



**Republic v Busuru alias Moreen & 3 others (Criminal Case E017 of 2023) [2025] KEHC 4025 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4025 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E017 OF 2023  
RN NYAKUNDI, J  
MARCH 28, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JULIET BUSURU ALIAS MOREEN ..... 1<sup>ST</sup> ACCUSED**

**PAUL OSINDE ..... 2<sup>ND</sup> ACCUSED**

**GREGORY MAYEBO ALIAS JOB ..... 3<sup>RD</sup> ACCUSED**

**BENJAMIN NJENGA ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. This is a joint enterprise mixed statement, direct evidence and circumstantial evidence in which the state arraigned the accused persons in court indicting them with the murder of Ahmed Mohamud Ismail contrary to 203 of the *Penal Code* which allegedly occurred on 26<sup>th</sup> June, 2023 at West Indies in Turbo Sub-County.
2. The four accused persons named hereinabove were arraigned before this court and indicted for the offence of murder contrary to section 203 as punishable with death under section 204 of the *Penal Code*. The brief particulars of the offence were that on the 26<sup>th</sup> June, 2023 at West Indies IN Turbo Sub-County within Uasin Gishu county, they jointly murdered one Ahmed Mohamud Ismail. Each of the accused person having been informed of the charge and its particulars made a categorical denial of any involvement whatsoever of the offence with which they have been charged by the state. In terms of Art. 50(2)(a) of *the Constitution* prima facie each of the accused is presumed innocent until the contrary is proved. This therefore necessitated a full blown trial by the Constitutional organ of the state charged with prosecution of criminal cases under Art. 157 (6)&(7) of *the Constitution*. As a consequence, the prosecution summoned the following witnesses to disapprove the innocence of each of the accused persons;



3. In compliance with Art. 50 (2)(h) of *the Constitution*, the 1<sup>st</sup> to 3<sup>rd</sup> accused persons were represented by Mr. Miyiinda whereas Mr. Oduor Evans represented the 4<sup>th</sup> accused.

### **The case for the prosecution**

4. PW1 Hassan Anwar on oath testified to the effect that. That on 26<sup>th</sup> June, 2023, he was preparing to attend prayers at a nearby mosque and on his way, his attention was drawn to some screams and unfamiliar noises accompanied with acts of assault of another human being. He became curious and temporarily moved to the scene. That is when he saw the victim of assault Ahmed Ismail being beaten by the accused persons. Apparently, according to PW1 prior to this criminal incident, these are persons who are known to him having had an encounter with each one of them within the West Indies locality. He went on to give some specific incidents of his knowledge which included the first accused person being a house help. Whereas the third accused works as a motorcycle rider and the 4<sup>th</sup> works as a driver. He was able to witness each one of them applying punches and kicks using their hands and feet. This did not stop there. They went ahead to arm themselves with wire rods and stones which now escalated the whole incident of inflicting multiple injuries to the deceased. Some of the key actors in the incident of assault were yet to be arrested as at the time, the indictment was preferred against the accused persons. It was further the testimony of PW1 that the 4<sup>th</sup> accused was at one time pushed away from the conflict by himself but that the furthest he could go was to disarm him from continuing to hold the stone which was an additional weapon aimed at inflicting severe harm. As for the 1<sup>st</sup> accused, PW1 gave the chain of events that he saw him sit on the top of the deceased and simultaneously placing his hands around his neck and performing acts of strangulation. In all, PW1 could hear the accused persons allege that the deceased had stolen a mobile phone and they have other members of the public cheering up the accused persons to continue inflicting the actual physical harm against the victim. The witness in the course of the incident left for the mosque only to run later at 4PM that the victim had succumbed to death due the injuries suffered on the material day.
5. PW2 Maimuna Ali testimony was to the effect that on 26<sup>th</sup> June, 2023 she was at her shop when she heard screams from the members of public. She stepped out her shop and saw a suspect who had been arrested with an allegation of having stolen a mobile phone from a student. In a quick action she decided to record the incident using her mobile phone as the shouts of “thief! thief! “thief!” rage the air. In the course of her recording, some members of the public had informed the police who visited the scene of the crime but she continued documenting the incident electronically. It was this electronic video recording which was later followed up by the investigation officer as one of the tools to trace the suspects. In her evidence, on being shown the video clips, she positively identified the accused persons as the ones she saw at the scene. In addition, PW2 confirmed that they were familiar faces within the area.
6. PW3 was Faith Ahmed on oath who told this court that on the material day near the mosque he saw the deceased being beaten by the members of the public and in a little while, he saw the clan elder (PW4) at the scene. He also confirmed to court that on arrival at the scene he saw a somali boy being beaten and in this he could single out the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. As one of the local administrators, he took the liberty to inform the police who visited the scene on thereafter, the report was received and acknowledged.
7. PW5 was Dr. Macharia Benson the Pathologist who testified to having received and examined the body of Ismael Mohamud on 27<sup>th</sup> June, 2023. During the post mortem examination, it was established that the deceased had sustained the following:
  - a. Brant right hand



- b. Blood clots around the upper lip
  - c. Right supraorbital borne 3x2 CM
  - d. 4x2 cm bruise lateral to the left eye
  - e. Right upper trunk bruises, linear with soft tissue haematoma
  - f. No defence wounds.
  - g. Left temporal scalp contusion
  - h. Extensive subdural of the whole brain
8. As a result of the pathological examination, formed the opinion that the cause of death was severe head injury due to blunt force trauma. The post mortem examination report was admitted in evidence as an exhibit in support of the prosecution case.
  9. PW6 NO. 83189 corporal Chrispin otieno rendered his evidence as the investigating officer who recorded witness statements from witnesses, secured the video recording which had been used to capture the chain of events of the deceased being assaulted by a mob on allegations of stealing a mobile phone. The police detective further told this court that the video recording facilitated the arrest of the suspects, that on interrogation of the first and second suspects, they admitted being part of the gang at West Indies assault scene. On further interrogation, the 1<sup>st</sup> accused allowed the investigation team to visit her house where they recovered a red pullover and a blue jeans she was wearing on the material day. The exhibits were recorded in the inventory and produced as exhibits to firm up the case for the prosecution on identification. The witness in addition told the court that he traced and effected an arrest against the 3<sup>rd</sup> accused who was wearing a black leather jacket during the commission of the crime. The investigating officer in his testimony did not stop there. He traced and arrested the 4<sup>th</sup> accused. As a consequence of all these gathering and collection of information, relevant to the investigation, he also retrieved the mobile phone from PW2 which was used to record the incident. This was forwarded to the cybercrime department for analysis and a report to that effect was admitted in evidence against the accused persons.
  10. PW7 PC Stephen Ikua also reaffirmed material evidence as adduced by PW6. In supplementing the investigation evidence, PW7 told the court that with the assistance of informers and other witnesses at the scene four suspects were arrested and arraigned in court as suspects of the murder against the deceased. That the piece of evidence from the video recording provided a key link to place the accused persons at the scene.
  11. PW8 Inspector Daniel Kieni, a cybercrime expert told the court on the role he played in undertaking and analysis of a motorola mobile phone which had been used to document the scene of murder on 26<sup>th</sup> June 2023. He produced a mobile forensic examination report dated 6<sup>th</sup> July, 2023 indicative of the assault upon a suspect and the suspects who committed the offence. In the same testimony, PW7 also produced a certificate in compliance with section 65(8) as read with section 106 (b)(4) of the Evidence Act. the video clips with all markings of identification of the suspects before this court were also admitted as electronic evidence in support of the prosecution case.
  12. With that material evidence under section 306 of the Criminal Procedure Code, each of the accused person was placed on his or her defence.



## **The defense case**

13. The first accused, Juliet Ayieta in his defence denied the offence and told the court that on the material day at around 4PM she heard screams from members of the public. She left her duties as a waiter at West Indies hotel that is when he saw a young man being beaten. She also joined the other members of the public. In the course of the events, there were many people whom she did not know and after the incident she left for her homestead only to be arrested that she was one of the suspects who was beating the deceased. She alleged that the assault upon the deceased was a matter of the public and a big mob which was alleging that he had stolen a mobile phone.
14. DW2 – Paul Osinde also on oath denied the offence and told the court that on the material day he came into contact of a big mob of people who were assaulting the deceased. He alleged that he had gone to that scene because he had been hired by the clan elder who wanted to visit the area to intervene between the suspected thief and a hundred people who were surrounding him at the scene. It was his defence that he was part of the rescue theme that was separating the mob from the deceased. In addition, the accused told the court that his involvement in the conflict was that of saving a life of the victim of assault from the mob. That he was never the person responsible for inflicting injuries on the victim.
15. DW3 Gregory Mayebo likewise told the court that he did not know the deceased and never was he involved in inflicting the fatal injuries as alluded to by the prosecution witnesses. He acknowledged being at the scene because it was nearby the stage where he operates his motorcycle for hire. According to DW3, his attention was drawn by loud screams from a location near West Indies area near the mosque and on arrival with the clan elder he found a big mob of more than fifty people who were inflicting injuries upon the suspected thief. That his role was to only make attempts to intervene to save a life of the victim but he was overwhelmed by the mob. In his evidence, the accused told the court that his presence was to rescue the deceased from the mob.
16. Finally, the 4<sup>th</sup> accused Benjamin Njenga told the court that on the material day, he went to a garage near West Indies and in the course he took some alcoholic drinks. He denied the offence as being part of the gang which killed the deceased. He further denied that he was the person positively identified as wearing the red shoes in the video clip admitted in evidence in support of the prosecution case.
17. The accused having been placed on their defense, each of them denied the offence of having any involvement in the murder of the deceased.

## **Analysis and determination**

18. The ingredients of what constitutes the offence of murder are set out in section 203 of the Penal Code which provides that the offence is committed when a person is found to have been criminally involved in the death of another human being and that in doing so, the act was unlawful and that the accused had malice aforethought.
19. In *Anthony Ndegwa Ngarivis Republic* [2014] eKLR the Court of Appeal sitting in Nyeri held:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”
20. It is a fundamental principle of criminal law that the burden of proving an offence rests with the prosecution, which must establish all elements of the charge beyond reasonable doubt. This principle



is expressly codified in sections 107, 108, and 109 of the *Evidence Act*, which govern the proof requirements for facts pertaining to the alleged offense. This burden of proof remains with the prosecution throughout the entirety of the trial proceedings.

21. The Supreme Court of Nigeria in *Bakare vs State* (1985) 2 NWLR stated as follows:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says, not admit of plausible possibilities and fanciful possibilities but it does admit a high degree of cogency consistent with an equally high degree of probability.”

22. The standard of proof beyond a reasonable doubt represents the highest evidentiary threshold in our legal system. This stringent requirement exists precisely because an individual's freedom hangs in the balance during criminal proceedings, reflecting our judicial system's commitment to protecting liberty interests. In the locus classicus case of *Denning J*, as he then was in *Miller Vs Ministry of Pensions* [1947] 2 All ER 372 he stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

23. The first element concerning the death of the deceased is not in dispute. PW5 Dr. Macharia Benson conducted a post-mortem examination on the body of Ahmed Mohamud Ismail. His findings documented various injuries, including bruises and extensive subdural hematoma of the whole brain. He concluded that the cause of death was severe head injury due to blunt force trauma.

24. Regarding the second element, that every homicide is unlawful unless authorized by law or excusable under the law See *Sharm Pal Singh* [1962] EA 13, see also *Guzambizi Wesonga v Republic* [1948] 15 EACA 63 where the court held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defense or in defense of property.”

25. It is evident from the post-mortem report that the deceased died from an unnatural cause. The injuries described were clearly inflicted by another person or persons through violent means. There is no suggestion that the deceased's death was accidental or from natural causes. In the absence of any evidence to the contrary, this Court finds that the death of the deceased was unlawful.

### **The element of identification**

26. The next question pertains to the third element: whether the prosecution has established beyond reasonable doubt that the accused persons committed the unlawful act that caused the death of the



deceased. This requires careful scrutiny of the evidence linking each accused to the commission of the offense.

27. PW1 Hassan Anwar testified that he witnessed all four accused persons assaulting the deceased. He specifically observed each accused applying punches and kicks, and later arming themselves with wire rods and stones to escalate the assault. PW1 also provided a detailed account of the first accused sitting on top of the deceased, placing his hands around the deceased's neck, and performing acts of strangulation. PW1's evidence establishes a direct link between the four accused persons and the assault that resulted in the deceased's death.
28. PW2 Maimuna Ali corroborated PW1's testimony through her electronic recording of the incident, which she later provided to the investigating officer. Upon viewing the video clips, she positively identified all four accused persons as participants in the assault. This electronic evidence is particularly compelling as it provides objective, contemporaneous documentation of the events that transpired, thereby eliminating concerns about mistaken identity or faulty recollection. The video recording serves as independent verification of the eyewitness accounts and significantly strengthens the identification evidence against the accused persons.
29. PW3 Faith Ahmed similarly testified to witnessing the deceased being beaten by members of the public, specifically identifying the second and third accused as participants in the assault. This independent account further corroborates the identification evidence against at least two of the accused persons.
30. When dealing with recognition, the English case of *Turnbull and another v. MGN Ltd* [1976] 1 QB 869 is useful in this regard: -

“If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution”.

31. The investigating officers, PW6 Corporal Chrispin Otieno and PW7 PC Stephen Ikuu, gathered additional evidence linking the accused to the crime, including the recovery of clothing items from the first and third accused that matched those seen in the video recording of the incident. This physical evidence corroborates what was captured in the electronic recording. Furthermore, PW8 Inspector Daniel Kieni, a cybercrime expert, conducted a thorough analysis of the video recording and produced a forensic examination report dated 6<sup>th</sup> July, 2023, which confirmed the identification of the accused persons at the scene. PW8 also produced a certificate in compliance with section 65(8) as read with section 106(b)(4) of the *Evidence Act*, ensuring the admissibility and reliability of the electronic evidence. The video clips with marked identification of the suspects were admitted as electronic evidence, providing irrefutable visual confirmation of the accused persons' involvement in the assault.

**Whether each of the accused persons participated in the commission of the crime of murder against the deceased.**

32. The offence before court in its information alleges that the accused persons jointly committed the offence. In determining whether or not they have played any role in the crime charged, this court has to



revert to section 20 of the Penal code which provides on the principles of criminal responsibility which is applicable to the facts of this case. It provides as follows:

- “(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
- (a) every person who actually does the act or makes the omission which constitutes the offence;
  - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
  - (c) every person who aids or abets another person in committing the offence;
  - (d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission. (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
- (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.”

33. Similarly, section 20 must be read conjunctively with section 21 since the accused persons are charged jointly with the commission of the same offence hence the consideration of the doctrine of common intention. The Code provides as follows:

“When two 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 of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”

34. For this element to apply to the facts of this case, there must be prove from prosecution evidence that they had formed a common intention, either before or in the course of events to prosecute an unlawful purpose in conjunction with one another. In this respect, what is required is evidence pointing towards each individual accused person was infact part of and an active group of two or more people on 26<sup>th</sup> June, 2023 at West Indies sharing a common purpose with the other or others not before court in the execution of the homicide offence. The case of *Ismail v. Uganda Cr. Appeal No. 6 of 1978* clearly explains on the characteristic features of the doctrine of common intention in the following language:

“In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime, a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue



a specific unlawful purpose and in the prosecution of that unlawful purpose, an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now settled law that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any one of them to disassociate himself/herself from the assault. It can develop in the course of events though it might not have been present from the start. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence. Where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death.”

35. In recognition of the relevance of the doctrine of common intention to apportion criminal liability, the court in *Abdi Ali v Republic* 1956 EACA 573, the Eastern Court of Justice held:

“the existence of common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused persons were to be made responsible was acted upon in furtherance of that common intention. However, the presumption of common intention must not be too readily applied or pushed too far. It is only when a court can with some judicial certitude hold that a particular accused person must have pre-conceived or pre-meditated the result which ensued or acted in consent with others in order to bring out that result that these sections of the *Penal Code* can be applied.”

36. In so far as the facts of this case is concerned, the chronology of events on the material day, the prosecution adduced evidence to prove participation from the testimony of PW1, PW2, PW3, PW6, PW7 & PW8. Regarding PW1, on the fateful day of 26<sup>th</sup> June, 2023, in broad daylight, he was prepared to go for prayers at the mosque located in West Indies. That is when he witnessed a group of people, some screaming and others were assaulting a victim of theft who later succumbed to death. It was his evidence that the accused person before court were actively involved in inflicting the physical harm while armed with some metal rods, stones and also manipulating their hands and feet to unlawfully occasion the severe injuries. In the same crime scene, PW2 who operates a shop acknowledged having heard some screams and on stepping out, she saw the deceased being assaulted by the accused persons before court on the basis that he had stolen a mobile phone. She took upon herself to engage his mobile device which she documented the events of the assault between the accused person and the deceased. The video recording was later to be a subject of further investigations by PW8 who carried out a forensic analysis and the authenticity of the evidence captured by PW2 within the statutory provisions of section 78(A) as read with section 106(B)(4) of the *Evidence Act*. His further evidence was that:

- a. Videos-MP4 format serial number 1-7 were captured using the device6/exhibit on the 26<sup>th</sup> June, 2023 between times of 10:06 am to 10:13 am of 26<sup>th</sup> June, 2023 capturing events of an assault to a male person by persons in the video stored a DVD for view.
- b. Videos serial 8-10 are videos MP4 stored by the device internal shared storage, shared on to the whatsapp of exhibit on the 30<sup>th</sup> June, 2023.
- c. Images of persons of interest are annexed with the report and on further review by this court, they happen to be the accused persons indicted with the said offence.



37. The law governing admissibility of electronic evidence is guided primarily section by 78 as construed with section 78A of the Evidence Act. For our purposes, we make reference to the admissibility criteria in 78A which stipulates as follows:

“78A. Admissibility of electronic and digital evidence.

- (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
  - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
  - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
  - (c) the manner in which the originator of the electronic and digital evidence was identified; and
  - (d) any other relevant factor.
- (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

38. The focus in this judgment will not escape a statement or so in the provisions of Section 106(B)(4) of the same Act.

- “(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
  - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
  - (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
  - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),



shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

39. In assessing admissibility of electronic evidence as generated by PW2, further analyzed by PW8 in the forensic lab at cybercrime department in CID headquarters, I am of the considered view that the evidential weight of the data photographic impressions, the prosecution has satisfied the criteria on its reliability and the manner it was generated, stored and communicated or shared with PW8. There is no evidence that the integrity of the documented video shots by PW2 was interfered with prior to its recovery by PW7 who later prepared the exhibit memo for onward transmission to PW8 for extraction and certification of it in the issuance of the Electronic Certificate in respect of section 106(B)(4) of the Evidence Act. This Certificate is to certify that the Electronic process in which the photographs or other statements were generated ensured the accuracy of the evidence for purposes of due process as stipulated in Art. 50 on fair trial rights of our constitution.
40. There is no doubt that the corroborated evidence on the doctrine of common intention and the participation of the accused persons as defined within the scope of section 20 and 21 of the Penal Code has been duly discharged by the evidence from the prosecution witnesses. To the contrary, the accused persons in their defense made every effort to disassociate themselves with the defense but unfortunately I find the evidence from PW1, PW2, PW3, PW4, PW6, PW7 and PW8 quite genuine, persuasive and credible in providing the elements of the standard and burden of proof of beyond reasonable doubt within the dicta of the Miller case (Supra). The electronic evidence is independent and implicates the individual accused persons in the commission of the offence in which the deceased suffered fatal injuries. In the instant case, I have subjected the evidence by the prosecution on the participation of the accused persons in the commission of the crime of murder to very close scrutiny and weighing it alongside with their respective defenses and I dare rule that their vehement denial has not controverted the whole of the prosecution’s case.

### **Malice aforethought**

41. The fourth element, malice aforethought, is defined under Section 206 of the Penal Code. The provisions of section 206 of the Penal Code states as follows in relation to 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; or 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.
42. In the case of; Tubere s/o Ochen {1945} 12 EACA 63 the court stated that in considering whether there was malice aforethought, the court will look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether



vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also *Dafasi-Magayi v Uganda* {1965} 1 EA 667).

43. I am also guided by the Court of Appeal decision in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR in which the court stated as follows on prove of malice aforethought:-

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, CR App No 95 of 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

44. In the present case, the nature and extent of injuries inflicted on the deceased, as detailed in the post-mortem report, strongly indicate an intention to cause death or grievous harm. The evidence shows that the accused persons, acting in concert, subjected the deceased to a prolonged assault using both their hands and feet, as well as weapons in the form of wire rods and stones. The severity of the assault, targeting vital areas including the head, demonstrates that the accused persons must have known their actions would likely cause death or grievous harm.
45. This was a case of inflicting multiple injuries to the deceased by the four accused persons simultaneously applying all manner of excessive force in absence of any justification or excuse as stipulated in section 17 and section 207 as read with section 208 of the *Penal Code* on self-defense and provocation. The facts of this case are in line with the principles in *People v Douglas* (1985) I.L.R.M. 25 and also *Hyam v DPP* (1975) A.C. 55 in which the courts made the following observations relevant to infer malice aforethought:

“... evidence of the fact that a reasonable man would have foreseen that the natural and probable consequences of an act of the accused was to cause death and evidence of the fact that the accused was reckless as to whether his or her acts would cause death or not is evidence from which an inference of intent to cause death may or should be draw, but the court must consider whether either or both of these facts do establish beyond a reasonable doubt and actual intention to cause death.”

46. It will be noted from the chain of events as presented by the prosecution with regard to the fateful date of 26<sup>th</sup> June, 2023, there was a manifestation for this court to conclude that the accused persons unlawful acts of assault reflects that they had the knowledge that through their felonious attack upon the deceased, the natural and probable consequences was either he suffers grievous harm or death was likely to ensue. Unfortunately for the deceased what evolved thereafter was that he suffered serious injuries resulting in simultaneous death which leads to the inescapable conclusion that the criminal homicide as defined under section 203 of the *Penal Code* with the key element of malice aforethought. The circumstances as deduced from the electronic evidence alluded to by PW2, PW7



and PW8 manifest extreme indifference by the accused persons to the value of human life which is guaranteed and protected under Art. 26 of *the Constitution* on the right to life.

47. The defense put forward by each of the accused persons amounted to bare denials of involvement. They did not offer any alibi or alternative explanation for the evidence presented against them. When weighed against the prosecution's evidence, which includes direct eyewitness accounts, electronic video recordings of the incident, forensic analysis of those recordings, and physical evidence recovered from the accused persons, the defense case fails to raise a reasonable doubt as to the guilt of the accused persons. The electronic evidence in this case provides compelling, objective documentation of the accused persons' actions that cannot be explained away by mere denial. This technological corroboration significantly strengthens the identification evidence and provides the court with a reliable basis upon which to determine the accused persons' culpability.
48. It is notable that the accused persons' actions were reportedly motivated by an allegation that the deceased had stolen a mobile phone. Even assuming this allegation was true, it cannot justify the extreme violence employed by the accused persons. Their actions far exceeded any reasonable measure of self-defense or citizen's arrest, and indeed constituted a serious crime in itself.
49. The evidence shows that this was a case of mob justice, where the accused persons took the law into their own hands with fatal consequences. Such extrajudicial actions undermine the rule of law and the proper administration of justice in our society. They cannot be condoned under any circumstances.
50. In a nutshell, besides the direct evidence on how this homicide was committed, the principles on circumstantial evidence in Ernest Asami Bwire Abanga alias Onyango v. Republic CACR No. 32 of 1990 are also applicable in which the court held as follows:

“that for a conviction to ensue certainly the facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency which should exclude every possible hypothesis except the one to be proved and there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must be done by the accused.”

51. In the instant case, the prosecution witnesses portrayed the following circumstances in its endeavor to establish the charge of murder against the accused persons
  - a. Motive: That is to say there was an allegation that the deceased had committed an offence of theft of a mobile phone and the accused jointly in exclusion of the members of the public or the mob at the scene got hold of the deceased and started inflicting physical harm and no one is able to understand whether it was punishment for the crime he committed or it was to disempower him so that they could effect an arrest. The accused persons were acting in concert with such animosity as can be deduced from the electronic evidence of the video clips. It is trite law that proof of motive might not be the primary element in a case of murder. However, when one looks at the circumstances motive if properly established assumes great significance and will definitely provide an important corroborative link in the chain of incriminating circumstances to strengthen the case of the prosecution.
  - b. It is also a cardinal principle of criminal jurisprudence that for the prosecution to establish the offence of murder beyond reasonable doubt, the basic facts from which a reasonable inference can be drawn which are within the special knowledge of the accused must manifest malice aforethought. Applying the principles in section 206 of the *Penal Code*, on the fateful



afternoon from the evidence it transpires that the accused persons consistently continued to assault the deceased and any cries or screams to be forgiven from further serious harm went unanswered from each one of them. On has to watch the horror scheme as depicted in the video, photographic evidence to draw an adverse inference that the unlawful acts against the deceased were accompanied with malice aforethought

52. As a consequence of the discussion made above, I of the view that the prosecution has established and proven the chain of incriminating circumstances against the accused persons beyond the shadow of doubt for this court to find each one of them guilty for the offence of murder contrary to section 203 as punishable under Section 204 of the *Penal Code* to additionally enter a verdict of conviction and culpable for the offence. There shall be a sentencing hearing on 28<sup>th</sup> March, 2024.

### **Ruling On Sentence**

53. The four accused persons, Juliet Busuru alias Moreen, Paul Osinde, Gregory Mayebo alias Job, and Benjamin Njenga, stand convicted of murder contrary to section 203 as read with section 204 of the *Penal Code*. The conviction stems from events that occurred on 26<sup>th</sup> June, 2023, at West Indies in Turbo Sub-County, where the accused persons, acting in concert, assaulted and killed Ahmed Mohamud Ismail following allegations that he had stolen a mobile phone. After a thorough trial, this court found that the prosecution had established beyond reasonable doubt all elements of the offense, resulting in the judgment of conviction delivered earlier. It now falls upon this court to determine an appropriate sentence that reflects both the gravity of the offense and the individual circumstances of each convict.
54. The parties through their respective counsel submitted on mitigating factors with the state recommending a custodial sentence of not less than 50 years whereas the accused persons prayed for a lenient sentence.
55. Ms. Kirenge drew the Court's attention to the deplorable manner in which the deceased met his death. She submitted that the accused persons outnumbered the deceased, giving him no chance against them; the deceased was stoned during the beating; the trio kicked, beat up, and choked the deceased; when he tried to run, the accused persons relentlessly pursued him to "discipline" him; and the post-mortem revealed extensive injuries including blood clots, facial injuries, soft tissue damage, and no defensive wounds, indicating significant suffering before death.
56. She argued that the Courts have consistently taken a firm stance against mob injustice, To reinforce this position, she cited *Chengo & 4 others v Republic (2023)*, where the Court described mob justice as "unlawful," "uncouth," "barbaric," and having "no place in this century."
57. Under section 204 of the Penal code, punishment for murder, upon conviction is death. In *S v Montsho 2014 JDR 0743 (GNP)* the Court imposed life imprisonment on a 27-year old man who was found guilty of the murder of a three-year-old child. Thulane AJ observed that:

“The right to life is sacred, basic to humanity itself and enjoying Constitutional protection. Children in this country are entitled to play in the streets, especially just in front of their parental home. They have a legitimate claim to play peacefully on the streets, to enjoy their youth, to run around and enjoy the peace and tranquility of their homes and neighborhood without the fear, the apprehension and the insecurity which constantly diminishes the quality of their lives”.



58. The court is guided by the fundamental purposes of sentencing as provided for in the sentencing policy guidelines of the Judiciary, 2023 which can be pursued by the court in applying one or more of the following eight objectives:
- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
  - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
  - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - e. Community protection: to protect the community by incapacitating the offender.
  - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
  - g. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - h. Reintegration: To facilitate the re-entry of the offender into the society.
59. Further, in accordance with the landmark Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, the mandatory death sentence previously prescribed for murder under section 204 of the *Penal Code* has been declared unconstitutional, giving courts discretion to impose sentences commensurate with the specific circumstances of each case. This discretion must be exercised judiciously, with careful consideration of established sentencing principles, statutory guidelines, and constitutional imperatives regarding the right to life and human dignity.
60. On behalf of the first, second, and third accused persons, Mr. Miyiinda presented mitigating factors for the court's consideration. He submitted that the accused persons are first offenders with no previous criminal records. He further stated that they are remorseful for their actions and have expressed regret for participating in the incident. Mr. Miyiinda urged the court to consider the circumstances of the offence and to consider that the accused persons have family responsibilities and dependents who rely on them for support.
61. For the fourth accused, Mr. Oduor similarly highlighted that his client is a first offender with no previous convictions. Mr. Oduor also emphasized his client's remorse and the impact of incarceration on his family and dependents.
62. The Constitutional Court of South Africa in *State v. Makwanyane* (1995) CCT/3/94 remarked as follows on mitigation and aggravating factors in sentencing:
- “mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no



reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence."

63. Several aggravating factors are evident in this case. First, this was a case of mob justice where the accused persons, along with others not before the court, took the law into their own hands based on an allegation of theft. Such extrajudicial actions undermine the rule of law and the proper administration of justice, which are foundational pillars of our constitutional democracy. The court notes with concern the rising incidents of mob justice in our society, which represent a dangerous regression to primitive forms of "justice" that have no place in a society governed by the rule of law.

64. In *R v Engert* (1995) 84 A Crim R 67 at 68, Gleeson CJ observed:

"Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of these facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment .....

In a given case, facts which point in one direction to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance .....

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

65. Turning to mitigating factors, I note that all four accused persons are first offenders with no previous criminal records. This factor weighs in their favor as it suggests that they do not have established patterns of criminal behavior. However, I must also consider that their defense during trial did not demonstrate genuine remorse, as each accused person attempted to distance themselves from the crime and denied any wrongdoing despite compelling evidence to the contrary.

66. In *Veen v. The Queen (No. 2)* (1988) 164 CLR 465, it was stated:

"Sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case."

67. Having carefully weighed all factors in this case, including the aggravating circumstances of mob justice, the brutality of the crime, and the deliberate participation of each accused person in the assault, against the mitigating factor that they are first offenders, I find that the gravity of this offense demands a substantial custodial sentence. The actions of the accused persons have not only robbed a man of his life but have also undermined the rule of law and the proper administration of justice. Their



participation in mob justice represents a dangerous disregard for the constitutional rights of others and the established legal processes for addressing alleged crimes.

68. For these reasons, and taking into account all relevant factors cumulatively, I hereby sentence each of the four accused persons, Juliet Busuru alias Moreen, Paul Osinde, Gregory Mayebo alias Job, and Benjamin Njenga, to twenty-five (25) years imprisonment for the offense of murder contrary to section 203 as read with section 204 of the *Penal Code*. However, in accordance with section 333(2) of the *Criminal Procedure Code*, I hereby order that the periods already spent in custody be deducted from their respective sentences as follows: Benjamin Njenga to receive a deduction of five (5) months spent in custody, Gregory Mayebo alias Job to receive a deduction of nine (9) months spent in custody, and both Paul Osinde and Juliet Busuru alias Moreen to each receive a deduction of one (1) year and eight (8) months spent in custody.

69. It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 28<sup>TH</sup> DAY OF MARCH, 2025**

.....

**R. NYAKUNDI**  
**JUDGE**

