

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**CRIMINAL CASE NO. E023 OF 2020**

**REPUBLIC.....**  
**PROSECUTOR**

**Versus**

**FELIX OCHOLA OKACH .....1<sup>ST</sup>**  
**ACCUSED**

**ROBINSON OMONDI ORWA ALIAS DADDY.....2<sup>ND</sup>**  
**ACCUSED**

**JUDGMENT**

The accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars are that on the night of 12<sup>th</sup> November 2020 at Masara Sub-Location, Suna West Sub-County in Migori County murdered Kennedy Oboo.

The Prosecution called 13 witnesses to support the charge and the accused persons in their defence denied the offence in their sworn statements and called one witness each to support their defense that they did not commit the murder.

PW1 AWINDA VICTOR OMOLO Medical Officer working for Migori County Government at the County Referral Hospital testified that he conducted the post mortem on the body of the deceased herein at the County Referral Hospital Mortuary on 17/11/2020 at about 1:30 p.m. He said the body was identified by Joshua Waseka and Evans Ochieng who were accompanied by a police officer. He said the body was of a male African about 32 years old and it was in underpants only. Nutrition was fair and fairly built. Height 165cm. Post mortem charges No rigor

mortis but there was liquefaction. Its first stage of decomposition of the body. Time of death was estimated to be more than 48 hours but less than a week.

On external appearance the doctor said that there was left and right periorbital oedemas indicating blow out injuries of the eyes. Eyes were swollen meaning they were hit by a blunt object; upper lip was swollen, indicating blunt trauma to the mouth. Central and peripheral cyanosis was also noted.

Blue discoloration of the mucus membrane in the mouth - palms of the hands and nails - it shows that there was no oxygen in circulation at time of death.

Ligature mark seen running circumferentially around the neck.

On respiratory system the doctor said the 2<sup>nd</sup> cricoid cartilage of trachea was fractured and vocal cords were bruised. Diameters of the groove around the neck was about 2cms.

On Cardiovascular systems there was central and peripheral cyanosis. Digestive and Genito urinary systems were normal.

Head scalp Galea haematoma and oedema are on left parietal region.

Galea is the covering of the scalp.

Collection of blood under the covering of the scalp may be due to blunt trauma to that region.

Nervous system, Spinal column and Spinal Cord were Normal

PW1 formed the opinion that cause of death was asphyxiation secondary cause was cardio respiratory arrest. Underlying cause of ligature strangulation.

Nail specimens of the left index finger and middle fingers were taken for lab analysis. PW1 signed the post mortem and it was stamped by office of superintendent. He produced it in evidence - PEXNO.1.

In Cross examined by Mr. Owade Advocate PW1 said he was not a pathologist. Duties of pathologist is a person who has performed pathology but it is not the first time he was conducting pathology. He said that when conducting post mortem, a police officer is present because the post mortem comes from the police station and the name of the officer is to be indicated at police station. He said the name of officer who was present during PM is not indicated in the form. I deny that the document was brought to me by a civilian. He said he could not rule out that the PM form was taken to him by a civilian. External appearance of the body; there was a blow-out injury on the eyes. There was swelling around the eyes. One falls before reaching the eyes, one can in this case eyes were broken. Something happened before reaching the structure around the eye. Blunt object was used to injure the eye.

A stone is blunt object. Blue discoloration of mucus membrane cause by lack of oxygen in the lungs. He said a dip pit of 50 metres has no oxygen and can lead to such discoloration. He said the ligature mark was of even formation around the neck. Ligature can be a cloth 2cm diameter. He said he observed trachea fracture. A fallen deep pit can lead to a fracture. If you hit the ground with the head first, then there will be trauma to the scalp, spine will try to go inside and fracture on base of scalp and blood will come one of the ears. It depends on the force of the fall. If its high force one sustains a compressed fracture of the cranium. If the force is minimal there will be slight injury to the scalp collection of blood in left parietal. It was scalp haematoma. PW1 said that nail specimen were taken for analysis and the results will come from Government chemist where they were referred to for Government analyst because when one dies in such manner, he may

scratch the assailant and one may get the DNA of the assailant in the nails. The lab communicates with the police.

In Re-examination PW1 said he is not a pathologist but he is authorized to perform post mortem. He said that Pathologist is opposite of normal physiology. I was called to find out the cause of death and I did. Post mortem originate from office of police officer. A civilian could not have brought a post mortem report. In the place meant for police officer to sign. It was typed police officer not civilian. Fracture of the neck was not a result of a fall. He said that if there was fall, he could have sustained injuries to the scalp. PW1 said that vocal cords were bruised and a fall cannot bruise vocal cords. He said the noise made when being strangled was the cause of the bruises on vocal cords. It corresponds with my findings. It was ligature strangulation.

PW1 Justus Ouma Okumu said he was from Masara and he was a motor cyclist rider. He testified that on 12/11/2020, he was at the stage about 8:30p.m. when Tom Ang'ila went and took him to his home in Mambokholo. That he left Tom at his home after he was paid. That on his way back at Mambokholo junction he met a boy called Owino Mbuya who stopped him and told him to take a customer to Masara. He said the customer was known to him as Kennedy Oboo. That he told him to get onto the motor cycle. That when near the road branching to his home, the customer told him to drop him on the road so that he walks home. That the customer paid him and started walking home as he headed towards his home as it was late. PW2 said that when he left Kennedy nothing happened. That the next day, his cousin called and asked me to take him to a funeral and he took him and after that he took the motor cycle for car wash where he stayed till 10:00 a.m. That while he was at the car wash a brother to Kennedy called me and asked where he was and he told him he was at Masara car wash. That

Kennedy's brother told him to go to him urgently. PW2 said he waited for the motor cycle to be washed and Kennedy's brother called again. That when he found Kennedy's brother at the stage he asked if PW2 carried Kennedy and where he dropped him and he told him he dropped him on the road near John's home. Kennedy's brother told him that that Kennedy had been killed and thrown in a hole. PW2 said he was not aware of the death and that he never recorded a statement at police station. He said he recorded a statement over events of 18<sup>th</sup> on Day-to-Day Bar. He said he was called by the owner of the bar, Johny and CID officers went where he was.

PW2 said he did not meet any person before he dropped the deceased. He said that when he came to court, he was given the statement to refresh his mind. He said he found it was written that he met Daddy and Felix who robbed Felix and threatened to kill me if he reported. PW2 said he did not say such a thing in his statement.

They wanted him to say something also but he refused. He said he was hand cuffed. He said he did not know the Felix police referred to until he started coming to court. He said he knew Daddy but he never met any person that night. The officer who recorded his statement is Robinson and the other who was forcing him to tell lies was Johny. He said that knew John Oboo as a neighbour but he never talked to PW2 about his security and he did not tell PW2 where he was coming from on that day it had drizzled. PW2 said he knew Oboo' home which is like from court to Police Station - about a kilometer. There is a clear road to that home. He said that Oboo requested to be dropped at home and he paid 30/= . PW2 said he did not get any communication about Oboo that night till the next day about 10:00a.m He said that he did not pass anywhere before reaching home and he did not meet any motor cycle rider.

PW2 David Otieno Oduogi said he came from Ndemra and worked in Jua Kali at Masara. He testified that on 12/11/2020, he was at work at the Center of a bar. Juala Wang Pub from 2:00p.m till 7:00 p.m. That later he saw Robinson who is also known as Daddy and Felix and Kennedy fighting in the bar. That they went outside and PW3 was left with the owner of the bar Washington Opiyo. PW3 said he did not know why they were fighting and nobody intervened. He said he was left with the owner of bar taking accounts and thereafter he went home. That the next day on 13<sup>th</sup> he heard that Kennedy who had fought with Felix and Robinson had been killed. PW3 said he knew Kennedy for a short time as he come from far. He said Robinson was known to him and was also known as Daddy. PW3 said he also knew Felix whom he identified in court.

PW3 said he heard people talking about the death of Kennedy at the Centre but he did not see Kennedy's body.

In cross-examination by Mr. Owade PW3 said he started work at the pub at 2:00p.m but he did not know at what time Kennedy came into the bar. He said Kennedy was taking alcohol in the bar. He said Robinson and Felix also drunk alcohol in that bar. He said there was a scuffle between the three and they left the bar while fighting.

In cross examination by court PW3 said he could not tell who was fighting who. He said the fight was at 7:30p.m

PW4 Brian Otieno a resident of Ndemra and a farmer testified that on 12/11/2020 he went to Masara to buy a phone. That on his way home about 8:00p.m he was on a motorcycle and alighted at Mambokholo. That after alighting he walked like 3 steps and saw people quarreling on the road and he was able to identify 2 of them as Aledu and Awendo. That he passed by and he met Kennedy on his way home. That Kennedy was drunk and he told PW4 to take him home. PW4

offered to stop for him a motor bike as he did not have one himself. PW4 said the motor bike he stopped belonged to Kennedy's neighbour known as Ouma Ong'ayo. That Kennedy boarded the motor cycle and they left as he also went home.

PW4 said he did not know what happened after that. That the next day about noon, he passed by a hotel and saw Okuku Riana who came and told him that Johny was calling him. That when he went to where Johny was he asked if PW4 had seen Kennedy and he said that he met him and gave him a cyclist. He said he had not talked to Kennedy after they parted.

That Johny took him to where Kennedy had been killed and there were many people. He said he saw the body in a hole far away from where he boarded the motor cycle. PW4 said that he was present when police from Masara went to the scene.

In cross-examination by Mr. Owade PW4 said that when he met Kennedy he was drunk and he handed Kennedy to PW1 Ong'ayo.

PW4 Fredrick Otieno Oleru a resident of Masara and a mine worker testified that on 12/11/2020 he went to Juala Wang bar at Mambokholo and a fight broke out between Daddy, Felix and Kennedy. He said that Daddy and Felix were beating Kennedy using their fists. He said it was about 8:30 p.m. and Kennedy ran outside and Daddy and Felix followed him. He said they were threatening him and he was shouting "Wooi Wooi" you are killing me. That he went outside and pushed Daddy and Felix to stop beating Kennedy and Kennedy ran off towards the motor cycle stage. That he followed him to the stage where Kennedy found Ouma and asked Owino to take him home. Owino said he had no motor cycle and handed him to Ouma to take him home

Ouma is PW1. I saw Ouma carry deceased. That he went back to the bar and Daddy and Felix also went back to the bar where they left him

at about 9:00p.m After that he also went home. That the next day he went at Mambokholo at 6:00 a.m. to work. That at about 11:00 a.m. he went with Nick to eat in a hotel and Nick told him that Kennedy had been found dead in a hole at John Oginga's plot.

In cross examination by Mr. Owade PW4 said that the three who fought Felix, Daddy and Kennedy were drunk and Kennedy ran out of the bar to the stage. That he saw Ouma take Kennedy home from the stage. He said he went back to the bar with Felix and daddy where they continued to take alcohol.

In cross examination by the court PW4 said that Kennedy was drunk but still had energy to run

PW5 John Ooko Ogunga\_a resident of Masara and a farmer testified that he knew the deceased Kennedy Oboo as his sister is married to the father of the deceased Oboo. He said he did not know the accused persons. He said that on 13/11/2020, a person called Jack went to his home at 9:00 a.m. and told him about his land which has gold. That the person told him to go and see something. That they went with him and he took him to the pit where he found a dead body. That when he saw the body and he went to police station at Masara and reported that he had got information of a dead body. He accompanied police back to the scene and found the body had been removed. He said he saw the body had cut wounds on the shoulder, neck and head. He went to the police station and recorded a statement. He said that the body was for a person he knew as Kennedy Oboo.

He said Jack Oko was mining on his land. He said he did not know who killed the deceased.

PW6 Moses Omondi Majiwa a resident of Masara and a mine worker testified that he knew Kennedy Oboo who was from his village. He also said he knew both Accused persons. He said he knew Felix in the bar

when he found him drinking in the bar. He said he knew A2 as Daddy. He said that on 13/11/2020 I he was in Juala Wang Bar together with Amadi, Odhis Aitila, Aton where they were taking alcohol. He said that he went to the bar at 8:30 p.m He said that a fight broke out between Vincent Ochola the 1<sup>st</sup> accused with Kennedy - deceased.

He said A1 hit the deceased with a bottle on the head and the empty bottle got broken and Kennedy's head got a cut and bled a little. That Amadi put deceased on Ouma Ongayo's a motor cycle so that he could go home and PW6 was left behind.

That the next morning he heard that Kennedy was found dead and he saw Kens people going towards the road and when he asked the brother, he was told Ken's body was in a hole. He said they found the body there and he was dead and he and Mzee, Otoyoi removed him and that the body had injuries on the neck and hand. PW6 said he did not know who killed the deceased.

In cross examination by Mr. Owade Advocate PW6 said that he was drinking with Kennedy at Juala Bar and that Kennedy and the others were drunk.

He said Kennedy and Vincent fought. That after Kennedy left the bar, Ouma Onyango took him home. Ouma came to the bar entrance and took him home. He was able to sit on the motor bike alone.

In cross examination by the court, PW6 said that Kennedy was going outside when accused held him by the shirt, then hit him on the head with a bottle and

Kennedy did not do anything.

PW7 Dorothy Achieng Olonde Assistant Chief of Masara Sub-Location testified that she knew the deceased Kennedy Oboo who was a resident of her area. She said she also knew the two Accused persons who came from a neighbouring location in a different Sub County.

She said that on 13/11/2020 about 9:00a.m she received a call from village elder, Phoebe Obambo that there was a body of a person in mining shaft in the home of John Oginga. She rushed to the scene and confirmed that the body had been removed from the shaft and she identified it as that of Kennedy Oboo. She rang the OCS of Masara Police Post CIP Alex Andati and he had the information and informed Sub County Commander. When waiting for police to go to the scene she gathered information on what happened. PW7 said the body of the deceased had visible injuries at back of head, oozing blood, and another wound on the side of the neck but interestingly clothes were not blood stained but were wet. That she noticed evidence of struggle; from the muscles of the body bulging. That PW7 got one person who gave an account of what had happened on 12/10/2022 and a cousin to the deceased Alex Amadi. PW7 called Amadi who explained that they had been drinking at a hotel bar at Mambkholo, when a fight broke out between Kennedy, Vincent and Felix and Amadi intervened and separated. He was not able to tell us the cause. When waiting for the police PW7 processed the scene and took away the body.

PW8 Evans Ochieng Juma also said he was from Masara and was mining gold. He said he knew Kennedy Oboo who was his elder brother. He said he also knew the Accused persons. That on 17/11/2020 post mortem was done at Migori Referral Hospital after he and his brother Joshua Waseka identified the body. He said that the doctor told them that the deceased was strangled with a cloth till the Oesophagus was severed.

PW9 NO. 64510 CPL Livingstone Katui from DCI Migori Crime Scene support Services Section said his duties involve to accompany the

investigating officer to a crime scene and document the scene and collect any evidence on the scene.

PW9 said that on 13/11/2020, at about 11:00 a.m he accompanied CIP Andati OCPD Masara police post and P. C. Arupe of DCI Migori to a mining site at Masara stage village in Masara Sub Location. He said that there was a report of a body of a deceased in a mine. Report had been made at Masara police post. He said he found the body having been removed from the mine pit which was about 12 feet deep. He said the body had visible injuries on the shoulder, neck and head. He was identified as Kennedy Oboo. That he also proceeded to Mambokholo trading Centre where deceased is alleged to have been drinking at Juala Wang Bar and took photographs of the two scenes at the mine and Juala Wang Bar. I took 15 photographs 1- 15.

1<sup>st</sup> Photo - General view of scene from a tarmacked main road at the mine

Photo 3 -5 Close up view of deceased at the mine.

Photo 6 - Close up view of the body for purposes of identification.

Photos 8 - 9 close up view of injuries on the body.

Photo 10 - 11 close up view of the mine - pit

Photo 12 -15 - the second scene Juala Wang Bar.

On 19/11/2020 I took the photos for printing; prepared a certificate, signed and stamped. I wish to produce them in evidence as exhibits - Photographs produced as PEXNO. 1 - (a) - (o).

Certificate - PEXNO 2.

In cross examination by Mr. Owade Advocate the Scenes of Crime Officer said that he found the body was outside the pit.

The information was that the body was in the pit. He said that he did not find out who removed the body from the pit. He said the scene had been interfered with as the body had been removed. He said that as a

scene of crime officer, he should have started with the body inside the pit as it would have shown the position of the body which is missing in all the photographs produced here.

PW10 TOM NGILA MBOYA testified that he was resident of Chamagina Village in Mbambokholo in Suna West and he sells gold. He said he knew Kennedy Oboo who was from his village. He said that on 12/11/2020 at about 8: 30p.m he was coming from Masara about 8:30p.m. That he boarded a motor cycle of Ouma Onyango at the stage and he was taken home. That on 13<sup>th</sup> November 2020, he got information that Kennedy Oboo had been found in a mine pit dead. He said he did not go to the mine.

PW 11 DR. Awinda Victor Omolo testified that he was a medical practitioner based at Migori County Government at the Referral Hospital

He said that he performed post mortem on the body of Kennedy Oboo at Migori County Referral Hospital Mortuary on 17/11/2020.

He said the body was of a male in underpants, black race, about 32 years.

Nutrition fair and fairly built height 165 cms.

Post mortem changes there was liquifaction and lividity. It was soft. Time of death was over 48 hours and less than a week.

PW11 observed Left and right periorbital oedemas. Eyes were swollen indicating blows to the eyes. The upper lip was swollen indicating blunt trauma to the mouth; marked central and peripheral cyanosis indicating that at time of death, there was no gaseous exchange in the lungs. Ligature mark was seen running circumferentially around the neck.

On Respiratory system PW11 observed that the 2<sup>nd</sup> cricoid cartilage of trachea was fractured (wind pipe). It means there was pressure on

that point to neck and it fracture. He said the vocal cords were bruised. He also observed diameter of the groove around the neck is about 2cm. He said that when one is being strangled and he tries to shout, the vocal cords get bruised.

On Cardio respiratory system he found vocal cords bruised.

Digestive system and Genito - Urinary system were Normal

On left parietal system covering of skull - there was haematoma or blood clot. Flesh covering the area was swollen which indicates that there was blunt force trauma to the area.

Cord and column- Normal

PW11 formed opinion that immediate cause of death was asphyxiation. Antecedent cause was cardio respiratory arrest. Underlying cause, ligature strangulation.

He took nail specimens of index and middle finger for analysis. When being strangled usually they fight back and may scratch the assailant and so DNA of the assailant may be found. He said he had not seen the results. PW11 produced the post mortem report as PEXNO. 3.

In cross examined by Mr. Owade Advocate, PW11 said injuries from the head could be as a result of a fall from a high place to a low place. If that was the case, the skull would have been fractured, the base and top of the skull and there would be bleeding from the ears.

PW12 NO. 226805 CPL James from Ntitaru Police Station testified that previously he was at Masara Police Post. That on 13/11/2020 at about 11:25a.m he was at station and established from Nairobi that a case of murder had been reported by Jack Ouko and Evans Ochieng Ouko.

That in company of CIP Alex Andati in motor vehicle Registration Number GK B135J driven by PC Dan Wekesa went to the scene in Company of DCI Officers from Migori and found the deceased had been removed from the hole and there was a big a crowd. Deceased's

body was photographed and observed by DCI Officers. The deceased's body was put in the police vehicle and taken to Masara Police Post. That CIP Andati authorized him alone to take the body to the mortuary. That he established the deceased's name to be Kennedy Oboo.

He said he was not present during post mortem.

PW13 NO. 96137 PC Mathews Arupe of DCI Migori testified that on 13/11/2020 at about 8:00a.m he was in the office when DCI Mr. Mutai called and informed him of incident of murder at Masara area. That together with the personnel in charge of scene of crime, CPL Katui and driver, they went to scene of crime which was at Masara Stage / Village in the home of John Obunga. That at the scene they met officers from Masara police station led by CIP Andati and CPL James Ouda together with members of Public. He said they also met Assistant Chief Dorothy Olonde who had found deceased's body - Kennedy Oboo. The body was besides a pit and blood oozing from back of the head and there were visible injuries on the shoulder. PW13 said the body was photographed by scenes of crime and transferred to Migori Hospital Referral Hospital Mortuary. That he recorded statement of several witness and established that David Odero bar attendant, Accused and deceased fought on night of 10/11/2020. That Fredrick Oleru (PW4) - witnessed the fight between Accused and deceased and they were armed.

Brian Okech (PW3) handed deceased to Angayo (PW1) because deceased wanted to go home. That PW1 confirmed that Accused 1 and 2 got hold of deceased and led him towards homestead of John Obunga; then Felix warned PW1 about divulge Information that Accused 2 had grabbed deceased and taken him to the homestead.

The body was lying beside a deep pit when we arrived. The body had been dumped in the pit. He said that he got information from witnesses and area Chief who had already testified.

That the next day they were called and informed that members of Public had arrested the suspects and they went to collect the two Accused from Masara Police Post. He said he met Accused persons in court as he did not know them before. That the accused persons were taken for mental assessment and report was filed in court. That the body was subjected to post mortem on 17/11/2020.

In cross examination by Mr. Owade Advocate the I/O said that he gathered that there was a fight at the Jwala Wang bar, between deceased and the 2 Accused. The deceased left the bar while one witness said that deceased and accused left the bar while drunk. He said that the witness saw the deceased leave the bar with the two accused persons- Fredrick saw them.

That Fred also said the deceased left for his home on a motor cycle with a rider alone, after the fight. He said the rider was alias Onyango - or Justus Onono (PW1). Justus Ouma testified before the court. He said he would be surprised if PW1 told the court that he saw a fight or that the two accused did not snatch the deceased from him. He said the basis of the charge was Justus. The boys also told him about the fight. He said he was not aware that Justus denied giving him a statement. He said he interrogated Obunga the owner of the home and he said he did not see anybody or any movement that night.

In re-examination PW13 said that apart from PW1 Justus, David (PW2) also Fredrick PW4 and Washington were at the bar and they saw accused and the deceased fight. The persons that were at the scene with deceased last before the death were the accused persons.

Wheb placed on defence the 1<sup>st</sup> accused person Felix Ochola Okach gave sworn statement and said that he came from Mikei and he was a gold miner. He said he did not commit murder of Kennedy. He said that on 12.11.2020 he was at Juala wang bar in Mbambokholo at 7.30pm. He said there were many other patrons at the bar who were drinking. He said he left the bar at 8.55pm and went home at Mikei. That he arrived at home at 9.30pm and did not leave again. 1<sup>st</sup> accused said he did not meet Kennedy Oboo on the material night. He said he came to learn of Kennedy Oboo's death the following day in the morning. He said they were at Arombe when police from Masara went and told them that there was somebody who had died in gold mine at Kajoni. The police told them that it was Kennedy Oboo who had died in the gold mine. He said he knew Kennedy Oloo's home which is some distance away from his home and directions to his home is different from that leading to accused person's home

Cross-examination by Mr. Oimbo for state A1 said he was at the bar with Robinson and when he left the bar Robinson accompanied him. There were other patrons at the bar but he did not see Fredrick Otieno PW4. He said he could not master names of all the people at the bar and he could not tell if David Otieno - PW2 was there as he didn't know him. They could have been at the bar. A1 said that Justus Ouma -PW1 boda boda rider is known to him and Justus also knew him. He said he know his home one week before this incident but he didn't see him on the material night. A1 said he got home at 9.30pm and his wife saw him arrive. He said his My children were also living with him. That after leaving the bar in company of Robinson they parted at around 9.00pm when Robinson entered his house and he took his motorbike to use it to get to his home as it was a bit far. A1 said that Robinson could account for the time he left the bar up to the time that they parted

ways. He said that his wife could also testify that he arrived home at 9.30pm. A1 said he I didn't see Kennedy argue with anyone at the bar and he didn't see Kennedy at the bar.

DW2 (2<sup>nd</sup> accused) Robinson Omondi Orwa in sworn statement said he works in the mine fields and he came from Mikei. He said that on the night of 12<sup>th</sup> November 2020 he did not murder Kennedy Oboo. That on the material day in the evening he was at Jwala Owang bar in Mbambokholo. He said he arrived at the bar at 7.30pm and left the bar at 8.55pm because there was curfew. That when he left he was in the company of Felix and he went home in Mikei and arrived home at 9.05pm. He said that he found his wives at home and he didn't leave again on the material night. A2 said that Kennedy Oboo was not known to him. He said he learnt of the death from police officers. The police told them that there was a man who was found in a gold pit at Kajohnny and that they should make reports to their colleagues who may have lost a relative or friends. That from his home to Kajohnny is Kshs. 50 fare.

In cross examination by Mr. Oimbo for state 2<sup>nd</sup> accused said that the deceased was found in a gold pit very far from where he was working and he didn't visit the scene. He said that on night of 12.11.2020 he was drinking at Jwala wang with Felix and Carlos. He said he could not identify the other patrons as the bar was packed to capacity. He said that his home is some distance from Felix' home but is in same direction as that of Felix.

A2 said that they left Carlos at the bar. Carlos came to the bar at around 8.20pm. He said he used his motor bike to go back home. He admitted that if there was any altercation between me and anyone at the bar Carlos would have seen. He said he would bring Carlos to testify as his witness. He said he was the one riding the motorbike and

he carried Felix. That when they arrived at his home, he gave Felix the motor cycle to use as his home was still some distance ahead. A2 said he did not see Fredrick and David at the bar and they were dancing and the light was dim.

DW3 witness to 1<sup>st</sup> accused, said she was Jackline Atieno Felix also known as Jackline Atieno Ochieng and she was married to Felix Ochola Okach. She said she was married in 2016 and had children with Felix. Her testimony was that on 12.11.2020 Felix was not at home during the day and he returned at 9.30pm. That he was okay when he arrived and his clothes were clean. That the following day he left home at 7.00am and returned riding a motorbike.

In cross-examination by Mr. Oimbo for state DW3 said that Felix returned home at 9.30pm. She said she confirmed from her watch that it was 9.30pm. She said Felix was working in the mines during that period and when he returned, he was not dirty. She said that Felix was a manager and does not get into the mining tunnels. She said that Felix does not drink alcohol. DW3 said she did record statement before she came to court and in the statement, she said that she sensed from Felix's breath that he had taken some alcohol. She said Felix stopped taking alcohol after this incident. She said she didn't ask Felix where he took the alcohol. Felix was neat and there was no sign he had been beaten.

DW4 witness Hellen Achieng Orwa witness for 2<sup>nd</sup> accused testified and said that she came from Mikei in Nyatike Sub County and worked in the mines. She said she was married to Omondi Robinson Orwa in 2015 and they are blessed with children. DW4 said that on 12.11.2020 Robinson returned home at 9.08pm. She said he went back walking on foot. That when he went back home he didn't leave until the following day when he left at 9.00am.

In cross-examined by Mr. Oimbo for state DW4 said she was cohabiting with Robinson in the year 2020. She said they were also staying with his brothers and mother in the same compound. That in their house they had 2 children who had slept by the time Robinson returned. She said Robinson returned back when drunk but she didn't ask where he had been drinking. She said she confirmed he returned at 9.08pm. She said Robinson did not own a motor bike in 2020. Felix 1<sup>st</sup> accused is known to her and is a distant neighbour about 1km from DW4 and A2's home. She said that from the nearest shopping center one gets to her home first before going to Felix home. She said she was sure Robinson arrived at 9.08pm.

At the close of defence case Mr. Owade Advocate for accused persons filed submissions dated 13<sup>th</sup> May 2025.

### **ANALYSIS AND DETERMINATION**

The accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

Under **Section 203 of the Penal Code**, the prosecution must prove to the required standard of beyond reasonable doubt that the accused persons committed the offence as held by the House of Lords in ***Woolmington v DPP [1935] AC 462*** as follows:

1. The Prosecution bears the legal burden of proof throughout the entire trial to prove the accused's guilt.
2. The required standard is "beyond reasonable doubt" — meaning the jury (or court) must be sure of guilt on the evidence.
3. The burden does not shift to the accused, except in very limited statutory exceptions (e.g., insanity or specific statutory defences).

4. Viscount Sankey L.C. described this as the **“golden thread”** running through English criminal law:

“Throughout the web of the English criminal law one golden thread is always to be seen — that it is the duty of the prosecution to prove the prisoner’s guilt... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, the prosecution has not made out the case and the prisoner is entitled to an acquittal.”

The Court emphasized that the prosecution must eliminate **any reasonable doubt**, not *all* doubt. A reasonable doubt is one that would cause a fair-minded person to hesitate before acting.

In **Bhatt v R [1957] EA 332** the East African Court of Appeal clarified what “proof beyond reasonable doubt” requires in criminal cases. The Court held that:

1. **A mere scintilla of evidence is not enough** to justify putting an accused on his defence.
2. Evidence must be such that a reasonable tribunal, properly directing its mind, **could convict if no explanation is offered** by the accused.
3. However, the Court emphasized that **proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt.**

The Court stated:

“The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. **If the evidence is so**

**strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible but not in the least probable’, the case is proved beyond reasonable doubt.”**

To secure a conviction, the prosecution must prove beyond reasonable doubt the following elements:

1. That the deceased is dead and the cause of death established.
2. That the death was caused by an unlawful act or omission of the accused.
3. That in causing the death, the accused had malice aforethought as defined under section 206 of the Penal Code

On the fact and cause of death PW1 and PW11 (medical officers) performed post-mortem and concluded death resulted from asphyxiation due to ligature strangulation, with antecedent cardiorespiratory arrest.

The 2 doctors observed periorbital oedema, swollen lip, circumferential ligature marks, fractured cricoid cartilage, bruised vocal cords, cyanosis and scalp haematoma (blunt force trauma). Both doctors were consistent that strangulation—not a fall—was the cause of death. This satisfies the 1<sup>st</sup> ingredient as to the fact and cause of death.

On whether the death was caused by an unlawful act, strangulation is inherently unlawful, and nothing suggests lawful justification. The 2<sup>nd</sup> ingredient as to whether act causing death was unlawful has therefore been met by the prosecution.

However, the difficulty is who inflicted the strangulation, and whether there is proof connecting the accused persons to the offence.

On whether there is a nexus between the offence and the accused persons the evidence shows that there was a fight in the bar at about 7:30–8:30 pm involving the deceased and the accused persons. PW3, PW4, PW6 confirm the fight, but no witness saw the accused attack the deceased outside the bar, or follow him thereafter. PW4 and PW6 say the deceased ran away to the stage shouting “Wooi wooi you are killing me”, but the last people seen with him alive were the boda boda riders PW1 Ouma as mentioned by PW4 and PW6. PW1 Ouma says he dropped the deceased safely and nothing happened. The body of the deceased was not found immediately; it was discovered the next day in a mining pit after multiple people had handled the scene. The chain of events from when the deceased left the bar to when his body was discovered is missing.

A fight in a bar does not in itself prove who later murdered the deceased.

In ***Nzuki v Republic*** it was held that suspicion, however strong, is not enough to sustain a conviction.

On whether the court should rely on circumstantial evidence to find that the accused persons committed the murder, the test to be met is in the holding in ***Kipkering arap Koske / Sawe v Republic*** where it was held the evidence must point unerringly to the accused; it must form a complete chain and it must exclude co-existing explanations.

In the instant case the circumstantial chain is broken: after the fight, the deceased ran away and he was seen by other people namely PW1, PW4 and other riders. It is PW1 Ouma who was last seen with the deceased when he was still alive and not the accused. The location where he was found (mining pit) was not shown to be connected to the

accused persons and the scene was contaminated; the body was removed before the scenes-of-crime officer arrived.

The “last-seen doctrine” does not implicate the accused persons. No evidence shows the accused persons followed the deceased and no witness places the accused persons anywhere near the scene where the body was found. This defeats the necessary nexus.

When the body of the deceased was found in the mine pit the Assistant Chief said it was removed before police Officers and Scene of Crime personnel arrived. The scene was therefore contaminated and the fact that no forensic evidence linking suspects to the offence weakens the chain of proof. PW9 testified that the body had already been removed from the pit. This contaminated the scene and broke evidentiary continuity.

PW11 took nail samples during postmortem but no DNA analysis was tendered. DNA/nail scrapings not produced This was a missing crucial piece of evidence.

The prosecution did not establish that the accused persons were the ones who strangled the deceased. At best, the evidence shows a fight occurred, the deceased fled and he was carried home by another person but was later found strangled. This is suspicion, and not proof.

Following the holding in authorities in ***Sawe v Republic, Mwangi v Republic and Abanga alias Onyango*** where the circumstantial chain is not complete, the court must acquit.

In consideration that the identity of the perpetrator of the murder has not been proved, the malice question does not arise. However, the nature of death—strangulation—points to malice aforethought.

Based on the above findings this court finds that the charge of murder has not been proved beyond reasonable doubt as the identity of perpetrators is not proved. The evidence leaves room for multiple possibilities. The chain of circumstantial evidence is broken, and the last-seen doctrine does not implicate the accused persons.

The accused persons are therefore acquitted under Section 322 of the Criminal Procedure Code.

The accused persons are to be set at liberty unless otherwise lawfully detained. Right of Appeal 14 days explained.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 5<sup>th</sup> DAY OF MARCH, 2026.**

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**HON. ANNE ONG'INJO**  
**JUDGE**