



REPUBLIC OF KENYA



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**State v Oliewo (Criminal Case E028 of 2021)
[2025] KEHC 919 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E028 OF 2021
RE ABURILI, J
JANUARY 31, 2025**

BETWEEN

STATE PROSECUTION

AND

JOEL JUMA OLIEWO ACCUSED

JUDGMENT

1. The accused person Joel Juma Oliewo is charged with the of the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence as detailed in the amended information dated 19th March 2024 are that on the 7th day of October 2021 at around 0030hrs at Kadawa village, Upper Kadongo sub-location in Kisumu West sub-county within Kisumu County, he murdered Erick Ochieng Atito.
2. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial.
3. The prosecution called a total of eleven (11) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

4. PW1 Nicholas Odongo, the Assistant Chief, Kaila sub-location testified that the deceased was a resident of his area and that the accused was his colleague. He testified that on the 7th October 2021 at about 11.30pm, the accused called him asking if he knew the deceased to which he answered in the affirmative. It was his testimony that the accused informed him that the deceased had attempted to rape a certain woman and so he, PW1, called Josephat, the deceased's brother and informed him. He testified that he also called the Chief who informed that he had spoken to Joseph and Eric. PW1 testified that Josephat later called him saying that the police had arrived at the scene.



5. PW2 Alfred Oloo Juma, a resident of Kisumu West, Upper Kadongo Location, Kadongo Sub-location and Kadawa village testified that he knew the deceased whom he grew up with and was his age mate and further that he also knew the accused who is his relative and was the Assistant Chief of Kodawa Sublocation.
6. PW2 testified that on the 7th October 2021 at around 9pm, he was at his house when he heard a lady screaming so he got out of his house armed with a rungu and solar lamp and headed towards his main gate where the sound was coming from. He testified that he also heard the voice of a man who also raised an alarm in Dholuo, showing that something was not right. It was his testimony that he reached near bushes then heard movements of someone running away and told him stop and the individual recognized his voice and stopped.
7. PW2 testified that the individual was Erick Atito, the deceased, and that he had a long trouser on his shoulder carrying it and on inquiry as to what the problem was, Erick sought his help as there were people following him from behind. He testified that he cooled him down and the people came running and found him standing with Eric. PW1 testified that the people informed him that Eric Atito wanted to rape a certain market lady and to stab her with a knife which allegations Eric denied stating that he and the lady had a relationship and knew each other.
8. It was his testimony that the lady identified herself as Natasha and on his instructions, she called Assistant Chief but she had no credit so Ogello, her son called Assistant Chief. He testified that as they were in a maize plantation, they headed to the road to wait for the Assistant Chief who arrived and PW2 handed the deceased over to the Assistant Chief. PW2 testified that both the deceased and the public confirmed that they had not assaulted the deceased.
9. PW2 testified that the Assistant Chief tied the deceased's hands, took a whip and started whipping him prompting PW2 to inform the Assistant Chief that what he was doing was not right or lawful as he was whipping Eric all over the body. He testified that the Assistant Chief then turned on him and whipped him on his left shoulder warning him not to teach him how to do his job. It was his testimony that the Assistant Chief then picked a rungu from the people standing there and hit PW2 with it using the end part of it stating that PW2 was defending bad people because they were his relatives, before turning on the deceased and using the same rungu to hit the deceased on the inner part of the leg prompting the deceased to ask the Assistant Chief why he was killing him.
10. PW2 testified that the accused then took his phone and called Eric's family informing them that Eric had been caught raping a woman and when he was asked whether Eric had been assaulted by the public, the accused said no and he was told to take them to the police station. It was his testimony that Corporal Collins Standa came and directed the accused to untie Eric and directed him to go with them but Erick could not even stand or walk and was helped by Ruben Paul Ogada and Boyi his brother only for Eric to move 3 steps then collapse. PW2 testified that the following day, a report reached them that Eric had died while at Holo Police Station. He identified the accused as the Assistant Chief whom he saw assault the deceased.
11. In cross-examination, PW2 admitted that when the deceased reached where he was, he had injuries though he could not know whether he had suffered internal injuries. He further testified that the people who responded to the alarm raised by the lady had crude weapons.
12. In re-examination, PW2 testified that when he met Eric, he had some bruises on the knees, that he was running but he had not seen him falling down.
13. PW3 Pamela Akinyi a businesswoman from Holo testified that she knew both the accused and the deceased. She testified that on the 7th October 2021 at about 9pm she was from the market of Holo



- on her way home in the company of her friend Carolyne with whom they noticed that someone was trailing them from behind. She testified that when they reached Carolyne's home gate, they stopped and Carolyne entered her homestead as the man who was following them passed and went ahead.
14. PW3 testified that as she proceeded home, the man grabbed her by the shoulder from behind causing her to fall down after which the man remarked that he had been sent to come and rape her. It was her testimony that the person held her neck and so she could not scream loudly. It was her testimony that she hit him with her head so he moved aside but that he removed a knife and threatened to stab her forcing her to start running and screaming as he followed her. She testified that she had a torch in her hand so she saw his face clearly.
 15. PW3 testified that people started coming in response to her screams and held the individual forcing him to sit down. She testified that the clan elder and the Assistant Chief also came to the scene. It was her testimony that her assailant had injuries on his legs but nobody assaulted him. She testified that despite the assailant insisted that she knew him. She further testified that the Assistant Chief took a rubber band and tied her attacker's hands and legs then started whipping the attacker all over his body.
 16. PW3 corroborated PW2's testimonies on how the accused person reached out to the attacker's family and further that she heard Eric tell his brother to tell the Assistant Chief not to assault him but take him to the police station. It was her testimony that apart from the whip, the Assistant Chief was also using another rungu club to hit the deceased on the legs. She testified that they were later taken to the police station but Eric was very exhausted and had no strength although he could talk. It was her testimony that they left Eric at the police station and that the following day, the Assistant Chief called them and informed them that Eric had died. In cross-examination, PW3 testified that she found one Jakom who urged people to stop beating up the said suspect. In re-examination, PW3 testified that she did not find people assaulting Eric.
 17. PW4 Fanuel Okeyo Oloo testified that he knew the accused who was their area Assistant Chief but did not know the deceased. He testified that on the 7th October 2021, he was unwell so he slept early only to be awoken by his wife who informed him that something was happening downstream. He testified that he got out and observed people running downwards and making noises so he told his wife to go and check and bring him a report.
 18. It was his testimony that he then received a call from the Assistant Chief who asked him if he had slept and if not to go and check on what was happening so he got out and went to where a person who was sat down surrounded by many people shouting and laughing. She testified that the Assistant Chief came and questioned the suspect who said the lady was his girlfriend who wanted more money from him and when he said he had no money, she screamed although the lady stated that she did not know the suspect.
 19. PW4 testified that the Assistant Chief sent him to pick a rubber band from his motorcycle and directed him to tie the suspect after which Joel, the Assistant Chief, then started whipping the suspect all over the body while the suspect was sat on the ground. He testified that another young man dissuaded the Assistant Chief from assaulting the suspect telling him not to take the law in his hands but this made the Assistant Chief furious and he warned the young man not to teach him his job. It was his testimony that the rubber band came off the suspect so the Assistant Chief tied him again and continued beating him and even took a rungu and beat him on the feet.
 20. PW4 testified that a phone call came in and the Assistant Chief put it on loud speaker and gave the suspect to speak to his brother who was on the other end of the line. He testified that the suspect told his brother to tell the Assistant Chief to take him to the police and not to beat him. He testified that police officers came and one asked the Assistant Chief if the suspect was assaulted by the public and the



- Assistant Chief said that the suspect was not assaulted so they tied him with strings but on telling him to stand, he could not so the Assistant Chief and another pushed him onto the motorcycle of Assistant Chief and took him to the police station. He testified that after 2 days he heard of the suspect's demise.
21. In cross-examination, PW4 testified that he found the suspect surrounded by over fifty people who were carrying weapons. He testified that the Assistant Chief used a nyaunyo whip to beat the suspect.
 22. PW5 Jacob Ayuoyo testified that on the 7th October 2021 at around 9pm, he heard noises from outside with dogs barking and got out and saw people with torches walking towards the upper part. It was his testimony that his wife, Pamela Akinyi (PW 3), had not returned home so he followed the people to find out what was happening and after about 150 metres found many people surrounding Eric. He testified that he saw the clan elder, a lady and she was told by the people present to call the Assistant Chief after which Eric was led to near the road.
 23. PW5 testified that the Area Assistant Chief came after about 20 minutes on a motorcycle and found people and Eric. It was his testimony that the Assistant Chief interrogated Eric who was non-responsive so he went to his motorcycle, took rubber bands and gave Fanuel to tie the suspect Eric. He testified that the Assistant Chief started assaulting and whipping Eric all over the body and he even stepped on the suspect's abdomen when Eric resisted the whippings. It was his testimony that the assistant chief even ordered Eric to remove his shoes then proceeded to whip his feet.
 24. PW5 testified that the beatings took place for over 30 minutes and that the Assistant Chief called the suspect's Assistant Chief as well as the suspect's brother and informed them what had happened. He testified that Eric's brother asked if Eric was beaten up by members of the public which the Assistant Chief denied and that even after that, the Assistant Chief continued beating Eric. It was his testimony that their market chairman told the Assistant Chief to stop assaulting Eric but the Assistant Chief told him off saying he- the accused herein knew his job and that later on, the Assistant Chief called the police who came with a string (rope) which was used to tie the suspect after removing rubber bands.
 25. It was his testimony that Eric was placed on the motorcycle and taken to the police station. He testified that they found Eric lying down and he could not talk. He further testified that the following day, he received information that the suspect's condition was bad and he was taken to hospital but later at 3am, he was informed that Eric died. PW5 testified that when he initially saw Eric, he had no injuries on him and that he never saw anyone save for the Assistant Chief assault Eric.
 26. In cross-examination, PW5 admitted that he could not tell if the deceased was assaulted earlier prior to his arrival but that he had no injuries. He further testified that he did not see the crowd of people holding weapons but that each one of them had a torch.
 27. PW6 No. 62444 Corporal Eliud Shitanda stationed at Daraja Mbili Police Post and formerly of Holo Police Station testified that on the 8th October 2021, at about 0010 hours, he was at the Station when he received a call from Joel Juma Oliewo, (accused herein), the Assistant Chief of Upper Kadongo Sub-location within their jurisdiction, inquiring from if he was within the station area as there were people who had cornered a person suspected of attempting to rape a lady. It was his testimony that he informed the Assistant Chief that he was not the in-charge of the station and that he, the Assistant Chief, knew Sergeant Okado the In-charge.
 28. PW6 testified that he called Sergeant Okado and relayed to him the information then instructed him to go and verify the information. He testified that he proceeded to the scene in the company of PC (W) Neema where they found people armed with sticks and pangas surrounding a man, Eric Atito, who was sitting on the ground. He testified that the accused herein was also present. It was his testimony



- that he saw the suspect who was injured on his legs and asked him to stand but he was not able to though he moved a few steps before sitting again.
29. It was his testimony that a motorcyclist offered to ferry him and the injured to their Police Station but that he had less fuel so he took them to Holo Police Station where the injured never spoke to them but lay down on his side. He testified that later on, the OCS Maseno Police Station came and ferried the dead man by that time he had died, to JOOTRH mortuary.
 30. In cross-examination, PW6 reiterated that the crowd at the scene was armed with rungas and pangas.
 31. PW7 No. 229542 PC Geoffrey Machogu based at Kojola Police Post performing general duties testified that previously, he was at Holo Police Post. He testified that on the 8th October 2021 in the evening at around 6pm, he took over duties from his colleague and while at the report office with PC Joseph Ondego, at around 1.30am, Corporal Eliud Shitanda, PC (W) Pauline Neema and the Area Assistant Chief Juma Oliewo came with 2 people one male, one female on board a motorcycle. PW7 testified that one person was badly beaten and that they entered the office and a few minutes later, his commander Corporal Shitanda asked for an OB which he gave and later he called for the in-charge Sergeant Okado to come to the office.
 32. PW7 testified that at around 2.00am, Sergeant Okado arrived and went to check on the injured person and that later, a motor vehicle came from Maseno Police Station and took the injured to hospital.
 33. PW8 Paul Reuben Ogada, a motorcycle rider at Holo market testified that on the 7th October 2021 at 11pm, he heard noises as he was going back home in the village so he proceeded to where the noises were emanating from and found a man who was sat down surrounded by people who told him that the man was a rape suspect. He testified that they were told to move towards the road where the man was searched and found with 2 Trust condoms and an empty wallet.
 34. PW8 testified that the Assistant Chief was called and he arrived after 30 minutes and the market chairman questioned the man whether he had been beaten to which the injured man said no but rather that he had fallen while running at night and injured his legs as he could not see well. He testified that the Assistant Chief took a whip and started caning the man to which the market chairman protested telling the Assistant Chief not to cane the man as that was not correct.
 35. It was his testimony that the Assistant Chief was harsh at the market chairman and further that he gave him the keys to his government issued motorcycle and directed him to go and bring police officers from Holo Police Station which he did. He testified that on his return to the scene, the Assistant Chief ordered him to take the victim and the police officers to the police station which he did but that the victim was unable to move and needed to be helped onto and off the motorcycle. PW8 testified that he never saw the crowd assault the man but that he only saw Joel Juma Oliewo cane the man using his 'nyaunyo' whip after which the Assistant Chief told them that he was talking to the brother to the man telling him that the man was disturbing people with rape.
 36. In cross-examination, PW8 testified that there were about 30 people at the scene who were armed with sticks and others with rungas though he did not see pangas.
 37. In re-examination, PW8 testified that when the Assistant Chief arrived at the scene, he asked the victim whether he had been beaten by the crowd to which the victim replied in the negative.
 38. PW9 Dr. Dickson Muchana who carried out an autopsy on the body of the deceased testified that he carried out the autopsy on the body of Eric Ochieng Atito at JOOTRH Mortuary on 13th October 2021 with the body being identified by two persons, Milton and Kennedy.



39. It was his testimony that the body was of an African Male about 33 years, of good nutrition, 180cm long, embalmed, 5 days since date of death. He testified that the nails, lips, tongue were dark blue in colour, there were widespread bruises and brazes involving most of all the four limbs – upper and lower limbs and the upper half of the back and leg sole. He testified that some were linear suggesting whipping; that the deceased was of good health and there was no evidence of recent medical interaction.
40. Dr. Muchana testified that internally, there was no bleeding in the stomach and that the kidneys were darkened. He testified that there was a blood clot on the right cheek below the skin and that the brain was swollen but no fracture of the skull.
41. Dr. Muchana testified that he formed the opinion that the cause of death was circulatory collapse secondary to extensive soft tissue injuries following assault. He testified that he opined that on the trunk there was sparing (no injury), defensive injuries and that there was use of blunt object including whip or cane. He produced the post-mortem report as PExh. 1.
42. In cross-examination, Dr. Muchana testified that the injuries could have been caused by sticks and canes, that it was likely that the injuries were caused by several not a single blunt object and that the injuries could have been caused by a group not one person.
43. In re-examination, Dr. Muchana testified that the linear injuries were suggestive of whip and cane.
44. PW10, Godwin Khamala Waliama, a Government Analyst working at Kisumu Government Chemist Laboratories testified that on the 18th October 2021, they received via exhibit memo, 3 items submitted for DNA examination of whether the items had any biological evidential material. He testified that the exhibits were:
 - a. Brown/cream leather whip wrapped in a khaki paper ‘X’.
 - b. Finger nail cuttings of Eric Ochieng Atito in a brown envelop ‘Z’ (Deceased)
 - c. The person of Joel Juma Otieno whose buccal swab I took ‘Y’
45. He testified that he proceeded with DNA analysis and established that the Whip ‘X’ was slightly stained with blood of human origin. It was his testimony that he analyzed the samples from the reference sample of Joel Juma and Eric Ochieng and concluded that: -
 - a. The DNA profile generated from the blood stains on the whip matched DNA profile generated DNA sample of Eric Ochieng Atito (deceased).
 - b. DNA profile generated from the whip’s handle matched DNA profile generated from Reference sample of Joel Juma Oliewo, the accused.
46. PW10 testified that he prepared the DNA Report on 20th May 2024, signed it and sealed it. He produced it as PExh. 2.
47. PW11 No. 241244 Inspector Paul Kureba Masika, the Deputy DCIO Imenti in Meru testified that he previously was attached to DCI Kisumu West. It was his testimony that on the early morning of 8th October 2021 he received a call from DCIO to proceed to the scene of Holo and take the suspect to hospital. He testified that he went with his colleagues and found Eric Ochieng Atito lying unconscious at the Report office of Holo Police Post as there were no cells.
48. PW11 testified that the in-charge informed them that at 2.00am, the suspect was brought to the police post after an assault. He testified that they took the suspect to JOOTRH where he was confirmed dead and taken to the morgue at the same hospital. It was his testimony that on the 11th October 2021, they



received the suspect's brother and father who reported vide OB 5/11/10/2021 that the Area Chief was the one who killed him and not mob injustice.

49. PW11 testified that they established that the deceased had followed a lady, Pamela Akinyi and attempted to rape her and in the process, she raised an alarm and the villagers responded including Alfred Oloo and John Okulo who arrested the deceased as they knew him so they controlled the mob from assaulting the deceased. He testified that the village elders Anastacia Adhiambo and Okeyo John responded and called the accused's area Assistant Chief of Upper Kadongo Sub-location and notified him of what had transpired then he came to the scene, removed a leather whip, directed Okeyo to tie the hands and legs of the deceased and he whipped the deceased, kicked him and that the accused took a photo of the deceased who was also drunk.
50. It was his testimony that the accused called Corporal Shitanda and Pauline who were ferried to the scene by Paul Reuben alias Mwala, a rider using the accused person's motorcycle. The 2 police officers took the deceased to the police post to wait for a Motor vehicle to take him to hospital. PW11 testified that on the 8th October 2021, they arrested Joel Juma Oliewo at Upper Kadongo, Holo from his house where they recovered a Samsung phone and a leather whip with blood stains.
51. PW11 testified that on the 18th October 2021, he escorted the suspect to Kisumu Government Chemist vide exhibit memo. He testified that the suspect took photos of the deceased when he was healthy before beating the deceased then deleted the said photos. It was his testimony that he witnessed the post-mortem on the deceased's body.

The Defence Case

52. Placed on his defence, the accused person gave a sworn testimony as DW1. He denied committing the offence and stated that on the material date, he was called to the scene by one of the village elders where he found the accused already assaulted on account of being suspected to have raped a certain lady. He testified that the crowd surrounding the suspect was armed with a whip, runigus and pangas.
53. The accused testified that he did not attack the deceased but rather that he took the whip from one member of the crowd so as to scare the crowd away from the suspect. It was his testimony that he later called police officers who came and removed the suspect from the scene and that the following morning, he was called by a police officer at Uhoho Police Station who informed him that the man had died.
54. The accused testified that on the 14th October 2021, he was arrested from his home and further that he took the whip to the police station before arrest. He testified that he could not tell where the blood on the whip came from as the whip was not his.
55. In cross-examination, the accused testified that he participated at the scene by taking the whip from a member of the crowd to scare the crowd.
56. DW2 Hellen Akinyi Otieno testified that she knew the accused. It was her testimony that on the 7th October 2021 she went to the scene where she found the mob. She testified that there was moonlight and thus it was a bit bright so she saw the crowd assaulting the deceased. She testified that the people were many and she could not identify any of the assailants.
57. It was her testimony that when the accused arrived, he found her. She testified that the accused took a whip from one of the people in the crowd then he called the police and that the accused went with the whip to the police station in the company of the police.



58. In cross-examination, DW2 testified that she knew the people at the scene and further that the scene was well lit with moonlight and mobile phone torches. DW2 testified that the accused took a whip from the crowd. She denied telling the police that the accused had taken the whip from the crowd.

Analysis and Determination

59. The offence of murder is created by section 203 of the Penal Code in the following terms:

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

60. Section 203 of the Penal Code defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the accused charged and that the unlawful killing was with malice aforethought. The onus of proving a criminal offence like this one before the court lies with the prosecution who must prove the offence beyond reasonable doubt.
61. The main issue for determination is therefore, whether the prosecution has proved all the elements of the offence of murder against the accused person herein beyond reasonable doubt.
62. I have examined the evidence by the prosecution witnesses. There’s no doubt about the deceased’s death and its cause. The same is confirmed by the testimonies of all prosecution witnesses. In addition, the post-mortem carried out by Dr. Muchana confirmed the deceased’s cause of death as circulatory collapse secondary to extensive soft tissue injuries following assault.
63. On whether the death was caused by an unlawful act or omission, the postmortem report produced by Dr. Muchana revealed that the deceased sustained widespread bruises and brazes involving most of all the four limbs – upper and lower limbs and the upper half of the back and leg sole which led him to conclude that blunt objects including a whip or cane were used on the attack on the deceased. It is without a doubt that the death of the deceased resulted from an unlawful act. This is so, considering that the injuries described in the post mortem report could not have been self-inflicted and neither is there on record a defence of self defence against the deceased or that the injuries were inflicted by a purely accidental act.
64. What about the identification of the person who caused the deceased’s death? PW1, PW2, PW3, PW4, PW5 and PW8 all testified that they saw the accused whip the deceased and that even when PW2 tried to stop the accused from whipping the deceased, the accused reacted harshly towards PW2, accusing him of protecting bad people who were his relatives. PW10, the Government Analyst testified that on analysis of the recovered whip, he found the accused’s DNA on its handle as well as blood that matched the deceased’s DNA.
65. In his defence, the accused denied assaulting the deceased and stated that he only used the whip to scare away the crowd that had already attacked the deceased. DW2 in her effort to offer a defense for the accused testified initially that she did not see the people in the crowd that attacked the deceased only to renege on the same in cross-examination and name individuals whom she allegedly saw at the scene. She further went on to state that the accused took a whip from the crowd then denied telling the police that the accused had taken the whip from the crowd.
66. There is no doubt that a crowd had run after the deceased in an attempt to enact and administer mob injustice on him in response to the screams from the lady whom the deceased allegedly attempted to rape that particular evening. However, the evidence on record reveals that the said crowd were stopped



by PW2 and other village elders. Evidence by the prosecution also revealed that the deceased himself stated that he was not beaten by the crowd. This evidence remained uncontroverted.

67. Even if the court were to hazard and consider that the deceased was exposed to mob injustice, the evidence on record shows without a doubt that the accused person took the lead and actively got involved in administering that mob injustice to the deceased and in a more pronounced manner such that he was not bothered by the calls from the people including PW2 who were at the scene, pleading with him, to stop assaulting the deceased.
68. I am thus persuaded, based on the evidence on record, that the accused committed the unlawful act that led to the deceased's death. The injuries identified by Dr. Muchana the pathologist was so much consistent with the weapon used by the accused person to assault the deceased, being, a whip on all parts of the body. The act of taking the whip to the police station does not exonerate him from culpability. As an administrator, he was expected to protect the deceased suspect of attempted rape and not to kill him. He
69. I am not persuaded that the accused did anything to protect the deceased from harm's way. He ought to have caused the arrest of the deceased and hand him over to the law enforcement agencies. I am not persuaded by the testimony of his witness who claimed that there was moonlight and thus it was a bit bright so she saw the crowd assaulting the deceased. She testified that the people were many and she could not identify any of the assailants. However, in cross examination, she stated that she knew the people at the scene and further that the scene was well lit with moonlight and mobile phone torches.
70. I am equally persuaded by the firm and credible testimony of the victim of alleged attempted defilement by the deceased who, in any event, would be siding with the accused if the accused went to her rescue, as opposed to giving testimony blaming the accused for the assault he administered on the deceased.
71. After due consideration of all the evidence before me, I am satisfied that the evidence adduced by the prosecution witnesses is sufficient evidence to prove that it was the accused person herein who unlawfully caused the death of the deceased person by viciously assaulting him hence, the identified cause of death. The fact that the accused took the whip to the police station is not an act of charity towards by accused person.
72. I now turn to the element of malice aforethought. Section 206 of the Penal Code defines malice aforethought in the following terms:

206. Malice aforethought

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

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



73. In Republic v Benjamin Kyalo Mulonzi [2019] eKLR, the Court had this to say at paragraph 30:

“ 30. It is therefore clear that malice aforethought is the conscious, premeditated intent to kill another person, without any provocation or just cause. The Court of Appeal in the case of Republic –vs- Tubere S/O Ochen (1945) 12 EACA63 held that an inference of malice aforethought can be established by considering the following: -

- a. The nature of the weapon used.
- b. The manner in which the weapon was used.
- c. The part of the body targeted.
- d. The nature of the injuries inflicted either single stab/wound or multiple injuries.
- e. The conduct of the accused before, during and after the attack.”

74. In this case, Dr. Muchana testified that the injuries sustained by the deceased were occasioned by blunt objects such as a cane. He further testified that the linear marks on the deceased’s body pointed to a whip as one of the weapons used to assault the deceased.

75. Further, it was the evidence of PW2 and other prosecution witnesses that he attempted to stop the accused from assaulting the deceased but the accused took offence at this and continued assaulting the deceased, claiming that he knew his job. PW8 testified that during the assault meted out on the deceased by the accused, he saw the accused stand on the deceased’s abdomen. This act, in addition to the weapon used by the accused in assaulting the deceased demonstrates that the accused had the intention to cause the deceased grievous harm and/or kill the deceased. The appellant displayed total disregard to the sanctity of life as a public servant who is entrusted with the responsibility to maintain law and order as an administrator when he mercilessly whipped and kicked the deceased which were the aggravating circumstances in this matter where members of the public take the law into their own hands.

76. I find malice aforethought proved beyond reasonable doubt, and further, that absence of motive is immaterial.

77. Having considered the evidence adduced by the prosecution I am satisfied that it was the accused that assaulted the deceased on the material day. I am satisfied that the prosecution discharged its burden of proof and has proved the charge of murder against the accused beyond any reasonable doubt.

78. I find the accused Joel Juma Oliewo guilty of the offence of murder as charged under section 203 of the Penal Code and I convict him accordingly.

79. Sentence shall be pronounced after receiving records and mitigation.

80. I so order.

DATED, SIGNED AND DELIVERED AT NAIROBI VIA VIRTUAL MICROSOFT TEAMS THIS 31ST DAY OF JANUARY, 2025.

R.E. ABURILI**

JUDGE**

