



REPUBLIC OF KENYA



**Republic v Obemi & 2 others (Criminal Case E001 of 2023)
[2025] KEHC 399 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E001 OF 2023
WM MUSYOKA, J
JANUARY 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

FREDRICK OTIENO OBEMBI 1ST ACCUSED

JAMES OTIENO ONYANGO 2ND ACCUSED

EVANS JUMA ODUOR 3RD ACCUSED

JUDGMENT

1. The 3 accused persons, Fredrick Otiemo Obemi, James Otiemo Onyango and Evans Juma Oduor, face a joint murder charge. It is alleged that on 3rd February 2023, at Bujumba Sub-Location, Bujumba Location, Butula South Sub-County, within Busia County, they murdered Lukas Ouma Okello, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. They denied the charges, and a trial ensued, where 8 witnesses testified.
2. PW1, Vincent Egesa, was on the road, on the night of 2nd and 3rd February 2023, with the deceased, driving cattle to a home, where they had been hired to plough that morning. They passed by a home where a funeral matanga or vigil was happening, and a group of people from that home caught up with them and began to question them about where they were taking cattle to at night. They gave them their explanations, but the people began to beat them. He escaped, to seek help, and left the deceased behind with the men. When he came back, he found that a liguru had arrived, and the deceased had been sat down, and was still being beaten. He was beaten to death, in his presence, and, at some point, an elder advised him to run away, which he did. He did not identify the persons who assaulted the deceased.
3. PW2, James Ochieng Butuba, was at the matanga. It was him who noticed the cattle being driven at night by the deceased and PW1, and alerted those at the matanga. A group of people left the matanga and trailed the deceased and PW1. He followed them. He found them having caught up with the



- persons driving the cattle, whereupon PW1 fled, leaving the deceased behind. The deceased was sat down, and interrogated. He identified the 3rd accused, and PW7 and Oduori, amongst the persons present. He stated that he did not see the accused persons kill the deceased, but he saw the 3rd accused slap him.
4. PW3, Livingston Ongono Luta, was also at the matanga. He was informed, by PW7, of suspected cattle thieves who had been caught driving cattle at night. He rushed to the scene, where he found the deceased had been sat down, and was being questioned. By then he had been beaten and had blood on his head. The deceased mentioned that he was driving the cattle to the home of Obunde, where he was to plough that morning. He was taken to that home, for Obunde to confirm that, but Obunde denied it. That provoked the crowd to beat him up the more. PW3 tried to restrain them to no avail. He stated that the 1st accused assaulted the deceased with a stick. He mentioned that the 2nd and 3rd accused were also present. He mentioned the persons that he saw and identified as Freddy, Stevo, Oduori, Papasa and Keyii. PW3 stated that he was the one who advised PW1 to go away, for his own safety.
 5. PW4, Michael Egesa Samia, was a brother of PW1. He testified that PW1 came to his home on the material night and woke him up. He explained to him that as he and the deceased were driving cattle to a home, where they were to plough that morning, they were attacked, and that he had left the deceased being beaten by a mob. He and PW1 left for the scene, where they found the deceased on the ground, having been beaten, and he had blood on his head. He was still being beaten. PW4 tried to intervene, to no avail. He identified the accused persons as among those he saw at the scene. He specifically stated that he saw Stevo, and the 2nd accused assault the deceased. The police later came, and removed the deceased to their vehicle, while he and the liguru went to the home where the deceased and PW1 were headed for, and confirmed that indeed the 2 were to plough there.
 6. PW5, Dr. Teddy Tura, a medical doctor, performed a post-mortem on the body of the deceased. He testified that the cause of death was a head injury, which had caused bleeding into the brain. He explained that the trauma had been caused by both sharp and blunt objects. He described external injuries to have been inflicted on the head/skull, left leg and face, and internal injuries to the head and the nervous system.
 7. PW6, No. 70819 Police Corporal Felicien Marwa, was the investigating officer, who gave a narration of all the steps that he took in the investigation of the matter. PW7, Michael Obendo, was part of the crowd at the matanga, who had responded to the alert by PW2, about possible thieves driving cattle at night. He left the home where the matanga was, with the rest, and followed the alleged thieves. He found that the deceased had been sat down, and he witnessed as he was interviewed by the liguru. He saw the 2nd accused there, but he did not witness him assault the deceased. He left but later heard that the man died. PW8, Lillian Nekesa, was the person who had agreed with the deceased and PW1 that they would plough her land, and a plough was brought to her home on 2nd February 2023, at daytime.
 8. I put the accused on their defence, on 26th April 2024. All 3 testified on oath, and did not call witnesses.
 9. The 1st accused, Fredrick Otieno Obembi, testified as DW1. He said that he woke up on the morning of 3rd February 2023, at 4:00 AM, to go to work. Along the way, he found a group of people beating a person. He identified the person being beaten as a brother of his wife. He assisted to have him taken to a police vehicle at the scene. He thereafter left and went to work. He later learnt that he died. The 2nd accused, James Otieno Onyango, testified as DW2. He stated that on that material day, at 3:00 AM, people from the disco matanga raided his home, accusing him of being a cattle thief. He escaped from his house through a window, and sought refuge at the home of Obunde, a neighbour. He denied participating in the killing of the deceased. The 3rd accused, Evans Juma Oduor, testified as DW3. He was at the matanga, and among those digging the grave. PW2 then came and informed them about



- thieves that had been sighted driving cattle along the road. He was among the people who rushed to the road, to see the thieves. He thereafter left the scene and returned to his grave-digging duties.
10. Although the parties indicated that they could file written submissions, at the close of the oral hearings, none were eventually filed.
 11. The elements, for the offence of murder, are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that the accused caused the death with malice aforethought.
 12. On the death, there is ample proof that the deceased died. PW1 was present when the deceased was beaten to his death. PW2, PW7 and PW8 also testified on the death. PW5 conducted post-mortem on the dead body of the deceased.
 13. On the cause of the death, the medical officer of health, PW5, testified that the body had a head injury, which had led to bleeding into the brain, causing the death.
 14. On the role of the accused in the causation of the death, the recorded evidence is that the deceased was assaulted by a large group of people, in what is commonly known as mob justice in Kenya. The accused persons were recognised and identified by witnesses as having been part of the crowd, something which they themselves confirmed in their sworn defence statements. See [Hamisi Swaleh Kibuyu vs. Republic](#) [2015] eKLR (Koome, Okwengu & GBM Kariuki, JJA). They were placed at the scene, and they themselves conceded to have been at the scene.
 15. Did the accused persons play any role in the causation? Did they have any role in the infliction of the injuries that caused the death? PW2 saw the 3rd accused slap the deceased. PW3 saw the 1st accused beat the deceased, after they visited the home of Obunde. He also saw the 3rd accused assault him with a rungu. The 2nd accused also hit the deceased with a rungu. PW4 saw all 3 accused persons assault the deceased. He described the attack on the deceased by the 2nd accused, with a hoe stick, on the legs, leading to a fracture. 4 of the prosecution witnesses were at the scene, and placed the 3 accused persons at that scene, where they were actively participating in the assault on the deceased. They were part of the mob that assaulted the deceased with assorted weapons until he died.
 16. The last consideration should be whether the accused caused that death with malice aforethought. What constitutes malice aforethought is defined in section 206 of the [Penal Code](#). One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. This is usually inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever. See [Republic vs. Stephen Sila Wambua Matbeka](#) [2017] eKLR (Nyakundi, J).
 17. The question then is, were the injuries, inflicted on the deceased, so inflicted with an intention to kill him, or with an intention to cause to him a bad injury, or were they caused recklessly and indifferently, or was the intention to commit some sort of felony? The killer blow was the injury to the head, which led to bleeding into the brain, according to PW5. There is ample caselaw that an injury caused to the skull, which houses a vital organ, the brain, would be deemed, should it cause death, to have been so inflicted with the intention of causing death. See [Republic vs. David Mweha Waweru](#) [2015] KEHC 2190 (KLR) (Lesiit, J), [Republic vs. Ambrose Katharu M'Itubiri alias M'Muraga, Seberio Kobia Munoru alias Zeberio Mugambi Kabuseria & Dominic Muchiru Munoru alias Kobia Munoru](#) [2019] KEHC 10401 (KLR) (Ong'injo, J) and [Republic vs. Wainaina](#) [2022] KEHC 12672 (KLR) (Kimondo, J). The injury in this case was to the head, which houses the skull and the brain. A blow,



- to that area or region of the body, must have been calculated and intended to cause death, or to cause a very bad injury. I am persuaded that the death was caused with malice aforethought.
18. In cases of mob justice, it is usually difficult to determine who landed the fatal blow. In this case, however, PW4 was positive, that that decisive blow to the head of the deceased was landed by Oduori, who was among the 2 individuals, who PW6 testified eluded arrest. However, the 3 accused persons having played some role in the assault, it can be said that they had a common intention with the person who delivered the killer blow.
 19. Section 20 of the Penal Code defines parties to a criminal offence, and provides for the principal offender, who it defines as the person who commits the offence, or who aids or abets another to commit the offence, or who procures another for that enterprise. Section 21 of the Penal Code defines common intention, and states that where 2 or more persons form a common intention, to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed, whose nature is a probable consequence of the prosecution of that purpose, each of the players or actors in that enterprise would be deemed to have committed the offence. See Njogu vs. Republic [2007] 2 KLR 123 (Bosire, Onyango-Otieno & Deverell, JJA) and Victor Nthiga Kiruthu & James Nyaga Gitemba vs. Republic [2017] KECA 251 (KLR) (Waki, Nambuye & Kiage, JJA).
 20. In the instant case, the 3 accused persons, and others, went out to handle a person that they suspected to be a cattle thief. There was no evidence that that person violently resisted or tried to fight them off, but they assaulted him, nevertheless, in various ways. He was not armed in any way, and he was not said to have acted aggressively towards them at all. It could be that they did not hit the fatal blow, but they acted in concert or conjunction with the person who delivered that blow. The conclusion to draw from that would be that they were of common mind with that person, and they assisted or aided him in the act causing the death, or they abetted his conduct. See Liningushu & others vs. Republic [2005] 1 EA 229 and Mohammed Dadi Kokane, Alfred Njuruka Makoko, Samwel Mwachala Mwagbania & James Chacha Mwita vs. Republic [2019] KECA 960 (KLR) (Visram, Karanja & Sichale, JJA).
 21. There was a common intention, to execute an unlawful purpose, of teaching a lesson to a supposed cornered thief, the resulting death was a natural consequence or progression of the prosecution of that unlawful purpose. The lawful thing to do, upon apprehending a suspected thief, is to take him to the authorities, principally to the police. Mob justice is not sanctioned by the law, even when dealing with a certified or well-known offender caught in the act. The courts have repeatedly stated that common intention need not be foreplanned, or that there need not be a concerted agreement, for it can be inferred from the actions of the perpetrators of the offence, or by their presence at the commission of the offence. See David Opedhi Oima vs. Republic [2014] KEHC 8781 (KLR) (Majanja, J), Republic vs. Mohammed Wanyoike & another [2017] eKLR (Chitembwe, J) and Ali Salim Bahati & another vs. Republic [2019] eKLR (Visram, Karanja & Kiage, JJA).
 22. Overall, it is my finding and holding, that the offence of the murder of Lukas Ouma Okello, contrary to section 203, as read with section 204, of the Penal Code, has been sufficiently proved against the accused persons herein, beyond reasonable doubt, and I do hereby convict them, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya.
 23. For the purposes of sentencing, I direct the Busia County Director of Probation and Aftercare Services to assess the antecedents of the accused persons, and to take the views of the family of the deceased, and the community, and thereafter file a report, within 14 days. The matter shall be mentioned thereafter for receipt of the pre-sentence report, and for mitigation and sentencing. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 24TH DAY OF JANUARY 2025.



W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Mayaba, Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the State.

Mr. Ouma, Advocate for the accused persons.

