



**Republic v Igathe & 4 others (Criminal Case 9 of 2023)
[2024] KEHC 13528 (KLR) (Crim) (31 October 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL CASE 9 OF 2023
CM KARIUKI, J
OCTOBER 31, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

MAGDALENE IGATHE 1ST ACCUSED

DANIEL MARARO IGATHE 2ND ACCUSED

GAD GITHUA IGATHE 3RD ACCUSED

PETERSON MWANIKI IGATHE 4TH ACCUSED

CHARITY NGONYO IGATHE 5TH ACCUSED

JUDGMENT

1. The Accused persons herein were charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars are that on the 22nd day of December 2016 at Passenger Sub-Location in Nyandarua Central Sub-County within Nyandarua County, the accused, jointly with another not before the court, murdered Anastasia Mwhiki Igathe, the Deceased herein.
2. The prosecution called ten witnesses in total. Consequently, the Accused persons were placed on their defense, and they all gave sworn testimony and called two witnesses.
3. Prosecution’s Case
4. PW1 No.233793 CIP- Catherine Kagwiria testified that on 23/12/2016, she was the Deputy OCS Bahati Police Station when she was informed that there was a body lying somewhere. She went to Kabatini, Gatitu, and found a crowd where the body was. The body was on the ground facing down (lying on the stomach). She took photos of using her phone. She asserted that she did not find any



- identification on the body, and she asked whether the person could be identified, but no one owned up. She took the body to Nakuru County Municipal Mortuary together with PC Wambugu and PC Sebastian Matambalu. It was her testimony that the body was for a woman. The lady was dressed in a trouser top and had a deep cut on the head. She produced the photographs of the body.
5. Upon cross-examination by Advocate Simiyu, she stated that she searched the body for identification. Still, she did not get any identification in her pockets, and she did not have a phone.
 6. PW2 Charles Kamau Kigotho, Assistant Chief Matura Sub-Location Passanga Location, gave sworn testimony that on the evening of 23/12/2016, chief Daniel Muiruri Ngugi called him and informed him that something had happened at the home of Igate Mararo. He told him there was a fight there and asked him to go and investigate. He rang Karanga Muika, who was a neighbor closer to Igate's home. He said that something had happened there, but he did not tell him what it was. He also called Charity Nganga Igate, a member of the family, and asked her if she was aware of anything going on at their home. He stated that she lived in Nakuru, and she told him that it was about her sister Anastasia Mwihiaki and that there had been a fight, and she did not know where Mwihiaki was as she was in Nakuru.
 7. It was his testimony that at about 9.00 pm, he told the chief that he had not found out exactly what had happened. On the next day, he received a call from Chief Muiruri at about 7 am, who asked him to meet them at the Igate's home. When they arrived, the Assistant Chief Passenga Sub-Location, Chief, an elder from village Samuel Chege, and me. Mr. Chege and Kumu entered first. They found Magdalene Wangari, the mother of Anastasia Mwihiaki (deceased). He stated that they asked her what had happened, and she said there was a quarrel between her and Mwihiaki. They wondered where Mwihiaki was, and she responded that she did not know because a vehicle came for her at night. They also asked if her clothes had been taken, and she said all her belongings were there.
 8. PW2 asserted there had been several cases before and that Mwihiaki had a case with the mother. The mother had called and informed him that they do not get on well with Mwihiaki over land. They had filed a Succession Cause and could not agree. He stated that Igate had died and that Anastasia was the administrator. Further, there were other caretakers belonging to Margaret and three people who used to live in the home: Gad Githua, Anastasia Mwihiaki, and their mother, Magdalene.
 9. It was PW2's testimony that Gad was also there, but he did not talk to him. He asked whether anybody was injured, and she said she hit Mwihiaki with a stick. He then went back to work and later recorded my statement. He remarked that Igate had two wives and that Magdalene was the 2nd wife, but he did not know the first wife. That one wife lived in their home. The first wife had children, but he did not know how many, although he knew some of them. He stated that the children of the first wife did not live in that home, and he did not know whether all the children were included in the Succession Cause. He reiterated that he knew the accused were neighbors and that Anastasia was born there. She had her own house about 10 meters from her mother's house and no children. Gad lives in the same home 200m from the home.
 10. Upon cross-examination, he stated that he had been Assistant Chief for 15 years and that Igate was alive when he was the assistant chief, but he cannot recall when he died. He asserted that he used to live in the same home with the accused, and the deceased lived with the mother. He pointed out that the accused had invited him to the house after quarreling with Anastasia about 2-3 times. The cause of the quarrel was over land, and she had made herself administrator of the estate without consent.
 11. He averred that Anastasia related well with neighbors and that whenever they were aware of a fight in the homes, they would intervene. He stated that he received information about a quarrel in the accused's house from the area chief. He called 4th accused - Charity Onyango, and tried calling Gad but



- did not get him. I did not attempt to contact the accused 1. He asked the Accused what had happened in the home, and she told him that there was a fight between her and the deceased. He did not ask the cause of the fight. That it was not essential to find out the cause of the battle, he stated that he knew all the accused persons, who were all family, and that he did not know whether outsiders were involved in the fight or that a mob attacked Anastasia and injured her.
12. On reexamination, he confirmed that he had received three reports before made by Magdalene and that, at the time, they wanted to know where Anastasia was.
 13. PW3-Timothy Kamau Igathe, the deceased's stepbrother, testified that the 1st Accused is his father's 2nd wife and the others are her children. He testified that on 24/12/2016, he was at work when he received a call from the Chief of Passanga, who informed him that he heard there was a fight at home and that Anastasia had been taken to the hospital. It was not known where to go, and nobody had reported to the police station. He decided to tell my brothers on the phone. He called Stanley Wathigari, Evans Kuboro, and Gad. Also, he received a call from Samuel Kamau from Nakuru County Mortuary, who told him that there was a body of a girl without a name, but when washing the body, a paper fell from the body. It had names and phone numbers, and one of them was my name.
 14. He went with his brothers to the mortuary, and they were shown the body and found it belonged to Anastasia Mwihi Igathe. The body had injuries on the left parietal region; there was a deep cut and other bruises on the body. He Sebastian brought the body, and we went to Bahati Police Station. He told them that members of the public had found the body at Dundori Forest. The OCS called OCPD OI Kalou, and he sent CID from OI Kalou. They went to the forest, where they found forest officers and APs who showed them where the body was found. They saw blood at the scene, but there was no disturbance there, and the body seemed to have been dumped there. PW3 stated that they went to OI Kalou Police Station, met OCPD, and recorded statements.
 15. It was his testimony that Anastasia lived in the Passanga scheme at his father's home, but she had her own house, and the accused lived in the home. He stated that he lives in Muranga. One brother lives in Juja, and another in Ndundori and Thika in their homes. He asserted that he lived with his mother and father in that land before the accused came. From 1960-the 1970s, the accused was employed to work on the farm, and she brought problems to their home. His deceased mother left because of a lack of peace. He stated that his father did not give them any land.
 16. PW3 testified that his father died on 23/10/2010, and they filed for succession, wherein he was an administrator alongside Anastasia and Erastus. They said that the land should be divided into two parts, but Magdaline's family refused. He averred that Anastasia said that the land had to be subdivided into two, and they were given a temporary grant. However, when they wanted to apply for confirmation, the accused opposed, and that is when their hatred for Anastasia started, especially from the mother. He asserted that Anastasia and the accused persons did not get on well and that the Accused had many cases against Anastasia at the police station. He pointed out that it was not normal for Anastasia to disappear from the home and that before she went missing, she did not tell him anything. He stated that he had told me that the accused had sold his father's cow and that she went to look for it.
 17. On cross-examination, he reiterated that Accused 1 is his stepmother and Accused 2-5 are stepbrothers. He stated that he was the fifth born in the first house and that there were nine, but two had died. Further, the second house is at Passanga, and they left Passanga about 1972-73 with their mother because the accused chased her away.
 18. PW3 averred that they did not relate well and that the 1st house and 2nd house were not on good terms. He stated that he knew Anastasia's relationship with her mother was very bad and that he did



- not hear her mention the brothers and sisters much. The father lived in 2nd house, and he remarried in Passanga. He pointed out that the 1st house had tried to reconcile the accused and Anastasia. When their father died, they sat down and decided that although their parents bought land, they would not snatch it from them but would share.
19. He asserted that Anastasia's mother hated Anastasia like a sore poison. He used to talk to her but never used to speak to the other accused. He agreed that the five conspired to kill the deceased but stated that he did not see them assault the deceased and that he only heard there was a fight in the home which involved the five accused. He averred that it is not true that a mob was involved in assaulting the deceased and that he has no bitterness with the accused and only wants justice to be done in this case.
 20. On re-examination, he stated that all the accused were involved in the death of Anastasia because they were all in that home on that day and that Accuseds 4 and 5 disappeared.
 21. PW4-Stanley Wathigari, the deceased's brother, stated that he knew the accused. Accused 1 is his stepmother, Accused 2,3 , and 5 are his step-brothers, while Accused 4 is his step-sister. He testified that on 24/12/2016, he received information from Timothy, who resides in Muranga, that the chief had called him and informed him that Anastasia had been beaten, and it was unknown where she was. After 10 minutes, Timothy called him and said a mortuary attendant had called to tell him that a body had been taken there. A paper fell from the body, which had several numbers, including his, and the attendant called him. They called Evans to inform him to go to Nakuru to go and identify the body. They picked him up at 3.00 p.m., and they set off for Nakuru.
 22. They arrived at 8.00 pm, and they identified the body to be that of Anastasia. They spent the night at Nakuru in order to report to Bahati Police Station, where they found PC Sebastian, who called the OCS and informed him that they had identified the body, and they were told the CID was coming. He stated that they came to Bahati, and they went to the scene where the body was found at Dundori Forest. It was at the edge of the forest, and the place was not disturbed; it seemed the body was thrown there as there was no evidence of a struggle. They went back to Ol Kalou Police Station, where they found DCIO, OCPD, and other officers, and they recorded statements.
 23. It was PW4's testimony that he knew Anastasia, her mother, and her siblings did not get on well, but he did not see the source of the disagreement. He said the Deceased lived in his father's home, that those who lived in the house were Gad, the deceased and accused, and that Gad had his own home on the farm.
 24. He stated that he observed the deceased's body on the left side of the head, bruises on the mouth, bruises on the left hand, and a deep wound on the left leg. One hand was fractured. He asserted that he did not live at Passanga and could not tell if it was normal for her to leave home. He confirmed that the Succession cause is still ongoing and averred that Anastasia said that the accused had beaten her. Even one time, Anastasia was arrested, and Timothy had to get her out on bond. There were times when Anastasia had also reported her mother to the police.
 25. On cross-examination, he stated that his father had two houses and that the first house and second house related well until his father died, and the accused refused to cooperate. He asserted that they believe that they are not entitled to his father's estate. He stated that Anastasia was not married and that she was badly related to the accused. He heard that the brothers also used to threaten her and that they constantly quarreled (disagreed).
 26. PW4 stated that they left their home in Passanga about 1972 when his mother separated from his father; he asserted that from 1972, he went back to that home in 1985 when in school and had been to that home several times and had also gone to bury his father. He reiterated that Timothy had called him. He



- informed Anastasia that he was missing and that he never called the accused or stepsister/brother to ask about Anastasia because their relationship was terrible. Hence, there was no need to contact them.
27. He averred that he had never witnessed Anastasia being beaten, and he never investigated to find out what happened. He stated that his statement was recorded at the police station by a police officer and that he had concluded that the accused wanted his father dead. He remembers that it was only Anastasia who took care of our father in the hospital. Accused 1 lived with my father for about 38 years, and he can't tell why she wanted him dead. It is after Succession that the relationship deteriorated.
 28. He asserted that he could not tell if the accused one beat and killed the deceased or who killed Anastasia or if there was a mob that intervened and killed Anastasia and that it might be true that the accused jointly murdered the deceased. That he would believe the accused killed Anastasia because of the disputes they had before. He also averred that they have not come to court because they are fighting over land and that it is not true that they want the accused imprisoned so that they can get the land. He also stated that he did not choose Anastasia to be troublesome so that she would disturb them.
 29. On reexamination, he confirmed that there were skirmishes between the accused and the deceased, that he had known Anastasia from the time his father was admitted, and that only Anastasia was taking care of him, and that there were skirmishes even then.
 30. PW5 Evans Kibiro Igathe testified that on 24/2/2016 at about 11.00 am, he was informed that Anastasia had been injured, that she was lost, and later that she had died. They picked up Stanley and proceeded to Nakuru, where they arrived at 8.00 p.m. They went to Nakuru County Mortuary and identified Anastasia's body. It had injuries on the left side of the head, the left hand was fractured, and injuries to the left leg. They went to Bahati Police Station on the next day and proceeded to Dundori Forest, where the body had been collected. They later recorded statements. He stated that PW2 told him that the chief called and said to him that there had been a fight at their father's home, but Anastasia could not be found and that he was also called by a mortuary attendant who said he saw a piece of paper with telephone numbers. He asserted that Anastasia used to live in his father's home. Accused one also lived in that home with his father before he died, and Gad lived a bit off the house.
 31. It was his testimony that Anastasia and the mother related very severely. That there was a succession case between the 1st and 2nd houses. He also averred that there were 2 cases, one in which the deceased had complained against the mother and another in which the mother had complained.
 32. In cross-examination, PW5 stated that the 1st and 2nd houses related well before the death of his father. It was after his father's death that discussions failed, and it became terrible. He asserted that Before the death, they were not related. He reiterated that the relationship between Anastasia and the accused persons was awful even when his father was still alive and that it was Anastasia who looked after their father when he died, and the relationship became worse. He stated that Timothy and Erastus were appointed by the 1st House to be administrators, but the 2nd House disagreed.
 33. He averred that they got information that accused 1 5 jointly killed the deceased and that he did not witness the death. Further, it is not true that the deceased was killed by the mob who attacked her for troubling the mother. He stated that if the accused are imprisoned, they shall not remain with the farm as they have families and want to share equally.
 34. Upon re-examination, he reiterated that the accused murdered the deceased because of the Succession Cause as Anastasia was not siding with them and that Anastasia also complained of being beaten by the mother. He stated that she was the one who used to care for my father, and they feared that she would inherit the father's property.



35. PW6 No.236155 CIP James Kiprotich Chepchieng, a DCI officer performing crime scene investigation duties, stated that on 3/1/2017 at about 10.30 am, he received three photographic prints from DCIO Nyandarua Central CIP Mwangi. His officers had taken the photographic prints as they were investigating a murder case. The prints were of the body of a middle-aged woman who had been killed and dumped in the forest. He stated that he requested certification, which he did, and that, together with DCIO, he went to the mortuary, where he took other photographs describing the injuries on the body. He took six photographs and processed the development of the photographic evidence, then wrote a report of the same. He stated that he had the nine photographic prints and the report, which stated as follows: -1 and 2 prints - general views of the deceased lying on the grounds where she was found in the forest.No.3-facial appearance with several deep cuts.4th was at the morgue, the body of the deceased.5th - close-up view of facial appearance and injuries inflicted.6th-back view with injuries on the upper part.7th upper arm - bruises and injuries all over it8th medium view admission no to the mortuary9th medium view of a sticker on the deceased for the legThe report was produced as P.Exh.No.1, and the nine photographs as P.Exh.No.2.
36. PW7 Graham Kungu Matu, Assistant Chief of Passanga, stated that on 23/12/2016 at 10.00 am, he received a call from Chief Passanga, who informed him that there was a quarrel at the home of Igate. He called the village elder and confirmed to the Chief that there had been a quarrel. They went to the Igate home on Igate on the 24th, together with the Chief, Assistant Chief Charles Kagoro, and village elder Joseph Kerera. He asserted that the Chief interrogated neighbors, and they went into the house and questioned the mother, who said that there had been a quarrel over another fence between the deceased and Mararo accused 2. She stated that the deceased attacked the accused and the other son's friends, Gad, Mararo, and Mwaniki and that neighbors joined in beating the deceased, but she did not name any of them.
37. They inquired about the deceased's whereabouts, and she said that neighbors told them that a vehicle had come and taken the deceased away in the evening. He stated that the 5th accused joined and asked them why they had allowed the deceased to sell charcoal, and they denied knowing about it.
38. It was his testimony that he was called by Kamau, who told him that Anastasia had been found in Nakuru Mortuary and had been killed within the Bahati Area. He called the Chief and Assistant County Commissioner and informed them. He stated that Anastasia used to live in that compound with accused persons and that he had heard of land disputes even before he came into office over succession. He stated that Anastasia used to go to their office, but it was the Chief who used to deal.
39. Upon cross-examination, PW7 asserted that he had known Igate for over 20 years and that Igate had two wives. He stated that the accused lived in the same compound as Anastasia, Gad had a home over 500 meters away, Mararo and Mwaniki lived away but used to visit, and Nganga, the fourth accused, used to live in Nakuru.
40. He reiterated that from the report, the accused and Anastasia did not relate well, and there was a dispute over land that the Chief dealt with, and they went up to the County Assistant Commissioner. He asserted that there was a problem with trees and that Mwaniki also complained of deceased burning charcoal. He pointed out that the Chief said that neighbors confirmed there had been a dispute at Igate's home and that they were the ones who called him and the Chief. He stated that, according to the accused, one person had attacked the deceased, but he did not get any report of mob justice.
41. He averred that he was not shown where the deceased was beaten up and did not observe any blood in the compound. That there has been no report of indiscipline, quarrel between them, or the like and that he could not tell if the accused killed Anastasia.



42. PW8 No. 217957 CIP Stanlous Mwaniki Sub-county Criminal Investigating officer North South testified that on 25/12/2016, he was in the office within Nyandarua Police Station when the then OCPD, Wilson Koskei, called him and informed him of a murder reported by OCS Bahati Police Station. He told him that on 22/12/2016, the body of a female adult was recovered at Dundori Forest and was taken to Nakuru Mortuary, where the body was identified to be that of Anastasia Mwaniki. He was requested to take over the investigations. He sent an officer to Bahati Police Station to record the statements of the deceased's step brothers of Anastasia, then proceeded to the Passenga Location together with the OCPD to confirm if the deceased was from there.
43. He stated that they were led to the deceased's home by the chief and two assistant chiefs. They found the 1st, 2nd, and 3rd accused persons who agreed that they quarreled with the deceased on 22/12/2016, and members of the public when deceased, accused 2 and 3 admitted to having been present and witnessed what happened. He asked for the names of the members of the public who assaulted the deceased, but he was not given any. Further, no report was made to the area chief or police as they said they did not see the need to do so. PW8 testified that he learned that the whole family, including the three accused, were present in the homestead on that day and that the three did not disclose where accused 4 and 5 were. He asserted that members of public told him that the deceased disappeared on seeing their vehicle. He decided to arrest the three accused and towed the 5th accused person motor vehicle to police station. The accused 1-3 were charged at Ol Kalou Police Station.
44. It was his testimony that on 3/1/2017, he prepared the postmortem form postmortem was done by Dr. Ngulugu. He witnessed the postmortem then filled and signed the forms. He also called scenes of crime office to attend. The photographs and postmortem report were handed over to him. He also tried to trace the 4th and 5th accused and they were later arrested and charged. He stated that he charged the accused after interrogating the three accused and they never made a report about the quarrel/fight between the deceased and accused. Further, he averred that a houseboy at home and members of the public who were not willing to record statements and said that the accused assaulted the deceased. Accused 5's motor vehicle was taken for further investigation, but he found no evidence connecting it to the offence.
45. PW8 pointed out that he visited the accused's home on 25/12/2016. The place where the deceased was allegedly assaulted was clean, and he found the deceased's room locked. He asserted that the room is connected to the main house. The accused refused to give him the keys, but when he opened the door, he found the room untidy. He established that the deceased had been living at the home since she was born and that there was a dispute between the deceased and the accused because the deceased was supporting the first family on Succession. He pleaded that he found out that the deceased supported the view that the two families should share the family land equally, but the accused wanted the Land to go to accused 1, who was her mother.
46. On cross-examination by Advocate Simiyu, he asserted that he is the investigating officer in this case. He stated that he went to the scene of the crime and that the Accused's home had neighbors, but they were far off. The 1st accused's land is about 15-20 acres. He confirmed that photographs were not taken of the compound and that he did not recover any weapons in the compound of the accused. He pleaded that he interrogated the accused persons, and they said that the accused one had quarreled with the deceased and that, according to them, the deceased abused the mother, and that is where the quarrel started. After that, the alarm was raised, and members of the public came. He also interrogated some neighbors who said they saw the accused fighting with the deceased, but they did not want to record statements.



47. PW8 averred that he interrogated many people, but they were not willing to record statements, saying it was a family issue. He remarked that if a witness refuses to cooperate, you cannot force them. Further, he stated that the compound is fenced and there is a gate, but one can cross over through the fence further, that the chief had not been at the scene and was not aware of the fight.
48. He pleaded that it was not true that a mob came to assist the accused one and that the 4 Accused persons assisted her. He stated that the body was found on the 23rd by Bahati Police Station. He took the 1st, 2nd, and 3rd accused mobile phones. He tracked the accused' movements, and they were at home, but he was not able to track them to the scene where the body was found.
49. It was his averment that the accused caused the deceased's death and that the 5 killed the deceased. He concluded that they assaulted and caused the death of the deceased and refuted that it was mob justice. He also asserted that Accused 1 said she beat the deceased. She was the first to beat her, and then the rest joined. He pointed out that there was animosity between the accused and the deceased and that they had assault cases between the accused and the deceased. There was no animosity between the 4th and 5th accused and deceased till that day.
50. PW8 asserted that everything was clean in the house, and they did not see the need to dust it. The deceased's body was found about 15 km from her home. He could not tell how the body was taken there. He averred that it was not true that the deceased walked away after the fight. The accused knew their sister was injured, but they did nothing like report to the police or assist her if indeed she was assaulted by the public.
51. On re-examination, he confirmed that he did not find members of the public beating any evidence of the deceased or that the deceased walked out of the compound.
52. PW9 Doctor Titus Ngulungu, a pathologist, testified that he conducted the postmortem on the deceased on 3/1/2017 at 3.30 p.m. he established that her Age was 34 years, good nutrition status, and the body was preserved. On external exam, the body had lacerations 100x10mm- left side of eye bruises on both sides of the face. In the left lower neck, there was swelling on the left clavicle, swelling, and bruises on the arm. The right wrist had a fracture and laceration on the right side of the head 50x30mm external exam.
53. On internal examination, there was a skull fracture and left orbital wall bruises on the head. Her brain suffered a subdural hematoma, and there was brain injury and swellings. The lungs sustained a contusion and bruise of the chest wall. He formed the opinion that the cause of death was severe head injuries, as noted in the postmortem report. It was a homicide. He averred that the body was identified by Ann N. Igate, Agnes M. Igate, Erastus G. Igate, and Evans Igate, and they witnessed the postmortem. He produced the post-mortem report as P. Exhibit No. 3.
54. PW10 No. 95390 PC Nyanda Bruno Bee stated that he was the investigating officer attached to Nyandarua Central and took over the matter in 2020 after the former investigating officer retired. He produced and identified the postmortem report.
55. Defence Case
56. DW1 Magdalene Wangare Igate, the deceased's mother, testified that on 22/12/2016, she was informed that her daughter had died while she was at home in Passenga. She stated that the Deceased used to go and come back. She said that she was unwell then and that she used to cook for herself. She pleaded that on 22/12/2016, she was at home and that she had not seen her. She had made food, including her share, but she never came back. She later learned that her daughter had died. She denied



- hitting or fighting with her. She also asserted that the deceased was a drunkard. She also stated that she did not see Anastasia on the material day and that nobody came that day and beat her.
57. DW2 Daniel Mararo Igathe gave sworn testimony that on 22/12/2016, he was at home irrigating his plants with two workers. He stated that after 2 p.m., he went to DW1's house and took a cup of tea. DW1 told him that she was unwell. He then went to Boiman by 3.30 p.m. and went to Church up to 5 p.m. He averred that there was a match on that day, so he watched football up to 8 p.m.
 58. He testified that when he went to his mother's place, Anastacia was not present, and he found a man splitting timber with a power saw within because DW1 had sold wood. He stated that he was arrested on 25/12/2016 alongside his mother and Gad and taken to Ol Kalou Police Station. He said that he saw Anastasia on 18/12/2016 at home.
 59. DW2 stated that when he was arrested, he was informed that they had killed their sister Anastasia. He asserted that he did not know she was dead then and that he never saw her body. He pleaded that he was a teacher, and after school, he used to come home and see her. They had a good relationship even in 2016. He pointed out that she had called him requiring medicine, and he sent her the same in August 2016. It was DW2's testimony that he did not see Anastasia on 22/12/2016, and he did not even beat her then or when he saw her on 18/12/2016.
 60. On cross-examination, he stated that the witnesses called against the accused were step-siblings and that the step-siblings went to their family land and started to share it. They do not have a good relationship with their step-siblings.
 61. Further, he averred that Anastacia used to drink alcohol and that he had never heard of her fighting accused 1. He denied hearing any screams nor rescuing the deceased on 22/12/2016. He asserted that Mwaniki did not beat Anastasia and that he was not present at home, but his motor vehicle was at home. He stated that Mwaniki used to live in Roysambu, but he had an accident and had brought his car home.
 62. DW3 Gad Githua Igathe testified that he lives in Passanga, according to the plot given by his father. He stated that he was arrested on 25/12/2016 and detained for 14 days. On 22/12/2016, he was working on his land with Mwaura and other casuals. He confirmed that he did not see Anastasia on that day. He also averred that he had a shop at a shop in Passenga, which he used to open very early, so he hardly used to see Anastasia.
 63. He asserted that after work, he went to the shop up until 9 p.m. he pleaded that he knew Anastasia as they were brought up together and were in the same secondary school and that they were close. He pleaded that he used to see her go to bars and that they never had any problems with her. He denied participating in the killing of his sister and that there was a fight at home on 22/12/2016. He also stated that he did not go to his mother's
 64. On cross-examination, DW1 stated that he knew of the deceased's death on 25/12/2016. He averred that his relationship with his siblings is good and that they are all close to their mother.
 65. On re-examination, he asserted that he cannot hide his mother's or siblings' wrongs.
 66. DW4 Charity Ngonyo Igathe gave sworn testimony that she is Accused 1's lastborn and that she lives in Lanet, Nakuru. She stated that she had no problem with her late sister and that her death affected her badly. She asserted that she used to take alcohol and that she did not know who killed her. She denied that they conspired to kill Anastasia and pleaded that there was no reason to kill her.
 67. In cross-examination, she stated that she and Anastasia had a good relationship as sisters. She averred that she did not go home to Passenga on 22/12/2016 and that she was informed that everybody at



- home had been arrested. DCI Olkalou called her on the phone while in Nairobi and told her to go to the police station. When she went to KBC Police Station, she was arrested with her child.
68. DW5 Peterson Mwaniki Igathe testified that on 22/12/2016, he was in Nairobi as he was preparing for theatre when he had an accident because, on 13/5/2016, he was hit by a vehicle and taken to hospital where he had an operation as he had a fracture. He stated that he was in the hospital from 13/5/2016 to 1/4/2016, but he did not have records. He denied having gone to Passenga on that day.
 69. He pointed out that his car was at his mother's place on the material day and that it had been there since June 2016. He pleaded that he had last seen Anastacia in December 2015. Further, he was arrested on 31/1/2018 in Thika after reporting to school after discharge from the hospital. He was informed by one DCIO that their family killed a sister. He averred that he came to know of the deceased's death via Joan on 12/1/2017. Further, that his relationship with Anastasia was good and that there was no reason to kill his sister. He stated that he has no relationship with his step-siblings and that his sister's loss really hurt him.
 70. He produced a bundle of documents showing that he was undergoing treatment as D Exhibit 1.
 71. Upon cross-examination, DW5 stated that he was a teacher and that he did not have a good relationship with PW4, who works with TSC. He said he brought the police, who arrested him and told the principal and TSC, and he had been forbidden since 2012. He reiterated that Anastasia and him had a good relationship.
 72. Additionally, he pleaded that he took his motor vehicle to their home in Passanga after the accident as he found it safe to do so and that there was a misunderstanding over the succession case in court with his step-siblings. He confirmed that he was in Nairobi on 22/12/2016.
 73. DW6 Abdallah Mutembei Gisanga testified that on 22/12/2016, he was harvesting timber on the Accused's farm and that he was doing so 500 meters from her home. He stated that he stored timber at her compound and was there from 6 a.m. to past 6 pm. He asserted that Mararo came to her compound at 4 pm and that Anastasia was not there on that day as he did not see her.
 74. He testified that he did not witness any incident at her house on the material day. He did not see the deceased and was accused of quarrels. He averred that he knew accused 1, Anastasia, and Gad, as well as others, but the others did not live around. He also said that he did not notice any bad blood between Anastasia and accused 1.
 75. On cross-examination, he stated that he saw accused two at around 4 pm taking tea.
 76. DW6 Phillip Mwaura Munyua testified that all the accused persons are his neighbors at Passenga. He stated that on 22/12/2016, he was at home in Passenga with Gad, who is his immediate neighbor. There was an issue with the fence as ants had feasted on it. He stated that they started working in it at 11 a.m. until 5 pm. He went home, and Gad went to the shop. He averred that there was no incident at Accused 1's home and that he did not see Anastasia on that day.
 77. On cross-examination, he stated that he knew the accused from the 1970s and had never heard of an incident at home, and he never had problems with accused 1.
 78. DW7 Margaret Njoki gave sworn testimony that she knew DW4 as they lived in the same plot, where she is the caretaker. She stated that on 22/12/2016, Charity was in Nakuru because her child was having problems, and she was helping her take care of the child. She asserted that Charity never left Nakuru (Lanet) on 22/12/2016 and that in January 2017, she was told to take the child to Nairobi. Later, she called her and said to her that she was arrested.



79. At the close of the defense case, parties were directed to submit submissions, but only the defense filed them. Thus, for the record, the court noted that the prosecution's Written Submissions were not available at the time of drafting this judgment.
80. Accused Persons' Submissions
81. Defence identified the following issues in their submissions. namely;
- i. Whether the prosecution has proved the ingredients of murder
 - ii. Whether the circumstantial evidence relied on by the prosecution infers guilt of the accused persons
 - iii. Whether Accused 5 had a corroborated alibi defense
 - iv. Whether failure by the prosecution to call crucial witnesses is fatal to its case
 - v. Whether the prosecution has proved its case beyond reasonable doubt
82. On the first issue, the accused persons submitted that the prosecution witnesses have testified that the accused persons caused the death of the deceased person. However, all of them have indicated that they were not present when the accused persons allegedly beat the deceased, causing her death. It was stated that neither of the witnesses was present at the scene and did not witness the death of the deceased. Reliance was placed on Criminal Case No. 16 of 2016 Republic v Emilio Njoka Mwaniki and Republic v Ismail Hussein Ibrahim [2018] eKLR
83. It was asserted that the prosecution has failed to prove actus reus since none of the prosecution witnesses had testified to seeing any of the accused persons beating the deceased and causing her fatal injuries and that the prosecution has failed in entirety to prove that the accused persons murdered by failing to confirm all the three ingredients of murder to the required standard.
84. On whether the circumstantial evidence relied on by the prosecution infers guilt of the accused persons, it was contended that the evidence from the trial is purely circumstantial, considering no eye witness was called to give evidence before the honorable court. Further, the evidence put before the court by the prosecution does not disclose the scene where the deceased was killed since it was the evidence of prosecution witnesses and specifically the Investigating officer PW8. There was no blood in the Igate compound, and at the scene where the body was recovered, it only appeared like the body was dumped.
85. It was argued that it had not been explained how the deceased person left her home; the investigating officer indicated that she walked away, whereas PW 7 indicated that from the evidence he gathered, a vehicle picked her up. The investigating officer PW 8 confirmed that accused 5's vehicle was not used in committing the offense and was not connected to the commission of the offense herein. He also confirmed there was no blood at the alleged scene of the assault.
86. Moreover, the accused persons reiterated that there is no shred of evidence linking the accused persons to the commission of the offense to which they have been charged and that there is no evidence that the accused persons were the last people seen with the deceased alive. Further, it was stated that the investigating officer indicated that he tracked the phones of the accused persons to establish the whereabouts of the accused persons at the time of the commission of the alleged offense, which data he did not produce before the court as evidence. Reliance was placed on Criminal Case No. 16 of 2016 Republic v Emilio Njoka Mwaniki, which referenced the case of Republic v Kipkering Arap Koskei & Another [1949] 16 EACA 135



87. On whether Accused 5 had a corroboration. Alibi. Defense, it was stated that PW2 confirmed in his evidence that accused five Charity was living in Nakuru, and after he got the information from the chief, he called her. She informed him that he had no information about what might have occurred at her home since she was in Nakuru. It was well within the knowledge of the investigating officer and, subsequently, the prosecution that accused 5 was not in Pasanga at the time of the commission of the alleged offense. Reliance was placed on Criminal Appeal No. 55 of 2015 Erick Otieno Meda v Republic
88. On whether failure by the prosecution to call crucial witnesses is fatal to its case, the accused persons asserted that PW 2 and PW 7 gave evidence based on information provided to them by the chief by the name of Daniel Muiruri Ngugi who was not called as a witness before this honorable court. It was submitted that the prosecution witnesses, specifically PW 2 and PW 7, who have indicated that they are assistant chiefs, stated that there was a confrontation between the deceased and the accused persons at their home. However, not even a single neighbor was called to give evidence of the same effect, considering PW 2 and PW 7 were not present at the time of the alleged confrontation. No one was called even to confirm that the deceased was injured as a result of the confrontation, whether she was bleeding or not, whether she was walking or was taken to hospital, or where she went after the alleged confrontation.
89. Reliance was placed on the case of [Peter Nyamu Mutithi v Republic \[2021\] KLR at Nairobi Criminal Appeal 13 of 2020](#). It is the accused person's submission that evidential gaps created by the failure to call crucial witnesses in this case should be interpreted in favor of the accused persons herein
90. Lastly, it was stated that the prosecution had placed before this honorable court evidence encumbered with gaps, such as where and who killed the deceased and what weapon was used. It was submitted that there was no blood at the Igathe compound, and the body was not recovered there. They averred that the prosecution did not explain how the body reached Dundori Forest and that there was no single witness who had been called to identify the accused persons as the people who beat the deceased, causing her death. Reliance was placed on Criminal Case 64 of 2006 Republic v Charles Njoroge, Criminal Case No.5 of 2016 Republic v Silas Magongo Onzere alias Fredrick Namema
91. It was contended that the evidence of the prosecution witnesses did not concern the death of the deceased but that of succession and assumption of what might have transpired. None of the witnesses were present during the alleged incident before the death of the deceased. It was asserted that it is not for the accused persons to prove their innocence. Still, for the prosecution to prove their guilt, and as such, the prosecution has failed to prove the charge against the accused persons beyond a reasonable doubt, and they prayed that this honorable court acquits them.
92. Issues, Analysis And Determination
93. After going through evidence on record and submissions filed, I find the issues are: whether the ingredients of murder were proved beyond a reasonable doubt?
94. Accused persons herein are charged with the offense of murder. Section 203 of the Penal Code defines the offense of murder. It requires proof of the following elements beyond a reasonable doubt to establish the offense 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 suspect and that the unlawful killing was with malice aforethought.
95. Accordingly, the first issue for consideration is proof of death. In the instant case, there is no dispute over the deceased's death. This was confirmed by all the prosecution witnesses, more so by the evidence of PW9, who conducted the postmortem on the deceased's body and arrived at the conclusion that the cause of death was severe head injuries attended by the skull, subdural hematoma, and multiple blunt



force trauma. Consequently, it is my opinion that the prosecution has satisfied this element beyond reasonable doubt.

96. The next question is whether the death of the deceased was due to an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. PW9 indicated that the cause of death was a homicide in the post-mortem report. Homicide is defined in the Black's Law Dictionary, 2nd Edition, as "The killing of any human creature; the killing of one human being by the act, procurement, or omission of another." Further, the post-mortem report revealed that the deceased sustained severe head injuries attended by the skull, subdural hematoma, and multiple blunt force trauma. It is my considered finding that such a severe assault amounted to an unlawful act as there is no evidence that the injuries were self-inflicted or inflicted in self-defense by the deceased's assailant(s). accordingly, I find that the prosecution proved beyond reasonable doubt that the deceased person died out of an unlawful act.
97. The other question is whether it was the accused persons who unlawfully caused the death of Anastasia Mwihi. This is a case where none of the prosecution witnesses stated that they saw the accused persons in the actual act of assaulting the deceased. None of the witnesses witnessed the deceased's unlawful killing. The prosecution's case was based mainly on circumstantial evidence. In *Ahamad Abolfathi Mohammed and Another vs. Republic* [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence: -

"However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person, just as direct evidence. Way back in 1928, Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver, and Donovan* [1928] Cr. App. R 21: - "It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances that, by intensified examination, can prove a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

98. Further, in the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

"Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and no other person, as the perpetrator of the offense. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows: "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

99. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
100. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
101. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else."



102. In *Neema Mwandoro Nduzuya v R* [2008] eKLR, the Court of Appeal reiterated the probative value of circumstantial evidence and the attendant duty of the trial court, stating that:

“Indeed, circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in *R v Taylor Weaver and Donovan* (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before the basis of a conviction on it.

103. Further, in *Mwangi and Another vs. Republic* (2004) 2 KLR 32, the Court of Appeal stated that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence, as proved, is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge.”

104. The prosecution weaved a circumstantial case outlining that the accused persons, who are the deceased’s mother and siblings, murdered the accused and later dumped her at Dundori Forest, where she was found because of the ongoing succession battles between them and their step-siblings from their deceased’s father first family. It was asserted that the deceased was in support of her step-sibling’s intention to share the deceased’s estate. At the same time, her own family did not want to share the estate, which caused enmity between her and her family, especially her mother, who she was said to have fought with several times. The prosecution led evidence that on the material day, the deceased was involved in a fight with her mother, and the siblings joined in, which assaulted her, leading to her murder. Then, they dumped her in the forest where she was found.

105. PW1 testified that she was called after the body was discovered lying in Kabatini. She asserted that the body was lying on the ground facing down, and then took photos, and then proceeded to take the body to the mortuary together with PC Wambugu and PW8. PW2 and PW7 were Assistant Chiefs who, upon the Chief’s information that there was a fight at the accused person’s home went to investigate the same. PW2 stated that he called the 5th accused person, who told him that there had been a fight and it was about the deceased, but she did not know where she was because she was in Nakuru.

106. He stated that when they went to the 1st accused’s home, she told them that there had been a quarrel between her and the deceased and that she was picked up by a vehicle at night, so she did not know where she went. She also stated that she had left all her belongings behind. PW2 asserted that there had been several cases between the deceased and the 1st accused over land. Further, the 1st accused told him that she hit the deceased with a stick. PW7 corroborated PW2’s account and added that the neighbors they had talked to confirmed that there had been a dispute at the Igate’s home on the material day. He pleaded that the 1st accused person told them that there had been a quarrel over another fence between the deceased and the 2nd accused person. She stated that the deceased attacked the accused and the other son’s friends, Gad, Mararo, and Mwaniki and that neighbors joined in beating the deceased, but she did not name any of them.

107. PW3, PW4, and PW5 were the deceased’s step-siblings. PW3 testified that he was called on 24/12/2016 by the Chief, Passanga, and was informed that there was a fight at home and the deceased whereabouts were unknown. He also received a call from Samuel Kamau from Nakuru County Mortuary, who told him that there was a body of a girl without names, but when washing the body, a piece of paper fell from the body, and it had names and phone numbers and one of them was his name. He then proceeded to



- the mortuary together with PW4 and PW5, and they identified the deceased's body. They also went to the forest where the body was discovered and later recorded their statements.
108. PW3 gave a narration on the 1st and 2nd family and recounted that when his father died on 23/10/2010, they filed for Succession, wherein he was an administrator alongside Anastasia and Erastus. They said that the land be divided into two, but the 1st accused's family refused. He averred that Anastasia said that the land had to be subdivided into 2, and they were given a temporary grant. Still, when they wanted to apply for confirmation, the accused persons opposed, and that is when their hatred for Anastasia started, especially from the mother. He asserted that Anastasia and the accused persons did not get on well and that the Accused had many cases against Anastasia at the police station. PW4 and PW5 echoed this account. They also asserted that the deceased and her mother had a bad relationship primarily because of the succession issue. Still, they were all clear that they did not see the assault on Anastasia.
109. Accordingly, all pieces of circumstantial evidence ought to be viewed as individual strands of a cord, which, when combined, constitute a rope. (See Regina vs. Exall and Others (1866) 176 ER). The first strand the prosecution presented was that there was a fight and quarrel at the 1st accused's home that led to the deceased's death. The accused persons denied that a fight happened; however, according to PW2 and PW7, the 1st accused told them that there had been a dispute at home and that neighbors had joined in and attacked the deceased. He stated that the 1st accused even admitted that she had hit the deceased with a stick. She confirmed that the 2nd and 3rd accused were present during the dispute. She also stated that members of the public beat the decrease and that a vehicle came and picked her and she left. Similarly, in her statement recorded at the police station, the 1st accused stated that a dispute had arisen between her and the deceased. Members of the public came and beat the accused with sticks and stones until the 2nd and 3rd accused persons came. She also stated that the members told her of the public to beat the deceased twice, which she did. Further, she asserted that the 5th accused had come after what had happened, but she went back to Nakuru. She confirmed that members of the public beat the deceased, but she was not dead and that she did not find her in the house when she woke up the next day.
110. At this point, it is my considered view that the accused person's defense testimony was full of falsehoods and mere denials, particularly the 1st accused. I say this because I have had time to thoroughly analyze the statements under inquiry vis a vis the testimonies they gave in court. I do not find the 1st accused to be a reliable or credible person, given the fact that she gave a different account to PW2 and PW8, a narration that was almost similar to her statement under inquiry. She sought to convince the court that nothing had happened on the material day at her home, but I do not believe the same thing to be true. She went ahead and placed the 2nd and 3rd accused at her house when the quarrel happened despite them denying the same in their statements.
111. Interestingly, she also indicated that the 5th accused had come to her home after the incident at around 2 pm, an account that the 2nd accused also gave in her statement under inquiry. She indicated that when she arrived home, she found the deceased seated outside the compound, and she could see injuries on the head and blood on her face. She also stated that she was at home together with all the accused persons and that on the next day, the herds boy had told her that the deceased was taken to hospital using a white vehicle. However, during her testimony in court, she stated that she had been in Nakuru the whole day and had even called DW7 to testify to that effect.
112. The 3rd accused, in his statement under inquiry, stated that he heard screams from his house, and when he approached his mother's compound, he found a crowd of people and was told that the deceased was beating the 1st accused. He stated that he was told the deceased had been beaten and had gone to her room, but then she left afterwards. The 2nd accused, in his statement, stated that members of the public



assaulted the deceased and that he also canned her thrice. He placed the 3rd and 4th accused at that scene and stated that the crowd was beating the deceased with every type of weapon, that he stopped them from beating her, and that he later left but could not trace the deceased's whereabouts on the next day.

113. In the circumstance, I am persuaded that the accused persons are definitely liars and that a dispute definitely happened at the 1st accused's homestead on the 22nd, but are the accused persons murderers? And has the prosecution proved the same beyond reasonable doubt? In the case of *Sawe vs. Republic* [2003] KLR 364, the Court of Appeal amplified the above thus:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused.”

114. According to Sections 107 and 109 of the *Evidence Act*, the burden of proof lies with the prosecution, and in this case, the standard of proof is beyond reasonable doubt. At no point does this burden shift to the accused person, and the courts are cautioned about this. In the instant case, it is my considered view that there was indeed a quarrel in the 1st accused's home where the deceased also lived on the material date that involved the 1st accused and the deceased and which the 2nd, 3rd and 4th accused later joined the fight and the 5th accused joined after the fight was over. The deceased was assaulted during this fight, and the same could have led to her demise. The prosecution even established that the accused persons had sufficient motivation to kill the deceased because of their ongoing succession battles; however, I am not able to completely displace the accused person's assertions that members of the public attacked the deceased and what exactly happened on the day the deceased was assaulted
115. After rigorously analyzing the evidence produced by the prosecution, it is my considered view that the circumstantial evidence fails to establish a solid chain of events proving that the accused persons conspired to kill the deceased. In my view, the circumstantial evidence creates a disjointed chain of events that creates reasonable doubts as to whether they indeed committed the offense. It is unfortunate that the police, in conducting their investigations, left gaps that this court cannot fill. Most of the evidence presented by the prosecution was based on hearsay, which cannot be relied on to convict the accused persons. It is also unfortunate that not even one neighbor was willing to testify as to what had happened in the accused's homestead on the material day.
116. The end is that the prosecution has failed to prove its case against the 1st, 2nd, 3rd, 4th, and 5th accused persons beyond a reasonable doubt, and the doubt is resolved in favor of the accused persons, and thus the court makes the orders;
- i. The court, therefore, acquits the accused persons 1,2,3,4 and 5 of the charge of murder and set at liberty forthwith unless otherwise lawfully held.

JUDGMENT, DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 31ST DAY OF OCTOBER 2024.

CHARLES KARIUKI

JUDGE

