record cannot, in my view, be said to be irresistible that the accused person was the culprit in the stabbing of the deceased. Under these circumstances, the accused is entitled to be given the benefit of doubt as any uncertainty on who inflicted the fatal knife has to be resolved in his favour. I am therefore not satisfied that the Prosecution has proved to the specified standard of proof of beyond reasonable doubt that it is indeed the accused out of all the people in the crowd involved in the commotion or melee, who actually stabbed the deceased. The Prosecution has therefore failed to prove the *actus reus*. A charge of murder is a serious capital offence with the potential of resulting into a death sentence. Conviction on such charge must therefore be founded only on firm, cogent and conclusive evidence of culpability, which in this case has, in my view, not been established.
44. For the above reasons, I do not find consideration of the merits of the Identification Parade in which **PW1** is said to have pointed out the accused to be helpful. This is because as aforesaid, the question here is not whether **PW1** recognized the accused but whether her testimony that it is the accused, out of all the other people in the crowd, that she saw stabbing the deceased was watertight and free from error. An Identification Parade of a person already recognized and known by the identifier, thus not a stranger, would not answer the above question.
45. Having found that the Prosecution has failed to prove the *actus reus*, the next issue of whether “*malice aforethought*” can be inferred from the actions of the accused does not now arise.
46. The findings above therefore inevitably result into my considered conclusion that, in my view, the evidence on record is not sufficient to sustain a conviction. The end result is therefore my finding that the Prosecution has failed to prove the charge of murder beyond reasonable doubt.

### Final Orders

47. In the end, I find the accused person not guilty of the charge of murder, and I accordingly acquit him under **Section 215** of the **Criminal Procedure Code**.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 30<sup>TH</sup> DAY OF JANUARY 2026**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Accused present physically in Court**

**Ms. Kemboi h/b for Ms. Wanjiku Karuga for the Accused**

**Ms. Muriithi for the State**

**Court Assistant: Brian Kimathi**