



**Republic v Albert alias Benard & another (Criminal Case
E048 of 2021) [2026] KEHC 2956 (KLR) (9 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 2956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE E048 OF 2021**

RK LIMO, J

MARCH 9, 2026

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD OMWAKA ALBERT ALIAS BENARD 1ST ACCUSED

LYTON ODENDO KIVATI ALIAS LAI 2ND ACCUSED

JUDGMENT

1. Godfrey Omwaka Albert alias Benard and Lyton Odendo Kivati alias Lai, the 1st and 2nd accused respectively are both charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 28th November 2021 at Minyali Village in Kiminini Sub-county within Trans Nzoia County the two jointly murdered Daniel Barasa (the deceased).
2. The accused persons denied committing the offence and the prosecution has presented a total of ten witnesses to prove their charge against both the accused persons. The accuseds on the other hand presented three witnesses in their defence. The prosecution's case against the accused is largely based on circumstantial evidence. Below is a summary of evidence tendered during trial.
3. Daniel Nyongesa Barasa (PW1) told this court that on 28/11/2021 he was at his house when he heard the deceased together with Kennedy Barasa and Godfrey Barasa talking. That the deceased kept doves and one of them had strayed to a neighbour named William Kivati. He further testified that the deceased went to the neighbour to get his dove back but was chased away by the houseboy named Benard who teamed up with another son of William.
4. The witness recalled that his grandfather used to have a boundary dispute with the family of William Kivati and when the grandfather passed on, they decided to straighten the boundary but as they were doing so a fight erupted and one of the children of William got injured. He stated that the issue got heated up and the matter was referred to the Assistant Chief.



5. He testified that the reason why the deceased was not allowed to collect his dove was contributed by that frosty relation. He stated that at around 8pm the same day his brother named Moses called him and told him that Daniel Barasa (deceased) had been injured, and was lying down and could not talk. He stated that he rushed to the scene and found Laban Wafula and other relatives surrounding the deceased. He stated the deceased was not taken to hospital until the next day when they first took him to Kiminini police station to report before taking him to hospital where he was referred to Kitale County Referral Hospital.
6. He insisted on cross-examination that although he did not see who attacked the deceased, the deceased was found lying near the fence that separates them with the family of William.
7. He stated that the deceased succumbed to the injuries the following day after being taken to hospital. That on 1/12/2021 he attended Post Mortem examination on the body of the deceased at Kitale County Referral Hospital mortuary where he identified his body
8. Eunice Nafula Thomas (PW2) testified that on 28/11/2021 at around 8pm she was home with her husband when she heard footsteps of someone running away and when she got out to find out what was happening she saw someone running away and heard someone screaming and when she used her torch to check who it was, she recognized him as Daniel Barasa (deceased). That she tried talking to him but was unresponsive.
9. She stated that she went inside the house and called her husband who responded and they tried to lift him up in vain. She stated that they called the rest of the family. That they took the deceased to the house and saw that he was bleeding from one of the ears and was drooling. She stated that they were unable to take him to hospital that night until the next day. She stated that in the morning the deceased was still unconscious and foaming from the mouth. That he was taken to Matunda Hospital before he was referred to Kitale County Referral Hospital where he succumbed.
10. She stated that she did not see who attacked the deceased but that the attack was vicious and the deceased could not have made it. She stated that they could not get transport and money to take the deceased to hospital that night.
11. Gabriel Juma Barasa (PW3) on his part stated that on 29/11/2021 at around 9.30am he was called by his brother in Nairobi who requested him to rush the deceased to hospital. He stated that he got a motorbike and rushed to Minyali Village where the deceased was and found him in bad shape. He stated that he rushed him to Kiminini police station using a boda boda before taking him to Matunda Hospital where the deceased was referred to Kitale Referral Hospital. He stated that they could not raise the money required for head scan and when they went back the following day they found the deceased still in pain and died shortly thereafter.
12. Amos Wanjala Barasa (PW4) testified that on 28/11/2021 he had visited his uncle known as Laban Wafula and at around 8pm they heard a commotion outside and Eunice went out to check and they also followed her shortly. That they met her heading back to the house saying someone was lying down near the fence. He stated that they went closer and recognized that it was Daniel (deceased). He stated that he was bleeding from his ears and was not talking. That he was not dead as he was still breathing.
13. He stated that they took Daniel to the house as they had no means to rush him to hospital. That the following day they took the deceased to hospital and that it was Gabriel (PW3) who assisted them with a motorcycle to take him to hospital. He stated that they went first to Kiminini police station before heading to hospital. He stated that the deceased died the following day in the morning.



14. Kennedy Barasa Natembeya (PW5), a fifteen year old boy in Standard 8 recalled that on 28/11/2021 at around 7.30pm he was home with Godfrey Barasa, Dan Barasa (deceased) Roy and Collins just story telling when suddenly Bena (the 1st accused) asked Godfrey to follow him and pick his dove but Godfrey told him that he had sold his. That he then asked the deceased to go and take his dove and they both left.
15. He stated that the two left the house and walked towards the fence. That he also walked out and watched the two walk towards the fence where Lai (the 2nd accused) was. He stated that they then went to the kitchen where the doves were and he went back to the house.
16. He stated that at around 8pm, he heard his mum (Eunice Nafula –PW2) calling them and telling them that the deceased had been injured at the fence. That he rushed there and found the deceased lying unconscious bleeding from his ears and in bad state. That he could not talk. He stated that from where he was he could see the kitchen where he last saw the deceased enter being taken by the 1st accused.
17. He stated that the following day he went to school and later learnt that Dan (deceased) had died. He stated that the 1st accused took the deceased from the house they were and 2nd accused joined them as they headed to the kitchen.
18. He further stated under cross-examination that the incident took place at night and that it was dark but the compound of accused persons was well lit. He stated that the deceased was not taken by force and that during the day, the deceased had tried going to look for his dove from the compound of accused persons but was chased away. He stated that the deceased was found injured near the fence of their compound.
19. Godfrey Barasa (PW6) an 18 year old then joining Form One recalled that on 28/11/2021 at around 7.30pm, he was at home with the deceased, Ken, Collins and Roy passing time with 8 other boys. That suddenly Bena (1st accused) appeared and told him to go and pick his dove but he told him he had sold his.
20. He stated in cross-examination that the 1st accused then called Dan (deceased) and the deceased followed him outside. That Ken (PW5) followed them to the door and went back. That there is a small space between their house and the fence separating the compound of family of the accused. That during the day, the accuseds had chased away the deceased from their home. That Eunice (PW2) went and told them that Dan had been injured at the fence. That he was taken into the house and the following day he was taken to hospital where he later died.
21. He recalled that there was a long standing dispute between the two families that is the deceased's family and the family of the accused persons. He stated that the deceased had seen his dove in the compound of the accused persons and when he was told to go and get it he readily went and did not know it was a trap.
22. Roy Barasa Wafula (PW7) testified and also recalled that on 28/11/2021 at around 7.30pm he was at home with Kennedy Barasa, Collins, Godfrey and Daniel (deceased) who were all cousins to him. That there was a knock at the door and Benard (1st accused) stepped in and called Godfrey (PW6) to go for his dove but that Godfrey told him that he did not have any as he had sold it. That Dan (deceased) told him the dove was his and he followed Benard (1st accused) to collect it. That Kennedy (PW5) followed them but after about two minutes Kennedy went back to the home telling them that the two had gone to William's compound to collect the dove.
23. He stated that after around fifteen minutes his mother Eunice (PW2) called them and told them to go and see Dan (deceased) lying at the fence. That she inquired what had happened and they rushed to



- the scene where they found the deceased lying next to the fence foaming at the mouth and bleeding from the ears. That the deceased was carried to the house and the next day he proceeded to school. That when he returned home from school he was informed that the deceased had been taken to hospital and that the following day he was informed he had died. He stated that Benard (1st accused) was the one who went and called the deceased and that they both left and later the deceased was found injured.
24. He stated under cross-examination that he had not differed with any of the accused persons but he was aware of a boundary dispute between the two families. He added that he did not see who injured the deceased but the deceased was found injured after he had left with the 1st accused. That he heard no screams after the two left together nor did he see anyone throwing the body of deceased to the ground. He stated that a fence separates the compounds of the two families but the doors of their houses do not face each other. He stated that they were called by PW2 after around 20 minutes from the time the deceased and 1st accused left together.
25. Collins Simiyu Barasa (PW8) testified and also recalled that on 28/11/2021 at around 7.30pm he was with Godfrey (PW6), Kennedy (PW5) and Roy (PW7) when they heard a knock on the door. That Benard (1st accused) went in and asked Godfrey (PW6) to follow him and take his dove but PW6 declined telling him that he had sold it. He stated that the deceased told the 1st accused that the dove was his and the 1st accused told him to follow him. That the two went and Kennedy (PW5) followed them and returned back shortly telling them that the deceased had gone into William's compound. That after fifteen minutes, Eunice (PW2) went running to where they were and called them to go and see Dan (deceased) at the fence. That they rushed and found deceased lying down bleeding from the ears and not talking. That their elder brother Amos Barasa was there and he called a Teacher known as Daniel Barasa who came and they took the deceased into their grandmother's house. That the following day the deceased was taken to hospital by Teacher Dan and Gabriel Juma (PW3). That he followed them to the police station and later to Kitale Referral Hospital where the deceased was referred to from Matunda Hospital where he was initially taken.
26. He stated that when they arrived at Kitale Referral Hospital, they were asked for Kshs.6000/- for head scan but none of them had that money. He stated that he remained with Dan (deceased) in the hospital as the others went to look for the money. That the deceased was given painkillers to stop the pain. He stated that the following day at around 9am the deceased died as he watched.
27. He recalled that the deceased was lying at the fence between their family and that of William. He stated that the 1st accused worked for William and lived with him.
28. He further clarified under cross-examination that the deceased was lying on their side of the fence within their compound. That he did not see Dan (deceased) go into William's compound, but it is Benard (1st accused) who went into their house and left with the deceased.
29. Maureen Musembi Mchiringany (PW9), a 13 year old girl testified but retracted her statement earlier made. After being stood down she was recalled later but denied knowing what happened to the deceased who she knew as a neighbour. She stated that he was beaten but did not know who beat him.
30. Doctor Dennis Nanyingi (PW10) the Doctor who tendered Post Mortem examination report about the body of deceased stated that the autopsy was performed by Doctor Alex Barasa whom he had worked with for many years and knew his handwriting. That Doctor Barasa was undergoing a rehabilitation program at Tenwek Hospital in Bomet.
31. He stated that the Doctor made the following observations;
- a. Externally, A bruised lower lip and bruised right shoulder.



- b. Internally Massive subdural haematoma, linear skull fracture involving the right and left parietal bone temporal. Massive epidural haematoma in the skull. Brain was compressed and oedema.

That the Doctor opined that the cause of death was severe head injury from a blunt object. He tendered the Post Mortem report as PExhibit 1. That the deceased was aged fifteen years at the time of his death.

32. Sgt Faith Kishoin (PW11), the investigating officer in the case testified that she recalled that on 30/11/2021 she was at her place of work at Kiminini police station when her Boss Inspector Joseph Adongo instructed her to take over the investigations of a murder case reported by Daniel Nyongesa who reported that his cousin Daniel Barasa (deceased) had been grievously injured by persons well known to him.
33. The investigating officer stated that in the course of her investigations, she established that the family of the deceased Peter Someki and that of the accused one William Kivati had a long standing land dispute. That there was a previous altercation between a grandson of Peter Someki and a son of William Kivati.
34. She stated that the scene of crime was a fence which was the boundary of William Kivati and Peter Someki. That the incident was reported to have been caused by a dove belonging to the deceased that strayed into the compound of William Kivati the father to 2nd accused and related to the 1st accused. That the deceased had tried to go and retrieve the dove but was chased away and that at night same day, the accused persons went and called the deceased to go and collect the dove which he did but minutes later he was found lying unconscious.
35. The investigating officer further stated that she did record statements from witnesses and recalled recording a statement of one Maurine Musembi then aged eleven years and that she overheard the two accused herein saying that they had called the deceased before beating him senselessly. That the accused persons were on a revenge mission after their kin Michael Kivati had been assaulted by a grandson of Peter Someki. She further stated that the two accused persons were last seen with the deceased before being found lying unconscious ten to fifteen minutes thereafter lying between the house of deceased and that of the accused persons.
36. When placed on their defence the accused persons denied committing the offence. Godfrey Omwaka (DW1) the 1st accused herein stated that he was a student and on 28/11/2021 he was from a posho mill and found dinner ready having been prepared by his mother. That after dinner he watched Television and later slept.
37. He stated the following day he went to start a posho mill belonging to his uncle as was usually the routine.
38. He testified that on 30/11/2021 his mother called him and told him he had beaten the deceased and that a crowd had gathered agitated wanting to harm him. He stated that he rushed home and hid until the police arrived. That he was arrested and taken to Kiminini police station where he was informed that he had killed someone with his cousin who is the 2nd accused herein. He stated that the OB extract indicated that the deceased was beaten by Daniel Kivati.
39. He stated that PW2 was a neighbour who lives around 100 metres from their home. He stated that PW9 was at school at the time and he had a school register to demonstrate the same.
40. He conceded that there was a dispute over land between his uncle and the grandfather of the deceased. That there was a fence that separates the two families that had been removed/or destroyed. He stated



- that the matter was reported to the police and that the same could have been the reason why they were framed.
41. When pressed under cross-examination to explain when the matter regarding the destroyed fence was reported, he stated that the matter was not reported.
 42. Lyton Odendo Kivati (DW2) testified that on 28/11/2021 he went to work with 1st accused and later went home in the evening, took dinner and slept. That he also did the same the following day.
 43. He stated that on 30/11/2021 while at the shop his mother went and told him to go and wait in the house. That the police later arrived and arrested him and took him to Kiminini police station. He denied meeting the deceased on the material night adding that he had no issues with him.
 44. He however admitted that there was a land dispute between his family and that of the deceased. He stated that the OB of the material time stated that his brother Michael Kivati is the one who assaulted the deceased and that he should be the one facing the murder charge.
 45. Janet Kivati (DW3) the mother of both accused herein testified that her sons took breakfast on the morning of 28/11/2021 and went to work until evening when they returned. That they then took dinner and slept. That the following day they proceeded to work as usual and she did not witness anything unusual and that she did not see the deceased.
 46. She stated that she was not aware of any issues between her family and that of the deceased person though there was a boundary dispute that saw the deceased's family destroy their fence. She stated that she reported the incident which occurred on 21st November 2021. That the police went to the scene and found no one at the deceased's family homestead.
 47. William Kivati (DW4) stated that on 28/11/2021 he was in Maragoli where he had gone to see his sick sister. That on 30/11/2021 his wife called him and told him that there was a problem. That because it was at night, he went home the following day on 1/12/2021 and found police officers in his compound. That he went to the police station and was informed that his children had committed murder.
 48. He stated that he had had some issues with his neighbour, the deceased's family. He recalled that in 2010 his chicken strayed and damaged their crops. That he bought a fence and the issue was resolved. He stated that after two years, Emmanuel Barasa, a brother to the deceased complained over their common boundary and they informed the Chief who called a surveyor. That the surveyor came and established that the boundary was intact. That later Peter Someki, the grandfather to the deceased died and that after his burial, Someki's family destroyed his fence and became hostile to his son. That his son named Michael came and tried to help but got beaten up. He stated that he reported to the police and recorded statements. He stated that the deceased was young. That he lives with his niece Maureen (PW9) and had lived with her since she was young. He denied suggestions that he influenced the said Maureen to change her mind about testifying in this case though he knew that she was a crucial witness to the prosecution.
 49. Annete Masinde (DW5), a teacher at Minyali primary school testified and tendered a Register (Dexhibit 4) and a letter from Head Teacher indicating that Maureen Musembi was a pupil in the said school at Grade 4 and was in school on 30/11/2021 from the morning to the afternoon. She explained that the Register is marked in the morning and in the afternoon to indicate pupil's attendance.
 50. At the close of defence hearing, both the defence and the prosecution filed their respective final written submissions which I will consider as I proceed to evaluate the evidence and determine this case.



51. The accused persons as observed above are jointly charged with the offence of murder contrary to section 203 of the Penal Code. For a charge of murder to be sustained the prosecution are required to establish and prove the following ingredients beyond reasonable doubt namely;

- a. The fact of death and its cause.
- b. Actus reus or the fact that the accused person through unlawful act of commission or omission caused the death of the deceased.
- c. Mens rea or malice aforethought.

52.

(a)) Fact of death and its cause.

In this case this fact is not disputed. The evidence of Daniel Nyongesa Barasa (PW1), Eunice Nafula Thomas (PW2) and Collins Simiyu Barasa (PW8) regarding the fact of death of the deceased was corroborated by the medical evidence tendered by Doctor Dennis Nanyingi (PW10) who testified on behalf of Doctor Alex Barasa who did the autopsy on the body of the deceased. The Doctor noted that the deceased suffered serious injuries to the head including massive bleeding between the skull and the brain (subgaleal) and skull fracture involving right and left parietal temporal bone. According to the Doctor the deceased died from a severe head injury caused by a blunt object. He tendered a Post Mortem report as Pexhibit 1 adding that the deceased was aged fifteen years old when he met his death. The fact of death and its cause were therefore well established and proved beyond reasonable doubt through the evidence tendered by the prosecution.

53.

(b) Actus reus

This element is the most contested issue in this case. The prosecution's case is hinged on the doctrine of 'last seen' and circumstantial evidence.

54. The State through its written submissions dated 27/11/2025 by learned counsel Mark Mugun relies on the decision of *Ahamad Abolfathi Mohammed & Anor –vs- R (2018) KECA 743 (KLR)* where the Court of Appeal set out guidelines with respect to relying on circumstantial evidence to render a conviction. This is what the court observed;

“Before circumstantial evidence can form the basis of a conviction,.....it must satisfy several conditions (terms).....

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

55. The defence through written submissions dated 17/12/2025 done through learned counsel Dennis Bikundo, submits that none of the prosecution witnesses saw the deceased being assaulted and concur that the prosecution's case relies on circumstantial evidence. They rely on the decision of *Sawe –vs-*



- Republic (2003) KLR 364 where the Court of Appeal held that “in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other explanation upon any other reasonable hypothesis than that of his guilt.”
56. They have also cited the decision in *Mwambegu –vs- Republic (2023) KECA 866(KLR)* where the Court of Appeal held that for the ‘last seen’ doctrine to be applicable, there should be overwhelming circumstantial evidence and corroboration that exclusively links the accused person to the death of the deceased. The above cited is sufficient illustration on situations where the two principles apply and the circumstances.
 57. Having set out the legal principles applicable on when circumstantial evidence can lead to a conviction and when the doctrine of ‘last seen’ applies, this court will now analyze the evidence tendered by both sides.
 58. The prosecution’s star witness with respect to both the last seen principle and what transpired at the material moment has to be Kennedy Barasa Natembeya (PW5), a fifteen year old student in Class 8. He stated that the 1st accused went into the house they were with the deceased and called Godfrey Barasa (PW5) to go and collect a dove that had strayed into their compound. PW6 corroborated this evidence and the fact that he declined saying the dove did not belong to him as he had already sold his. The deceased told the 1st accused that the dove was his and the 1st accused then told him to follow him and they proceeded outside. PW5 stated that he followed the two outside and he watched them walk towards the fence where he says the 2nd accused (LAI) was standing.
 59. What is crucial is that barely fifteen minutes after the deceased and 1st accused had gone to reportedly pick his dove, Eunice called them and informed that the deceased had been injured and lying near the fence separating them and the compound of the accused persons.
 60. This court has considered and evaluated the evidence of Eunice Nafula (PW2). She heard footsteps of someone running outside and upon going outside to check he found the deceased groaning in pain badly injured and not talking. This piece of evidence corroborates the evidence of PW5, PW6, PW7 and PW8 all of who were with the deceased at the material time in one house enjoying their evening through story telling.
 61. It is also evident from the evidence of Daniel Nyongesa Barasa (PW1) that a dove belonging to the deceased had actually strayed into their neighbour’s compound and when the deceased went to look for it, PW1 stated that he was chased by the 1st accused together with one of the children of William. He stated that there was a boundary dispute between the two families and that is how he perhaps interpreted the reason why the deceased was chased away at around 10am that very day.
 62. The defence submits that there is no chance that the deceased could go alone to collect his dove when he was aware of the hostility and having been chased away during the day.
 63. However the age of the deceased has to be factored in when trying to figure out what could have gone through his mind when he was told to go and pick his dove. The 1st accused, going by the account given by the boys (PW5, 6,7, and 8) who were with the deceased, went and called Godfrey Barasa (PW6) but PW6 told him that the dove was not his as he had sold his.
 64. The deceased was in the same house. He informed the 1st accused that the dove was his and perhaps enthusiastic to get back his dove went with 1st accused oblivious of the danger that awaited him. The proximity of the two homesteads could have also given him a false sense of security. I therefore discount the defence’s assertion that it was not possible for the deceased to accompany the 1st accused alone.



- What is evident is that PW5 went up to the door to check the deceased and the 1st accused as they were leaving headed to the homestead of the accused persons and when he saw them enter the house where the dove was, he went back to the house.
65. The defence has also faulted the prosecution's witnesses for not raising an alarm but finding someone already injured without assailant(s) on sight made no sense to raise an alarm other than calling the close family members who were around. The deceased's family of course should have rushed the deceased to hospital but the evidence tendered was that they were of low means that is why even the following day when the deceased was eventually taken to Kitale Referral Hospital for treatment, they could not afford the Kshs.6000/- required for urgent CT Scan.
66. This court finds that to the extent that the 1st accused went into the house where the deceased was with around five other boys and left with him only to be found a few minutes later badly injured a few metres from their compound and at the fence separating the homestead of accused person and the deceased's homestead, the doctrine of last seen applies. This is because the 1st accused left with the deceased who at the time was in good shape or healthy and after around fifteen minutes PW2 found him groaning in pain foaming in the mouth. The circumstantial evidence includes what PW1 witnessed during the day that which was the same 1st accused chased the deceased when he had gone to look for the very dove that he was later called to go and collect that night. The fact that the OB extract contains different information on who attacked the deceased does not, in my view, negate the fact that the 1st accused left with the deceased.
67. The only legitimate point raised by the defence regards the identification of the 2nd accused. This is because the only evidence linking him with the incident is the evidence of PW5 who says he saw him standing at the fence. While it could be true that he was actually the one, I find that the issue of lighting was not well established. This is because PW5 says that it was dark at the time. He also stated under cross-examination that there was no electricity in their homestead. That there was latrine next to the fence and trees along the fence. He did not clarify when testifying in chief how he managed to see or recognize the 2nd accused. Though he stated under re-examination that the compound or the homestead of the accused persons was well lit, he did not say if the same light was sufficient to penetrate the fence or the trees sufficiently enough to enable him recognize the 2nd accused person.
68. The evidence given by both the accused persons indicates that the two were together during the day and even at the material time. There is strong suspicion therefore that the person seen by PW5 was actually him but suspicion alone however strong cannot be a basis to render a definite positive finding. The prosecution's case on the question of lighting particularly with respect to identification or recognition of the 2nd accused left out some gaps that left some lingering doubts in my mind whose benefit by law goes to the benefit of the 2nd accused.
69. This court for the aforesaid reasons finds that the element of actus reus was only proved by both circumstantial and the doctrine of 'last seen' as against the 1st accused person.
- 70.

(c) Mens rea

The fact that there was bad blood between the family of the deceased and the accused is uncontested. Both the prosecution's witnesses and the defence stated that there has been a long standing dispute over the boundary. William Kivati (DW4) gave the history of the feud between the two families which began as far back as 2010 when his chicken strayed into his neighbour's homestead, the deceased's family herein. He stated that he bought a fence probably a chain link and resolved the issues of chicken straying into his neighbour's homestead and



causing destruction and strained relationship. He however stated that when Peter Someki (his neighbour) died a quarrel ensued after the deceased's family destroyed his fence. He says the matter was escalated to the police and the Area Chief. That fact is well corroborated by the evidence of PW1 who concurs that the boundary dispute erupted after the burial of his father early in November 2021. The murder incident happened on 28/11/2021 which shows that the disagreement or hostility between the two families was still raw. That in my view is an indication of motive on the part of the 1st accused. He was upto no good when he went to call the deceased and this could be seen from his action earlier during the day which was chasing the deceased when he went to collect his dove.

71. I am persuaded by the prosecution's submissions that given the serious and fatal injuries inflicted on the deceased, malice can be inferred under the provisions of section 206 of the Penal Code which 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.”

72. This court finds that the prosecution's case against the 1st accused has been proved beyond any reasonable doubt.

It is unfortunate that the life of an innocent child could be lost in a most cruel and gruesome manner over issues that he had no control of. Parties are advised to always resolve their differences through civil means rather than resort to violence and vengeance. This court finds that the evidence against the 2nd accused left grey areas regarding the lighting and identification or recognition. He is given the benefit of doubt as the evidence tendered is not sufficient to found a conviction against him. He is therefore not guilty and he is acquitted. The case against the 1st accused is established and proved beyond any reasonable doubt for the reasons aforesaid. He is found guilty as charged and convicted accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 9TH DAY OF MARCH , 2026.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Bikundo for the accused person

Mugun for the State

Duke/Chemosop – Court assistants

