



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. E048 OF 2022

REPUBLIC
PROSECUTOR

VERSUS

BRIAN MUSASIA Alias CHAIRMAN 1ST

ACCUSED

KEVIN LUCHESI Alias MARSHAL 2ND

ACCUSED

JOHN OLILO Alias JOHNTTE 3RD

ACCUSED

FRANCIS MWANGI 4TH

ACCUSED

JUDGEMENT

1. The four Accused persons are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 22nd day of October 2022 at Kenya Power Garage area within Kakamega Central Sub-County in Kakamega

County, they unlawfully murdered Moses Atambo Lumatete.

2. The Accused persons denied the charges and the prosecution called eight (8) witnesses in support of its case.
3. PW1 was Richard Okello, a Mechanic who recollected that on 22nd September 2022 while on his way to work, he collected a wallet which had a NHIF card, Safaricom card and a bunch of keys from the ground and on checking, found it read the name Moses. As he walked along the road, he saw blood stains which appeared as if somebody had been dragged along the road for about 15 metres. Shortly thereafter, he met a crowd which was gathered around a dead body. Among the crowd, he identified Ochieng and Odipo. However, he could not identify the body as its head was in a thicket. He showed the gathering the documents and the photo was identified as that of Moses, a worker at Lumino Hotel which was about 2 Km away from the scene. The witness said that the CID collected the body from the thicket and the hotel workers

- identified it as that of Moses, their worker. He said that the body had a cut wound on the back of the head.
4. PW2 was Joshua Alukava who testified that on the 22nd September 2022, he was at home when he received a report from his brother who informed him that his son Moses had been injured and he was needed at Kakamega at the son's hotel. He proceeded to the hotel where he was informed by the Manager that Moses had died and the body was in the mortuary. PW2 said that the Manager informed him that Moses had reported to work at 2.00 p.m. and worked until 9.00 p.m. when he left for his house at Shikambi. PW2 recalled that later, a post-mortem was done at Kakamega General Hospital after he and Hannington had identified the body and the Pathologist attributed the death to blunt head injury following assault.
 5. PW3 was Hannington Lumatete, a brother to the deceased. He testified that he travelled home from Nairobi after receiving a call from his sister on 22nd October 2022 who informed him that Moses was dead. He attended the post mortem exercise and the doctor

informed them that the cause of death was blunt head injury subsequent to assault.

6. PW4, was Dr. Dixon Mchana, a Pathologist at Kakamega County. He testified that on 26th October 2022, he performed a post-mortem on the body of Moses Otambo Lumatete after identification by PW2 and PW3. He found three perforating lacerations on the skull. The first was on the outer side of the left eye, the second one on the left side of the back of the head, and the third one at the top of the head to the right. There was a graze on the left forehead but no evidence of medical intervention. The Pathologist narrated that there was extensive bleeding under the skin of the scalp and above and beneath the brain covering on both sides of the brain. He found a moderate swelling on the brain which means that the death was not immediately after the incident. He stated that from the stomach contents, the deceased died within four hours of his last meal. PW4 said that in view of his findings, he formed the opinion that the cause of death was severe head injury secondary to blunt trauma

following assault. The witness produced the post-mortem form as PEX.1.

7. The next witness PW5 was Corporal Samwel Tisa who recalled that on 18th November 2022, he interrogated a suspect by name Francis Mwangi after his arrest in connection with a series of murder and robbery incidents. He stated that the said Francis Mwangi informed him that a group of street children had formed a group going by the name, “Mbogi La Izraim Territory” with the aim of protecting street children from injustices meted out on them on the basis of suspicion that they were involved in crime. PW5 stated that the suspect informed him that the gang leader was Brian Musasia, who is the 1st Accused while the suspect he was interrogating is the 4th Accused. He narrated that the 4th Accused led them to Maraba area, and to the 1st Accused whom they found riding a motor bike. According to PW5, when the 4th Accused notified the 1st Accused that the persons accompanying him were police officers who required the latter’s presence at the police station, the 1st Accused defied them and sped off but along the way, he abandoned his motor bike and fled

on foot. The police pursued him and arrested him after which they took him to the police station alongside his motor cycle registration No. KMCN 318W make Bajaj, red in colour. They then interrogated the 1st Accused who led them to Kevin Luchesi alias Marshall whom they found with motor cycle registration No. KMGB 026L Bajaj, black in colour. PW5 further stated that on interrogation of Kevin Luchesi, he led them to his house in Maraba area where they recovered several items. The witness produced the items which were:- a sharp rusted blood stained panga, a sharp pointed metal rod, a bluish rain coat labelled Kenya Power, brown desert boots, pair of black shoes, assorted clothing and a bluish bed sheet. The said items were produced as PEX.2 (i) to (vii).

8. PW5 continued to testify that after recovering the items, they took the suspect to Kakamega Police Station where he was booked. He produced an inventory that was signed by the suspect, Kevin Lutechi. PW5 further stated that he was involved in the arrest of the 1st and 2nd Accused but the 3rd and 4th Accused were arrested by officers from Kakamega police station.

9. When cross-examined, PW5 said that he was part of the investigating team but the lead investigating officer was PC Daniel Ateka. He said that when they arrested the 2nd Accused, he was alone and took them to his house for a search on his own volition. He stated that he did not know whether any of the items he had produced were connected to the deceased.
10. PW6 was James Geteri who said that he was a businessman in Maraba but previously a boda boda rider. He recalled that on 22nd October 2022 at around 4.00 a.m. he was from his house heading to town for work. As he reached a hotel called Lumino towards Kenya Power Area, he heard some noise as though someone was being beaten. He turned his motor cycle and switched on the headlights. He saw the 1st Accused and the 3rd Accused and feared for his life. He testified that he saw the four Accused persons but only knew the names of the 1st and 3rd Accused persons. He said that he saw the others during the identification parade which was conducted on 5th December 2022 at around 4.00 p.m. He testified that he identified Marshall among 11 people, John Olilo alias

Johnte amongst 12 people, Francis among 11 people and Brian Musasia among 9 people.

11. PW6 further testified that after encountering the Accused persons, he called Evans who came after a short while and he then informed him that he had seen the Accused persons heading towards a certain direction and he feared to follow. On encouragement from Evans, they followed the direction that the Accused persons had taken and there, they found Musa alias Kaparo's body. It had cuts on the body. According to PW6, Evans called the police, who arrived within 20 minutes and took the body to Kakamega General Hospital. PW6 further stated that he knew the 2nd Accused well before the accident, and the 3rd Accused vaguely. He said that he saw the Accused persons from the back as they were going the opposite direction and that when he turned on the headlights, he saw the 2nd Accused pushing his motor cycle registration No. KMGB 026L which he knew very well as they used to park their bikes which they bought from the same shop, from the same stage.

12. On cross-examination, PW6 insisted that he saw the Accused persons and could identify them. He said that the turned on the headlights. According to him, the incident occurred between 4.00 a.m. and 5.00 a.m.
13. PW7 was inspector Hillary Kioko who conducted the identification parade in respect of Brian Musasia, Kelvin Luchesi, John Olilo and Francis Mwangi while the witness was James Geteri. He recounted that he conducted the exercise on 5th December 2022 at around 2.00 p.m. after briefing the Accused persons of the importance of the parade and assuring them that their rights would not be violated. He narrated how he arranged every individual parade separately and gave the suspects the option of choosing their position before the parade. He testified that each suspect consented to the parade. He said that before the parade, James Geteri had not seen any of the suspects or known that they were part of the parade. PW7 said that the identifying witness was able to identify the suspects by touching them after which he filled the Parade Form then gave it to the suspect to sign in acknowledgement that the parade was fair and lawfully

conducted. The witness produced the Parade Forms as PEX. 4 (a) to (d).

14. On cross-examination, PW7 denied the suggestion that only one parade was conducted for all the Accused persons. He said that he did not have the national identity card numbers of all the participants of the parade and denied fabricating the details.
15. PW8 was PC. Daniel Ateka who testified that on 22nd October 2022, he was assigned a murder case for investigation. He visited the scene at Kenya Power within Kakamega. He said that he organized a joint operation involving the police and members of the public in which they apprehended about twenty (20) people. Through investigations, they established that there existed an organized group called “Mbogi Law Izraim Territory” whose aim was to trace persons who had identified their members as criminals and exact revenge. With the aid of the public, they arrested the 1st Accused, who was said to be the gang’s chairman and with his lead, arrested the 2nd Accused and seized his motor cycle registration No. KMGB. They recovered a metal rod, panga, brown desert

boot, pair of black boots, bluish jacket and assorted clothes from his house. Later, on 5th December 2022, an identification parade was conducted and a witness identified the Accused persons. PW8 said that he recorded the statement of James Geteri who could recall the names of Kevin Luchesi alias Marshall and John Olilo alias Johnte. The witness produced the items recovered from the 2nd Accused's house.

16. In defence, the 1st Accused gave a sworn statement and denied killing the deceased. He said that on 22nd October 2022 after his work as a fruit trader in Kakamega town, he went home at 7.00 p.m. and slept until the next day when he went back to his work as a fruit vendor. He denied that he was a member of a criminal gang and said that he did not know the deceased nor his co-Accused.
17. On being cross-examined, the 1st Accused said that he used to work near the Bus Park and lived alone. He said that on being arrested, he was placed in an identification parade with eleven (11) other people where a witness identified him. He said that many people knew him because of the nature of his work.

18. On re-examination, the 1st Accused said that he was placed in the same parade as his co-Accused and that the person who identified him saw him before the parade as that person brought lunch to the DCI and found him with the DCI who had summoned him to his office.
19. The 2nd Accused also gave a sworn statement in his defence. He said that on 22nd October 2022, he closed his boda boda business early and went to his house to rest. He denied being a member of an organized gang. He said that he was arrested on 19th October 2022 when he had his motor cycle registration No. KMGB 026L, black in colour which was seized by the police. He said that he was not informed of the reason for his arrest but later placed in an identification parade where all his co-Accused persons participated. He said that he did not know his co-Accused prior to the arrest. He said that he was first charged with burglary and attempted murder but he did not know his co-Accused in this case.
20. The 3rd Accused gave a sworn statement and said that before his arrest, he was a shoe vendor at Bondeni Primary School. He denied killing the deceased and said

- that on the material date, he reached his house at around 4.00 p.m. he denied being a member of any gang or knowing his co-Accused.
21. When cross-examined, he denied that the name Johnte is his nickname. He admitted that an identification parade was done in which he was identified but claimed that he was forced to sign the Identification Parade Form.
 22. The last Accused, Francis Mwangi when sworn, denied ever knowing any of the other Accused persons. He said that on 22nd October 2022, he finished his work and went to sleep and it was on 18th November 2022 that he was arrested. He said that he was not present when the deceased was killed.
 23. On cross-examination, the 4th Accused said that the identifying witness saw him in the office where he was being interrogated before the identification parade.
 24. The court directed the parties to file written submissions.

Analysis and Determination

25. The burden of proof in a criminal case rests upon the prosecution which is required to prove its case beyond reasonable doubt. This principle was laid out in the case

of **Woolmington v. DPP [1935] A.C. 462** where the court held that where there is a reasonable doubt in the evidence of the prosecution or the accused, the benefit of doubt goes to the accused and the accused must be acquitted.

26. For the offence of murder to be proven against the Accused persons, the prosecution needs to prove the following:-

- (i) Death of a human being.
- (ii) Unlawful causation of death.
- (iii) That the said unlawful causation was done with malice aforethought.
- (iv) That the accused participated in causing the said death.

(See **Republic v. Kipkemei [2024] KEHC 9695 (KLR)**)

27. PW4, the Consultant Pathologist, testified that he performed an autopsy on a body which was identified by two named witnesses as belonging to Moses Otambo Lumatete. It is a trite fact that an autopsy is only conducted on a dead body. Thereafter, the Pathologist

issued a burial permit. The fact of death was conclusively proven.

28. In respect to the cause of death, there was sufficient evidence that the Accused was found lying dead on the road side. The Pathologist concluded that the cause of death was severe head injury secondary to blunt trauma following assault. He testified that the deceased had been assaulted because the deceased had injuries on both the left and right side of the head. Absent circumstances to suggest that the cause of death was justifiable, I find that the prosecution was able to prove that the cause of death was unlawful as assault is a criminal act. See **Gusambizi Wesonga v. Republic [1948] 15 EACA 65** and **Republic v. kipkemei (Supra)**.
29. As to whether the Accused participated in causing the death of the deceased, the prosecution's prime witness was PW6. From his testimony, he did not witness the Accused persons assault the deceased. It was his testimony that after he heard the sounds of someone being beaten, he turned on his motor cycle headlights and saw the Accused persons. He did not testify that he saw

- the said Accused persons who were in a group of five, assaulting anybody at that point. According to him, it was after Evans joined him that they followed the direction the Accused persons had taken whereby they found the deceased lying dead with stab wounds all over his body.
30. It seems that the Prosecution wants the court to find that since the Accused persons were seen heading towards the direction where the deceased was later found dead from stabbing, then they are guilty of the offence.
 31. Considering the fact that the offence occurred at night and with only one witness saying that he saw the alleged assailants and later identifying them in an identification parade, it is necessary to determine whether the identification was proper.
 32. Where a single witness alleges to have identified an offender, the court must exercise utmost caution especially where the circumstances of the identification are not favourable. In the case of **Jackson Kinuthia Kungu & Others v. Republic [2011] KECA 108 (KLR)**, the Court of Appeal emphasized the need for the greatest care in the evidence of a single witness and held thus:-

“...Thus the first appellate court also had to consider with the greatest care the evidence of David and Mungai being single witnesses in respect of counts 2 and 3 respectively. In the well known case of Abdallah bin Wendo & Another vs. R, (1953) EALR volume 20 page 166, the predecessor to this Court held:-

“Although subject to certain exceptions, a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care, the evidence of such witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to the guilt is needed.”

33. In **Cleophas Otieno Wanunga v. Republic [1989] KECA 47 (KLR)**, the Court of Appeal held that:-

“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."

34. In **Republic v. Turnbull & Others [1976] ALL ER 549**, Lord Widgery CJ laid down the circumstances necessary for consideration whenever an issue of identification arrives as follows:-

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should

make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.

...

Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing, traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long it 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 witnesses when first seen by them and his actual appearance?

35. PW6's evidence was that when he turned on his lights, the Accused persons were facing away and the light fell on

their backs. He also said that he was in a state of fear. Out of the five people he saw at the scene, he only knew the 1st Accused well and the 2nd Accused vaguely. The witness said that he saw that the motor cycle that was being pushed away belonged to Marshall. There was no evidence led to establish the distance between the witness and the Accused persons. The witness did not identify any distinguishing features that led to him to identify the 1st and 2nd Accused persons considering the unfavourable circumstances. There was no evidence adduced that the witness described the person he had seen on the material date to the police when he recorded his statement.

36. The incident occurred on 22nd October 2022 and the identification was held more than a month later on 5th December 2022. This was a huge time lapse for a witness who saw the backside of the suspects one of whom was by his admission only vaguely known to him, and two of whom were unknown to him. Further, even for the 1st Accused who the witness said he knew well, their absence of any corroboration makes the identification unreliable as

the witness needed to establish how he could identify him by viewing the back of his body as he walked away. Was it in the way the 1st Accused walked? What is the shape of his head?

37. The Accused persons denied committing the offences and in their defence, raised issues with the identification parade with claims that all the Accused persons were placed in one identification parade and claims by the 1st and the 4th Accused saw them at the police station just before the parade.
38. After carefully weighing the prosecution's case against the defence case, and in the absence of any evidence corroborating the evidence of PW4 the identifying witness, I find that the prosecution was unable to prove that the Accused persons were properly identified by PW6.
39. Even if I were to hold that the Accused persons were properly identified, the prosecution needed to prove through circumstantial evidence that the Accused persons were responsible for the killing. From PW2's evidence, he was informed that the deceased had reported to work at 2.00 p.m. and left for his home at 9.00 p.m. The

deceased was found dead between 4.00 a.m. and 5.00 a.m. which is at least seven hours later. No evidence was led that the deceased was alive between 9.00 p.m. and 4.00 a.m. so as to rule out any other cause of death than the alleged actions of the Accused persons. The circumstantial evidence was too weak to link the Accused persons to the death.

40. In the end, I find that the prosecution failed to prove its case beyond reasonable doubt. The Accused persons are acquitted and ordered released unless otherwise lawfully held.

Dated, signed, and delivered at Kakamega, this 2nd day of February 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Chala for the State/Prosecution

Mr. Shifwoka holding brief for Mr. Munyendo for the Accused persons

Court Assistant: Polycap

COPY