



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abonyo v Republic (Criminal Appeal E241 of 2022)  
[2025] KECA 608 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KECA 608 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL E241 OF 2022  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
MARCH 28, 2025**

**BETWEEN**

**PETER ODHIAMBO ABONYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Siaya  
(Aburili, J.) dated 25<sup>th</sup> January, 2021 in HCCRC No. 29 of 2017)*

**JUDGMENT**

1. The appellant, Peter Odhiambo Abonyo, and another, Micheal Otieno Odero (Michael), , were the accused persons in the trial before the High Court in Siaya High Court, Criminal Case No. 29 of 2017. The appellant was the 2<sup>nd</sup> accused while Micheal was the 1<sup>st</sup> accused. They were charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that on 13<sup>th</sup> November, 2017, at around 8.45pm at Bondo Sub-County within Siaya County, together with others not before court, they murdered Rodgers Nalinya (deceased).
2. They both pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the appellant was convicted and sentenced to thirty (30) years imprisonment. Michael was found not guilty of the offence and was acquitted.
3. The appellant was aggrieved by that decision and has lodged the present appeal. In his Memorandum of Appeal, he has raised six grounds of appeal which are that:
  1. The learned trial judge erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.
  2. The learned trial judge misdirected herself by holding that the prosecution proved their case beyond reasonable doubt despite the post mortem report indicating the cause of death of the



deceased to be severe head injury with skull fracture resulting from trauma (mob justice), the evidence on record never implicated the appellant.

3. The learned trial judge misdirected herself by convicting the appellant despite the evaluation of the facts and evidence that placed more than 100 boda boda riders on the scene, some of who were later arrested and released. It is also not clear as to who is the person that inflicted the fatal blow that ultimately caused the death of the deceased.
4. The sentence of 30 years imprisonment meted on the appellant was harsh, cruel and therefore unreasonable as the learned trial judge considered irrelevant factors and did not consider the appellant's mitigation when meting out the sentence.
5. The learned trial judge erred in both law and fact by failing to subject the entire evidence tendered in the course of hearing to an exhaustive scrutiny, therefore arriving at a verdict that occasioned a miscarriage of justice.
6. The learned trial judge exercised her discretion in sentencing capriciously, rendering her decision unsafe and therefore warranting the intervention of this Honourable Court.
  1. Consequently, the appellant prayed that the appeal be allowed, the conviction quashed and the sentence be set aside/varied and/or quashed; and he be set at liberty.
  2. At the trial court, the prosecution called a total of twelve (12) witnesses. The evidence that emerged from the trial was as follows.
  3. The deceased who was a Police Constable at Kogelo Police Station, was conducting an investigation in a particular case of burglary and stealing. On 13<sup>th</sup> November, 2017, he went to Bondo Police Station in the company of three people namely: Caleb Omollo (the complainant in the burglary case), Charles Oduor Omboko (PW4) and Peter Otieno (PW9). They were in a motor vehicle which was being driven by Caleb.. The deceased requested the assistance of an additional police officer from the area to help him arrest a suspect in the case.
  4. PW8, P.C. Linus Omuse, testified that Cpl Julius Kimutai Ngeno (PW10) was assigned by Cpl Abraham Rop to assist the deceased; and afterwards, PW10 left the police station together with the four people named above, to assist the deceased with the arrest.
8. It was Cpl Julius Kimutai Ngeno's (PW10) testimony that Caleb informed him that he had traced the suspect on phone to a place near Bondo Sub-County Mortuary. Caleb explained that he wanted the escort of boda boda riders from the mortuary gate for an agreed fees and he led them there. On reaching the mortuary, Caleb received a phone call and thereafter started chatting with one of the boda boda riders at the mortuary gate. Later, he told PW10 that the suspect was not there and requested him to accompany them to Barkowino stage where the suspect operated from. PW10 took them to the stage and showed them around. After a while, on their way back to the police station, PW10 alighted from the car and left them.
9. PW8 told the court that the deceased, Caleb, Charles and Peter later returned to the police station amid chaos of being chased by boda boda riders. He advised them to wait for the situation to calm down before they could go back to Kogelo. However, at around 8.00pm, the deceased and Charles decided to go to Siaya, whereas Caleb and Peter felt unsafe and remained at the police station.
10. Peter Otieno (PW9) testified that he was Caleb's cousin and confirmed PW8's testimony above. He told the court that in their quest to arrest the suspect, they were attacked by boda boda riders who chased their car and hit it with stones. In the mayhem, Caleb sped off to Bondo Police Station and even



hit another person's car. The huge crowd followed them to the police station and remained at the gate baying for their blood. A Senior Police Officer went out and tried to calm them down but they told him that they wanted Caleb and not the deceased. The police officer then requested them to appoint a representative to enter the police station and negotiate how they wanted the situation to be handled. PW9 identified Michael as the person who was appointed by the crowd as their representative, and referred to him as Otieno. Thereafter, the crowd dispersed and the deceased and Charles were escorted to the bus stage as they wanted to leave.

11. Charles Oduor Omboko, PW4, testified that when they left the police station at around 8.45pm, the deceased stopped a private car at a roadblock and asked for a lift to Siaya. PW4 sat at the front while the deceased sat at the rear passenger seat. On their way, as they approached Bondo Cereals Board, they saw many people standing on the road. The crowd had installed a make-shift road block on the road. Some people were on their motorcycles while others were on foot.
12. The driver stopped the car and put on full lights. Additionally, the road was well illuminated with bright security and street lights all over. At that moment, one person from the crowd went in front of the car and shouted, "ako kwa hii gari! toka toka" – ("he is in this car! come out, come out"). The deceased, then, got out of the car. As soon as he did that, the crowd attacked him and he started running. The crowd gave chase. On sensing danger, the driver drove off towards Siaya Police Station where he reported about the incident.
13. PW4 identified the person who shouted in front of the car as the appellant and said that he later singled him out at an identification parade that was conducted at Siaya Police Station. It was his testimony that he did not know the appellant and Michael prior to the incident. He further testified that he also saw Michael in front of the car, but he was never called to identify him at the identification parade.
14. During cross examination by Mr. Odongo, Michael's advocate, PW4 stated that incident occurred just before 9.00pm and there were about one hundred boda boda riders on the road who were saying, "stop, he is in the vehicle". He also said that the appellant was in the frontline and went in front of the car.
15. During cross examination by Mr. Ooro, advocate for the appellant, PW4 reiterated that when the car stopped, he saw the appellant who went in front of the car as he placed his hands on the windscreen. He further said that even though there were many people, the appellant was very close and he saw him very well using the bright security lights in the area. He also said that he did not see the people who beat up the deceased as he ran away to save his life.
16. Cpl Abraham Kibet, PW5, reiterated the entire testimony of PW8 above and added that he escorted the deceased and PW4 to the stage whereby they stopped a private car and asked for a lift.  
  
However, a while later, he was informed that a police officer had been assaulted and when he went to the scene together with his colleagues who included PW8 and PW10, they found the deceased lying beside the road having been badly injured on the head, neck, chest and back.
17. Cpl Douglas Wamalwa, a crime scene officer was PW6. He testified that on 13<sup>th</sup> November, 2017, at around 8.50pm, he was called by PW8, who requested his company to a murder scene at Bondo. He informed the court that by the time he arrived in Bondo, the deceased's body had already been taken to the mortuary. He took photos of the deceased's body which he produced as exhibits.
18. Dorosila Apiyo Nalianya (PW1), the deceased's mother and Pamela Makonjo Munyendo (PW2), the deceased's wife, testified that on 13<sup>th</sup> November, 2017, at around 8.45pm, they received information that the deceased had been killed in Siaya. They were later contacted by a police officer and asked to identify the deceased's body before the postmortem examination was conducted.



19. Jacklyne Awino Adiwa Nalianya (PW3) the deceased's wife, testified that on 13<sup>th</sup> November, 2017, he called the deceased at 7.00pm and he informed her that he was in a noisy place and would call her later. But when he did not call her as promised, she again called him at 9.00pm to no avail. The following day at 11.00am, her brother-in-law, Bernard Nalianya, informed her that the deceased had been attacked and seriously injured in Bondo. She was later contacted by the OCS Siaya and escorted to the mortuary to identify the body of the deceased before the postmortem examination was conducted.
20. Dr. Willis Ochieng Odhoch, a former medical officer at Bondo Sub-County Hospital was PW7. He informed the court that he was the one who prepared the postmortem report of the deceased on 15<sup>th</sup> November, 2017. The external examination showed that the deceased had eight bruises on the head with a frontal wound measuring 8.5cm and a cut wound on the head measuring 5.6cm; and five bruises on the anterior chest. Internal examination showed that the deceased had multiple rib fractures with a collection of blood in the chest cavity; multiple adhesions suggestive of chronic chest infection; ruptured spleen; and extreme skull fractures which caused the brain to have increased intracranial pressure. The doctor concluded that the cause of death was asphyxia resulting from frail chest syndrome, severe head injury, and hypovolemic shock due to excessive blood loss. In short, the injuries sustained caused his immediate death.
21. PW8, who was also the investigation officer in this case, testified that he found out that Michael had called Caleb ten times and they had hatched a plan. Michael's phone number was 0700531555 whereas Caleb's phone number was 0722866821. He got the call data records and upon interrogating Michael, he informed him that he was to assist the deceased to arrest one Peter Abonyo, who had been involved in a case of burglary. He recovered the phone which Michael used to communicate with Caleb, preserved it as an exhibit and produced it in court). He also produced the Safaricom call log data report for Michael.
22. PW 8 further testified that the appellant was arrested later and identified at an identification parade.
23. I.P Ayub Ghati was PW11. It was his testimony that he conducted the identification parade on 3<sup>rd</sup> December, 2017, in which PW4 positively identified the appellant who was in a lineup of eight (8) people. He told the court that he asked the appellant for his consent to appear in the parade, which he freely gave. He also asked him where he wanted to stand in the lineup and he chose to be in between position four (4) and five (5). Lastly, he asked the appellant if he desired to have a friend or advocate to be present but he declined. After the parade, he asked the appellant whether he was satisfied with the process and he admitted that he was satisfied. Thereafter, he signed the form which he produced as an exhibit.
24. During cross examination by Mr. Ooro, advocate for the appellant, PW11 denied that the appellant was made to lineup in the parade with handcuffs.
25. The last witness was James Makobi, a law enforcement liaison officer who worked at Safaricom Limited. It was his testimony that he received a call data request letter from DCIO Bondo, for mobile number 0700531555 for the period between 1<sup>st</sup> November, 2017, to 14<sup>th</sup> November, 2017. He informed the court that the mobile number was registered with Safaricom in the name of Michael Odero of ID number 208xxxx8. The request was processed on 15<sup>th</sup> November, 2017, and sent to the investigation officer. He produced the call data as P. Exhibit 6; the electronic certificate evidence dated 14/2/2020 as P. Exhibit 7; and the request letter dated 14/11/2017 as P. Exhibit 8.
26. When he was placed on his defence, Michael (DW1), gave sworn evidence and called no witnesses. He denied the charge and stated that on 13<sup>th</sup> November, 2017, at about 9.00 pm, he was at his home with his family. The following day he went to work at Seme and at around 1.00pm, PW8 called and



informed him that there was someone else who was laying claim to his motorcycle which had been lost and found. As such, PW8 asked him to return it to the police station for verification. He did as he had been instructed and upon arrival at the police station, he explained how he lost his motorcycle and later recovered it. Instead, PW8 handcuffed him and put him under police custody; and a few days later, he was charged with the offence of murder. He denied knowing Peter Otieno (PW9) and said that he did not know which Otieno he was referring to. He also said that he was not subjected to an identification parade.

27. During cross examination, he stated that he has never been a motorcycle rider and that on 13<sup>th</sup> November, 2017, he did not have his motorcycle as he had sold it to one Lazarus.
28. He admitted that he knew the deceased as he had called him on 2<sup>nd</sup> October, 2017, concerning his (DW1's) cousin who had been arrested for burglary; and that they even met and conversed at Siaya Police Station. Afterwards, on 4<sup>th</sup> October, 2017, he again saw the deceased at Siaya Law Courts when he went to process his cousin's bond.
29. Lastly, he denied being at the scene of crime on 13<sup>th</sup> November, 2017, at around 8.45pm and shouting that the deceased was in the car; thus attracting people as a result of which the deceased ended up being killed.
30. The appellant (DW2) also gave sworn evidence and called no witnesses. He denied the charge and also denied being a boda boda rider. He informed the court that on 13<sup>th</sup> November, 2017, he was at work in Bukhungu stadium from morning till 5.00pm when he returned to his rental house in Kakamega where he lived alone. On 25<sup>th</sup> November, 2017, his brother called and informed him that police officers from Bondo Police Station were at his home looking for one Peter Odongo Abonyo, in connection with a murder case. The following morning, he went to Kakamega Police Station and reported what his brother had told him. The police informed him that they would call Bondo Police Station. He returned to Kakamega Police Station on 26<sup>th</sup> November, 2017, whereupon he was detained by PW8 who asked him about Peter Odongo Abonyo and he denied knowing him.
31. He was then taken to Siaya Police Station where he was detained for about a week before being subjected to an identification parade whilst in handcuffs. He told the court that he did not know the person who identified him and he was also not satisfied with the identification parade. The following day, he was arraigned in court.
32. Lastly, he denied having any other criminal case in court and said that he was not to be arrested by the deceased.
33. During cross examination, he stated that he did not know the names of the people he worked with at Bukhungu stadium. He also denied knowing the deceased and said that the person who identified him, touched him during the identification parade. He told the court that according to him, his identification was a wrong identification and he informed his advocate as much.
34. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Mr. Ogenga, appeared for the appellant and learned counsel, Mr. Okango appeared for the respondent.
35. Counsel for the appellant, Mr. Ogenga, narrowed down the issues of determination to two, which are that:
  1. The prosecution did not prove their case beyond reasonable doubt as required.



2. The learned judge did not consider the appellant’s mitigation and therefore the sentence meted out was unduly harsh and excessive.
36. Respecting the first argument, counsel argued that none of the prosecution witnesses testified that they saw the appellant armed with a weapon which was used to inflict the injuries that were sustained by the deceased; nor did the prosecution produce such weapon before the trial court. He contended that it was only PW4 who testified that he heard the appellant tell the deceased to get out of the car. In this regard, counsel opined that it was a travesty of justice that the appellant was convicted without any actual evidence that the appellant actually caused harm (actus reus) which is a required element in a case of murder.
37. He relied on this Court’s decision in Peter Gachoki Njuki, Anthony Mbogo Njuki & Obed Kariuki Muthike vs. Republic [2002] eKLR, wherein the court quashed a murder conviction on the ground that it was a case of mob justice and the prosecution had failed to present evidence demonstrating who had dealt the final and fatal blow on the deceased.
38. Lastly, counsel contended that the learned trial judge did not consider the appellant’s mitigation that he was a first offender and was the provider for his deceased brother’s children who suffered from sickle cell anemia. Therefore, given the circumstances of the offence, the thirty (30) year sentence that was meted out was unduly harsh and excessive. In this regard, he prayed that the appeal be allowed and relied on the Supreme Court case of Francis Karioko Muruatetu & Another vs. Republic [2021] eKLR and the sentencing parameters outlined by the Supreme Court therein; and urged the Court to review downwards the thirty (30) year imprisonment sentence imposed on him.
39. Opposing the appeal, counsel for the State submitted that the prosecution proved their case to the required standard as the three elements of murder were proved.
40. First, counsel submitted that the death and cause of death of the deceased was not in dispute as it was proved by the evidence of PW1, PW2, PW3 and PW6. Hence, there was cogent evidence that the deceased succumbed to injuries that were inflicted by the mob that stopped the car he was in and pursued him when he fled.
41. Second, counsel submitted that in determining whether the appellant caused the death of the deceased, PW4 testified that he sat in the front seat with the driver and saw the appellant who was part of the mob that stopped the car, shouting “toka toka” in front of the car. He further submitted that PW4 testified that he saw the appellant using security lights that illuminated the area; which evidence was not controverted and neither has the same been challenged in this appeal.
42. Counsel also submitted that the appellant was placed at the scene by PW4 who identified him at an identification parade; which evidence was not controverted during trial. In the result, the trial court correctly invoked and applied the doctrine of common intent to convict the appellant despite the fact that no one saw him assault the deceased.
43. Additionally, counsel urged that the jurisprudence in the case of Peter Gachoki & 2 Others vs. Republic (supra), cited by the appellant has since evolved and that contemporary jurisprudence is evident in the case of Ali Salim Bahati & Another vs. Republic [2019] eKLR, wherein this Court stated that while in a case of mob justice it is difficult to pin point which blow was the fatal one in a victim’s death, the doctrine of common intent under section 21 of the *Penal Code* makes all participants in a mob violence case equally guilty of the offence of murder where the victim dies.
44. Lastly on sentence, counsel submitted that contrary to the appellant’s allegation that his mitigation was not considered, the record shows that the trial court considered his mitigation and even called for a



presentencing report and victim impact statement. He also submitted that in sentencing the appellant, the trial court operated within the guidelines outlined in *Francis Karioko Muruatetu & Another vs. Republic* (supra). Furthermore, counsel contended that the maximum statutory penalty for murder is the death penalty. Consequently, given that the court had the option of meting out a death sentence, the thirty (30) year sentence meted upon the appellant cannot be said to be harsh and/or excessive.

45. This being a first appeal, this Court is under a duty to re-evaluate the evidence, assess and weigh it as a whole, in order to arrive at its own findings and independent conclusion. In doing so, the Court has to take into consideration that it neither saw nor heard the witnesses testify. This duty was well set out by the predecessor of this Court in *Okeno -vs- Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala*

- v. *R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

46. Having carefully considered the record of appeal, the grounds on which it is anchored, the respective written and oral submissions and the law, the main issue that falls for determination in this appeal is whether the evidence adduced against the appellant was sufficient to prove the ingredients of the offence of murder; and, in particular, whether the doctrine of common intention sufficiently connects the appellant to the murder of the deceased; and whether the sentence imposed against them was harsh and excessive.

47. Section 203 of the *Penal Code* provides for the offence of murder as follows:

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

48. Thus, to prove the offence of murder, the prosecution should establish the following three ingredients in order to secure a conviction: First, that the death of the deceased occurred; second, that the death was caused by an unlawful act of commission or omission by the accused, and third, that the accused had malice aforethought in committing the said act or commission.

49. The ingredients of murder were identified by this Court in *Anthony Ndegwa Ngari v Republic* [2014] eKLR as follows:

“...that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought.”

See also *Joseph Kimani Njau v Republic* [2014] eKLR.

50. There is no substantial controversy whether the death of the deceased occurred or not in the present case. PW1 (the deceased's mother); PW2 (the deceased's wife); and PW3 (the deceased's other wife) all testified that they went to the mortuary and identified the deceased's body before the postmortem examination was conducted. Dr. Odhoch, who performed the autopsy, concluded that that the cause



of death was asphyxia resulting from frail chest syndrome, severe head injury, and hypovolemic shock due to excessive blood loss. In short, the injuries sustained caused his immediate death. The first element of the offence of murder was, therefore, easily established.

51. The real issue in the present case is whether there was sufficient evidence to prove beyond reasonable doubt that the appellant was one of the persons who caused the unlawful action that caused the death of the deceased; and that in doing so, he had malice aforethought.
52. The appellant has attacked the prosecution evidence in this regard in two ways. First, he contests the identification evidence and claims that the identification parade was done in a manner that violated the rules since he was presented at the identification parade in handcuffs. Second, the appellant argues that there was insufficient evidence to link him to the murder even if, *arguendo*, he is placed at the scene. This is because, he says, there is no evidence at all showing him carrying any weapon of the kind that could cause the kind of injuries indicated in the postmortem report; and, further, there is no evidence at all to show that he inflicted the fatal blow that killed the deceased. In making these arguments, as aforesaid, the appellant heavily relies on this Court's decision in *Peter Gachoki & 2 Others vs. Republic* (*supra*).
53. We will begin with a re-evaluation of the identification evidence. The pertinent testimony in this regard is that of PW4. The witness was categorical that when the vehicle in which he and the deceased were in got to the road block enacted by the mob, he was seated on the front passenger seat. He explained that the place was illuminated with bright security lights. Moreover, the driver had put the vehicle lights on. When the vehicle stopped, he narrated that he clearly saw the appellant, among others, get to the front of the vehicle. He was close enough that he put his hands on the windscreen of the motor vehicle as he shouted for the deceased to get out of the motor vehicle. Given their proximity; the time of their interaction; and the intensity of the lights, the witness had no doubt that he properly saw the person and could so identify him at an identification parade. The Police did, in fact, arrange such an identification parade; and the witness positively identified the appellant as one of the assailants he saw on that day; and, in particular, as the one he remembers shouting that the deceased should get out of the motor vehicle.
54. The appellant contests the regularity of the identification parade – arguing that it was suggestive because he was placed there while in handcuffs. We note that the High Court considered this objection and rendered itself thus:

“PW11 was firm in his testimony that he carried out the identification parade in accordance with the law and that the 2<sup>nd</sup> accused was positively identified. He further stated that he inquired from the 2<sup>nd</sup> accused as to whether he wanted a friend or advocate to be present and he said no and further that at the end of the parade he inquired from the 2<sup>nd</sup> accused if he was satisfied with the process to which the 2<sup>nd</sup> accused acknowledged even signing the form on 03/12/2017. PW11 reiterated in cross-examination that the 2<sup>nd</sup> accused was not in handcuffs during the parade.

I am persuaded beyond reasonable doubt that the prosecution's evidence even in cross-examination by the defence.”

55. Like the High Court Judge, we, too, are satisfied that the identification parade was conducted in strict compliance with the laws and regulations and that the appellant's complaint that he was handcuffed during the parade is a convenient afterthought. We do so because we have noted that the appellant voluntarily signed the identification parade form and never contested the authenticity of his signature. If he was, in fact, dissatisfied with the process, he would not have so signed. Secondly, we have also



looked at the trial court record and the manner in which PW11 testified and was cross-examined and we are satisfied that he came across as not only forthright and truthful, but his testimony was completely unshaken in cross-examination. Thus, we have no reason whatsoever to depart from the findings of the learned Judge who heard, saw and believed the witness.

56. The bottom line is that upon proper re-evaluation of the evidence, we are satisfied that the identification evidence in this case was watertight: PW4 properly identified the appellant as one of the assailants at the roadblock; the one who ordered the deceased out of the vehicle.
57. This takes us to the second pertinent issue raised by the appellant. It is that he is entitled to an acquittal because there was no evidence showing that he carried any weapon of the kind that could cause the injuries found on the deceased; and that there was no evidence showing that he inflicted the fatal blow.
58. On this, we must agree with the respondent that to the extent that the Peter Gachoki & 2 Others vs. Republic (supra) case implies that in cases of mob violence the prosecution must demonstrate that the person charged is the one who inflicted the fatal blow, it is no longer good law.
59. In Kenyan jurisprudence, the doctrine of common intention is applied to hold individuals criminally liable when they act together with a shared purpose that leads to the commission of an offense. This Court has addressed this doctrine in various cases, including those involving mob violence like the present one. This doctrine is statutorily grounded in section 21 of the *Penal Code* which provides:

“when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

60. This doctrine has been applied in cases involving mob violence such as the one in this appeal in a long line of cases in this Court. They include, for example, Ali Salim Bahati & Another Republic [2019] eKLR. In that case, the Court remarked that:

We must say that it is difficult in the case of mob justice, such as in this case, to pin point that a blow or assault by a particular person in the group led to a victim’s death. It is in such circumstances that the provisions of Section 21 of the *Penal Code* come into play.....

See Eunice Musenya Ndui vs. R [2011] eKLR.

The moment that the 2<sup>nd</sup> appellant implicated the deceased as one of the perpetrators who robbed him to his fellow ‘boda boda’ operators as opposed to the police it was discernable that he did not intend to let the law take its course. Thereafter, the conduct of the said ‘boda boda’ operators who included the 1<sup>st</sup> appellant, of jointly going for the deceased in his home others[1943] 10EACA 51 applies in this case: 3 & Kirya Yenka S/o Tabula approval the following excerpt with vs. quoted of Rex

“To constitute a common intention to prosecute an unlawful purpose...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”[Emphasis added].



61. Similarly, in a recent decision, this bench, in *Ombati & 3 Others v Republic* [2025] KECA 469 (KLR) stated:

“The evidence implicating the four appellants show that they were all acting in concert in attacking the deceased. They were no doubt pursuing an unlawful purpose of assaulting the deceased of which death was a probable consequence. In the circumstances, the appellants must all be deemed to have had the common intention of committing the offence of murder which arose from their common purpose of attacking the deceased. From the foregoing, all the ingredients of the offence of murder were proved against each of the appellants to the required standard. Their conviction was, therefore, safe.”

62. In the present case, there was no obligation on the prosecution to demonstrate that it was the appellant who inflicted the fatal blow. Indeed, there was no need to even demonstrate that he inflicted any blow at all. The requirement was to demonstrate that he was acting in concert with a group of others and that they were pursuing a specific unlawful purpose which led to the commission of the offence. As the record amply demonstrates, the mob that accosted the deceased at the roadblock of which the appellant was a participant was acting in concert; and they were pursuing an unlawful purpose. The unlawful purpose was to eject and, at least, assault the deceased for perceived wrongful targeting of a boda boda rider with arrest. In the present case, therefore, the doctrine of common intention was appropriately applied to link the appellant with the ultimate crime committed which was murder.

63. Turning to the final element of the offence of murder, that is, malice aforethought, we simply point out that the vicious attack on the deceased demonstrates a clear indication that the assailants intended the consequences of their actions, that is, either grievous harm to the person of the deceased or his death. As our case law has now established, malice aforethought is normally determined by the weapon used, the manner in which it was used, the part of the body targeted, the nature of injuries inflicted, and the conduct of the accused before, during and after the incident, and so forth. (See *Republic vs. Ismail Hussein Ibrahim* [2018] eKLR).

64. From the evidence on record, the parts of the body targeted, the nature of the injuries inflicted and the conduct of the mob and the appellant before and during the incident, clearly show that their intention was to cause grievous bodily harm or kill the deceased. The intensity of the injuries sustained by the deceased and parts of the body targeted, established sufficient malice aforethought in this case.

65. Lastly on sentence, contrary to the appellant’s allegation that his mitigation was not considered, the record shows that the learned trial judge considered the appellant’s mitigation and even called for a presentence report and victim impact statements, before sentencing the appellant. She, then, imposed a sentence of thirty (30) years imprisonment. Given the circumstances of this case – the brutal murder of a Police Officer while on duty - we find that the learned trial judge properly exercised her discretion in imposing the sentence on the appellant and we have no reason to interfere with it.

66. The upshot is that we are satisfied that the conviction of the appellant was safe and there is no ground upon which we can interfere with the sentence imposed. Consequently, we find that the appeal against both conviction and sentence has no merit. We hereby dismiss it in its entirety.

67. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF MARCH, 2025.**

**HANNAH OKWENGU**

.....



**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Deputy Registrar

