

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CRIMINAL CASE NO. 72 OF 2020**

**REPUBLIC .....**  
**DPP**

**=VERSUS=**

**PHILLIP AMBOKE KAVUNJA .....**  
**ACCUSED**

**Coram: Justice R. Nyakundi**  
**Ms Kirenge for State**

**JUDGMENT**

1. The Accused was charged with the offence of murder contrary to Section 204 of the Penal Code. The particulars are that on 27/11/2020 at Chebarus village within Uasin Gishu County jointly with others not before Court murdered **Andrew Wanyika**.
2. The Accused person pleaded not guilty to the offence and the Prosecution adduced evidence from the witnesses to prove the following elements:
  - *The death and cause of the person being killed*
  - *The unlawful act of mission*
  - *The element of malice aforethought*
  - *Whether the Accused person was the one who committed the murder.*
3. The summary of the Prosecution case; PW1 is No. 73181 PC David Kamuren. It was his evidence that on 27<sup>th</sup> November 2020 at about 1900hrs the complainant Andrew Wanyika, the deceased lodged a complaint that he has been previously assaulted by people who included the Accused and Paul Mustafa. The complaint was booked and the investigation commenced to establish the cause which

resulted in the commission of the offence. It was further the evidence by the PW1 that members of public about 25 in number emerged with crude weapons targeting at them and this forced him and another Police Officer to draw out their guns and he acknowledge firing his Seska Pistol. In that commotion PW1 told the court that his colleague had arrested the Accused but simultaneously he was attacked and sustained injuries to the head. Fearing for his life he let the Accused go as the other members of the group continued to pelt the crude weapons at them. It was at that same scene that one Andrew was assaulted and he suffered multiple injuries. According to PW1 during the investigations a panga was recovered and a knife, both were blood stained. They were later to be forwarded to the Government Analyst for a DNA Profile. What follows was for the Accused to be searched, traced and was arrested as part of the suspects who committed the offence of murder.

4. PW2 The Village Elder, Edward Shiundu testified that it was dark and that on the said date of the alleged murder, he did not witness an altercation if any between the deceased and the accused, the mob attack. He admitted that he did not catch a glimpse of the deceased before the said attack and only saw him lying in a pool of blood. He informed court that he found the Accused standing behind his father's homestead in blood-soaked clothes. He admitted to the fact that the Accused was also injured and the blood could have been his and not any other persons.
5. PW 3-Police Officer Rajab Jebet - he testified under oath and informed court that on 27/11/2020, he accompanied PC Kamuren to Chebarus Village to make an arrest. That they arrested the accused, cuffed him and about 3 meters from the door as they were leaving, an irate mob attacked them. That the mob was of around 20 or more people. He testified that someone attacked him and he retreated towards the main gate and the main road and called for

reinforcements and he came back after 10 minutes and he found the deceased in a pool of blood. He told the court that he found the Accused beside the deceased. (Even as we proceed before analysis, it is of note that PW 2, The Village Elder informed the court under oath, that the Accused was standing alone, behind his father's homestead). He informed court that they later collected the panga and knife which were in court as P. Exhibit 3 and 4 respectively.

6. PW 4 Government Pathologist Adori David confirmed the deceased died as a result of a brain stem associated injury.

7. PW5 NO. 81294 Corporal Polycarp Odoyo who testified that he was the Officer who arrested the Accused person, he also took possession of the exhibits which included the panga, the knife which were later to be forwarded to the Government Analyst for the DNA profile. The report of the Government analyst dated 24<sup>th</sup> September 2021 was admitted in evidence by consent with the following contents *in situ*:

I, Polycarp Lutta Kweyu MSc, a Government Analyst at the Laboratory of the Government Chemist's Department Kisumu for the purpose of section 77(1) of the Evidence Act, Laws of Kenya, hereby report as under:

*I, Polycarp Lutta Kweyu MSc, a Government Analyst at the Laboratory of the Government Chemist's Department Kisumu for the purpose of Section 77(1) of the Evidence Act, Laws of Kenya, hereby report as under:*

**INSTRUCTIONS:**

*Acting under the request of No.81294 PC Polycarp Odoyo of Kipkaren Police Station, it was desired to examine the items listed below and determine the presence/origin of biological evidential material.*

**ITEMS RECEIVED:**

On the 3<sup>rd</sup> day of December, 2020, at the Laboratory of the Government Chemist's Department Kisumu, the following samples/exhibits were received:-

- (a) Blood of Andrew Wanyika (deceased) in a vacutainer marked "A1".
- (b) Finger nail of Andrew Wanyika (deceased) in a clear plastic bottle marked "A2".
- (c) A panga with a black rubber handle marked "B1".
- (d) A knife (with a metallic handle) in a brown envelope marked "B2".

**REPORT:**

- (a) The red stains on the panga (item "B1") and the knife (item "B2") tested positive for human blood.
- (b) The DNA profiles generated from the above listed items are tabulated and produced at the end of this report.

**ISSUES RELATING TO GENETIC RELATIONSHIP:**

Every person has a unique DNA which is acquired from his/her parents who contribute half each from biological mother and father. By examining the DNA from a blood sample or any body fluid, it is possible to determine the origin of the blood or body fluid given the blood samples or body fluid of the suspects.

**CONCLUSION AND OPINION:**

Based on the findings;

- (a) The DNA profile generated from the blood stains on the panga with a black rubber handle (item "B1") match the DNA profile of Andrew Wanyika (deceased).

*(b) The DNA profile generated from the blood stains on the knife (item "B2") is a mixed DNA profile Andrew Wanyika (deceased) and another single unknown, male person.*

8. At the close of the Prosecution case the Accused person was placed on his defence and a summary of his evidence is as follows:

**DW 1 Philip Amboke Kavunja** testified and informed court that on 18/11/2020, he was taking a nap in his house, after a long day working. In the house, was his son and he informed the court that his wife was not around, as she was yet to return from an engagement at a burial. That two officers knocked on his door and his son let them in. That they informed them that they had come to effect an arrest and they proceeded to handcuff him. That they sought to lead him out towards the station when a commotion erupted within his homestead. He asked his son Dennis, to proceed and warn the grandfather, of his arrest. He further informed court that he did not have anything in his hands as he was led out as he was handcuffed by the officers. That he was also injured in the melee as the group attacked the police officers, the deceased and himself. He informs court that he ran to cover some distance between the scene and self, and only came to know of the passing of the deceased when he returned a few moments later to find the deceased in a pool of blood. He was then escorted to the police station where he was locked up. On cross examination, he confirmed that indeed on the material date of the alleged murder, his wife was away, and that he was aware of an earlier altercation between his brother, Mustafa Paul and Andrew, the deceased. He said Paul died as a result of the melee/attack. He further testified that he did not opposed being arrested, and he willfully allowed the police officers to handcuff him. He confirmed that the melee was within their compound and it involved many people. He denied that he had no blood in his hands.

**DW2-Dennis Kavunja** testified, sworn, that on the material date of the alleged murder, he was at home with his father, the accused. That his father was taking a nap and there was a knock at the door. On opening, he came to bear with two police officers and the deceased. He let them in upon them informing him that they were looking for the accused. That they handcuffed him and led him outside, towards the exit of the homestead. That the Accused had asked him to rush to his grandfather's and warn him/inform him of the arrest. As he was leaving the group behind, he heard shouting, and a melee seemed to occur a few paces outside their house. He rushed to his grandfather's house and did not go back to the scene again that day.

9. Learned Counsel for the Defence Mr. Amihanda filed written submissions urging this Court to find that the elements of the offence have not been proved beyond reasonable doubt. He placed reliance on the following authorities: **Republic v Ronald Songa Imbuye [2019] eKLR, Simon Musoka vs Republic (1958) EA 915 at page 79, Republic v Adan Keynan Wehliye (No. 2) [2005] eKLR and Pravin Singh Dhalay v R. [Nrb Misc. Cr. Appeal no. 10 of 1997) Unreported.**

10. From the above submissions and case law, Learned Counsel contended that the Prosecution has failed to place the Accused at the scene of crime. He therefore cannot be found culpable to have killed the deceased and yet no evidence was adduced that any one of the witnesses saw him assaulting the deceased.

## **Analysis and Determination**

### **The standard of proof**

11. It is trite that in criminal cases like the instant one against the Accused persons, the burden of proof lies with the Prosecution. The Law Section 107(1) of the Evidence Act provides that whoever

desires any court to give judgement as to any legal right or liability dependent on the existence of facts, he asserts, must prove those facts exist. The position runs through the entire process in consonance with Article 50(2)(a) of the Constitution that the Accused person is presumed innocent unless the contrary is provided. Even in the exception created by virtue of Section 111 of the Evidence Act, the burden for the Accused to answer to any issues comes into effect when the Prosecution has placed before court sufficient evidence establishing each elements of the offence against the Accused person. The principle on this purposive interpretation was stated in the case of **Mkende Shiro v R 2002** where the court of Appeal held that:

*"The Accused persons assume no legal burden of establishing his innocence except for certain limited cases where the law places a burden on the Accused to explain matters which are peculiarly within his personal knowledge."*

(See also text on criminal law by **William Musyoka C 2<sup>nd</sup> Edition Law Africa pg 74 paragraph (a1)**). The same issue was also considered in the persuasive authority from South Africa in the case of **DPP v Oscar Leonard Carl Pistorius appeal No. 96 of 2015** where it was stated:

*"The proper test is that an Accused is bound to be convicted if the evidence establishes his (her) guilt beyond reasonable doubt, and the logical corollary is that he (she) must be acquitted if it is reasonably possible that he (she) might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in record, however, is that the conclusion which is reached, (whether it be to convict or to acquit) must account for all the evidence, some of the evidence might be false,*

*some of it might be found to be possibly false, or unreliable but none of it may simply be ignored.”*

“The standard of proof concept is as defined in the cases of **Woolmington v DPP 1935 AC** the duty for the Prosecution to prove the Accused guilty beyond reasonable doubt never shifts save for the existence of a *prima facie* evidence which places such an obligation on the Accused to allude to material evidence especially those within his knowledge and belief (see **Mwaitige v R 1961 EA 470 and Hasibu Bin Rashid v the Queen KLR 172**).

12. The Supreme Court held “that the offender’s moral culpability or degree of responsibility should be measured by gauging the essential substantive elements of the offence including the offence’s *mens rea*, the offender’s conduct in the commission of the offence, the offender’s motive for committing the offence, and aspects of the offender’s background that increase or decrease the offender’s individual responsibility for the crime, including the offender’s personal circumstances and mental capacity” (at paragraph 58).
13. The offence of murder does not consist simply the unlawful act or omission which does result in the death of a human being but that act envisaged in the law must be at the same time be a dangerous act where intentionally the perpetrator is armed with a dangerous weapon or if not he or she manipulates one targeting vulnerable parts of the victim. That is why you will find that the perpetrator to arm himself with blunt objects and applies it to occasion multiple injuries to his or her victim which occasions death. Therefore, an offence of killing another human being may it be under Section 202 commonly defined as manslaughter or 203 defined as murder the first element is that of causing grievous harm. This unlawful act must be such that all sober and reasonable people inevitably recognize that the injuries inflicted were meant to cause grievous harm or death.

14. There is no dispute Andrew Wanyika is dead. That is not disputed from the medical evidence by the Pathologist - PW4. In the second limb the post mortem report dated 30<sup>th</sup> November 2023 is very clear on the extent and intensity of the injuries sustained which covered deep wounds to the head nervous system and the spinal cord. These injuries were opined by the Pathologist to have facilitated the cause of death of the deceased.
15. The most important element in murder cases is that of malice aforethought under Section 206 of the Penal Code. It is deemed to be established when the Prosecution by way of evidential material places before the Court credible and cogent evidence touching on the following elements:
- a) *An intention to cause the death or to do grievous harm to another human being,*
  - b) *Knowledge that the act or murder mission causing death with probably cause death of or grievous harm to some other person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference, whether death or grievous harm is caused or not or by act that it may not be caused,*
  - c) *An intent to commit a felony,*
  - d) *An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.*
- The Accused therefore can only be convicted of murder once the Prosecution establishes by way of evidence objectively that the unlawful act or commission was accompanied with malice aforethought. The Accused caused the death of the deceased specifically, with an intention to cause death and or intention to cause grievous harm. **S v Dube (CC03/22) [2022] ZAMPMBHC 28 (3 May 2022):** Directly addressed premeditation and intention. The court held

that if a perpetrator carries through with a plan to cause serious bodily harm while foreseeing that the assault may cause death, but proceeds regardless, the murder is premeditated, and the necessary intention (malice) is established. The evidence which the Prosecution is required to present before the court to prove malice or intention includes the following:

- **Nature of the Weapon:** Use of lethal weapons, or in some cases, excessive blunt force.
- **Circumstantial Evidence:** The conduct of the Accused before, during, and after the incident.
- **Medical Evidence:** Post-mortem reports showing the severity of injuries (e.g., deep wounds, multiple injuries).
- **Threats:** Prior threats to harm or kill the deceased.

16. The classic case of **Rex v Tubere S/O Ochien 1945 128 EACA 63** held as to the question as to whether malice aforethought is manifested in law the court to determine it from the nature of the weapon used, the manner that was used to inflict harm injuries that part or parts of the body targeted by the accused, the intentional conduct of the Accused before, during and after the unlawful act of killing. From this case to establish malice aforethought the Prosecution must prove the above elements beyond reasonable doubt.

17. The evidence before this court is purely circumstantial as deduced from the evidence of PW1 and that of PW3 who at the time of the murder they were at the scene confronting a crowd of people armed with crude weapons and machetes. The police officer being PW1 and PW2 happens to be the first responders to the scene and of particular importance is the testimony of PW2 who is very categorical that he saw the Accused person assault the deceased. That evidence was never controverted by the defence. The guidelines on circumstances of identification in a crime scene are

well articulated in the celebrated case of **R v Turnbull and Others [1976] 3 ALLE 2549** stated that:

*“Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by such witnesses 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 elapsed between 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 the actual appearance”*

18. From the testimonies of PW1, PW2 and PW3 there are explanatory pieces of evidence cumulatively analyzed and examined by this court paints a very clear picture that the deceased was violently pummeled by the Accused and others not before this court. During this beating which continued in the presence of PW1 and PW2 who were Police Officers called to the scene by members of the public to deal with some kind of confrontation involving a mob of approximately numbering 25 persons it was the evidence of PW1, PW2 and PW3 is anything to go by as having captured the chain of events on the fateful day. This beating continued to the extent that the deceased met with instant death. In my view the deceased must have been overpowered by the mob who had ganged up against him apparently the Accused person happen to be among that gang and leaving him with no room to escape. This is a clear demonstration that the Accused and his gang had an intention to cause death or grievous harm which constitutes the necessary mental element for the offence of murder as envisaged in Section

203 of the Penal Code. I therefore find no hesitation in holding that the Accused person and others not before court were armed with the necessary knowledge and realization that serious harm was a natural and probable consequence of beating someone who was in the state of the deceased with crude weapons and machetes. From the post mortem report the injuries suffered by the deceased were multiple and as the Pathologist testified before this Court they included the following:

- *Deep transecting brain stem injuries*
- *Deep cut (approximately 7cm) wound on the scalp*
- *Deep cut at parietal region 6cm, temporal region 7 cm*
- *Brain tissue injuries*
- *Hematoma*
- *Deep cut wounds on the upper and lower limbs*

As a result of the examination the Pathologist opined that the cause of death was asphyxia due brain injuries associated with organ injuries.

19. On matters of malice aforethought the court in **R v Smith [1960] 2 All ER 450, 453** had this to say applying on this test to determine the accused's intention: Thus;

*"The presumption of intention means that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. Although, however, that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not correct inference, then it should not be drawn."*

*"...it matters not what the Accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, i.e., was a man c*

*apable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result."*

20. On the part of the Prosecution there is probative evidence that on the material day the Accused was one of the persons who assaulted the deceased inflicting injuries to the various parts of his body but more pronounced to the end. The acts of assaulting the deceased was carried out simultaneously with other persons not before Court while armed with crude objects and machetes. As far as the Prosecution case is concerned their version is all over the record when it comes to this question as to who killed the deceased. So far as the accused's defence is concerned, he was unable to controvert the evidence by the Prosecution as founded in the testimony of PW1, PW2 and PW3.

21. For those reasons, it is my finding that the brutal, continuous assault of the deceased by a mob of people who included the Accused person satisfies the criteria outlined in Section 203 for the offence of murder beyond reasonable doubt. In addition there is circumstantial evidence of the pathologist report to establish that the victim was killed with intent to cause death despite the accused's denial. In the circumstances I find the Accused guilty of the offence of murder and proceed to convict him as per the law established as the perpetrator who must have foreseen the possibility of death occurring but continued to act, gambling with the life of the person which is protected by Art 26 of the Constitution. With regard to these

proceedings, the matter is set down for sentencing on 16<sup>th</sup> March 2026.

**DELIVERED, DATED AND SIGNED IN ELDORET ON THIS 4<sup>TH</sup> DAY OF  
MARCH 2026.**

.....

**R. NYAKUNDI**

**JUDGE**