

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL DIVISION
CRIMINAL CASE NO. E032 OF 2023

STATE PROSECUTION

- VERSUS -

JAMES OTIENO OGADA 1ST ACCUSED

BRIAN ODHIAMBO OUMA 2ND ACCUSED

J U D G M E N T

1. The 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 of the charge were that on **11/10/2023** at Kopere village, Kopere Shopping Centre, Chemilil location in Muhoroni sub county within Kisumu County, they jointly murdered **Wilfred Kipchirchir Mutai**.
2. They pleaded not guilty, calling upon the prosecution to discharge its burden of proof and disapprove their innocence as provided for in *Art. 50(2)(a) of the Constitution*.
3. The prosecution called fourteen (14) witnesses in support of its case. **Pw1 Thomas Kimutai Birgen**, the father of the deceased testified that on the **11/10/2023** the deceased left home for work as a tractor driver. That the

deceased had brought a spare for the tractor home. That at 10am while he had gone to Kapsabet, he received a call from his wife that the deceased had been injured and so he rushed to Nandi Hills Hospital where he found the deceased injured on the head and bleeding from the ears and nose.

4. That the deceased was unconscious and was referred to Kapsabet Hospital as a CT scan was required but doctors were not available so they took him to Tomken Hospital. The following day, they went to the hospital and the doctors informed them that the deceased had succumbed to the injuries. On **18/10/2023**, he identified the deceased's body for autopsy. He stated in cross-examination that he was not present when the deceased was injured.

5. **Pw2 Dr. Emmanuel Kipteling** testified that he conducted the deceased's post-mortem on the **18/10/2023**. That rigor mortis had set in and externally he had clotted blood on the nostrils, bleeding on both ears, surgical medical interventions on the head, brain surgery, distended abdomen, bruises on the left elbow- defensive injuries with whip marks were noted bilaterally on the arm.

6. Internally, the respiratory system was normal and the bowels were air filled due to resuscitation. That the head and nervous system had several fractures at the right temporal parietal region, obvious bleeding above the brain covering. That in the brain, there was subdural haematoma on the right side of the brain

and the bleeding extended to the frontal region of the brain. That the spinal cord and spinal column had no injuries.

7. He formed the opinion that the cause of death was severe head injury, massive epidural haematoma and subdural haematoma resulting from skull fracture secondary to the use of high force trauma. He signed the post-mortem report on the **18/10/2023** which he produced as **PExh1**. In cross-examination, he stated that he did not find wounds of a panga or knife. That he determined that the deceased was attended to by a neurosurgeon and operated on.
8. **Pw3 Everline Akoth Agengo** testified that she knew one Brian Odhiambo, a rider of motorcycle model boxer 100 registration number **KMGE 786E**, red in colour. That she was the one who bought the motorcycle in **September 2022** to aid in her business and that her son, Brian Okoth Onditi, used it until July 2023 when he went to look for another job.
9. That her son agreed with one **Brian Ouma**, the 2nd accused to be riding the motorcycle and 2nd accused would be paying **Kshs. 300/-** daily into her other son's (Vincent Ochieng) number, **0794266520**. That the 2nd accused would at times send the daily money to her son's wife's number **0746862708**. That the 2nd accused faithfully remitted the money on a daily basis but when he defaulted for 3 days, she instructed her son Vincent to follow up on the same. That her son established that the motorcycle may have been detained during the

demonstration which turned out to be true when her son found the bike at Kopere Police Station before it was taken to Chemilil Police Station. That the DCI informed her that the bike was left at the station but was subsequently released to her.

10. In cross-examination, she stated that she knew the 2nd accused who used to ride her motorcycle. That she bought the motorcycle via a loan agreement with Watu Credit.

11. **Pw4 Janet Atieno**, testified that on the **11/10/2023** whilst at Kopere, she saw motorcycles approaching her from Chemilil and that they stopped near her and started shouting at the boda boda stage. That she saw the riders start to assault a young boy who, despite attempts to flee, was accosted by the mob of riders who were armed with pangas and rungus. That the young boy was bleeding profusely and unable to wake up. That when the police arrived, people lifted the young boy and took him to a nearby hospital for first aid. That she later learnt that the boy had died. In cross-examination, she stated that she did not see the 2 accused persons when she witnessed the incident.

12. **Pw5 Stephen Njuguna Kingoro** testified that he knew the deceased. That on **11/10/2023**, he met the deceased as he was going to collect a plough from the mechanic at Kopere at 8am. That at 10am, his mechanic Sila, called him to quickly go attend to the deceased who had been hurt badly.

13. That when he went, he found the deceased had been taken to hospital, bandaged all over the head and vomiting blood. That he was unconscious. That the deceased was finally taken to Kapsabet hospital and subsequently to Eldoret on the **12/10/2023** where he passed on. That the deceased never spoke to him until his death. In cross-examination, he admitted not having witnessed the assault and further that he did not know the accused persons.
14. **Pw6 Olang Boran Odhiambo** testified that on the **11/10/2023**, he was at school in Kopere. He was to go to Awasi when he saw boda boda riders who were complaining that their motorcycle had been stolen. That the people hit him with a stone so he ran and hid in a sugarcane plantation but the people surrounded him and beat him. That he was rescued by a good Samaritan who took him to hospital. That his attackers were armed. That none of his assailants were in court. He testified that he broke his left hand and went to Nandi Hills Hospital for treatment.
15. **Pw7 Silas Omondi Oyugi** testified that he did not know the deceased or the accused persons. That he lived in Kopere and was a boda boda rider. That on **11/10/2023** at about 10am, he was at the boda boda stage in the company of 6 other riders when they saw a mob of riders approaching Kopere centre carrying 2 pillion passengers and armed with pangas, rungus and jembes. That one of the

mob, who claimed to be a chairman of the group, approached him and stated that they were looking for their lost motorcycle.

16. That the mob started beating one Boran as well as a tractor driver. When he saw what was happening, he held the Chairman's hand and requested him to go to the police over the issue. That he went with the Chairman to the police and on his return, he found 2 red boxer motorcycles abandoned at the scene bearing registration numbers **KMEL 136V** and **KMGE 786E**. That he knew both motorcycles did not belong to any of his members as he was the Chairman of his stage and so they took them to the police.

17. In cross-examination, he testified that the man who introduced himself as Chairman was dark skinned, tall and heavily built. That he could not recall the faces of the assailants.

18. **Pw8 Rael Abuso Oyugo** testified that on the material day, she was at the market in Kopere selling fish when she saw a mob on motorcycles approaching whilst shouting in Dholuo which she did not understand as she is a Tanzanian. That the mob started beating a man whom she did not know and that the police came and took him away. In cross-examination, she admitted that there were so many people at the scene and that she did not know the 2 accused persons.

19. **Pw9 Francis Amollo** testified that he is a boda boda rider. That on **11/10/2023**, he was at Kopere when he saw a mob shouting on motorcycles.

That he ran away leaving his motorcycle behind. That he did not know the deceased or the accused persons. In cross-examination, he stated that he ran away and left his blue motorcycle registration number KDG. That he saw a person beaten and bleeding though he did not know him.

20. **Pw10 Dancan Otieno Onditi** a boda boda rider from Kopere testified that on the material day, he was on his way to work when he saw many motorcyclists carrying people approaching his stage whilst shouting. That the mob started fighting and beating people, throwing stones at people and houses.

21. That being secretary of the Kopere boda boda stage, his team escaped but he returned and saw Boran being chased and beaten for filming the incident. That he found a man beaten, lying in a ditch bleeding from the nose and mouth. That he saw a motorcycle with keys in it so he used it and took the injured to the dispensary where first aid was done after which his relatives and police came and took over. He indicated in cross-examination that he did not recognise any of the assailants in court.

22. **Pw11 Charles Ochieng**, a boda boda rider testified that on **11/10/2023** he was at the stage at 10am when he heard and saw motorcyclists from Chemilil shouting and saying, '*leo tunaenda nao*' so they ran away. That the mob caught up with Boran and chased him into the sugarcane but he followed him and

assisted him. That they returned to the stage where they found a man bleeding who was assisted and taken to hospital by one Dancan Onditi.

23. He admitted that they found 3 motorcycles abandoned which they pushed to the police station.

24. **Pw12 Boniface Otieno** a boda boda rider at Kopere testified that on **11/10/2023** he gave out his red motorcycle which was used by Dancan Onditi to take the injured to hospital following a fight by people from Awasi. He testified that he did not know the deceased or the accuseds.

25. **Pw13 Silas Otieno Minda**, a welder testified that he knew the deceased when he came to repair his tractor at his place. That on **11/10/2023** when the deceased came to have the repairs on his tractor completed, he heard screams and hooting from the road so he went to check on what was happening and learned that the deceased had similarly gone to check out what was happening.

26. That one of his workers went and returned saying that the deceased had been beaten. He testified that he called the deceased's manager and that the deceased was then escorted to the hospital by boda boda men. He admitted in cross-examination that he was not present when the deceased was assaulted. That he helped put the deceased on a motorcycle which took him to hospital.

27. **Pw14 No. 88406 PC Alvin Kinyua** testified that on **11/10/2023** he was assigned this case by the in Charge. He visited Kopere Shopping Centre where a

commotion had been allegedly caused by boda boda riders from Awasi who had gone there searching for an alleged lost motorcycle.

28. That they found that the commotion had been calmed so they proceeded to the Police Post in the shopping centre where they were briefed by the officers of what had happened. That at the time, the 1st accused had been detained at Kopere Police Post having been rescued from an angry mob at Kopere. That the 1st accused introduced himself as the Chairman of boda boda from Awasi.
29. That they were handed 2 motorcycle registration number KMGE 786E, Red Boxer which was believed to have been recovered as it was lying idle at the shopping centre. That in his investigations, he established that following the confrontation between the boda boda riders of Awasi and Kopere, the deceased who was a bystander, had been attacked. That he established that the abandoned motorcycle belonged to one **Pw2** who had purchased the same on hire purchase from Watu Credit. That she had given the same to the 2nd accused for business in return for him to be sending money to her son.
30. In cross-examination, he stated that the 1st accused was arrested at the scene by members of public. That although two motorcycles were found abandoned at the scene, he was only interested in one, registration number KMGE belonging to Everlyne Akoth as he established that it had come from Awasi.

31. When placed on their defence, the accused gave sworn statements. The 1st accused, **James Otieno Ogada** testified that on the **11/10/2023** at **4pm**, he was going to the market to buy food but before he reached the market, he was attacked by a crowd who arrested him. That the crowd identified themselves as police officers from Chemilil and they took him to the station. That he was subsequently informed that he had assaulted someone. He denied being arrested by the Chairman of the Kopere boda boda.
32. In cross-examination, he told the court that on the said date at 10pm, he was at home alone. That he was arrested by a group of people who later introduced themselves as Police Officers. That there was nothing presented in court to show that he was a boda boda rider.
33. **Brian Odhiambo Ouma**, the second accused, testified that he lived at Onyalo Biro centre near Awasi and worked as a juakali worker. He testified that he was not aware why he was in court. That he was arrested on **15/10/2023** at Onyalo Biro Centre when he was informed that there were people who had been assaulted. He denied being a boda boda rider. He denied knowing Everlyne Akoth nor knowing one **Vincent Ochieng**.
34. In cross-examination, he denied being at work on 11/10/2023. He reiterated that he did not know Everlyne Akoth.

35. The parties filed submissions which were highlighted on the 10/12/2025. I have considered the same as well as the evidence on record. The accused were charged with the offence of murder. The onus was on the prosecution to prove the offence beyond reasonable doubt. The ingredients of murder that must be proved by the prosecution to that standard are: -

a) the fact of death;

b) the cause of death;

c) that the death was caused by the wrongful act or omission of the accused; and

d) that the act or omission of the accused was with malice aforethought as defined under section 206 of the Penal Code.

36. I have examined the evidence by the prosecution witnesses. There's no doubt about the deceased's death. The same is confirmed by the testimonies of the prosecution witnesses. **Pw1** testified that he identified the deceased's body prior to the autopsy being carried out, which autopsy he also witnessed. Accordingly, I am satisfied that the prosecution proved this element to the required standard.

37. The second element is the cause of death. **Pw2, Dr. Kiplating** produced a post-mortem report that he carried out on the deceased. He told the Court that

post-mortem was carried out on **18/10/2023**. That on examination, the deceased's head and nervous system had several fractures at the right temporal parietal region, obvious bleeding above the brain covering. That in the brain, there was subdural haematoma on the right side of the brain and the bleeding extended to the frontal region of the brain.

38. He concluded that the cause of death was severe head injury, massive epidural haematoma and subdural haematoma resulting from skull fracture with the use of high force.

39. On the foregoing, I am satisfied that the cause of death was head injury secondary to trauma from assault.

40. The third element is whether, the cause of death was as a result of the wrongful act or omission of the accused. In the present case, none of the prosecution witnesses saw the accused persons kill the deceased. It follows that the evidence linking the accused persons to the offence is circumstantial. The Court must therefore closely examine the evidence on record so as to ascertain whether the recorded evidence satisfies the following requirements: -

a) The circumstances from which an inference of guilt is sought to be drawn. This must be cogently and firmly established;

b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

c) 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.

41. Those principles were set out in the case of GMI vs Republic [2013] eKLR which echoes the *locus classicus* case of R. v. Kipkering Arap Koske & Another, 16 EACA 135.

42. The chain of events leading up to the accused persons arrest came from fourteen prosecution witnesses none of whom witnessed the accused persons committing the offence. From the evidence, the prosecution's case was that the 1st accused was the Chairman of the Awasi boda boda group that instigated the attack on the deceased whereas the 2nd accused was a participant in the attack as a motorcycle he allegedly used was found abandoned at the scene.

43. It is worth noting that none of the prosecution witnesses saw the accused assault the deceased. Even those who were at the scene such as **Pw4**, who was at the scene when the attack on the deceased commenced, **Pw6** who was one of the individuals attacked alongside the deceased and **Pw8** who witnessed the attack up-close could not identify the accused as having participated in the assault.

44. As regards, the 1st accused who was alleged to be a Chairman of the boda bodas who attacked the deceased, the testimony of **Pw7** was that he personally stopped the said Chairman from attacking **Pw6** and took him to the Police Station. When called upon to identify this Chairman, **Pw7** stated that he was not in court amongst the accused persons and further that the man was dark skinned, tall and heavily built.
45. In his defence, the 1st accused denied being a boda boda rider or a Chairman of any boda boda group. He testified that he was arrested by police and informed that he had assaulted someone.
46. In my view, no evidence was led by the prosecution to prove that indeed the 1st accused was the Chairman of the boda boda group that descended on Kopere and attacked the deceased and **Pw6**.
47. As regards the 2nd accused, the prosecution's case against him was that he was a participant in the attack as a motorcycle he allegedly used was found abandoned at the scene. **Pw3**, a resident of Awasi testified that his son hired out her motorcycle registration number **KMGE 786E** to the 2nd accused for **Kshs. 300/-** daily payments. That the money the 2nd accused would send to her son's number **0794266520** or in the alternative to her daughter in law's number **0746862708**. This testimony was corroborated by PC Kinyua, the investigating

officer who produced evidence of the 2nd accused sending money to **Pw3**'s kin as alleged.

48. Juxtaposed against this testimony was the 2nd accused person's defence in which he denied knowing **Pw3** or her son Vincent Ochieng and stating that Ruth was his girlfriend.

49. Despite the fact that there was no evidence of a written agreement between the 2nd accused and the kin of **Pw3** on payments for use of the motorcycle, the Mpesa statements produced by PC Kinyua clearly disprove the 2nd accused's denials.

50. However, there was no evidence adduced to show that the motorcycle was in the possession on the 2nd accused on the material day. The evidence presented by the prosecution did not form a clear chain linking the accused persons to the murder of the deceased.

51. The standard of proof in a criminal case must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on **Article 50(2) (a) of the Constitution** which guarantees individual freedoms under the bill of rights, particularly, the aspect of innocence until proven guilty. This burden of proof rests on the prosecution throughout the trial.

52. This proof need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to defeat the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour, the case is proved beyond reasonable doubt but nothing short of that will suffice.

53. Where there is doubt of any kind in a criminal matter, and evidence which would likely advance the case of the prosecution is not adduced, the effect of such an occurrence would go to the benefit of an accused person. It is a foundational principle that mere suspicion, no matter how strong, is not sufficient to convict an accused person. A criminal conviction requires that the prosecution proves the guilt of the accused beyond any reasonable doubt. See the case of **Woolmington v DPP 1935 A C 462**.

54. Accordingly, I am satisfied that the prosecution failed to prove beyond reasonable doubt that the accused were amongst the mob that attacked the deceased and thereby unlawfully caused the death of the deceased.

55. Being of that view, there arises no need to consider the last element of whether the accused had malice aforethought.

56. In the premises, the Court finds that the prosecution failed to prove the case against the accused and they are acquitted of the charge.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 24th day of **April, 2026**.

A. MABEYA, FCI Arb

JUDGE