

1. The Accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63, Laws of Kenya. The particulars of the charge were read to the Accused Persons, and they pleaded not guilty to the charge.
2. A plea of not guilty was entered, and the matter was set down for hearing. The Prosecution called a total of 7 witnesses in a bid to prove its case.
3. PW1, Allan Ligwa Shittila, a cousin of the deceased, testified that on 24th December 2020, he attended the post-mortem of the deceased. He observed that the deceased had deep cut wounds on the back.
4. PW2, Sarah Mujiti Atsanye, the widow of the deceased, recalled that on the night of 17th December 2020, while she and the deceased were asleep, two men entered their house. They pulled the blanket, dragged the deceased by his legs, and began cutting him with pangas. She identified the attackers as Samuel (1st Accused) and Andeka (2nd Accused), who were related to the deceased. She stated that she, too, was assaulted and sustained cuts on the head and leg, which left her with permanent scars and a deformed finger. She showed the court the injuries.

5. According to her, the attackers demanded documents belonging to the deceased, and when she failed to produce them, they cut her again. She further testified that she saw three of the deceased's aunts, namely Emma, Rose, and Linet, outside the house. She attributed the attack to a land dispute, stating that the Accused persons wanted to sell part of the family land. On cross-examination, PW2 maintained that she positively identified Samuel and Andeka, both armed with pangas. She stated that apart from the land issue, she had no other conflict with the Accused.
6. PW3, a daughter of the deceased, aged 7 years, testified after a *voire dire* examination. She recalled that on the material night, the assailants entered their home and attacked her father. She testified that her father was cut and dragged towards the sugarcane plantation, where he was abandoned. She stated that her mother, who was also assaulted, managed to run away with their neighbour, Mangala, who went to call for help. According to her, she could identify some of the attackers as there was light inside their house and some moonlight outside.

7. She specifically mentioned Samuel and Ngare as the persons who cut the deceased with pangas. Further, she identified Emma, Linet and Rosemary as being outside the house, beating her father with canes. She maintained that although it was at night, she could see and recognise the attackers.
8. On cross-examination, PW3 said she was woken up by the cries of her father, and upon waking, saw him being attacked. She reiterated that she saw Samuel and Ngare with pangas, while Emma, Linet, and Rosemary were outside beating the deceased. She added that after the deceased was dragged to the sugarcane plantation, the attackers ran away.
9. On re-examination, she said that the incident occurred on a Monday evening at about 7.00 p.m. She stated that the 1st Accused wore a blue shirt and reiterated that she was able to see Emma, Linet and Rosemary attack her father from outside. However, she clarified that she did not see Samuel and Ngare at that stage.
10. PW4, Donald Musungu Khabuchi, the Chief of Shisele Location in Ikolomani North Division, Kakamega South Sub-County, testified that on the night of 17th and 18th December 2020, at about midnight, he received a call

from one John Mangala reporting that his neighbour, Vincent Ngala, and his wife had been attacked and assaulted.

11. He advised them to seek transport to the hospital since his home was about 12 kilometres away. Shortly thereafter, he was informed that the victims had been taken to the hospital in a pickup. Unfortunately, the deceased succumbed on the way and was taken to Mukumu Hospital mortuary while his wife was admitted at St. Elizabeth Mukumu Hospital. He further stated that the following day, he went to the scene and found the door to the deceased's house broken and bloodstains inside and outside the house extending to a banana plantation. The DCIO and other officers accompanied him. He noted that there had been a long-standing land dispute involving the deceased, his father, and his aunt.
12. He confirmed that the 3rd to 5th Accused had previously been to his office over the dispute, the last occasion being when they demanded that the land be sold, although the land was registered in the name of the deceased.
13. PW4 further recalled that on 25th December 2020, he received instructions from the DCIO, Malinya, to arrest

the 5th Accused, which he did, and handed her over to the DCIO. He also stated that the land dispute had escalated to the Assistant County Commissioner, who eventually confirmed that the land indeed belonged to the deceased.

14. On cross-examination by Mr. Mulama, PW4 admitted that he had no documents in court to prove the land dispute, but maintained that the matter had come before his office and the ACC had intervened.
15. PW3, who was recalled, further testified that on the night of 17th and 18th December 2020, she was asleep in her bedroom when intruders entered their house and attacked her father. She identified the assailants as Samuel (1st Accused), Andeka (2nd Accused), Rose (3rd Accused), Linet (4th Accused), and Emma (5th Accused), whom she knew well as her uncles and aunties.
16. She stated that her mother's cries awoke her, and upon looking through the curtain, she saw the Accused persons in her father's bedroom. According to her, the solar light in that room was on, and she witnessed Samuel, Andeka, and Ngala, armed with pangas, cutting her father. She said that Rose stood at the back door,

and Emma, together with Linet, positioned themselves at the front door.

17. She stated that both her parents were attacked, her father succumbing to the injuries, while her mother survived with multiple cuts. She further explained that there had been a land dispute between her father and Ngala over property that belonged to her grandmother. She recalled that although neighbours later responded to her mother's cries, her father died before he could be taken to the hospital.
18. On cross-examination by Mr Mulama, the witness stated that before the incident, all the Accused persons resided within the same compound, some sharing Emma's house. She did not hear doors being broken, nor did she see the Accused enter the house.
19. She confirmed that only her father's bedroom had light, and she was able to identify Samuel and Andeka through the curtain, describing Samuel as wearing a green T-shirt and Andeka a striped one. She said Samuel and Ngala cut her father with pangas, while the others stood outside.
20. She added that the attackers had torches which were not switched on, and that she remained silent for fear of

being harmed. She further said that when neighbours arrived in response to her mother's screams, the assailants had already escaped into the sugarcane plantation. She later accompanied her mother to record a statement and confirmed that the police showed her the Accused persons.

21. On re-examination by the prosecution, she reiterated that the Accused were her uncles and aunts, familiar to her long before the incident. She clarified that Ngala was the one who inflicted the fatal cuts, while Samuel and Andeka carried sticks, which she did not see them use.
22. On being questioned by the Court, she confirmed that the Accused persons referred to her grandmother as their mother, and that at the time they all lived within the same compound. She stated that there was moonlight outside, but only her father's bedroom had light inside. She maintained that Ngala, Samuel and Andeka cut both her father and mother, and particularly that Ngala inflicted the fatal injuries.
23. She placed Rose and Emma outside the house at the back door, but clarified that she did not see Linet during the attack.

24. PW5, Merceline Imali, recalled that on the night of 17th and 18th December 2020, she was at a funeral when, at about midnight, her daughter-in-law, PW2, called to inform her that one Samuel, Andeka and Ngala had attacked them. She went to call the neighbour to assist, and when she reached the house, she found blood on the doorstep.
25. She testified that she saw the deceased had panga cuts on his sides and back, and so did the wife, PW2. She identified the Accused persons, as well as Pascal Ngala, who was her husband, and who had also attacked the deceased.
26. She stated that the disputed land was given to the deceased by the grandmother, and that Rosemary and Linet had sold the land. She said the dispute had not yet been resolved.
27. On cross-examination, she denied being present and said that she was only informed what had happened and that it was not the first time the attack had occurred.
28. On re-examination, she confirmed that she was told the names of the attackers by her daughter-in-law while

she was in hospital and that she was currently staying with her grandchildren.

29. The Investigating Officer testified as PW6 and recalled that he received information concerning a murder in Shimanyiro sub-location, where the Accused entered the deceased's home by digging a hole at the door and attacked the deceased and his wife with pangas, leading to his demise.
30. He stated that he visited the scene on 19th December 2020 and commenced investigations and later arrested the five Accused persons who were identified as the attackers. He claimed that there had been a family land dispute since 2019, and the deceased had been charged with assault of the 3rd and 4th Accused arising from the dispute.
31. The witness produced the post-mortem report marked as the Accused person's Counsel had no objection. According to the report, the autopsy which was conducted by Dr. Dixon Mchana revealed that the deceased had seven cut/chop wounds on the head; five cut/chop wounds involving the dorsum, left wrist, forearm arm, and left deltoid; and multiple cut /chop wounds to the thighs. The deceased had a fracture on

the head and suffered severed left neck major vessels, part of the spine, and left kidney among other injuries. The cause of death was multiple injuries secondary to sharp force trauma following assault.

32. On cross-examination, he confirmed visiting the crime scene and claimed that according to PW1, she raised an alarm although no one responded and that the three ladies were outside their house.
33. On re-examination, he stated that the 5th Accused lived near the deceased, while the 1st and 2nd Accused lived 10Km away. He confirmed that the PW2 stated that she saw the attackers.
34. The Prosecution closed the case at this stage. Justice P.J.O. Otieno delivered a ruling and found that the Accused Persons had a case to answer. The Accused persons were placed on their defence, and they chose to give sworn evidence.

Defence Hearing

35. DW1 was Samuel Ingumba and gave sworn testimony. He denied committing the offence. He recalled that on the night of 17th and 18th December 2020, he was at home in Bushangala when he heard someone knock on his door, and when he opened it, it was his mother, the

3rd Accused, who came to inform him that his cousin, the deceased, had been killed. He advised his mother to go home so they could address the issue in the morning.

36. He claimed that in the morning, he went to ask his mother what had happened. That is when she, the 3rd Accused, received a call from the Chief, who asked her not to go to the crime scene.

37. He testified that on 25th December 2024, around 3.00 a.m., he heard harsh knocks on his door and stones being thrown on his windows and house. Since the people were armed, he only opened when he heard the Chief's voice, who warned the crowd not to attack him, whereby he was arrested without being informed the reason.

38. He stated that he was at the station until 9.00 p.m. when the police asked him about the names of the other suspects, and he learnt that his mother had also been arrested. They were escorted to Malaika police station, and when the 5th Accused, his aunt, came to the station, she informed him that there were allegations that they had killed the deceased.

39. He asserted that they had a good relationship with the deceased, who was like his brother and denied having any land dispute with him.
40. He denied the allegations that he was at the scene when the deceased was killed, claiming that he was a victim of circumstances since his mother and the deceased's family had a land dispute.
41. On cross-examination by the prosecution, he identified the deceased's father as Pascal Ngala, a brother of the 3rd Accused and stated that the dispute was about land. He said that despite there being many children, his mother only woke him up and informed him about the incident.
42. He denied knowing the deceased's alleged wife, PW3, claiming that she was not the biological mother of the children and claimed that she had been coached to implicate him in the murder.
43. DW2 was Shacklands Andeka, who testified that the 1st Accused was his cousin, the 3rd Accused was his aunt, and the 4th Accused was his mother's younger sister. He denied committing the offence and claimed that on the night of the murder, he was at home.

44. He said that on 4th January 2021, around 8.00 to 9.00 a.m., he had gone out of his house when he saw a cousin of the deceased, and he started chasing him. When he caught up with him, he was dressed in black, wielding a machete. He inquired why he was lurking in his compound while armed. The intruder replied that he had gotten lost.
45. He claimed that his father referred him to the village Chief. When he went, he was referred to Khayega police station, where he was arrested, informed that he was a wanted man, and taken to Malinya police station. He was questioned about the deceased and later transferred to Malaika police station, where he found his co-Accused. He learnt that they had been charged with the murder of the deceased.
46. He denied killing the deceased and stated that they had no existing grudge. He maintained that he had been at home the whole time.
47. On cross-examination by the prosecution, he stated that his mother was the 4th Accused, while the 3rd and 5th Accused were her sisters. He acknowledged knowing the deceased, saying that the deceased lived on his

father's ancestral land while he himself lived on his father, Meshack's, farm.

48. According to DW2, his mother had not been given a share in her father's land, but he did not know if she had demanded to be given a share.
49. He denied knowledge of any dispute between the deceased and his mother or any existing assault case. He denied the allegations by the witnesses that he was at the house on the night of the incident and maintained that he was at home with his wife and children. He stated that he only learnt of the deceased's death after he was arrested.
50. On re-examination, he claimed that he heard about the killing from his brother David at the police station. On being referred to the Covering report, he claimed that he knew Sarah, who testified that she identified the 1st Accused and Ngala at the crime scene, but did not mention him as being present.
51. On further cross-examination, the prosecution put it to him that the witness identified the deceased's cousin, one Shacklands Andeka, as being at their house when they entered the second time.

52. DW3 was Rosemary Khayeshi Shimanga. She denied committing the offence. She recalled that on night of 17th and 18th December 2020, she was asleep at her house at about 1.00 a.m. when her nephew Joshua called her, informing her that thugs had broken into the deceased's home and around 3.00 a.m., She received another call from her sister, Petronella, telling her that the deceased had been taken to Nala Hospital. She said that around 5.00 a.m, she received a call from the deceased's sister Metrine accusing her that she and her sisters had gone to kill the deceased.
53. She confirmed that the 4th and 5th Accused were her sisters, the 1st Accused was her son, while the 2nd Accused was the 4th Accused's son, and the deceased was her nephew, a son of her brother Pascal Ngala.
54. She admitted that they had a land dispute and claimed that they had their own land, while the deceased had his own land. She testified that their mother had subdivided the land among her children and denied having any land dispute with the deceased despite being accused of killing him over land. She said that on the night of the incident, she was at her home and got to know of the murder from Metrine.

55. She denied committing the offence or knowing how the deceased died, claiming that the 5th Accused was at the time at Shimanyiro, while the 4th Accused was at Shinyalu, which was far from Bushangala. At the same time, the 1st Accused lived with her at Kwilenyo in Shinyalu.
56. She denied that they all converged together on the day of the crime and said that they were all arrested after the funeral, which they never attended, since they had been implicated in killing the deceased because of the land.
57. On cross-examination, she said that she lived with her husband and a 5-year-old child at Shimenga, although her husband passed away in 2021. She claimed that Joshua and Petronilla called her, even though they were not among her witnesses.
58. DW4 was Linet Ngina Lihanda. She testified that on the night of 17th and 18th December 2020, she was at her home when, around 1.00 a.m., she received a call from Metrine informing her that thugs had entered Vincent's home and attacked him. She received a call from Petronila informing her of what had happened, and later Metrine called, accusing them of killing the deceased so

that they could settle on his land which they claimed belonged to their mother.

59. She said that she wanted to attend the vigil for the deceased, but got word that they would be attacked on suspicion that they had killed the deceased. She stated that she remained at her home until 4th January 2021, when she was arrested at about 9.00 p.m. and taken to Shisani police station, where she found her sisters, the 4th and 5th Accused, as well as the 1st Accused.
60. On cross-examination by Ms Chala, she confirmed that Metrine was the deceased's sister and that she was the one who informed her that the deceased had been killed and accused her of killing the deceased despite her being in Nairobi.
61. She claimed that she took the deceased to live with their mother in the land and that his father left a long time ago, leaving the deceased alone. She denied killing the deceased to get his land since she is the one who took him to live there. She rejected the claim that they conspired to kill the deceased, although she admitted that they had a dispute with the 1st house, claiming that they had refused their proposal. She denied having a grudge with the deceased's wife.

62. On re-examination, she said that she took the deceased to stay with her mother after his father left them a while ago and never came home. She denied having a dispute over the land and claimed they had been framed by a purchaser who wanted the land.
63. DW5 was Emma Khaoya. She testified that she lived with the deceased in the same compound. She claimed that on 18th December 2020, she was asleep at home when she was woken by screams; upon investigating, she discovered they were coming from Vincent's house. She later saw their neighbours at the scene and learnt that thugs had attacked Vincent and his wife.
64. She said that on inquiry, she was directed to the location where the deceased was at the banana plantation. She claimed that the group was armed with pangas, slashers, axes and when she went to the banana plantation, she found the deceased half-naked, and went to his house to get a blanket to cover him, when her niece, Vivian, informed her that they had been attacked by thugs.
65. She claimed that she went to their bedroom to get a blanket, although the deceased's wife was not around, and she met John Mangala, who asked her to take some

clothes to her in-law, Sarah, who was at his house. She said Joshua called her sister, Rosemary, to inform her of the attack. She said that though she did not witness the attack, the neighbours came to their rescue and that Shikoti informed the Assistant Chief, who directed them to take the deceased to the hospital.

66. According to her, the deceased was taken to the hospital by his wife, who was injured, while she remained at home to take care of her sickly sister and niece. She said that she was shocked to learn that she was implicated in the attack. She denied killing the deceased so that she could take the land and claimed that the deceased was her friend and nephew.
67. During cross-examination, she stated that she was asleep by 8.00 p.m. and was awoken by screams from the deceased's home at 1.00 a.m., when she met the neighbours outside the deceased's house. She said they lived on their mother's land, and that the deceased lived on his father's share of the land. She claimed the dispute was between the 1st and the 2nd house, since the 1st house claimed it had received a larger share of the land.

68. She denied that they conspired to kill the deceased, and said that the deceased's wife had been instructed to implicate them.
69. On re-examination, she claimed that she took the deceased wife's clothes after being informed by Mangala's wife that she was naked, and she found her in a bad state.
70. The court questioned the witness, who said that the house they lived in belonged to their mother and that their brother Pascal left them 10 years ago when she was 10 years old, and they have never heard from him since then.
71. The defence closed its case, and the parties were directed to file their submissions.
72. In the course of the trial, it was confirmed that the 2nd Accused unfortunately passed away on 14th May 2025, and the proceedings against him were terminated.

Submissions

73. The Accused persons, through their Counsel filed their submissions dated 17th July 2025, where they argued that the prosecution had failed to prove the case against them.

74. They argued that the prosecution failed to establish that the cause of death was due to the alleged incident that occurred on 17th and 18th December 2020.
75. The Accused persons submitted that the prosecution's witness statement was full of contradictions. They asserted that there was no consistence in the evidence tendered by the prosecution.
76. They relied on the defence of DW5, who narrated that she was in her house when the incident occurred and how she only learnt about the attack from her neighbours and maintained her innocence.
77. They asserted that they all maintained their innocence and that they were all arrested based on mere suspicion. They relied on the case of **Kanyi vs. Republic (1991) KLR**, asserting that there was no evidence linking them to the deceased's death.
78. They urged the court to find that the prosecution failed to prove their case beyond reasonable doubt and pray that they be acquitted.
79. The prosecution submitted that they had proved the case beyond reasonable doubt as they had proved the essential ingredients of the offence. They further submitted that there was positive identification of all

the accused persons and that they had demonstrated that the Accused had a common intention to kill the deceased.

Analysis and Determination

80. To determine whether the Accused persons are guilty of murder, the court must address the following issues:

a. *Whether the death of Vincent Ngala occurred.*

b. *Whether the death was caused by an unlawful act or omission.*

c. *Whether the accused persons acted with malice aforethought.*

d. *Whether the accused persons were positively identified as the perpetrators of the crime. See*

Antony Ndegwa Ngari v Republic [2014] eKLR

81. On the first issue, the death of Vincent Ngala was conclusively proved. PW1 attended the post-mortem examination on 24th December 2020 and identified the post-mortem report which was later produced by the Investigating Officer as P Exhibit 1. The evidence of all the witnesses and the defence confirmed the death.

82. The second ingredient is whether the death was caused by an unlawful act or omission.

83. In **Guzambizi Wesonga v Republic [1948] 15 EACA 63**, the court held that every homicide is presumed unlawful unless justified or excusable.
84. In the present case, the prosecution adduced evidence that the deceased was attacked with pangas on the night of 17th and 18th December 2020. The post-mortem report confirmed the cause of death as multiple injuries caused by sharp-force trauma following assault. The cause of death was not challenged by the defence nor did they offer any justification for the assault, such as self-defence or defence of property. The court finds that the deceased's death was caused by an unlawful act.
85. The third element is the identification of the Accused persons as the perpetrators. The Accused persons were well known to PW2 and PW3. PW2, the deceased's widow, identified Samuel (1st Accused) and Andeka (2nd Accused) as the assailants who entered the house and attacked her and the deceased with pangas.
86. She testified that she saw Rosemary (3rd Accused), Linet (4th Accused), and Emma (5th Accused) outside the house. PW3, the deceased's daughter, a minor aged 7 years, corroborated this, identifying the Accused as her uncles and aunties, whom she knew well.

87. PW3 specifically noted that Samuel wore a green T-shirt and Andeka a striped one, and that the solar light in the deceased's bedroom aided identification.
88. The defence submitted that there was insufficient evidence to convict the Accused persons, as there was no direct evidence to link them to the death of the deceased. The defence was therefore challenging their identification as the assailants by the prosecution's witnesses.
89. In **Mwaura v Republic [1987] KLR 645**, the court emphasised the need to consider the quality of light and duration of observation when making a determination on identification. The solar light inside the house and moonlight outside, combined with the proximity of the witnesses to the Accused, provided favourable conditions for identification. PW2 and PW3, being relatives of the Accused, could not have mistaken their kith and kin. The evidence of PW2 and PW3 is that there was light in PW2's bedroom during the attack. PW2, who was severely injured positively identified the 1st and 2nd Accused persons as their attackers. Although she did not refer to Ngala as being one of her attackers, her mother-in-law, PW5, testified that when

PW2 first called her, she informed her that the 1st Accused, 2nd Accused and Ngala had attacked them while they were in bed and dragged the deceased out of the house. PW3, who had been recalled, corroborated her mother's evidence. She was quite explicit in her evidence. It is also noted that PW2 stated that while in the course of assaulting them, the Accused persons were talking. They warned her to keep quiet. The two Accused persons and Ngala were well known to the two witnesses, and they interacted closely with PW2 while committing the act in a room with sufficient light. Theirs was identification by recognition, and it is trite law that identification by recognition is the best form of recognition as it is more satisfactory, assuring and reliable than the identification of a stranger. (See **Reuben Anjononi & Others v Republic [1976-1980] 1 KLR 1556**).

90. Regarding the identification of the 3rd, 4th and 5th Accused persons on the fateful night, PW2 testified that it was dark outside. It was after the said Accused persons had dragged the deceased outside and came attacking her while demanding to be shown where the deceased used to keep his documents, then threatened

her not to raise an alarm that, after a while, she got out and saw the 3rd, 4th and 5th Accused persons near the door. She did not say how long after the second attack she went out. She did not clarify whether by the time she saw them, the 1st and 2nd Accused were still around.

91. PW3's evidence concerning the three aunts was not consistent with that of PW2. When she first testified, she said she had seen the 3rd, 4th and 5th Accused persons beat her father with whips. On cross-examination, she said that the trio beat up her father in the evening before he had been cut. When she was subsequently recalled, she testified that she saw the 3rd Accused at the back door and the 4th and 5th Accused at the front door of their home. When examined by the court, she said that she did not see the 4th Accused that night.

92. Put together, the evidence of PW2 and PW3 regarding the identification of the 3rd, 4th and 5th Accused at the scene was wanting. The conditions for recognition were poor, as it was in the dead of the night, and PW2 had suffered extensive trauma that could have led her to the mistaken conclusion that the three Accused women were all at the scene at the time of the incident. It is

not lost to the court that there were latent hostilities between the deceased and the 3rd Accused's family arising from a land dispute. This could have caused PW2 to conclude that the women she saw were the three Accused women herein.

93. It could be that the women that PW2 and PW3 saw were actually the 3rd, 4th and 5th Accused. Still, in the absence of cogent evidence that they were positively identified and that they were an integral part of the group that attacked the deceased and PW2, it would be unsafe to convict them. Taking into account their respective defences, the 3rd, 4th and 5th Accused were arrested on suspicion that they were involved in the attack. However, suspicion alone is not enough to found a conviction. In **Kanyi v. Republic [1991] KEHC 22 (KLR)**, Amin, sitting in Mombasa held that:-

“...There is the grave suspicion that the appellant might well have committed the offence for which he is charged but suspicion alone is not a substitute for pre-requisite evidence beyond reasonable doubt. These deficiencies to be explained and/or accepted were in the domain of the learned trial magistrate, who unfortunately

was no longer available to pass judgment. For these reasons, the Court finds that the conviction is of a doubtful nature. It is quashed...”

94. The final element in the offence of murder is malice aforethought. In **Nganga v Republic [2024] KECA 238 (KLR)**, the Court of Appeal held:-

“In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered, whether the appellant foresaw the risk of the voluntary act he was about to carry out against the deceased. Whether the appellant was able to foresee the real or substantial risk and the consequences of targeting the part of the body that may result in the deceased suffering grievous harm...”

95. Similarly, in **Kaburu v Republic [2024] KECA 536 (KLR)**, the court defined express malice as a deliberate intention to unlawfully take a life. The court finds that the Accused persons, by using pangas to inflict deep cuts on the deceased’s head and back, demonstrated express malice under Section 206 (a) and (b) of the Penal Code.

96. PW2 claims that the deceased and the Accused persons had a dispute with regard to the land that they currently resided on. It was evident from the evidence of the prosecution witnesses, including the area Chief, PW4, that there was an ongoing land dispute between the deceased and his relatives, who were the Accused persons. The long-standing dispute proved fertile ground for the Accused persons to form an intention to maim or kill the deceased.
97. In his defence, the 1st Accused raised an alibi, stating that he was at home on the material night. The law on alibi is well settled. In **Kiarie v Republic [1984] KLR 739**, the Court of Appeal held that an accused does not assume the burden of proving his alibi, but the court must consider it in light of the prosecution's evidence.
98. However, where an alibi is raised late in the trial, courts have treated it with caution. In **R v Sukha Singh S/o Wazir Singh & Others (1939) 6 EACA 145**, it was held that an alibi should be raised at the earliest opportunity to allow the prosecution to investigate.
99. In the present case, the Accused never put the alibi to the prosecution witnesses in cross-examination. Neither PW2 nor PW3 were challenged on this aspect. The alibi

only emerged at the defence stage. As observed in **Naikona v Republic [2024] KEHC 4019 (KLR)**, an alibi raised late in the day without prior disclosure is likely to be treated as an afterthought. Furthermore, the 1st Accused merely stated that he was at home “at night” without specifying the precise time. Considering the incident occurred between 12.00 midnight and 1.00 pm, and the Accused’s home was only a few kilometres away, he could have been at both places during the night.

100. I therefore find the alibi defence weak, uncorroborated, and incapable of raising a reasonable doubt. The recognition evidence of PW2 and PW3 was consistent, credible, and left no room for mistaken identity. In my view, the 1st and 2nd Accused were positively identified as the persons who assaulted the deceased.

101. The defence’s submissions on inconsistencies and lack of physical evidence are unpersuasive. In **Richard Munene v Republic [2018] KECA 186 (KLR)** the court held that:-

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that

will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.” See also *Thoya Kitsao alias Katiba v Republic* [2015] KECA 172 (KLR).

102. It is trite that no two people can give an exact narrative of events that happened in the past. There was consistent and credible evidence that the first two Accused persons, with a common intention to inflict harm on the deceased, committed the offence. The evidence outweighs the minor discrepancies in the prosecution’s case.

103. Regarding the final ingredient, malice aforethought is proven when it is demonstrated that the accused had formed the intent to kill or to maim the deceased. Section 206 of the Penal Code provides:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

104. It was a common thread across the prosecution case and the defence case that there was an existing land dispute between the deceased and the Accused persons. Coupled with the nature of the weapons used, the manner in which the Accused descended on the deceased at night while he was asleep and the nature

and extent of injuries on the deceased and his wife, the court finds that malice aforethought was properly proven as the Accused persons knew that their actions would likely lead to the death or grievous harm of their victims. See **Republic v Tumbere s/o Ochen [1945] 12 EACA 63, Moses Wanjala Ngaira v Republic [2019] eKLR** and **Dhadho v Republic [2023] KECA 280 (KLR)**.

105. Ultimately, the court finds that the prosecution proved its case only against the 1st and 2nd Accused. The court is highly suspicious that the 3rd, 4th, and 5th Accused were involved in the attack, but, due to the scarcity of evidence connecting them to the offence, the court grants them the benefit of the doubt. If guilty, they shall be judged by a higher power. In the end, I make the following orders:-

- a) Since the 2nd Accused died during the proceedings, the 1st Accused is convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code.
- b) The 3rd, 4th and 5th Accused are acquitted under Section 322 (2) of the Criminal Procedure Code and

shall be set free forthwith unless otherwise lawfully held.

Dated, signed, and delivered at Kakamega, this 10th day of February 2026.

A. C. BETT
JUDGE

In the presence of:

Ms. Chala for the Prosecution

Mr Onsango for the Accused

Court Assistant: Polycap