

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 55 OF 2016

(CONSOLIDATED WITH ELDORET HIGH COURT CRIMINAL CASE NO. 65 & 87 OF 2016)

REPUBLIC.....PROSECUTION

VERSUS

MUSA YEGO KIBET.....1ST
ACCUSED
GIDEON KIPRUTO KISANG.....2ND
ACCUSED
NICHOLAS CHEBOI CHEMLELA.....3RD
ACCUSED

JUDGMENT

1. The 3 accused persons were jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars were that on 5/07/2016 at Kapkitany village in Embolot location within Elgeyo Marakwet County, they jointly murdered one **Nicholas Chebet Cheburur**.
2. As I stated in my Ruling on case to answer delivered on 21/02/2025, the 1st accused was initially charged alone under this **Eldoret High Court Criminal Case No. 55 of 2016**, the 2nd accused under **Eldoret High Court Criminal Case No. 87 of 2016**, and the 3rd accused under **Eldoret High Court Criminal Case No. 65 of 2016**. The 3 cases were later consolidated on 2/07/2018 before **Hon. Lady Justice H. Omondi (as she then was)**, and the instant file marked as the lead file.
3. **Mr. Nyachiro Advocate** appears for the 1st accused, **Ms. Adongo** for the 2nd accused, and **Mr. Wabomba Masinde** for the 3rd accused.
4. The trial commenced on 3/10/2018 before **O. Sewe J** who took the evidence of **PW1-PW4**. Upon her transfer, **E. Ogola J** took over and received the evidence of **PW5** and **PW6**. It is upon the transfer of the latter Judge that I stepped in and took the evidence of **PW7** and **PW8**, after which the Prosecution closed its case.
5. As I stated in the Ruling on case to answer, upon both instances of transfer of Judges and taking over of the case by new Judges, directions under **Section 200(3)** of the **Criminal Procedure Act** were taken, and in both instances, the defence elected not to ask for recall of

any witnesses, and thus requested that the matter proceeds from where it stopped. The Prosecution agreed, and so it proceeded in that manner.

6. I will now recite and recount the testimonies given by the respective witnesses, and/or the evidence given, both for the Prosecution and for the defence.

7. **PW1, Wilfred Yego**, testified that the deceased was his father. He stated that on the fateful date, 5/07/2016, he was at his home when at about 8.00 pm, he heard screams and when he went out to check, he noticed that his father's house was on fire, then he saw some people setting fire to the house and screaming and chanting I jubilation that they had succeeded in killing the Mzee as they had wanted. He stated that he next saw a sheep fleeing from the fire only for **Musa Yego** (1st accused) to give chase it and cut it. He stated further that he was also able to recognize **Ruto, Ronald Kipruto, Daudi, Alex Kosgei** and **Kirotich**, that they were 6 people and that some were keeping guard to stop neighbours from coming out from their houses to respond to the attack. It was his testimony that he heard **Musa Yego** state that they were also looking for **Petro Chebusos, Joseph Kipchumba, Charles** and himself (**PW1**). According to him, there was a land dispute concerning his family, and that **Petro, Joseph** and **Charles** are his uncles. He stated further that he proceeded to the scene after the attackers left and raised alarm, the fire was raging and he feared that his father could have been trapped inside, that neighbours came over and helped to put of the fire upon which they found his father's body inside the house, the police came in the morning and collected the body, and he later recorded his statement. He then identified **Musa Yego** and "**Daudi**" seated in the dock. In cross-examination, he stated that he was about 2 metres away from the burning house, that the fire was bright enough to illuminate the whole house, that the house was grass-thatched, and that there was a fence from his house made up of shrubs. He also stated that the land dispute was between clans. He stated further that his father was living alone, that it was **Musa Yego** who was leading the attackers in singing in jubilation. He then conceded that he never saw the attackers setting the house on fire, and stated that the attackers left after the roof caved in. He stated further that the body did not have hands and had a cut on the head.

8. **PW2, Julius Kibet Kanda**, testified that he relocated to Tanzania after his life was threatened and his house burnt. He stated that the County Commissioner had come and instructed their Kapsiran clan to move out of the area, and that when he challenged the directive, other clan members opposed him. He stated that several meetings were later held in which a plan to kill some members of the rival clan was hatched on the ground that it is they who were agitating the land case and that one of the people identified to be killed was

the deceased (**Nicholas Chebet**). He stated that when he opposed the plan, one of his clan members, came and told him that he (**PW2**) would be killed and his house burnt down, and that he reported the threat to the police. He then testified that on 5/07/2016, he was at his brother's house when at about 5.00 pm, some people raided and attacked him with pangas, that among them were **Musa Kibet** and **Ronald Kipruto**, that **Musa Kibert** cut him on the head before he managed to escape into a maize plantation and that on looking back, he saw his house burning. He also testified that while in hospital, he learnt of the death of the deceased (**Nicholas Chebet**).

9. **PW3, Timothy Chelimo**, testified that he, too, had to relocate from Kapcherop and now lives in Mt. Elgon after his life was threatened by the accused persons. He stated that on 5/07/2016, he heard screams in the evening and upon going out to check, he saw the house of the deceased (**Nicholas Chebet**) on fire, that on the way he met a group of over 10 people amongst whom he recognized **Ronald Ruto, Alex Kosgei, Kiprotich** and **Musa Yego (1st accused)**, that they had torches which enabled him to see them before they saw him, that he hid by the roadside out of fear and that he then followed them to the scene after they had passed. He stated further that he found some neighbours at the scene with whom they put out the fire before they found the body of the deceased in the debris, and that the police came in the morning. He then identified **Musa Yego** seated in the dock. In cross-examination, he attributed the killing to inter clan differences, and stated that his house is 4 kilometres from that of the deceased.

10. **PW4, Solomon Cheboi Kitum**, testified that the deceased was his elder brother, that on 14/07/2016, he received a phone call from the Directorate of Criminal Investigation Office (DCIO) and was asked to go to Kapsowar Mission Hospital to identify the body of the deceased, which he did. He stated that the legs and hands of the deceased had been amputated, and the body was partly burnt but he was able to identify it as that of the deceased because the head was not burnt. He testified that he then witnessed the post-mortem exercise. In cross-examination, he stated that the body was burnt from the neck downwards.

11. **PW5, John Maiyo Biwott**, testified that the deceased, **PW1** and the 3 accused persons were all his neighbours. He stated that on 5/07/2016, he had gone to the house of the deceased at around 7.00-8.00 pm to ask him for a ram and that he spoke with the deceased for about 30 minutes and left at about 9.00 pm to go to his house, that on the way, he met a group of about 8 people, including the 1st accused whom he heard stating that “*tonight when we*

reach there we shall do a shocking act” and that the 2nd accused also stated that when “*we reach there, we will kill the deceased*”. According to **PW5**, he recognized **Chemlela, Mluya, Cheptugun, Solomon, Musa, Ruto** and **Kosgei** as there was clear moonlight and the group also had torches, that he met them about 50 metres from the home of the deceased and that he did not speak to them but decided to secretly follow them as they went to the home of the deceased. He stated further that the group did not know that he was following them as he did not enter the homestead, that he then heard the deceased shout from inside the house as **PW6** hid himself, and that the group then set the house on fire, that he saw the said **Cheptubun** set the house on fire but that he is not among those charged herein, and that during all this time, the deceased was inside the house. He stated that he ran to his home in fear, the police came in the morning, and he then returned to the scene, and it is then that he saw the body of the deceased which was burnt, and also a dead lamb, that the house was grass thatched, and that he recorded his statement a year later. He stated that he had to go to the bush as the killers were after him. In cross-examination, he reiterated that the accused persons were known to him, that they were drunk and this is why they did not notice him, and that he saw **Musa** with a panga and **Ruto** with arrows.

12. PW6, Dr. Wilfred Kimosop, testified that he is a doctor and worked at the Kapsowar Mission Hospital, and that he conducted the post-mortem on the body of the deceased on 14/07/2016. Regarding the body, he testified that he could not determine its sex, race, apparent age, nutritional status or physique and that it had started to decompose. He testified that the body was burnt, the left limb was absent from the knee joint downwards, the left limb from mid fibular was absent, on the right lower limb, there was a fracture at the femur, the right upper limb was absent from the mid part of the forearm, the left upper limb was absent from the forearm, and that on the left side, the humerus was missing. He testified further that, internally, there were 4 fractured ribs on the chest, a penetrating chest injury on the chest wall between the 7th and 8th ribs, the lungs were putrefied, decomposed and charred, the heart and somatic tissues had also started to decompose, the digestive system, gut intestines and the abdominal organs were also burnt and in decomposition state. He testified further that the genitals were absent, the head was burnt and there was fracture on the left side which was comminuted and depressed, and that the brain had also started decomposing. He stated that he formed the opinion that the cause of the death was multiple injuries, and that the deceased was set on fire after he had already succumbed to the injuries. He then produced the post mortem Report. In cross-examination, he stated that some parts of the body were burnt beyond recognition and agreed that he could not confirm that the body was that of the deceased.

13. PW7, Corporal Isaac Nakitare, testified that at the material time, he used to work at the Directorate of Criminal Investigations (DCI) department at Marakwet West, and that he is the Investigating Officer in this case. He testified that on 6/07/2016, at between about 9.00 am – 11.00 am, he received a phone call from his superior who informed him of a murder that had occurred in Imbolot Location and directed him to proceed to the scene and carry out investigations thereon. He testified that he went to the scene with other police officers and found the body of the deceased which had been burnt beyond recognition, that both his 2 mud-walled grass thatched houses had also been burnt, there was also a dead sheep whose throat had been slit, and that the body of the deceased was in one of the 2 torched houses. He stated that he took photographs, that there was a big crowd among whom he identified and interviewed witnesses and took their statements. He added that they subsequently removed the body to the Kapsowar Mission Hospital where a post mortem exercise was later undertaken. He stated further that from the investigations, it was established that a group of about 10 people led by **Musa Yego** (1st accused) had invaded the home of the deceased and killed him, that **Musa Yego** was arrested by members of the public on 27/07/2016 and handed over to the police and that he had been beaten up, that they took him to hospital and upon his discharge on or about 3/08/2016, he charged him in Court. It was also his testimony that he later took the photographs to the Scene of Crime Department where they were printed and authenticated, and that he was then transferred and later learnt that the other accused persons were also subsequently arrested. He then identified the 1st accused, **Musa Yego**, seated in the dock, and the photographs and the Reports were then marked for identification. In cross-examination, he stated that the deceased used to live alone, that the body was burnt beyond recognition but was identified by his son at the scene, and that although the private parts were missing, they established that it was the body of a man, although no DNA test was conducted thereon.

14. PW8, Inspector Denis Imboko, testified that he is attached to the Crime Scene Support Services (CSSS) at Eldoret and that he is a gazetted Scene of Crime Officer. He testified that the CSSS is the unit that is mandated with the task of visiting and documenting scenes of crime by photographing, collecting evidence and forwarding it to different departments such as the Government Chemist and also certifying the relevant documents. He then referred to the photographs marked for identification by **PW7** and the Exhibit Memo Form, which photographs he confirmed were taken by **PW7**. He also referred to the Photographic Admissibility Certificate and testified that in this case, the photographs were certified by one **Chief Inspector Nyarara** who is however currently based in Murang'a but with whom he

served together in Thika for 2 years and that he is therefore acquainted with his writing and signature. He then confirmed that the handwriting and signature on the photographs are **Chief Inspector Nyarara's**, who is also a gazzeted Scene of Crime Officer but who has however been sick for some time and that it is for this reason that he (**PW8**) had come to testify on his behalf. Upon laying the above basis, and there being no objection from the defence, I allowed him (**PW8**) to produce the 9 photographs, which he did. In cross-examination, he stated that the photographs show an image of a burnt human being, that 7 of them were taken from inside the house and 2 from outside, and that he is not the one who visited the scene.

15. After the Prosecution closed its case, by my Ruling delivered on 21/02/2025, I found all the accused persons as having a case to answer and placed them on their defence. All of them then gave sworn testimonies and were cross-examined. They also called 2 other defence witnesses.

16. **DW1** was the 1st accused, **Musa Yego**. He testified that he lives in Moror and he is from the Kapsirani clan which occupies the area, although the clan does not hold a title deed for the area as it is community land, measuring about 200 acres. He confirmed knowing the deceased who, he stated, lives in another village. He denied killing the deceased and stated that he was at his home at night on the alleged date of the accident. He confirmed knowing the 2nd and 3rd accused who live in the neighbourhood, but denied being with them at the scene of the crime on that night. He then pointed out that the post mortem report does not establish the gender of the body alleged to be that of the deceased. In cross-examination, he stated that he knew the deceased from about the year 1998 and that he used to meet him at the Centre or at the Baraza but denied that they were relatives. He also denied having any disagreement with the deceased, and stated that he was arrested when he went to hospital. He also confirmed that he and the deceased were from the same sub-location by the name Korou. He confirmed that there was a land dispute sometime in 2016 in the area, and also stated that the clan to which the deceased belonged relocated to Kapkongot sub-location, but that the house belonging to the deceased that was burnt was situated in Korou area. He then stated that it is his great-grandparents who occupied the area although he has nothing to prove that fact.

17. **DW2** was the 2nd accused, **Gideon Kipruto Kisang**. He, too, testified that he lives in Moror and that he knew the deceased who had purchased land in Korou sub-location, which is however within Moror. He testified that sometime back, the Kapsangor clan to which the deceased belongs called the police who came and burnt down **DW2's** clan's entire village but by which time the deceased had already relocated to Kabimoyo, which is also still within **Eldoret High Court Criminal Case No. 55 of 2016**

Korou. He denied killing the deceased as he had no disagreement with him, and he, too, stated that he used to meet the deceased at the Centre, or when the deceased was going to church. In cross-examination, he stated that he used to live on the same land with the deceased, within the same village, before the deceased moved out around 2001 and relocated about 4 kilometres from Moror where **DW2** lives. He stated that on 5/07/2016, he was at home in the morning with his wife, he then went to his farm where he worked until about 12.00 pm when he returned home, then went back to the farm at about 1.00 pm after taking lunch, and worked at the farm until about 4.00 pm when he returned home and tended to his cows by feeding them until about 6.00 pm. He stated that he never again left his home until the next morning when he woke up and went back to the farm. He denied meeting the co-accused persons at any time on 5/07/2016, denied any knowledge of whom the deceased left his home when he relocated, and also denied that he ever left Korou on 5/07/2026. He denied relocating after the incident and insisted that the land belonged to their great-grandparents. He also described the 1st accused as his “brother” within the context of their clan relationship, and also confirmed that **PW1** is a son of the deceased but denied any knowledge of **PW2**. About burning of the deceased’s house, he stated that he only learnt of it on the morning of the night it happened.

18. DW3 was the 3rd accused, **Nicholas Cheboi Chemlela**. He testified that he lives in Kapcheseke, Kotut sub-location. He stated that the deceased had married his sister and was therefore his brother-in-law, and they used to visit each other before the deceased relocated to a place he did not know, and where he never visited the deceased. He stated that he was at his home with his children between 7.00-9.00 pm on 5/07/2026 and never heard any incident happening that night. He testified that he was not with anyone else at home on that night, apart from his children, that before that date, he had not seen the deceased for 8-9 years, and that he only learnt of the incident from his children who had also heard about it in school. He thus refuted the allegations that he was seen at the home of the deceased on the night of the incident. In cross-examination, he stated that at the time of the incident, he used to live in Kapcheset, while the 1st and 2nd accused persons used to live in Moror, about 500 metres away. He thus agreed that they would not know what was happening in each other’s home. He also agreed that he was arrested much later after the incident in Chesoi where, he stated, he was running a banana and cassava selling business. He denied any knowledge of **PW3** and refuted his claims that he (**DW3**) and others plotted to burn down the deceased’s house. He also denied knowledge of any community land dispute or whether the deceased was involved, and also denied having any disagreements with **PW1** or **PW3**. He stated that from his home to that of the 1st accused is about 500 metres away, and from his home to where the

incident occurred is about 3 hours walk. He denied belonging to any group that wanted the deceased out of the area, and denied that his arrest in Chesoni meant that he had fled or escaped there.

19. DW4 was **Sharon Cheoyatich Komei**, who introduced herself as the wife to the 2nd accused', **Gideon Kisang**, and regarding the deceased, she stated that she only used to see him in church. She then testified that her husband, the 2nd accused, never left home at any time on 5/07/2016, and could not therefore have been among the killers of the deceased. In cross-examination, she stated that she heard of the death of the deceased during the same week that it happened, and that from her home to the home of the deceased is about 10 kilometres. Regarding the 1st accused, she stated that he lives about 5 kilometres. Regarding the 3rd accused however, she denied knowing him, or that he was her husband's friend. She also denied knowledge of any land dispute in the area, and stated that her husband and herself went to bed around 9.00 pm.

20. DW5 was **Gladys Chepkemoi** who introduced herself as a wife to the 3rd accused, **Nicholas Chemlela**, and testified that she knew the deceased as a relative in the clan. She stated that the 3rd accused never left home on 5/07/2016, and that they both stayed home with their children. She however stated that she was not aware that the 3rd accused had testified that he was only with their children on that night, and no one else. She testified that she only learnt of the death of the deceased from her children on 6/07/2016 when they returned from school. In cross-examination, she insisted that her husband, on 5/07/2016, tended to his cows during the day, and that they took supper at around 8.00 pm and went to bed at around 10.00 pm. She denied knowing **PW2** or **PW3**, and stated that although she did not know the home of the deceased, she used to see him in church. She also stated that she did not know **DW4** since her husband and **DW4's** husband (2nd accused) were not really friends, but just relatives, although she confirmed that she used to see the 1st and 2nd accused persons around, although she did not even know their names before this case. She, too, stated that she was not aware of any land dispute in the area, and that the deceased's home where the incident occurred was far away.

21. Upon close of the defence case, and by extension, of the whole trial, I gave the parties leave to file written Submissions. **Prosecution Counsel Ms. Muriithi**, handed over to me in Court, a copy of her Submissions dated 18/11/2025. However, the same does not appear in the Judiciary Case Tracking System (**CTS**) online portal. Counsel is advised to ensure the same is so filed in the CTS as now required, otherwise the Submissions might be deemed as

not forming part of the record. For the defence, I have only come across the Submissions dated 11/12/2025, filed through **Messrs Adongo & Co.**, on behalf of the 3rd accused.

Submissions for the 3rd Accused

22. Counsel for the 3rd accused submitted that out of the 8 Prosecution witnesses called, only **PW5** claimed to have seen the 3rd accused at the scene, and even then, his testimony was doubtful since he claimed to have relied on moonlight to identify the attackers. Counsel also pointed out that the doctor who conducted the post-mortem (**PW6**), who was not even a Pathologist in the first place, testified that the body was burnt beyond recognition and, as such, he could not determine its gender. According to her, this position cast doubts on the identity of the body examined. She also highlighted the testimony of the 3rd accused's wife (**DW3**) who testified that the 3rd accused was at home and never left, and that they lived a long distance away from the home of the deceased. Counsel asserted that for these reasons, it has not been proved that the 3rd accused "***committed the unlawful act that caused the death of the deceased***". Regarding "***malice aforethought***", she submitted that no clear motive was established as the allegation of a land dispute was not proved. She cited the case of **Republic v Musau & Another [2025] KEHC 698 (KLR)**.

Prosecution's Submissions

23. **Ms. Muriithi** restated the ingredients of the offence of murder. Regarding "***death of the deceased***", she submitted that although **PW6**, the doctor who conducted the post-mortem testified that the body was burnt beyond recognition and he could not therefore determine its gender, he confirmed that the deceased died of multiple injuries before being set on fire. Counsel also highlighted **PW1's** testimony that the deceased was his father and lived alone. She also recounted the testimony of **PW4** that he is a brother of the deceased and identified the body for the doctor, and testified that the deceased's legs and hands had been amputated and his head was partially burnt, but nonetheless, he was able to identify the body as being that of the deceased. Counsel submitted that although the burden of proof of the existence of any facts in a criminal case lies with the Prosecution, there is an exception to this rule under **Section 111** of the **Evidence Act**, and that although the defence has challenged the identity of the body, it has not adduced any evidence to the contrary. She submitted that the failure to conduct a DNA analysis is not fatal since **PW1** also testified that the attack occurred shortly after he had left the home of the deceased where he had left the deceased all alone.

24. In respect to "***the act of the accused persons that caused the death of the deceased***", she submitted that the "***doctrine of common purpose***" was proved as the accused persons shared a prior plan to commit the act. She recounted the **PW5's** testimony that on his way from the

deceased's home at around 9.00 pm, he met a group of 8 people, including the accused persons, with torches, how he hid and managed to identify them by way of the moonlight and their torches, how the 1st accused was armed with a panga and the 2nd accused with arrows, how he saw them proceed to the home of the deceased, and shortly thereafter, he heard the deceased screaming, and how he then saw a fire burning and the attackers then left. He submitted further that the testimony of **PW5** was corroborated by that of **PW1** (a son of the deceased) who narrated how he heard screams from the direction of his father's home at around 8.00 pm, how he went out to check and found his father's house on fire, how he saw the 1st accused chasing after a sheep and cutting it by the throat, also saw the 2nd and 3rd accused in the homestead, how he heard the 1st accused leading the rest in singing and chanting victory songs, and how he raised the alarm after the attackers left. She also recounted the testimony of **PW3**, **PW2** and **PW7**, including the account that the attack had been planned at a prior meeting, which she submitted, further corroborated the evidence. She refuted the *alibi* evidence offered by the defence, and submitted that it did not cast doubt or shake the Prosecution's evidence. In the end, she asserted that "*malice aforethought*" was proved by the fact that the 1st accused were armed, and the fact that the injuries inflicted were brutal, which proved that the actions of the accused persons were very deliberate and a clear indication that death was intended.

Determination

25. **Section 203 and 204 of the Penal Code** under which the accused are charged provide for the offence of murder and the punishment for it. Under these provisions, the Prosecution has a duty to prove, beyond reasonable doubt, that the accused, by an unlawful act or omission caused the death of the deceased through "*malice aforethought*". The sections read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death."

26. For the Court to make a finding that an accused person committed the offence of murder, the Prosecution must establish the following elements; **(a) death of the deceased; (b) proof that the accused person(s) committed the unlawful act which resulted in the death of the deceased; and, (c) malice aforethought.**

27. Regarding the first ingredient, "*whether death has been proved*", the defence has cast doubt on the identity of the body claimed to be that of the deceased. This is understandable because

according to the doctor who conducted the post mortem, the body was burnt beyond recognition, and, as such, he could not identify whether it was the body of a male or a female person. It is also not in dispute that no DNA analysis was conducted on the body to establish its identity. The omission to conduct the DNA analysis, I agree, was a huge omission on the part of the Prosecution as no explanation was offered for the omission.

28. It is however the legal position that a murder conviction is still possible even if a body is burnt beyond recognition and no DNA analysis has been carried out, if death and the identity of the deceased can still be proven through other cogent circumstantial evidence. While therefore the death of the deceased must be proved, the physical remains (the *corpus delicti*) do not strictly or necessarily need to be identified by scientific means such as DNA if there is other evidence cogent enough to prove the same. For instance, evidence from family or close associates identifying personal items found with the body, such as unique jewellery or clothing, can still be relied on, or identification of unique physical traits that survived the fire, such as a deformity such as a missing finger, or teeth, or testimony that the missing person was last seen with the accused person or, the accused was seen at the scene of the fire under suspicious circumstances.

29. In this case, the doctor (**PW6**) confirmed that the deceased he examined died of multiple injuries inflicted before being set on fire. That the body suffered burns from a fire was therefore established. **PW4**, who testified that he is a brother to the deceased and who identified the body for the doctor, testified that although the legs and hands on the body had been amputated, he was able to identify the body as being that of the deceased because the head was only partially burnt. **PW1**, who testified that the deceased was his father, stated that he (deceased) lived alone. There is therefore testimony that no one else lived with the deceased and there is no evidence that any one else was at the home of the deceased at the material time. **PW5** also testified that he had just left the deceased alone in the house shortly before the attack was executed. **PW7**, the Investigating Officer, also confirmed that the body was recovered at the scene where the burning had occurred, which testimony was not challenged. There is also no allegation that the deceased has ever been cited at any place alive, after the incident.

30. From the above account, I am satisfied that although no DNA test was conducted in this case to establish the identity of the body recovered from the scene, the available evidence on record is sufficient to establish that the body was indeed that of the deceased.

31. This finding should not however serve as an encouragement to the Prosecution to ignore the relevance of procuring DNA tests. In appropriate cases, the Court will and should proceed to acquit accused persons if there is no cogent evidence to establish the identity of the body alleged. The Prosecution should never therefore gamble with chances.
32. Regarding the competence of the doctor (**PW6**) to conduct the post-mortem exercise, he produced his qualifications in the medical field and he was allowed to testify and produce the Report. There is no record that the defence raised any objections. There is therefore no basis for the belated challenge over the competence of **PW6** to produce the post-mortem Report.
33. The next question is whether there is proof that it is the accused persons who committed the “*unlawful act*” which resulted in the death of the deceased.
34. As aforesaid, being a criminal charge, the Prosecution bears the duty to prove the charge beyond any reasonable doubt (see the case of **Woolmington v Republic 1935 AC 462**)
35. In this case, it is not in dispute that there is no eye-witness to the murder of the deceased as his charred remains were simply found lying in the rubble of his razed down house. The Prosecution case against the accused persons is therefore based primarily on “*circumstantial evidence*”. The Prosecution must therefore satisfy the Court that the “*circumstantial evidence*” presented does not amount to mere suspicion. This is because, as was held by the Court of Appeal, in the case of **Mary Wanjiku Gichira v Republic 1998 eKLR**, suspicion alone, however strong, cannot provide a basis for inferring guilt, which must be proved by evidence.
36. As to what constitutes “*circumstantial evidence*” and in what manner it can sustain a conviction, the Court of Appeal, in the case of **Ahamad Abolfathi Mohammed & 2 others v Republic (2018) eKLR**, stated the following:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

37. As to how **“circumstantial evidence”** may be established such that it can sustain a conviction, the Court of Appeal, in the case of **Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990**, guided as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (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 the 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 none else.”**

38. The Court of Appeal, again, in the case of **Joan Chebichii Sawe v Republic [2003] eKLR**, the Court observed 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 explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

39. It is therefore generally agreed that for **“circumstantial evidence”** to carry the day, the Prosecution must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt. It is also agreed that in a case reliant on

Eldoret High Court Criminal Case No. 55 of 2016

“*circumstantial evidence*”, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge (*see Mwangi & Another V Republic (2004) 2 KLR 32*).

40. In this case, **PW5, John Maiyo Biwott**, testified that the deceased, **PW1** and the 3 accused persons were all his neighbours. He stated that he had gone to the home of the deceased on 5/07/2016 at around 7.00-8.00 pm to ask him for a ram and that he spoke with the deceased for about 30 minutes and left at about 9.00 pm. He testified that on the way, about 50 metres from the home, he met a group of about 8 people, including the 1st accused whom he heard stating that “*tonight when we reach there, we shall do a shocking act*”, and the 2nd accused also stated that when “*we reach there, we will kill the deceased*”. He also testified that he recognized **Chemlela (3rd accused), Mluya, Cheptugun, Solomon, Musa, Ruto** and **Kosgei** as there was sufficient moonlight and they also had torches, that he quietly followed them as they went to the home of the deceased, but he did not enter the homestead. He testified that he then heard the deceased shout from inside the house, the group then set the house on fire, and that he saw the said **Cheptubun** set the house on fire. He stated that he then ran to his home in fear, the police came in the morning, and he then returned to the scene, and it is then that he saw the body of the deceased which was burnt, and also a dead lamb. In cross-examination, he reiterated that the accused persons were known to him, that they were drunk and this is why they did not notice him, and that he saw **Musa** with a panga and **Ruto** with arrows.
41. **PW1, Wilfred Yego**, testified that the deceased was his father and that his home is separated from his fathers by a fence made up of shrubs. He stated that he was at his home on 5/07/2016 when at about 8.00 pm, he heard screams and when he went out to check, he noticed that his father’s house was on fire, that he saw people setting fire to the house while screaming and chanting in jubilation that they had succeeded in killing the “**Mzee**” as they had wanted. He testified that he next saw a sheep fleeing from the fire only for the 1st accused, **Musa Yego**, to give chase and cut it by the throat. He testified that he saw 6 attackers in total, out of whom he was also able to recognize **Ruto, Ronald Kipruto, Daudi, Alex Kosgei** and **Kirotich**, and that some were keeping guard to stop neighbours from coming out of their houses. He testified further testimony that he heard the 1st accused, **Musa Yego**, state that they were also looking for **Petro Chebusos, Joseph Kipchumba, Charles** and himself (**PW1**). According to **PW1**, there had been a long simmering land dispute within the area concerning his family, and that **Petro, Joseph** and **Charles** are his uncles. He

testified further that he proceeded to the scene after the attackers left and raised alarm, and that neighbours came over and helped to put out the fire upon which they found his father's body inside the house. He identified the 1st accused, **Musa Yego**, and the alleged "**Daudi**" seated in the dock. The record is however incomplete as it does not specify whether the "**Daudi**" he identified is the 2nd or the 3rd accused. In cross-examination, he stated that he was about 2 metres away from the burning house, and that the fire was bright enough to illuminate the whole homestead. Regarding the motive of the attack, he reiterated that it was have been a result of the land dispute between clans in the area. He also confirmed that his father was living alone.

42. **PW3, Timothy Chelimo**, too, testified that on 5/07/2016, he heard screams in the evening and upon going out to check, he saw the deceased's house on fire, that on his way there, he met a group of over 10 people amongst whom he recognized **Ronald Ruto, Alex Kosgei, Kiprotich** and **Musa Yego**, who they had torches which enabled him to see them, he hid himself by the roadside out of fear, and that he quietly followed them to the scene after they had passed. He stated that he found some neighbours at the scene with whom they put out the fire before they found the body of the deceased within the rubble. He, too, identified **Musa Yego** seated in the dock. In cross-examination, he, too, attributed the killing to inter-clan differences within the area, and stated that his house is 4 kilometres from that of the deceased.

43. **PW2** also testified that on the same 5/07/2016, he was at his brother's house at about 5.00 pm, when some people raided and attacked him with pangas, that among them were **Musa Kibet (1st accused)** and **Ronald Kipruto**, that the 1st accused cut him on the head before he managed to escape into a maize plantation and that on looking back, he saw his house burning.

44. An assessment of the above narratives, taken together, reveal that all the 3 accused persons were placed at the scene of crime by the witnesses. The accused were also well-known to **PW1-PW3**, and also **PW5**, as they were all basically from the same neighbourhood. There is testimony that they were spotted at around 8.00-9.00 pm on 5/07/2016, being part of a larger group of attackers who were seen carrying crude weapons (panga and arrows), walking towards the home of the deceased while proclaiming how they were going to kill the deceased in a shocking manner. There is also testimony that they were actually seen entering the home of the deceased, and it is shortly thereafter that screams were heard from the deceased's house, and the home set ablaze. There is also testimony that the group remained in the home for some time, some kept guard to ensure neighbours did not come out of their

Eldoret High Court Criminal Case No. 55 of 2016

homes to respond to the attack, and they only left after the deceased's grass-thatched house had been completely razed to the ground. Although, as aforesaid, one "**Daudi**" recorded to be one of the accused persons identified by **PW1**, is not captured by the record as being the 2nd or the 3rd accused, **PW5** expressly identified all 3 accused persons, and **PW1** and **PW2** both expressly identified the 1st accused. As aforesaid, there is also the testimony from **PW5** that he had just left the deceased alone in the house shortly before the attack.

45. Regarding the motive of the attack, **PW1** and **PW2** advanced the theory that it must have been a result of the long simmering inter-clan land-related disputes within the area. Indeed, the 1st and the 2nd accused did, in their defence testimonies basically also confirm that such clan land dispute had been raging in the area. In fact, according to **PW2**, he had to relocate to Tanzania after his life was threatened and his house also burnt. He stated that the area County Commissioner had come and instructed their Kapsiran clan to move out of the area, and that when he challenged the directive, other clan members opposed him. He stated that several meetings were later held within their clan members in which a plot to kill some members of the rival clan was hatched on the ground that it is they who were agitating the land case and that one of the people identified to be killed was the deceased (**Nicholas Chebet**). He stated that when he opposed the plan, one of his clan members, came and told him that he (**PW2**) would be killed and his house burnt down, and that this is why he relocated. **PW3** testified that he, too, relocated from Kapcherop and now lives in Mt. Elgon after his life was also threatened by, none others than the same accused persons herein.

46. My observation is that the evidence of the Prosecution witnesses, as recounted above, was consistent and cogent, the sequence of events was corroborated and the testimonies were also not shaken during cross-examination. In my assessment, the respective testimonies sufficiently tallied with each other. The witnesses' testimony that they easily identified the attackers because of the strong moonlight, the raging fire set by the attackers, and the torches the attackers had was not shaken or contradicted. From the witnesses' testimony, it is clear that the attackers made no effort, perhaps deliberately, to conceal their identities. This was perhaps meant to send out a message to others holding views similar to those of the deceased, on "who they were messing with". No reason or motive was also given by the accused persons as to why all these witnesses would so gang up and give false testimony against them, since the accused persons did not allege that any of the witnesses held any grudges against them.

47. The accused persons also did not impress me as being truthful or credible. Although they gave sworn testimonies, the same was contradictory and inconsistent in various material areas. For instance, while **DW5, Gladys Chepkemoi**, who introduced herself as a wife to the 3rd accused, (**Nicholas Chemlela**), testified that she was with the 3rd accused at home with their children throughout the night of 5/07/2016 when the attack is alleged to have occurred, and that the 3rd accused therefore never left home on that night, the 3rd accused, on his part, although also claiming that he never left his home, testified that he was only with his children. He was emphatic that there was no one else in the house. Was **DW5** therefore a hired mercenary hired to come and lie to the Court in an attempt to falsely exonerate the 3rd accused?
48. The denial by the 3rd accused and his alleged wife, **DW5**, and **DW4** of the long-standing and well-known clan rivalry over land ownership in the area is also clearly dishonest. The disputes are well-documented and are a matter of public knowledge, and the existence thereof was in fact, also confirmed by the 1st and 2nd accused during their defence testimonies.
49. The above conduct exposes the accused persons and their witnesses as unreliable and untrustworthy. Having heard and seen them in Court, they came out as evasive and selective in their responses. They all did not impress me at all as credible.
50. Regarding the *alibi* defence alleged by the accused persons, there is no evidence that the same was raised or even alluded to at any time earlier, not even during cross-examination of the witnesses, and was only brought up at the defence stage. The logic behind the requirement to raise an *alibi* defence early enough is to give the police an opportunity to investigate it. The timing on when an *alibi* defence is raised therefore determines the weight the Court will give to it. Where it is raised late as in this case, the weight of the defence is weakened as there is no opportunity for the police to scrutinize its veracity. This has been restated in many authorities, for instance, in the case of **R v Sukha Singh S/o Wazer Singh & Others (1939) 6 EACA 145**.
51. The Prosecution having proved the *actus reus*, the next issue is whether “*malice aforethought*” can be inferred from the actions of the accused persons. This is because the offence of murder is only complete when “*malice aforethought*” is established if, as prescribed in **Section 206** of the **Penal Code**, the evidence proves 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.”

52. In the case of **Hyam v DPP {1974} A.C.** the Court held *inter alia* that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

53. In the case of **Bonaya Tutu Ipu & another v Republic [2015] eKLR**, the Court of Appeal stated as follows;

“..... In the persuasive decision of *Chesakit v Uganda, CR App No 95 of 2004*, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

54. In this case, the post-mortem Report produced by **PW6, Dr. Wilfred Kimosop**, paints a shocking, sad and horrific state of the state of the body of the deceased as a result of the attack. The Report reveals that the left limbs had been amputated from the knee joint downwards as it did not have the mid-fibular part, there was a fracture at the femur, the right upper limb was also amputated from the mid-part of the forearm, and the left upper limb was amputated from the forearm as it did not have the humerus part. Internally, he testified that there were 4 fractured ribs on the chest, a penetrating chest injury on the chest wall between the 7th and 8th ribs, the lungs were putrefied, decomposed and charred, the digestive system, gut intestines and the abdominal organs were also burnt and in decomposition state. The **Eldoret High Court Criminal Case No. 55 of 2016**

genitals were also absent, and the head was burnt with a comminuted and depressed fracture on the left side. According to the Report, the cause of the death was multiple injuries, as the deceased was set on fire after he had already succumbed to the injuries.

55. From the above account, the element of “*malice aforethought*” is easily inferred from the nature and extent of the assault executed against the deceased. “*Malice aforethought*” is also inferred from a consideration of the fact that almost all parts of the body of the deceased were targeted during the attack—the head, legs, arms, chest, neck, genitals, among others. The attackers obviously intended to cause the deceased nothing but death. The fact that the attackers were in a big group and had armed themselves with, at least, a panga and arrows, and the fact that they were also heard, while on their way to the home of the deceased, proclaiming the shocking manner in which they were going to kill the deceased, confirms that their intention to kill. Their act of celebrating and singing in jubilation after the killing and also setting the body on fire after brutally hacking the deceased to death, is also telling. There is also no evidence that they even stole anything from the home, which confirms that this was a pure case of assassination well planned and ruthlessly executed. Considering these factors, I am convinced that that it was the intention of the assailants, whom the 3 accused persons were part of, to completely stuff life out of the deceased. To my mind, these facts easily establish the existence of “*malice aforethought*”.

56. Under the above circumstances, I am clear in my mind that the accused persons were part of the larger group that committed the act that resulted in the death of the deceased and further, that there was “*malice aforethought*” in their actions. I agree with **Ms. Muriithi** that the doctrine of “*common purpose*” was proved to the extent that the accused persons shared a prior plan to commit the death of the deceased. In view thereof, I am satisfied that the Prosecution has through the facts and evidence presented, convincingly proved the charge of murder beyond any reasonable doubt. The evidence remained credible, cogent and irresistible to point at the accused persons as being part of the culprits.

57. For the above reasons, I find all the 3 accused persons guilty of the charge of murder contrary to **Section 203** of the **Penal Code** and as a consequence, convict them all.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2026

.....

WANANDA JOHN R. ANURO

Eldoret High Court Criminal Case No. 55 of 2016

JUDGE

Delivered in the presence of:

All 3 accused persons present in open Court at Eldoret

Mr. Nyachiro for 2nd accused

Mr. Nyachiro also h/b for Ms. Adongo for the 3rd accused

Mr. Nyachiro also h/b for Mr. Wabomba for the 2nd accused

Ms. Muriithi for the State

Court Assistant: Brian Kimathi