

REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. E013 OF 2022 (MURDER)

REPUBLIC.....

PROSECUTOR

VERSUS

1. JOHN KWEYU MALALA.....1ST

ACCUSED

2. PETER MUKHWANA MALALA.....2ND

ACCUSED

3. MICHAEL ANCHERI MALALA.....3RD

ACCUSED

4. AYUB ODHIAMBO MALALA.....4TH

ACCUSED

JUDGMENT

1. John Kweyu Malala (1st Accused- John), Peter Makhwana Malala(2nd Accused- Peter), Michael Ancheri Malala(3rd Accused- Michael) and Ayub Odhiambo Malala(4th Accused-Ayub) face a charge of murder contrary to section 203 as read with section 204 of the Penal Code vide an information dated the 10th May 2022. The particulars of the offence are that, on the 3rd day of May 2022 at Bwaliro village in Bumula Sub-County within Bungoma County murdered Fredrick Sifuna Juma.

2. Each accused person denied committing the offence, and the case proceeded to trial. The prosecution called eleven (11) witnesses to support its case.

PROSECUTION CASE

3. Moses Khisa Wakesa (Pw1) testified that the accused persons are his neighbours. Sifuna (the deceased) was also his neighbour. He knew the deceased as Nyikuri. On 3rd May 2022 at 3:00 am, he was woken by shouts of "thief, thief." He went outside, the shouts coming from John Malala's home. Upon arriving, he saw the deceased lying on the ground, with all the accused persons at the scene, each holding a fimbo and beating the deceased. The deceased was bleeding from the head. He had a daylight light which was on. He asked Ayub what had happened, and Ayub told him that the deceased had stolen. He advised him that it was better to report the matter rather than beat the deceased. The deceased was bleeding as he lay on the ground. John explained to him that the deceased had eaten his food, ugali and chicken, and had stolen his blanket. The accused persons stopped beating the deceased. John had an injured finger. They then went to the village elder, who advised them to take the deceased to the hospital. He took John and Ayub to Sindano, where John was treated. Later, he was informed that the deceased had died. During cross-examination, Pw1 reiterated his evidence that he knew the accused persons and saw them beat the deceased. He could not

identify the person who was being beaten, as it was at night, and he was not able to identify the deceased because of the blood that was on his head. He saw about 30 to 40 people at the scene. He wrote the names of the persons he found at the scene, John Malala, Barasa Wekesa David Namasaka. He could not recall the colour of the clothes the accused persons had on. He did not see anyone else beat the deceased. He learnt that the injury on John's small finger was due to a bite from the deceased. Ayub identified the deceased as Nyikuri.

4. David Namasaka Wehocha (Pw2) testified that all the accused persons are his neighbours and are all brothers. He knew the deceased, whom they called Nyikuri. On 3 May 2022 at 3 a.m., he heard shouts of "thief, thief" coming from the deceased's shamba. He went outside and found the deceased lying down, being beaten by John and Michael. They were using fimbos to hit the deceased. There were many people, but he could not identify all of them. There was a dim light on. He asked Mukhwana why they were beating the deceased. Mukhwana told him the deceased had stolen a blanket and a shuka. He did not see the stolen items. He decided to return home. On his way back, he met the deceased's mother and cautioned her not to go to the scene. He later heard that the deceased had died. During cross-examination, he told the court that John and the deceased are his neighbours. He did not recognise the voices of those who were shouting "thief, thief." He saw Moses Khisa, who had a light. He

does not recall what clothes the accused persons were wearing. He did not go to the village elder.

5. Ben Emusase Esibai (Pw3) testified that he is a senior chief of Nanatotoa. He stated that he knows all the accused persons and the deceased. On 3 May 2022, John reported to him that the deceased had stolen two blankets and a mattress, and had also eaten his food, his ugali and chicken. The deceased was found at his house at 12.00 midnight. John told him that he had an injury to his finger and was bleeding. He gave John a letter to go to the hospital. Later, the village elder informed him that the 1st accused and his brothers had beaten the deceased, who subsequently died. He knew the deceased but had not heard any allegations that the deceased had stolen, nor had the accused reported that their belongings were stolen. It was not established that anything was stolen. During cross-examination, he told the court that the village elder told him that John was framing the deceased, and that after conducting his investigation, he concluded that they had framed the deceased and that the deceased had not stolen from anyone. He gave John a letter to go to the hospital to have the injury attended to first. He admitted that, in his statement, he had written that John had sought help from the villagers.

6. P.S. was a minor (Pw4). She gave an unsworn statement. She testified that she knows all the accused persons. The accused are their neighbours. On 3.5.2026 at 3:00 am, John went to their house and called her father, the

deceased. John entered the house and left with her father. Her mother was inside the house. She also woke up. While inside, she heard her father scream. They were locked inside. They had lights on, including a tin lamp, and John also had a torch. They went outside, but Michael told them to go back in. Someone opened the door for them. Her father managed to get into the house and asked for water. Her father later died. He was cut on the head, back, and legs during the incident. During cross-examination, she told the court that she had not guessed who called her father. The light was off when her father was called. She heard people shout, thief, thief. When she went out, she saw many people near their house. At one time, she saw her father quarrelling with Ayub. Her father used to cut sugarcane at Nzoia. Her father worked with Ayub. Before the father died, they were not working together. The father woke up, but he was not supposed to work.

7. James Barasa Mafubo (Pw5) testified that the deceased was his brother-in-law, known as Fredrick Sifuna Juma. He did not witness the incident. He attended the post-mortem at Bungoma on 6.5.2022 and identified the deceased's body.

8. Barasa Makokha Ombulo (Pw6) testified that he is a village elder. He knew the deceased and knew him as Nyukuri. He also knows the accused persons. On 3.5.2022 at 5:00 am, John came to his house and reported that someone had entered his residence. The person was described as a thief. He struggled with the individual, identified as

Nyukuri. John was accompanied by the other three accused persons. He then proceeded to the home at 6:00 am. Upon entering John's house, he saw three items: a jacket, slippers, and two pieces of timber (exhibit 2). He then went to Nyukuri's home, which is nearby. There, he found the deceased and his wife. His wife informed him that the deceased had been called out at 3:00 am. The deceased was seriously injured on the head and left shoulder and was bleeding heavily. He arranged for a boda boda to take him to the hospital. He also called the chief to inform him of the incident. Later, he received a report that Nyukuri had died. The police went to John's house and collected the two pieces of timber, the jacket, and the slippers. During cross-examination, he reiterated that he saw 3 things in a jacket, slippers, and pieces of wood, and that they had blood. The jacket and slippers were not in court. The items were on the floor. John went to his place at 5.00 am.

9. George Wanjala (Pw7) testified that he knew the deceased as Sifuna. On 3.5.2022, he was called by the village elder and asked to take Sifuna to hospital. On entering Sifuna's home, he noted that Sifuna could not speak. He sat with the deceased on a motorbike. On reaching Bumula hospital, the doctor told them that the deceased had died. He called the deceased's mother and reported the incident at Bumula Police Station. Later, he heard that the accused persons, who are his neighbours, had been arrested. During cross-examination, he told the court that the

deceased's entire body was covered with blood and that he helped dress him. He left whilst the police were taking pictures. He does not know whether they took any clothes.

10. Michael Juma Barasa (Pw8) testified that on 3.5.2022 at 3.00 am, his wife woke him to say there were screams outside. He was sleepy and did not go out; he went back to sleep. At 6.00am, he was called by Robert, the village elder, who asked him to take Sifuna, who was in pain, to hospital. He found Sifuna lying in his house; he had been hit on the head and back and was bleeding. He took the deceased to hospital, where the doctor told them that Sifuna had died. They reported the matter to the police. He saw the body of the deceased. All the accused persons are his neighbours.

11. Godwin Khamala Waliama (Pw9), the government analyst, testified that he was asked by Sgt. Harrison Muguno of DCI Bumula to perform a DNA examination on various exhibits and to determine any genetic relationships. The submitted exhibits included eleven items identified as follows: a pair of brown shorts marked D; a long-sleeved brown shirt marked A; a black faded short; a multicoloured sheet marked A; two pieces of timber marked C; a blood sample from John Kweyu Malala marked E; a blood sample from Michael Nderi Malala marked F; a blood sample from Ayub Odhiambo Malala marked G; a blood sample from Peter M. Malala marked H; and a nail sample from Fredrick Juma Sifuna marked B. These items were submitted on 25.5.2022. Upon

examination, he found that the brown shirt, the white shirt, and the bedsheet (A) and short (D) were all heavily stained with human blood. The short (A) and the two pieces of timber (C) were moderately stained with human blood. He conducted DNA profiling and drew two conclusions: (i) the DNA profiles from bloodstains on the brown shorts (item D), the brown shirt, the black shorts, the white shorts, the sheet, and the timber were similar and matched the DNA profile from the nail sample from Fredrick Juma Sifuna. (ii) the DNA profiles of John Kweyu Malala, Michael Nderi Malala, Ayub Odhiambo Malala, and Peter Mkhwana Malala, the suspects, did not match any of the DNA profiles generated from the listed items. He produced his report as P-Exhibit no. 5. During cross-examination, he told the court that he received the items on 24.5.2022. One can leave DNA by touching an object. All the exhibits supplied to him lacked the DNA profile of the accused persons. He was restricted to examining the bloodstains, which were not connected to the accused persons. In re-examination, he stated that the bloodstains on the exhibits belonged to the deceased.

12. Agnes Naliaka (Pw 10) testified that the deceased was her husband. On 3 May 2022 at 3:00 a.m., they were asleep when John Kweyu came to their home and woke the deceased. She got up and saw John seated outside. The deceased went out. The two sat on a bench and talked. John had a light when he arrived at their home. John told her husband to accompany him to his house to

give him work. After a short while, she heard the deceased cry, 'They are killing me, they are killing me.' They were locked inside. She started screaming in the room. A neighbour opened the door for her. She went out and found many people beating her husband. About 29 people, including the accused, were beating him. The accused were their neighbours. The others included Juma Khisa, George Omutama, Michael Wa Titus, Shikuku Mukhwana, and others who were not in court. She recognised them because they were her neighbours. The solar lights were on. When she went out, Michael told her to go back into the house and threatened to kill her if she did not return. They continued beating him. She heard them say that they had finished him. Her husband went into the house. He was bleeding and crying, with blood all over him. He was later taken to hospital at 5:00 p.m. Her husband died. She reported the incident to the police at Bumula. She accompanied the police, and they arrested the three accused persons. Ayub later surrendered to the police station. Two pieces of timber were found in John's house. The police found a short (brown/khaki), a white shirt belonging to the deceased, a faded black short, a long-sleeved brown shirt, and a coloured shuka. She saw blood at John's door. She further testified that she had known the accused persons for less than two years and that they had recently moved into the area. Her husband used to cut sugarcane. Although they were neighbours, the accused persons were not good people. They quarrelled

with her husband over a land boundary. During cross-examination, she told the court that they had quarrels with the four neighbours, and that the dispute was over land boundaries. She had no evidence that the accused persons killed her father-in-law. Her husband trusted the person who called him. They have lived in Bwaliro since 2013. She heard shouts of 'thief, thief' and 'kill him, kill him'. She went out and saw many people beating her husband. This was in her brother-in-law's shamba. When her husband got out, they sat on a bench, then he was beaten and ran into the shamba. She pulled her husband into their house at 6 a.m. She wanted the accused persons arrested so that the shamba issue could end. She does not recall the clothing each accused person had.

13. Dennis Sifuna Wafula (Pw11) testified that he knows the accused persons. They are all his neighbours. On 2.5.2022, he was in his house at 4.00 am. He heard screams from the deceased's wife. She was screaming, calling his name. When he went to her house, he found she had been locked from the outside. He opened the door for her. Agnes and he went to the place where the screams were coming from. There were shouts of 'thief thief'. The deceased was being beaten. He saw five people — John, Peter, Michael, Ayub, George Omutana — beating the deceased. They had torches and kept calling him 'thief thief'. They beat the deceased using fimbos. After they finished, the deceased and his wife went to their house.

He did not see the stolen item. The deceased was bleeding from the head. Later, he heard that the deceased had died. During cross-examination, he told the court that the wooden sticks he saw in court were not the ones he saw that day. The deceased is his uncle. He heard shouts of 'thief thief'. He did not have any torch. He has known the accused persons for a long time. He found about 50 people at the scene. He has identified the ones he saw. The accused persons had torches and shone them on the deceased as they beat him. He moved closer and saw the accused persons. The deceased was being beaten in the brother's shamba and not at the home of John Malala.

14. No. 26067 P.C Kipkemboi (Pw12), the investigating officer, testified as follows: On 3.5, he received a report from Agnes that her husband, Fredrick Sifuna Juma, had been assaulted by people she knew and had died .Agnes led them to their village at Bwaliro. They recovered clothes stained with blood and a bedsheet. She led them to the home of a neighbour, where they recovered two pieces of timber on the floor with spots of blood. They arrested John Peter and Michael . John had a short with spots of blood. They went to the hospital and found the body of the deceased. He had injuries on the head and hands. They took the body to Bungoma mortuary. Ayub went to the police station and was arrested. A post-mortem was done on the 6th . The accused persons were charged after they completed their investigations. They

took the exhibits they recovered to the government chemist for analysis. He produced them in court. During cross-examination, Pw12 told the court that the post-mortem report does not indicate whether any samples were taken from the deceased. The exhibit memo indicates that the nail of the deceased was taken. The accused persons were taken for DNA sample testing on 6.5.2022. Nothing shows that the blood remained in the hospital. They recovered items from John's house but did not write an inventory of the same. They booked them as exhibits from the scene. The deceased had many injuries on himself, and they looked as if they had been inflicted by mob-justice.

15. Doctor Elly Kiplimo Kosgei (Pw13) testified as follows: he performed a post-mortem on the deceased, a male of African descent, about 40 years old. On external examination, there were several notable findings: deep cut wounds on the head, which extended to the skull. He observed a fracture on the parietal bone and bruises on the left forearm and shoulder. Internally, a significant finding was a massive subdural hematoma. In his opinion, the cause of death was severe head injuries. During cross-examination, he stated that he did not take any specimens from the accused persons.

DEFENCE CASE

16. The 1st Accused, John Kweyu Malala, gave a sworn statement. He testified that he did not murder the

deceased. On 2.5.2022, he spoke with the deceased. He is a thief. He does carpentry work as a cover. The deceased told him there was a goat somewhere, and they could go and steal it. On the 3rd night, he went to pick up the deceased at 2:00am from his place at Bwaliro. They went to the boma where the sheep was kept. They untied the sheep, which started making noise. People woke up, and they fled in different directions. He heard voices in the sugarcane. When he went to check, he found that the deceased had been caught and was being beaten. He did not recognise the people who were beating the deceased. He returned to his house and slept. The next day, he heard that the deceased had died. He was arrested at his mother's house. He did not shout "thief". He was the thief. He did not tell people that the deceased stole his ugali and kuku. He was not arrested or beaten. He was not taken to hospital. He hid when he saw the deceased being beaten. The issue regarding the shamba was between him and his wife. They had been involved in thefts with the deceased for a long time. They are the people who cause sleepless nights in Bwakoli village. During cross-examination, he told the court that he knew the deceased well. He knew him as David. They have been stealing for three years. They both live in Bwaliro village. He did not enter the deceased's house. The 2nd, 3rd and 4th accused persons are his brothers. They all live in the same homestead. It is the first time he is saying that they used to steal with the

deceased. There is a possibility that the witnesses are lying against him. He quarrelled with the 4 witnesses who testified against him in 2015. He had hired a shamba to David and Moses. It is 7 years since then, and the 4 have never testified against him before. He would not know if the other three accused persons were involved.

17. Peter Mukhwana Malala, the 2nd accused, gave a sworn statement. He testified as follows: the accused persons are his brothers. He did not kill the deceased. On 3.5.2022, he was asleep at home with his wife. He heard screams. They both woke up. They went outside to the place the screams were coming from, which was close to the deceased's place. They found many people. They asked what was going on. The people told them that they had found the deceased lying there. He went back to his home. He was told that John had been home on the 3rd, but he did not see him. He did not see John in the group, nor Ayub or Michael. The next day he woke up and did his usual chores. John was arrested, and he was also arrested. He did not go to Pw6's home to report. The deceased was beaten that night, but he could not tell if the deceased had injuries, as his torch did not have sufficient light. During cross-examination, the 2nd Accused told the court that there were people with lights at that place, but he could not tell the condition of the deceased, as the deceased was lying there. He did not see blood on the deceased. He did not report to Pw6 that he was robbed.

He has never quarrelled with the village elder, and Pw6 has no reason to lie against him. There was a time he quarrelled with Pw1, about 3 years ago. There was a time he quarrelled with Khisa. This was when his child stole his radio. Dennis cut his trees using a panga and entered the deceased's home. He has never John say he is a thief.

18. Michael Anderi Malala, the 3rd Accused, gave a sworn statement. He testified as follows; he did not kill the deceased. He was asleep in his home with his wife, Janet Ancheri. They slept until morning. At 11.00 am the next day, police went to his place and asked him if he was Mike. He was arrested. He found his brothers inside the vehicle. They were taken to the police station and told that they had been arrested over a murder. The witnesses lied against him. Pw6 lied that he went to his place at night. He did not hear screams that night, nor shouts of thief, thief. He quarrelled with some of the witnesses. During cross-examination, the 3rd Accused told the court that the other witnesses had a grudge against him. He explained various incidents with the 4 witnesses and acknowledged that the witnesses were not asked about the incidents he was raising in his defence. The accused persons are his brothers, and the deceased their neighbour. They lived well with the deceased. The witnesses he did not mention have no reason to lie against him. He was in Bwaliro on the material night. He did not

go out on the material night. The village elder visited their home in the morning.

19. Ayub Odhiambo Malala, the 4th accused, testified as follows: On 3.5.2022, he was asleep in his house and slept until morning. He woke up to go to work. He digs toilets and wells. He went to work and returned home at 2.00pm. On returning home, his wife told him that the police had been looking for him and that his brothers had been arrested. He went to the police station to check on his brothers, and whilst there the police arrested him. He asked why he was being arrested and was told he would be told. He surrendered to the police. He knows Agnes, the wife of the deceased. They did not go to the deceased's home and call him outside. He did not beat the deceased. He had a disagreement with Moses, Dennis and Khisa. He also disagreed with the deceased's wife. John has two homesteads, but he stays in Kababi. He found that John had been arrested. During cross-examination, he testified that the accused persons are his brothers. He was arrested because they are family. The deceased is his neighbour. He had quarrelled with the deceased in 2017. He never went to the home of the village elder.

20. Gladys Nechesa (Dw5) testified that John, Peter and Michael are her brothers-in-law and that Ayub is her husband. Ayub had come from work very tired. Ayub asked her to wake him the next day in case he overslept. At 3.00am, she heard noise outside but did not wake him.

She woke her husband at 5.20am He went to work and returned at 11.00 am. They heard of the murder at the neighbour's place. CID went to their home before Ayub went back and searched their home. CID told her to inform her husband to report to their offices. Ayub went to the CID at 2.00pm and did not return home. Her husband did not go out that night. It is not safe to go out at night when you hear screams. During cross-examination, she told the court that she did not go out that night. She was at home with her husband. She does not know whether her brothers-in-law were out that night. They have good relations with the neighbours. They have a good relationship with the village elder.

SUBMISSIONS

21. The prosecution submitted as follows. To prove its case, it must establish that a death occurred; that the death was due to an unlawful act or omission; that the unlawful act or omission was on the part of the suspect; and that the unlawful act that resulted in the death was actuated by malice aforethought (see *Shangasu vs Republic* (Criminal Appeal E042 of 2023 [2024]KECA (KLR)). On proof of death, it was submitted that there was evidence of the deceased's death from the evidence of Pw5 and the doctor, Pw12. On proof that the deceased's death was due to an unlawful act or omission, it was submitted that the doctor's evidence sufficiently corroborated the evidence of the eyewitnesses, and

therefore the deceased died due to an unlawful act. On proof that the unlawful act was on the part of all the accused persons, it was submitted that the prosecution witnesses sufficiently linked all the suspects to the murder of the deceased. The evidence of Pw1, Pw2, Pw3 and Pw11 confirmed that they saw the accused persons assaulting the deceased with wooden sticks (fimbos). Identification was by way of recognition, as they all knew each other. The motive of the attack was that the deceased had stolen their property. There was also positive forensic evidence linking the suspects to the offence. Pw9 confirmed that, upon analysis, the DNA generated from the blood stains matched the DNA profile of the nail sample from the deceased. On malice aforethought, it was submitted that evidence of malice aforethought is provided by the timing and the intention to cause grievous harm, as disclosed in the post-mortem. On the defence raised, it was submitted that the defence tendered by all accused persons proved a total sham when compared with the prosecution evidence, and that, when tested at cross-examination, none of the claims of being implicated in the murder were substantiated, with the accused persons resorting to last-minute guesswork and baseless attempts to explain why prosecution witnesses would implicate them in the murder.

22. The accused persons' submissions were as follows. The defence concedes that there was a death. Regarding

the cause of death, there was evidence from Doctor Kosgei that the deceased died due to severe head injuries. As to whether the accused persons caused the deceased's death, it was submitted that there was no evidence linking the accused persons to the deceased's death. The incident took place at night in a village setting with no lighting. The prosecution witnesses testified that the lighting was insufficient to properly identify a person. Moses and David told the court that they were unable to identify the person being attacked due to insufficient lighting. Dennis saw only the accused persons from a group of 50 people. Agnes could not see her husband; she saw the accused persons on the outer circle, as she could not see the inner circle. Agnes also confirmed that she had previous disagreements with the accused persons. Peris was unable to state how she identified the accused persons. It was submitted that visual identification must always be approached with great care (see *Waithaka Chege vs R* [1979] KLR 271). Reliance was also placed on *Gikonyo Karume & Another vs R*, where it was held that before a court can return a conviction based on the identification of any accused person at night and in difficult circumstances, such evidence must be watertight. On recognition, the defence relied on the case of *Wamunga vs R* [1989] KLR. It was submitted that the conditions for correct visual identification were not favourable, and that the witnesses could not positively identify the deceased and the other

people present at the scene. The poor lighting must have contributed to the identification of the scene of the offence, with some witnesses stating that it was at the home of the accused persons and others stating that it was at the deceased's brother's land. It was further submitted that none of the prosecution witnesses established that they had sufficient interaction with the accused persons to enable them to recognise the voice of the accused persons. On the DNA analysis, the investigating officer told the court that there were no unique identification marks placed on the items that were collected, and they were kept in the exhibit store, and therefore there was a high chance of a mix-up. The defence challenged the evidence of the Government Analyst, stating that none of the DNA profiles of the accused persons matched any of the DNA profiles generated from the items supplied to him, including the short alleged to have been recovered from the deceased. The post-mortem form did not indicate that a nail sample was taken from the deceased. On the defence raised, it was submitted that the defence raised by the 1st accused is believable, and that all the other three accused persons denied having been involved in the killing of the deceased and gave their versions of their story, which remained unchallenged during cross-examination. It was further submitted that there are too many inconsistencies in crucial evidence and too many doubtful gaps to hold a

conviction against the 2nd to 4th accused persons, and that the last person in the company of the deceased, the 1st accused, is better placed to shed light as to the circumstances under which the deceased died. On whether the accused harboured any malice aforethought, it was submitted that the prosecution cannot infer any malice aforethought where the accused is a stranger to the offence and its particulars. None of the prosecution witnesses testified to the existence of any malice aforethought by the accused.

ANALYSIS AND DETERMINATION

23. In a charge of murder, the prosecution has the duty to prove the following three elements to secure a conviction: that the death of the deceased has occurred; that the death was caused by an unlawful act of commission or omission by the person accused of the offence; and that the accused had malice aforethought when he committed the act. (see Chiragu & Another vs. Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR))
24. The fact that the deceased died and the cause of death is not disputed. Pw 4, Pw5 Pw7 and Pw10 all confirmed that the deceased died. Pw 13 Doctor Kosgei confirmed that the deceased died due to severe head injuries.
25. On whether the accused person caused the unlawful death of the deceased. The undisputed facts are as

follows; on the night of 3.5.2026 the 1st accused person went to the deceased's house at 3.00am. That on the same night the deceased was beaten and sustained serious head injuries and died as a result of the said injuries. There is also no dispute that the deceased was known to the accused persons and that they are from the same village. From the defence adduced it is also not in dispute that the accused persons knew the prosecution witnesses

26. The prosecution's case is that all the 4 accused persons beat up the deceased on the material night. In *Wamunga -vs- Republic (1989) KLR 426* the Court of Appeal stated that: *"It is trite law that where the only evidence against a defendant is identification or recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction.* Pw1 testified that he was woken up by shouts of "thief, thief." Ongoing out he saw the deceased lying down and the accused persons were beating the deceased using fimbo and the deceased was bleeding. There was a daylight light on. He spoke to Ayub, who told him that the deceased had stolen. The allegation was that the deceased had stolen from John, he had eaten his food ugali and chicken and had stolen his blanket. Pw1 told the court that they stopped beating the deceased when he

asked them to. He could not identify the Pw2 too came out of his house when he heard shouts of *thief thief*. He found the deceased lying down and being beaten by John and Michael; there were many people, but he could not identify all of them. There was a daylight light on and he was able to see. Mukhwana , the 2nd accused who told him the deceased had stolen a blanket.Pw2 's evidence corroborates Pw1's evidence as both saw the accused persons beat the deceased. Pw4 and Pw10 both testified that John the 1st accused went to their home and called out the deceased. A fact the 1st accused does not deny but claims that he called out the deceased so that they could go and steal goats. The evidence of all these witnesses link the accused persons to the incident that happened at 3.00am on the 3.5.2022. Pw1 did explain that he was not able to recognise the deceased then as he had blood all over his head. He did not see anyone else beat the deceased. The accused persons were persons whom they knew well, as they recognised them. Pw1 had a daylight that was on, and he used it to see what was happening, in addition the accused persons were he knew well. Pw2 too was also at the scene and using the same light he saw the accused persons. Identification was by way of recognition.

27. Pw3 testified that the 1st accused went to his home the same day and reported that the deceased had stolen his blanket and mattress, had eaten his food, and had

been found in his house at 12 midnight. Pw6 also testified that the 1st accused went to his house at 5.00am on 3.5.2022 to report that the deceased had entered his house, and that they struggled with the person. According to Pw6, they recovered a jacket, slippers, and two pieces of timber from the 1st accused's house. These were taken to the government chemist for analysis. The defence has submitted that there was insufficient light to enable the prosecution witnesses to identify the accused persons. In my view, Pw1 and Pw2 saw the accused persons and clearly explained the lighting conditions, and their firm evidence was that they knew the accused persons and saw them beat the deceased. The deceased had injuries to his head, and Pw13 confirmed that the deceased died as a result of severe head injuries. To further support their case, the prosecution relied on the evidence of a government analyst. Pw12 testified that he recovered short and timber pieces from the 1st accused's house and clothes from the deceased's house. Pw9, the government analyst who carried out the DNA tests as requested, found that DNA profiles generated from the brown short (recovered from the 1st accused) and timber matched the DNA profile from the deceased's nail. The argument that the exhibits could have been mixed up is not persuasive. The evidence adduced by the prosecution clearly links the accused persons to the incident. They were seen beating the deceased; the persons who saw them knew them and

spoke with them, and they were arrested the same day, later in the morning. The post-mortem report confirms that the deceased died as a result of the head injury, an injury Pw1 and Pw2. I observed these two witnesses and find no reason why they would have lied against any of the accused persons. In my view, they were truthful witnesses and consistent in their evidence. Their evidence corroborates each other and is sufficient proof that the accused persons were involved in the unlawful act.

28. The defence submitted that the evidence of Agnes Naliaka (Pw10) was that she had had previous disagreements with the accused persons and that she wanted them arrested. When examined by the court, she told the court that the 4 were in court over the murder of her husband. In my view, her evidence on what happened on the material night was corroborated by the evidence of Pw1, Pw2 and Pw11 who opened the door for her. I am not persuaded that she was out to fix the accused persons on account of a previous dispute.

29. Each of the accused persons denies involvement in beating the deceased. The 1st accused person never asked any of the witnesses about the deceased's alleged behaviour of stealing. The village elder told the court that he had never heard allegations that the deceased was a thief. The allegations of dispute made against the prosecution witnesses by each accused were not raised during their cross-examination. In my view, each defence

raised was an afterthought and does not rebut the cogent evidence adduced by the prosecution.

30. In **MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment)**, the court cited with approval the case of **Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** as follows: -

“With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

The defence has pointed out contradictions regarding the time and place of the incident. There is no dispute that the incident occurred in Bwaliro village; this was confirmed by the witnesses. Regarding the time, in my view, the variance is not fatal to the prosecution case. They do not point to deliberate untruthfulness, nor do they affect the main substance of the prosecution case.

31. Section 206 of the Penal Code defines malice aforethought. Malice aforethought is deemed established if there is an intention to cause death or grievous harm to

any person, whether or not the person is killed. In Rex vs Tubere s/o Ochere 1945 EACA 63, the court held that, in determining the existence or non-existence of malice, one must look at the facts showing the weapon used, the manner of its use, and which part of the body was injured. In this case, the deceased was struck severely on the head. According to the village elder and chief, the allegations were that the deceased had stolen from the 1st accused person, hence the shouts of thief, thief. The beatings were directed at the deceased's head. According to Pw1, he had to plead with the accused persons to stop beating the deceased. The assault on the deceased was so severe that it resulted in his death. The evidence of Pw1 and Pw2 clearly shows that the accused persons intended to cause grievous harm to the deceased.

32. In conclusion, I find that the prosecution have proved their case beyond reasonable doubt against the 1st, 2nd, 3rd and 4th accused persons. All the ingredients of murder were proved beyond reasonable doubt, and I find each accused person guilty and convict them accordingly as charged.

Dated, signed and delivered via Teams this 7th Day of April 2026.

R.E. OUGO

JUDGE

In the presence of:

1st , 2nd , 3rd and 4th Accused persons

Miss Matere -For the State

Miss Wakoli - For the Accused persons.

Wilkister - C/A

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