

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

SIAYA

CRIMINAL CASE NUMBER E041 OF 2023

**REPUBLIC.....PROSECUTIO
N**

VERSUS

**FELIX OTIENO ODHIAMBO ALIAS LUAMBO.....
.....ACCUSED**

JUDGMENT

1. The accused herein Felix Otieno Odhiambo alias Luambo has been charged with an offense of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the night of 28th October 2023 at unknown hours within Mur Ng'iya sub location in Siaya sub county within Siaya

County jointly with others not before court unlawfully killed one Allan Otieno Oduor.

2. The accused pleaded not guilty to the charge and that the prosecution presented ten witnesses in support of its case which was as follows:
3. **Evans Oduor (PW1)** was the father of the deceased. He testified that he received a phone call from a neighbor that his son had been beaten at a certain funeral of Mzee Okebe. That he later accompanied other family members to Siaya County Referral Hospital from where they learnt that his son had passed on and that they took the body to the morgue and later participated in the autopsy.
4. **Byron Odhiambo Ochieng (PW2)** testified that he attended the burial vigil of Mzee Okebe while in company of the deceased when one person named Luambo chased them from the venue and later started beating the deceased using a club (rungu) and a panga thereby cutting his eye. That when he tried to intervene, the said Luambo struck him with the club and then cut his buttocks with a knife. That he heard the voices of Luambo, Jemo, Daddy and Ochieng before he lost consciousness before the asst chief arrived and rushed him together with the deceased to Siaya County Referral Hospital. He further stated that they had gone to the home of Mzee Okebe to dance during the funeral vigil when the accused herein popularly called Luambo ordered them to leave the

venue and later pursued them and attacked them. That he had a torch at the time and was able to recognize him. That he saw the accused cutting deceased in the eye and hitting him with a club.

5. **Everlyne Oduor Ochieng (PW3)** testified that she is the mother of the deceased. That on learning of the incident, she rushed to the scene and found the deceased lying down on the ground and being beaten by the accused herein and one Otieno. That the asst chief arrived and that police officers also arrived and arranged to take the deceased and Byron **Odhiambo Ochieng (PW2)** to hospital. That the deceased informed her that it was the accused who had injured him. That she was able to recognize the accused who had a panga and a club. That there was lighting at the scene and was able to see clearly.
6. **Caroline Achieng Ochieng (PW4)** was the **mother to PW2**. She stated that she rushed to the scene and found her son lying down while the deceased was informing his mother that he had been beaten for nothing. That the accused herein was armed with a club and a panga and who ordered her to take away the victims and bury them as he had killed them. That the deceased died before a CT scan could be conducted while her son **(PW2)** survived.

7. **Grace Anna Otieno (PW5)** was the asst chief of the area. That the father to accused had called her to say that his son (accused) had apprehended some suspects. That she could not tell if the accused was one of the suspects. That the accused managed to calm down the irate crowd while he carried two pangas and a torch.
8. **Dr. Tadeus Masawa (PW6)** was the pathologist who conducted an autopsy on the body of the deceased who noted a frontal bone (skull) fracture and that he formed the opinion that the cause of death was severe head injury secondary to blunt force trauma. He produced the autopsy report as exhibit one.
9. **Ambrose Ondong Ochieng (PW7)** testified that he learnt that the deceased had been injured in a funeral vigil in the area. That the accused was one of the vigilante members in the village and who had been known to assault victims.
10. **No. 108720 Pc Martin Mwenda Miriti (PW8)** testified that he was on night patrol when he was alerted that some two men were being attacked by members of public through mob justice. That on arrival at the scene, they found a large crowd of about sixty people assaulting the two young men and that the crowd turned hostile when they attempted to rescue them as they claimed that they (police) were protecting thieves. That the accused handed over to them two sharpened pangas

and a large spotlight torch which were kept as exhibits. That it was the accused and his father who managed to contain the irate crowd.

11. **No. 252011 Pc Josephat Mbugua Mureithi (PW9)** testified that he was on night patrol when they were alerted that there was a mob injustice incident at Sigana primary school and that they rushed there and found a crowd of about 50 people attacking the victims. That other police officers arrived and managed to restore order and that one Luambo also calmed the irate crowd. That they recovered two pangas and a spotlight from the scene. That the accused was not among the assailants as he assisted in placating the irate mob. That he learnt that the victims had been armed with pangas.
12. **No. 254222 Pc Clifford Gikundi (PW10)** testified that he received a report that some two young men were harassing mourners at a funeral vigil and who were ordered to leave but that they declined. That the accused was later attacked by the two young men and that members of public intervened and assaulted the victims. That members of public later mentioned the accused as the assailant and thus charges were preferred against him. On cross examination, he stated inter alia; that the accused was in company of one Joseph who recorded a statement but was not called to testify; that he recovered a club, panga and a torch which had been seized from the

victims; that he is not aware that the deceased had previous criminal activities in the area.

13. This court later established that the prosecution had established a prima facie case against the accused herein who was subsequently placed on his defence. He opted to tender a sworn testimony and called three witnesses.

14. **Felix Odhiambo Otieno alias Luambo (DW1)** testified that on the material date he had been assigned to go and purchase changaa for use at the funeral vigil by the grave diggers and that while on the way back he met a group of twenty young men who included the deceased and **PW1**. That the deceased attempted to cut him with a panga which he deflected it with a stick and that the panga fell down. That he collected the panga as he ran away only to be pelted with stones by the deceased and his companions. That he managed to reach the funeral venue whereupon the mourners came to his rescue and managed to repulse the attackers but that the deceased and his companion Byron were not lucky. That the victims were later rescued by police officers and rushed to Siaya County Referral Hospital. That he later attended hospital for injuries sustained. On cross examination, he stated inter alia; that he was using a panga to ward off his attackers. That the deceased had claimed that somebody would go to the mortuary.

15. **Joseph Ochieng Ochondo (DW2)** testified that he was one of the grave diggers and that he accompanied the accused to go and purchase changaa for the grave diggers. That on their way back, they were accosted by a group of young men who attacked them. That he managed to escape and later alerted those at the funeral vigil who rushed to save the accused.
16. **George Otieno Tawo (DW3)** testified that he is father to the accused herein. That **Joseph Ochieng (DW2)** who was one of the grave diggers raised alarm and that he rushed to the scene and saw the victims being assaulted by a large crowd. That he stepped in to avert further assault on the victims. That he together with other villagers interrogated the deceased herein who confessed to have been among the persons who had been waylaying people at night. That he also found the accused having been assaulted. That he is not shielding the accused from any blame.
17. **Bernard Omondi Oyembe (DW4)** testified that he visited the scene and found two young men already on the ground and being assaulted by a large crowd. That he learnt that the two victims had been among persons who had been troublesome in the area. That he did not see the accused assaulting the victims.

18. Learned counsels filed and exchanged submission. The defence submissions are dated **8/12/25** while those of the prosecution are dated **12/2/26**.
19. **Mr Ooro F** for the defence submitted that the fact of death of the deceased is not in dispute as it was confirmed by the pathologist. As regards the involvement of the accused as the assailant, it was submitted that the accused was not placed at the scene and that it was irate members of public who had assaulted them and that the accused only came in to intervene and placate the irate mob. It was also submitted that the evidence of the deceased's **companion (PW2)** and their respective mothers (**PW3 and PW4**) should be treated with a pinch of salt as they are looking for someone to blame over the incident. As regards the issue of malice aforethought, it was submitted that the same was not proved as the police officers who testified herein (**PW9 and PW10**) confirmed that they found the deceased and **PW2** being attacked by irate members of public. It was finally submitted that in the unlikely event that the accused is one of the assailants, then he acted in self defence after he was attacked by the deceased and his group as corroborated by the evidence of **DW2**.
20. **Mr Clinton Muntui** for the prosecution submitted that they had proved the charge of murder against the accused beyond any reasonable doubt. As regards the fact of death, it was

submitted that the same is not in dispute. As regards the unlawfulness of the offence, it was submitted that the injuries sustained led to the death of the deceased and hence the same was unlawful and unjustified. As regards the participation of the accused, it was submitted that the accused and witnesses came from the same village and that **PW2, PW3** and **PW4** had no difficulty in recognizing the accused at the scene. Reliance was placed in the case of **Anjononi & Others VS R [1980] KLR 59** where it was held that recognition is more satisfactory and reliable than identification of a stranger. It was also submitted that the dying declaration made by the deceased to his mother (**PW3**) to the effect that the accused had cut him should be relied upon under section 33(a) of the Evidence Act which allows the admissibility of such evidence. As regards the aspect of malice aforethought, it was submitted that the nature of the weapon (rungu and panga) was a dangerous one which could inflict serious injuries and the nature of injuries inflicted (eye and head) left no doubt that the action of targeting sensitive parts of the body left no doubt of the intention to cause death of the deceased by the accused and hence there was malice aforethought.

21. I have considered the evidence adduced herein by both the prosecution and defence. I find the main issue for determination is whether the prosecution has proved its case

against the accused herein beyond the requisite threshold of proof.

22. Section 203 of the Penal Code provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

23. It is trite law that the burden of proof in all criminal cases rests squarely upon the prosecution to discharge and that the standard of proof is one of beyond any reasonable doubt. See **Woolmington Vs Dpp [1935] AC 462**. Also, in the case of **Miller Vs Minister of Pensions [1947] 2 ALL ER 372** the court held as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof of beyond reasonable doubt does not mean proof beyond the shadow of doubt. 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.”

24. For the prosecution to secure a conviction on a charge of murder, it has to prove four main elements against an accused person. They are as follows:

- a) that the death of the deceased occurred;**
- b) that the death was due to an unlawful act or omission;**
- c) that it was the accused who committed the unlawful act or omission which caused the death of the deceased; and**
- d) that the accused had malice aforethought.**

25. As regards the aspect of death and cause of death, it was the evidence of the pathologist Dr. George Tadeus Masawa (PW6) that there was a frontal bone (skull) fracture and that he formed the opinion that the cause of death was severe head injury secondary to blunt force trauma and went ahead to produce the autopsy report as exhibit one. The deceased's father (PW1) attended the autopsy and identified the body. I find that the prosecution proved this ingredient beyond any reasonable doubt.

26. As regards the aspect of whether the death of the deceased was caused by an unlawful act or omission, it is trite law that all homicides are deemed unlawful unless authorized by law. Under Article 26 of the constitution, every person has the right

to life, and a person shall not be deprived of life intentionally except as authorized by any other written law. In **Guzambizi Wasonga Vs Republic [1948] 15 EACA 65**, the court held as follows:

“ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example, in self - defence or in defence of property.”

It is noted that the deceased died as a result of the injuries inflicted on him. There is no evidence showing that the injuries aforesaid were self- inflicted or that they were justified in any written law. I find the manner in which the deceased was assaulted and the injuries sustained, left no doubt that the assailants intended that the injuries were to cause his death. An attack on one's head is an attack on the life of a person, and the attacker's intention must be to eliminate such a person. He did not deserve to die in the manner that he did, as the assailants ought to have presented him to the authorities, if at all, he was threatening mourners who had gathered for a funeral vigil. Hence, I find that the evidence tendered leaves no doubt that there was an unlawful act that led to the death of the deceased following the assault. I find this ingredient was proved by the prosecution beyond any reasonable doubt.

27.As regards the aspect of malice aforethought, the Court of Appeal in the case of **Nzioka Vs R [1993] KLR 171** held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused: -

- Intention to cause death.
- Intention to cause grievous bodily harm.
- Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

The foregoing authority is a replica of the conditions to be considered whether the ingredient of malice aforethought under Section 206 of the Penal Code has been established.

Section 206 of the Penal Code sets down the factors which constitute malice aforethought as follows:

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

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

- b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c) an intent to commit a felony;**
- d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

It transpired from the evidence that the deceased herein was among other young men who had gone to the home of Mzee Okebe where there was a funeral vigil. Apparently, the deceased and his group were not wanted at the said vigil as they were persona non-grata over some allegations that they were social miscreants and had previous criminal conduct and that a disagreement arose between them and the accused herein, who was the community vigilante leader and that during the repulsion of the deceased and his group, the deceased was overwhelmed together with his companion (PW2) after the villagers joined in the fray. It is clear that this was an incident of mob injustice meted on the deceased and

his companions. It would appear to me that the circumstances were not favourable to suggest that the said assailants had planned to kill the deceased. I find that it was a spontaneous reaction on the part of the assailants, as it is a common problem in these parts of the country for irate members of the public to join the fray and assault persons alleged to be troublemakers or those caught in the act of stealing without letting the authorities handle the matter. It is quite common during burial vigils where young men are treated to what is commonly known as **“disco matanga.”** In the present case, it transpired that the deceased and his group had clashed with the accused herein, which led to a confrontation in which the rest of the members of the public present at the scene joined in. Indeed, the accused in his defence confirmed that he was using a panga to ward off his attackers. It is clear that the accused or any other person had not planned to attack the deceased prior to the encounter at the funeral vigil. Hence, I find that this ingredient was not proved beyond a reasonable doubt by the prosecution and that the eventual outcome would have to support a charge of manslaughter and not murder.

28. As regards the involvement of the accused in the alleged crime, the accused has distanced himself from blame and maintained that it was the irate members of the public who assaulted the deceased. It was further contended by the defence that it was the accused and his father who managed to quell the violence and that some of the witnesses indicated

that the accused was not at the scene. It was also contended by the defence that the accused was acting in self-defence after he was attacked by the deceased and his companions. It was also contended by the defence that the accused was injured and had to go to the hospital for treatment. Even though the defence has contended that the key witnesses for the prosecution happened to be related to the deceased in some ways, I am persuaded by the evidence of PW2, who was also one of the victims and who survived the attack and lived to tell his story. It was his evidence that the accused herein, who was in charge of vigilante groups in the area, ejected him and the deceased, together with others, from the funeral vigil and that the accused, whom he knew by his popular name of **“Luambo”** pursued them out of the venue where a confrontation ensued whereupon the accused hit the deceased with a club (rungu) and also cut him with a panga. It was further his evidence that when he tried to intervene, the accused cut him on the buttocks with a knife. The witness further added that he had a torch and was able to recognize the accused during the incident. The other two witnesses (PW3 and PW4) also stated that on arrival at the scene, they saw the accused herein busy assaulting the victims and leading the irate members of the public, who ordered them to take away the victims and bury them. The evidence of these three witnesses and, more particularly PW2, is that of recognition

rather than that of a stranger. In **Anjononi & Others Vs Republic [1980] KLR 59** the court held as follows:

“Recognition is more reliable than identification of a stranger. This is because recognition depends on the witness's familiarity with the accused, reducing the likelihood of mistaken identity.

It is clear from the evidence of the said witnesses that the identification of the accused was based on recognition rather than mere identification of a stranger. The witnesses had known the accused as they all hailed from the same area. Indeed, the accused in his defence confirmed that he confronted the attackers and used his panga to ward them off. This then seems to corroborate the version by PW2 that the accused had chased them away from the funeral venue and pursued them up to Sigana Primary School, where the confrontation took place. Even though the accused claimed to have been injured, no medical expert came forward to confirm the same, and no medical documents were produced in that regard. The entire evidence left no doubt that the accused was indeed placed at the scene of the crime and that the defence evidence did not cast doubt on the prosecution's case. The two police officers (PW8 and PW9) who arrived at the scene did not find any injuries on the accused, and the one who was briefing them on what had happened, yet he claims to have been injured. It is thus clear that the claim of injuries by the accused was made up

with a view to glossing over his active involvement in the crime. The accused's witnesses (DW2, DW3 and DW4) appear to have been called purposely to take away the limelight from the accused who was at the centre of this crime. The accused who was in charge of vigilante groups in the area, had been tasked to take charge of the funeral vigil and to get rid of persons with criminal tendencies, some of whom included the deceased and PW2. I find that even if the two were criminals, they did not deserve to be killed or injured without affording them the due legal process. The accused and his group took the law into their hands and meted out mob justice on the deceased and his companions.

29. Turning to the accused's alibi defence, he has vehemently denied involvement in the death of the deceased. It was therefore incumbent upon the prosecution to present watertight evidence placing the accused person herein at the scene of crime. The accused herein in his defence confirms that indeed he joined the rest of the members of public at the scene, but that he did not assault the deceased and that it was other persons and not him and that he maintains that he has been framed up. Further, the accused's witness (DW2) testified that he was in company of the accused after buying changaa when they were accosted by a group of young men and that he managed to escape and left the accused at the scene and that he went to alert the other mourners who were at the funeral vigil to go and rescue the accused. The accused

maintained that upon being assaulted by the young men, he rushed to the venue of the vigil and alerted members of public to go and repulse the attackers and thus he was not at the scene of crime. It would appear to me that the accused in his defence is raising a defence of alibi as an answer to the prosecution's evidence. It is trite that once an alibi is raised, the duty to prove the guilt of an accused still remains with the prosecution to prove beyond any reasonable doubt. In the case of **Patrick Muriuki Kinyua & Another Vs Republic [2015] KECA 1000 (KLR)** it was held that an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged. Again, in the case of **R Vs Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145** the court held as follows:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

It is noted that the alibi defence of the accused person has been raised halfheartedly since the accused herein confirms being at the scene of crime but contends that it was irate members of public who administered mob justice on the victims and that he only came to the scene to placate the irate members of public. This can be seen by the stand taken by the accused that even though he was at the scene, it was other persons who assaulted the deceased and that he has been framed up. The prosecution's evidence presented by PW2, PW3, PW4 and PW5 clearly placed the accused herein at the scene of crime when they stated that they saw the accused was at the scene of crime. Again, the evidence of PW2 is that he saw the accused assaulting the deceased and that the accused also assaulted him before he lost consciousness. The said PW2 was well known to the accused and thus had no difficulty recognizing him as the assailant at the scene. Learned counsel for the defence has submitted that the two police officers and the area asst chief confirmed that the accused was not involved in the assault but was there to placate the irate mob from attacking the deceased. This contention was watered down by the accused himself when he stated in his defence that indeed he met the deceased and his companion and that an altercation ensued wherein he was attacked by the deceased and that he warded off the attack by using his panga to deflect the blow before running to the funeral vigil to seek assistance. This was clear

evidence that indeed the accused was at the scene of crime and which backs the evidence of the deceased's companion (PW2) that the accused herein kicked them out of the funeral vigil and then pursued them for some distance before the fight ensued. On the whole, I am satisfied by the evidence of the prosecution that the accused herein was among the assailants during the mob injustice in which the deceased lost his life, while the deceased's companion (PW2) sustained injuries. Nothing transpired from the evidence that the witnesses had any differences with the accused herein so as to suggest a frame-up. Even though the accused had tried to repulse the deceased and his companions, it was unlawful for him to assault him and also team up with the rest of the irate mob and assault the victims. They should not have taken the law into their hands and assaulted the victims but they should have handed them over to the authorities so that the law could take its just course. I find that the accused was placed at the scene of crime as one of the perpetrators. The accused's claim that he had been injured is not believable in view of the fact that no medical documents were available to support the same. I find the prosecution proved this ingredient beyond any reasonable doubt. I am satisfied by the evidence presented by the prosecution that the accused herein did kill the deceased in circumstances that establish an offence of manslaughter rather than murder.

30. In the final analysis, I find that the defence evidence did not shake that of the prosecution which is overwhelming against the accused. I find that the prosecution has successfully proved the charge of manslaughter against the accused herein beyond any reasonable doubt.
31. In view of the foregoing observations, it is my finding that the prosecution has not proved the charge of murder under section 203 as read with section 204 of the Penal Code beyond any reasonable doubt. However, I find that the prosecution has proved a charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code against the accused herein beyond any reasonable doubt. I find the accused herein **Felix Otieno Odhiambo alias Luambo** guilty of the said charge and is convicted therefor accordingly.

Dated and delivered at Siaya this 16th day of April 2026.

D.KEMEI

JUDGE

In the presence of:

Felix Otieno Odhiambo alias Luambo.....Accused.

Ooro F.....for Accused.

M/s Kauma.....for Prosecution.

M/s Maurine.....Court Assistant.

HCCRC CASE NO. E041 OF 2023