



REPUBLIC OF KENYA



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**Republic v Kithinji & 2 others (Criminal Case 63 of 2015)
[2023] KEHC 1362 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 63 OF 2015
EM MURIITHI, J
FEBRUARY 23, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

BENJAMIN KITHINJI 1ST ACCUSED

BERNARD MUTURA 2ND ACCUSED

COSMAS KIRIMI 3RD ACCUSED

JUDGMENT

1. On 23/9/2015, Benjamin Kithinji, Bernard Mutura and Cosmas Kirimi (the accused) were arraigned in court to plead to the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 21/8/2015 at Kiegoi Location in Igembe South Sub-County within Meru County, the accused jointly murdered Joses Kaiyongi Kachumbika.
2. After they denied the charge, the prosecution called 8 witnesses to prove its case.

Evidence

3. PW1 Rael Ncooro testified that, "...Joses Kainyogi was my child. I recall 21/5/2015 is the day he was killed. I came to know that he has died at 4 am. I was asleep at home. I was woken up by one Cosmas. He is the 3rd accused. My husband had leased a Miraa farm to the 3rd Accused so that he could get money to go to hospital. The previous night at about 8pm I had seen Kithinji and Gatheno (1st and 2nd Accused) together with Cosma. They passed my homestead heading to the farm...I know the 2nd accused by the name Katheno. When I asked them what they were going to do in the farm at night they informed me that they were going to check on Miraa which they had harvested. I was standing on the door to my house as they went to my farm. After that I slept. At About 4 am, the 3rd accused woke up my children. He told them to come out they go to hospital as Kaigongi was in hospital. I opened



the door and looking outside, I saw him with a police officer, the 3rd accused called us that we go to see Kaigongi in hospital. I questioned him how that was possible as Kaigongi was home the previous night. The children left him. I was left behind. I had a small child with whom I remained. My children returned at about 1 pm. These were Dorothy Kathambi, Beatrice and others. These were my children. When they came back they told me that Kaigongi was already dead at Maua Methodist. I did not go to hospital. I later went to see him but was in the mortuary. I saw the body. His clothes were blood stained. The head had an injury. The skull was split. The previous night when I saw the three they came to my home. They were barely 3 metres away from my door where I was standing. It was at night. There was electric light and I could identify them well. It was a security light. The three were together. I had leased the Miraa farm to Cosmas the 3rd accused for 2 years.”

4. On cross examination by counsel for the 1st and 2nd accused, she stated that, “...The previous night at 8:30 pm, they were the three of them...My child was killed because he refused to sell 0.10 acres to the 3rd accused.”
5. On cross examination by counsel for the 3rd accused, she stated that, “Paragraph 2 of the witness’s statement read to her. I started that I saw two men namely Kathengo and Kithinji pass by my home to go to guard Miraa farm. I think I also saw the 3rd accused that evening. Gachungukia was my late husband...I would not know how the deceased left his house. I never saw the accused come for him. Had I seen I would have fought them. In my statement to the police, I did not states that I was 3 paces away from the accused. I stated that I was outside my house. The 3rd accused had his own house. He had bought some land and constructed a house. It is in Mulika area...Mulika is not far from Maua. When I opened my door I saw Francis Meme my son, Cosmas and a police officer. Francis Meme died after this incident. They told me that Jose was in hospital having fought with some people guarding the miraa of Cosmas.”
6. On re-examination, she stated that, “The farm was mine. I had leased it to Cosmas the 3rd accused.”
7. PW2 Dorothy Kathambi testified that, “...The deceased in this case was my brother. I recall the 20/8/2015 at about 8 pm I was at home I was in the Kitchen. I heard my mother talk outside with a male person. My mother is PW1. She called out to know who was passing out side. I heard Kathengo responded that it was them. Kathengo is also known as Benard. It is the 2nd accused (points at Accused 2). I knew him and I was able to recognize his voice. He was a friend to the deceased. I have known since childhood. They went to the farm while my mother returned back to the house. At about 10pm, Jose (deceased) came home. He had Miraa and Soda. He went to sleep. At home, we were myself, my sister Beatrice Kagendo, PW 1 and Jose. At about 11:00 am. I heard someone knock the door of Jose’s house. Where I was to his door was about 3 metres. It was pushed and opened with force. Then there followed silence. I did not go out to check. In the morning at about 4am, it was called from outside by Francis Meme, my brother. I opened my door and found Meme in the company of Cosmas, a police officer and the wife to Francis Meme outside. Francis Meme and his wife have a house approximately 10 metres from PW 1’s house. It is in the same homestead. I had not seen Francis Meme the previous evening. I had however seen his wife. When I opened the door, I saw them standing about 2 paces from my doorstep. I asked Meme where he was coming from with Cosmas. He told me that Cosmas and the police officer had woke him up. He then told me that we go to hospital, Maua Methodist. Cosmas is the 3rd Accused (points at accused 3). I had known Cosmas for about a year as he had leased Miraa from our farm. My sister Beatrice knocked my mother’s door to wake her up. She opened and asked what the problem was. My brother just told her we should go to hospital while shaking. Beatrice, Francis and a cousin by the name Mbaabu accompanied Cosmas and Police office. I joined them and when we reached the road, we found the Police vehicle. We then went to Maua Methodist Hospital. When we reached the hospital we found another police officer by the name Ocharo who told us not to go to the



- emergency. Mr. Ocharo told us that the body of the deceased was in the hospital and there was no been to take it to Meru General Hospital. I asked Cosmas why he decided to finish my brother. When I asked the second time, he told me that he was not the one. I decided to call my uncle. I asked Cosmas why he had finished Joses because he had earlier on threatened my brother. He had then beaten him but I asked him to take him to the police. He took him to Maua Police Station on my insistence. My brother was taken to Kangeta for a month. Cosmas told me that he wanted my brother to be disciplined. This was in 2014. Cosmas had complained that Joses was chewing his Miraa. The two were friends.”
8. On cross examination by counsel for the 1st and 2nd accused, she stated that, “The farm had been leased by Cosmas from my father. I have known the 1st accused since childhood. They were friends with Joses having any quarrel of disagreement with the 1st and 2nd accused. I had no cause for alarm at 11:00pm when I heard Joses door being knocked. I do not know how my brother met his death.”
 9. On cross examination by counsel for the 3rd accused, she stated that, “My mother was outside the Kitchen collecting utensils. It is then I heard her speak to some people. I heard a male voice. I had started the name of the person whose voice I had heard but it was not recorded in the statement to the police. Given the statement and he states, I did not state the name. The security light had gone off when I went to collect clothes from the cloths line. At 11:45 pm I heard a knock on my brother’s door and someone called him Issa. I did not speak to the police officer at 4 am. Cosmas stated that my brother had been hurt by his people guarding Miraa. I did not state in the statement about Cosmas earlier threats to my brother because I was never asked about it...The Miraa was being guarded by Benard and Benjamin (2nd and 1st accused) Joses was a friend to the accused.”
 10. On re-examination, she stated that, “I told my brother to let his door to his house open so that I could see the cloth line because the security light had gone off. That was the only security light in the compound. It is Cosmas, 3rd accused who is formed us that our brother had been injured and was in hospital.”
 11. PW3 Charles Kinoti, a carpenter, testified that, “...On 21/8/2015 I recall at about midnight, I was at my home sleeping. My home is near the road. I heard some commotion outside. People were shouting about a Miraa thief. I came out to see the Miraa thief. I came out and went to the road where there was a commotion. I found Kaigonji having an injury on his head and nose bleeding. I found Bernard and Kithinji at the scene (2nd and 1st accused). The 1st accused was holding the deceased on his trouser at the back Bernard was standing beside. When I reached there, Bernard asked me to give his phone which I gave. He called the 3rd accused. The two said they wanted to take the deceased to the home of the 3rd accused. I decided to accompany them. After a short distance, the deceased sat down. We sat there until Mureithi came with a motor cycle. He picked the deceased together with the 1st and 2nd accused went away later heard that the deceased had passed on. When I saw Kaigongi that night, I shown the torch on him. He was nose bleeding. Bernard is the 2nd Accused. I recognized him as I used my torch. I spoke to him, Kithinji is the 1st accused. I also saw him that night and recognized him as I shown my torch. I knew the two. They are village mates. I knew them well. I never saw Cosmas that night. I know him He is the 3rd accused. He is my in law. Benard had been engaged as a guard for Cosmas Miraa Kithinji had also been hired as a guard by Cosmas.”
 12. On cross examination by counsel for the 1st and 2nd accused, he stated that, “It is Kaigongi who was alleged to be a miraa thief. It was alleged that he had stolen from Cosmas Miraa. I do not know how he was arrested. When I reached the scene, there were about 5 people. These included Benard and Kithinji.”
 13. On cross examination by counsel for the 3rd accused, he stated that, “The noise I heard was from one person saying he had arrested a miraa thief. I inquired where he had stolen from. They never showed me



the stolen Miraa. It was past mid-night. It is Benard who borrowed my phone. I had him ask Cosmas. Where he was. Cosma told Benard that he was in Maua. Mureithi is still alive. I do not know who had sent him. I had a torch. The people I found at the scene were scattered. It was at night. I may have not seen all those present.”

14. PW4 Beatrice Kagendo testified that, “...I recall the August 21, 2015 at about 8pm, while I was in the Kitchen at home at Mulika with my sister. While there, I heard my mother who was outside asking Kithinji and Katheru where they were going. The two were guarding Miraa belonging to Kaiyongi. Kaiyongi had leased the Miraa to Cosmas. I know Cosmas, Kithinji and Katheru. Kithinji is the first one (points at 1st accused), Katheru is the one at the middle (points at 2nd accused) and Cosmas is the last (points at 3rd accused). I was with my sister Kathambi (PW2) and my mother is Nchooro (PW1). My mother asked the 1st and 2nd accused whether they were going to the farm at night. They responded that they will go both at night and during the day. Then I and my sister had supper and continued to watch T.V at about 10:30 pm, my brother Joses Kaiyongi left us to go to sleep. I heard him speak. I heard him speak to some people outside. He went to sleep. At about 4:30 am, I heard Francis Meme knocked the door to our house. I opened the door and found him with O.C Crime Mr. Ocharo and an Administration Police officer. Francis told me that he had heard that Kaigogi had been assaulted by the 1st and 2nd accused and he was at Maua Methodist. He asked me that we go to see him. I woke up PW2 and Isaiah Martin and Mbaabu to accompany us. We boarded the police vehicle in which we found Cosmas (3rd accused). On arriving Maua Methodist, the OC Crime told us that he had come for us because he wanted to know whether the body of Kaiyongi was to be preserved at Maua Methodist or be taken to Meru level 5. We were small children and could do nothing. It is my uncle who handled the rest. I only heard the 1st and 2nd accused converse with my mother. I have known the 1st and 2nd accused since childhood. Katherru was a school mate. I knew Cosmas (3rd Accused) in 2013 when I first saw him. I came to know him when he was with my late brother Kaiyongi. I knew him because, I found that my brother had given Cosmas Miraa without the authority of my father. The 3rd accused killed the deceased. They are the ones who removed the deceased from the compound. I do not know why they killed him. We later went to Maua police station and made our statements.”
15. On cross examination by counsel for the 1st and 2nd accused, she stated that, “I did not see the men who spoke to my mother that right. At 10:30 am I heard two men talk to my brother. I did not see them. The 1st and 2nd accused were friends to the deceased. The 1st and 2nd accused were guarding the Miraa belonging to the 3rd accused. Then Miraa was within our farm. The Miraa commence behind our house. There are no lights within the farm.”
16. On cross examination by counsel for the 3rd accused, she stated that, “I heard my mother call the 2 by their names I did not state so in my statement. It is Kithinji who answered that they were to guard the Miraa night and day. I only heard their voices. I heard the voice of Kithinji answer as such. There was no lighting outside. When I heard my brother talk to some men at 10:30pm, I did not hear the door being pushed. I was not happy that my father was in hospital and Kaiyongi had given Miraa to Cosmas. In 2013, Kaiyosi did not have his own Miraa. I was not happy with what Cosmas did. He took advantage of Kaiyongi who was a young boy. The 3rd accused was not there that night. He only came in the morning with the police.”
17. On re-examination, she stated that, “I heard the people talking to my brother Kaiyongi at 10:30 am I recognized the voices to be those of the 1st and 2nd accused. I reported the 2013 incident to the chief. That is the time, I knew Cosmas. I was given his phone number and I called him. I wanted him to get back his money from Kaiyongi I did not harbor any grudge with the 3rd accused because of the said incident.”



18. PW5 Joseph Murithi Kiwanthi, a boda boda rider testified that, "...I recall the 21st August, 2015 at about 4.00 am, I was at my home. I received a call from Cosmas who told me I go and pick Gatheng'o (2nd Accused), Kithinji (1st Accused) and Kaiyongi. I took my motor cycle and went to Mulika Market. Then I heard being called. I heard the voice of Gatheng'o (points at 2nd accused). I took my motor cycle and went to Mulika Market. Then I heard being called. I heard the voice of Gatheng'o (points at 2nd accused). He called me to the edge of the market. When I went there I found Kaiyongi lying the ground besides some foot path Kithinji and Gatheng'o were besides him. I know the 2nd accused by that name. I saw Kaiyongi nose bleeding on the ground. I told the 1st and 2nd accused to put Kaiyongi on the Motor cycle. The first and 2nd accused boarded my Motor Cycle and put the deceased between them. Kithinji (1st accused) sat next to me the body in between him and 2nd accused who was at the rear. They directed me to drive to Maua police station. We found we Cosmas outside the gate to the station police officer, directed that we take the deceased to hospital. We headed to Maua Methodist where I left the deceased, Cosmas, Kithinji and Gathen'go (2rd accused). I knew the accused before the incident. Gatheng'o was ahead of me in school Kithinji home is not far from our home. I was able to know those I dealt with because I used the headlights of the Motor cycle. I went away and left the 3 accused at the hospital with the deceased. I later went and recorded my statement with the police."
19. On cross examination by counsel for the 1st and 2nd accused, he stated that, "When I reached where Kaiyongi was lying on the ground, I found Gatheng'o and Kithinji I never saw anyone there. It was at Mulika Market."
20. On cross examination by counsel for the 3rd accused, he stated that, "It is Cosmas who told me to go and pick some people. He did not tell me where he was calling from. At the scene I found the 1st and 2nd accused. Statement read to the witness, I started that I met Mutura, Kithinji, Kinoti and Kaiyongi was lying down nose bleeding. Mutura is also known as Gatheng'o. That is the name we used to call him while in school. I asked the 2 accused why the deceased lying was down. They told me they did not know why. From Mulika to Maua is a distance of about 10 minutes Motor cycling. I used 17 minutes to Maua because they were many on my Motor Cycle. Cosmas told me we take Kaiyongi to hospital."
21. On re-examination, he stated that, "At the scene, I found Mutura and Kithinji and Kaiyogi lying the ground."
22. PW6 Isaiah Mati, a businessman testified that, "I recall 20/8/2015 at about 10pm. I was at my barber shop. Kayongi was with me. We were together upto 11pm when he went to sleep. I was left washing my shop. The following morning at 6 am I received a call from my brother Mbaabu informing me that Kayongi had been killed. I went to Maua police to go and report the incident. I was with my brother, Meme and sisters. Kayongi was killed at a place I do not know and by a person I do not know."
23. On cross examination by counsel for the 1st and 2nd accused, he stated that, "I was only informed that Kayogi was killed."
24. PW7 No. 75707 PC Lucas Maitha from Voi Railways Police Station SGR Section, testified that, "When the incident happened I was from Maua Police Station crime offices. On the particular day on 20/8/2015 I was on crime shortly. I was with Inspector Odero and the duty officer of the day. While on duty at the police station I was on patrol and when the report came, the investigating officer informed me that there was a report made by Cosmas Kirimi. Inspector Odero informed me not Cosmas Kirimi had reported the complaint that his two miraa guards by names Benjamin Kithinji and Bernard Mutura had arrested one suspect by the name Joseph Kaijongi at the Miraa shamba who wanted to steal the miraa. The OB was OB No. 9/21/8/2015 at 01.30 hrs. The person who made the report is the 3rd accused. After that the Investigating Officer told me that he had informed them about the case later



so that I could take action. About 03.00 hrs on the said day, Inspector Odero called them again and informed me not to report Cosmas Kirimi had come to the station and reported that the accused person Joses Kaijungi had been brought to Maua for treatment at Maua General Hospital and later referred to Maua Methodist hospital. He had been brought by Benjamin Kithinji and Bernard Mutura. He further told me that Cosmas Kirimi went to Maua Methodist Hospital met Benjamin Kithinji and Bernard Mutura together with the accused Joses Kaijungi. Joses Kaijungi is the deceased. Cosmas who was to report talked to doctor at Maua Methodist and confirmed that Joses Kaiyongi was dead. That is the time Cosma talked to the security guards of Maua Methodist Hospital to stay with Benjamin Kithinji and Bernard Mutura at the Hospital. That this is the time Cosmas came to the Police Station at around 0320 hrs. I and Inspector Odero together with Cosmas and PC driver Mania boarded our police vehicle and went to the Maua District Hospital and met Benjamin Githinji and Bernard Mutura together with the doctor. Inspector Odero talked to the director and director informed us that Joses Kithinji was dead. Inspector Odero ordered the arrest of Douglas Kithinji and Bernard Muchira. I arrested them and escorted them to Maua Police Station. I reached there and remanded them in custody and they had no complaint. I and Inspector Odero together with Cosmas proceeded to the scene at Mulika village Kigui location. At the scene at the miraa shamba and Inspector Odero and I and observed that there was no miraa to be stolen and it had already been picked. The scene itself was not at the shamba but on the road approaching the shamba. We found a walking stick at the scene, we also found one of his shoe and a cap. I wish to produce the walking stick, the shoe, and cap. PEX 1, 2, & 3 respectively the walking stick, open shoe, and read cap. We also found a jacket also found a jacket from Benjamin Kithinji which was taken to the Government Chemist. Jacket is marked PEx 4. It had blood stains. We used an exhibit memo dated 21/8/2015 to present the jacket to the Government Analyst exhibit memo marked PEX 5. When analyzed, the Government Analysts concluded the DNA from blood sample of deceased Joses Kaiyongi. The government report is dated 7/3/2017. I produce the same as exhibit. PeX-6. We went to the deceased's home which is about 30-40 metres and we got the family of the deceased and some of them accompanied by the Maua Methodists Hospital and they made arrangements from the boy to be escorted to Maua Methodist mortuary. The post mortem was conducted on 29/8/2015 at Maua Methodist Hospital mortuary by Dr. Kariuki for Maua General Hospital. The persons present during the post mortem identified the body were Kaberia Mungania and Isaac Inoti. Post mortem Pex 7. The post mortem concluded the cause of death as Fracture in his head caused by blunt object. When we conducted investigations the 3rd accused reportee was arrested after 2 days. The reason for this arrest of is that there was a witness Harison Mutwiri who recorded his statement with Cosmas was spotted at the scene when the deceased was being assaulted at the scene. The 3rd persons arrested are the 1-3 accused before this court.”

25. On cross examination by counsel for the 1st and 2nd accused, he stated that, “Initial report made at 0.130 hrs already for O.B No. 9 at 0300 hrs. Reportee Cosmas went back he had reported and the deceased was brought to Maua by Benson and Benard Mutura. The 2nd report was 0300 hrs. There is a time difference of 1 ½ hrs statements of Benjamin Kithnji and Bernard Mutura. The statements Benjamin Kithinji states as per statement is that Cosmas assaulted the deceased while at Makuri an estate within Maua town. They tried to intervene person statement. The weapon used as per the statement is a piece of wood. The deceased was hit according to the statement on the head. Statement of Bernard Mutura the narration is identical with statement of Benjamin Kithinji. The statement states that deceased was taken to hospital by the two Benjamin Kithinji and Bernard Mutura. When I went to the scene, we entered the miraa shamba There was nothing to steal. The miraa had already been picked. Why was the shamba being guarded. It was to guide against malicious damage. On his read and recovery of exhibits 2, 3, and 4. It is said the 3rd accused who was there. The 1 and 2 accused were not present. The recovered items in court were blood stained and we did not present them for analysis and finger prints



- examination. Jacket PEx. No. Blood stained with blood of the deceased. As he is the one who took the deceased to hospital, it would not have been abnormal to find such blood stains.”
26. On cross examination by counsel for the 3rd accused, he stated that, “The 3rd accused reporter the matter Inspector Odero told me that that the 3rd accused. The 3rd accused got a report with a phone call. According to the statement of the 3rd accused, we received a call from Charles Kinoti while at Maua Town. The farm is at Mulika village about 25-30 kilometres. The 2nd report to the station was that the person had died. Inspector Odero established how accused got to know about the death when he went to the hospital. The 1 and 2 accused are the once who took the deceased to hospital. Did you enquire from director who took the deceased to hospital. It was the 1st and 2nd accused. It was Cosmas who said details for two. The statements were recorded by the Inspector Ocharo. Statements of eye witnesses PW1, PW4 close relatives of the deceased. The statements said they were at the Mulika village where the weapons were recovered. The statements do not comply with the statement of the 1 and 2 accused. We spoke to the eye witness and they told me what happened. The witnesses said the 1st and 2nd accused talked with the deceased before the incident. On 21/8/2015 is the date Harrison Mutwiri recorded his statement He had not testified before court. Harrison Mutwiri is related to the deceased. I am not sure of the relationship. The witnesses said Cosmas had leased miraa from the father from a longtime and that they were not in good terms.”
27. PW8 Harrison Mutwiri, testified that, “...I am in the business of miraa. I do the business at Kathiari. On 20/8/2015 at 11:30 pm. I was sleeping at home. I was alone. I heard noises and screams on the road. From the house to the road is about 200 metres. It screams noises. I went out to witness what is happening. I went out of the house and went to the road where the screams were coming from. When I got home I saw that the people had arrested a thief and they said they had arrested him in their shamba. The thief was Joseph Kaigongo. Joseph is dead. I knew Joseph my uncle. He was a brother to my father. The person who had arrested him was Bernard Kaiyongi, Kithinji and another I did not recognize. I recognized Bernard and Kithinji. Bernard is the 2nd accused. I knew Bernard is my neighbor. I know him for about 10 years from 2011. Kithinji is the 1st accused. I know him he is my neighbor. I have known him for 15 years from 2005. On the date and I saw Bernard and Kithinji arresting a thief, I run had a torch light. I am the one who had a torch. I saw Bernard and Kithinji beat Joseph. I saw Bernard beating Joseph using a “Rungu” he was beating Joseph with the rungungu all over the body. Kithinji was also beating Joseph. Kithinji also had a Rungu which he was using to beat Joseph. Bernard and Kithinji went with Joseph as they were beating him. I was at the back home. The road they took led to Mulika. They stopped at some distance. I followed them to know what they were doing. I followed them up to Mulika. Mulika is a small town. There were many people who went along with Bernard Kithinji and I. It was at night. I do not recall the hours. At Mulika town they were waiting for their boss. Kithinji and Bernard were waiting for their boss. Their boss is Cosmas. Cosmas is the 3rd accused (jointly). I knew Cosmas the person who had rented miraa shamba for Joseph. Bernard and Kithinji were beating the thief Joseph as they wanted for their boss. They said they were waiting for their boss who was said to be far off. They set him at a place and waited. I then went back home as they were waiting for their boss Cosmos. On the following day 21/8/2015, Joseph died and we went to record a statement. I do not know how he died. I was told by the chief. I recorded my statement at Maua police.”
28. On cross examination by counsel for the 1st and 2nd accused, he stated that, “I am Harrison Mutwiri. I do not have my identity card. I do not have anything to show I am Harrison. I recorded a statement at Maua. [Witness is referred to his statement]. This is my statement “Cosmas arrived and he joined and hit him on his body. He hit him severally.” The statement states that Cosmas used a jembe to hit the suspect. Statement of Harrison Mutwiri to be marked DMFI 1.”



29. On cross examination by counsel for the 3rd accused, he stated that, “I have been showed the typed statement. I have been shown the copies that had my signature. I went back when they reached Mulika. It then when I left for home. Cosmas had not arrived. I do not know who ordered the matter of Cosmas beating the suspect. I saw two people beating the suspect. Kithinji and Beranard. The other people who were present were beating the suspect. I am Harrison Mutwiri. I had not been ordered before to come to testify. I know Cosmas had hired the two to guard his miraa. That is what I told the police.”
30. DW1 Benjamin, the 1st accused herein, gave sworn testimony that, “On 2015, I was working as a guard for miraa owed by Cosmas Kirimi. Cosmas is the 3rd accused. On 21/8/2015, Kaithingi was cutting miraa for their shamba. The shamba belonged to Kaunyangi who had been given by his father, Giciumbika Cosmas the 3rd accused had leased the miraa on that land. When we found Kaithingi in the shamba, the 2nd accused Bernard Mutura and I asked Cosmas. It was in the night at about 10:00pm when we got Kaithingi cutting the miraa. Cosmas told a boda boda rider to come to the shamba. The boda boda rider came and we asked Kaithingi to take the boda boda to the police station at Maua. When we arrested Kaithingi, we did not beat him. When we reached Makuri on the way to police station we met with Cosmas (the 3rd accused). Cosmas carried a Rungu. Cosmas started beating Kaithingi with the Rungu before the court. Cosmas later left has with Kaunyangi and Mutura and went to the Police Station. He came back with a police vehicle at the hospital, where we had taken Kaithingi. It was at Maua Methodist Hospital. Cosmas found as at the Methodist hospital. He was in a police car. We were arrested and taken by the vehicle to Maua police Station. Cosmas ran away and he was found after about 5 days. Kaithingi was beaten and he died from his injury. I did not beat Kaithingi.”
31. On cross examination by counsel for the 3rd accused, he stated that, “On that night it was the 2nd accused and I who went to the miraa shamba. We used to stay there guarding the miraa. We are the ones who found him in the shamba. Cosmas was not there at the time. [Witnesses referred to testimony of Charles Kinoti PW 3]. I heard this testimony that he found us with Kaithingi who was bleeding with injuries on the head. The witnesses was lying. We were speaking with the deceased’s we went to Maua. We called Cosmas using the mobile phone of Charles Kinoti (PW3). It is not time that we waited to take Kaithingi to the home of Cosmas. The deceased had not been beaten by us. The boda boda rider who was sent by Cosmas was called Murithi. He testified. He was PW5. We took the boda boda upto Makini, and went back. It is 20/= fare from Makini to Maua hospital. It is a short distance. Did you hear the witness PW5 say that Cosmas was not at Makini? I did not hear that. How did Cosmas know that you are at Makini? We told him by telephone about the route we were taking. I am not lying. How did Cosmas know you were at Makini? It is put to accused that they met Cosmas at police station. Cosmas beat the deceased and ran away. Cosmas knew the route we were going to take. The Rungu before court was not the one Cosmas used. I saw the Rungu in court. Why didn’t you tell your lawyer that it was not the same Rungu? [Witness does not answer]. Cosmas went to the police. He is the one who reported the matter when we were arrested we were not released. Cosmas ran away. How did you know that he ran away? When his home was burnt down it his when he came up. [it is put to witness that they are the ones who beat the deceased until he could not walk] it is not true.”
32. On cross examination by the prosecutor, he stated that, “We found him at the shamba. [PW1 and PW4 said the deceased was at home and the accused went to call him]. We came with from the shamba, it is not true that we called him from home. [PW 8 witnesses the accused beating deceased]. I know Harrison. We came from the area. I have no grudge with him. I did not see him that day. It not true that he saw has that day. We spoke to Cosmas using the phone of Kinoti (PW3). [Kinoti said he found the deceased with injuries]. The deceased had not been beaten. I know Joseph Murithi. He is the one who carried us on boda boda. [It is put to witnesses that Joseph Muriithi testified that he found the deceased with injuries]. He was lying. I had no grudge with Joseph.”



33. On re-examination, he stated that, “Did you ever go to Kaithingi’s home? It was on another date not the same day.”
34. DW2 Bernard Mutura, the 2nd accused herein testified that, “...In 2015 I worked as a guard from miraa. I had been employed by the 3rd accused Cosmas. On 21/8/2015 at 10:00 pm. I was at work guarding miraa. I was with Benjamin Kithinji the 1st accused, we found a person picking miraa. We arrested him. It was Kaithingi we found him with miraa. We took him to market at Mulika. We borrowed a phone to call Cosmas that we had arrested someone. We borrowed the phone of PW 3 Kinoti. He gave us his phone and when we called Cosmas he told us to meet him at Makuri. We were with 1st accused, Kaithingi and the boda boda rider. At this time Kaithingi had not been injured. We reached Makini. We found our employer who removed a Rungu that he had and he hit him once on the head and he fell down unconscious and Cosmas ran away. As Kaithingi was a neighbor we arranged to take him to hospital. We took him first to Mau General Hospital and we were informed that there was no doctor available and we then took him to Methodist Maua Hospital. At Methodist the doctor told us that Kaithingi had died. The police came at Methodist Maua Hospital. They were with Cosmas the 3rd accused. We were beaten by the police. We never beat Kaithinji. It was Cosmas who hit he deceased once.”
35. On cross examination by counsel for the 3rd accused, he stated that, “It was the 1st accused who went to the shamba Cosmas was not there. I heard the evidence of the prosecution. Is not true. I am not lying. It is Cosmas who hit him, it is not true that we beat the deceased at the scene until he was very weak. We borrowed the phone from Kinoti. I am the one who spoke to Cosmas. We told him that we had found a thief and he told as to meet at Makini. The boda boda motor cycle belonged to Murithi (PW5). [It is put to witness that PW5 said he took him to Maua not Makini]. Makini is in Maua. It is that deceased had serious injuries and had to be proposed on the motor bike as he was very weak. [That witnesses PW5 said he was asked by the accused to take them to police station Maua). Why did you not instruct counsel to raise the issue of the witness (PW5) lying. I do not agree with the testimony of PW 5. [That PW5 testified that Police Officer referred to accept the deceased and directed them to take him to hospital]. It is not true. Why did you not cross examine on the question as to where PW5 dropped them? It is not true that we beat the deceased. He was only hit once by the 3rd accused and he asked whether he waited to kill him.”
36. DW3 Cosmas Kirimi, the 3rd accused herein testified that, “...I know I am charged with death of Joseph Kaithingi. I had leased miraa shamba from his father Gachumbika and upon his death Joseph also leased the miraa shamba to me. On 21/8/2015, I was at Maua. I received a call from Kinoti who testified (as PW3) in court. He told me to speak to my employees who were guarding my miraa. I then spoke to Bernard Mutura the 2nd accused. He told me that they had arrested a thief Joseph Kaithingi, I told them to bring him to Maua Police Station as I was at Maua. I would meet them there. They asked me how they would bring him and I told them to use a boda boda rider. I called one Murithi a rider who testified as PW5. I told him to go to Mulika and take Bernard Mutura, Benjamin Kaithingi and Joseph Kathingi and bring them to Police Station Maua. When Murithi reached Mulika he called me again and told me that the person had been seriously beaten and injured and he could climb on the motorbike and that he was lying down on the ground with blood oozing from his nose. I told him to have the person held and carried on the bike and taken to police station. I had reported the matter to the Police Station even before they arrived as I had been told that there was a person Joseph Kaithingi who had been arrested. I continued to wait at the Police station. He was brought in by Murithi the boda boda rider. Bernard Mukira and Benjamin Kithinji. They found me at the gate to the police station and I went to the Police Station tell them that the person had been brought. He was bleeding from the nose on the head and he was being supported. The police told us to take to hospital. The boda boda rider



continued to the hospital together with Bernard Mutura, Benjamin Kithinji and Joseph Kaithingi. I went by road to the Methodist Hospital as we could not fit on the bike. The police station at Maua was not far from Methodist Maua Hospital. It is about 20-30 metres. At Maua Methodist Hospital I found Joseph Kaithingi had been taken into the doctor. Murithi went away and after a few minutes, the doctor told me that Joseph Kaithingi had died. I went about to the security officers at the gate and asked him not to release the two Bernard Mutura and Benjamin Githinji who had brought the deceased. I went to report at the police station that the person I had reported on had died. We went back to the hospital with police officers and I told them it Benard Mutura and Benjamin Kithinji who had been with the deceased. They were arrested. The police had asked me to accompany them to the scene at the shamba. It was about 2:00-4.00 am. The police went to examine the scene. Before we got to the scene at the road, we found a cap, a Fimbo which had been broken into 2 pieces, a jacket and 1 piece of shoe. The police took the items. I then led them to the shamba which was nearby and we found that the miraa had been picked. I told the police that it appeared to be a lie about Kaithingi. It is not true that I met the 1 & 2 accused at Makuri. After the report was made to me I went to the police station and I never left until they came. Before I got the call that my miraa had been stolen. I never went to home of Julius Kaithingi. I never went with the 1st and 2nd accused to home of Kaithingi. It was not true the evidence of PW1 was false. I never went home. I was arrested after 2 weeks I did not run away. I never went with the Police to the scene. I am the one who reported the matter to the police. Kaithingi was a friend. Kaithingi is the one who introduced me to the farmers in the area. I did not beat Kaithingi I deny the charge. I pray for an acquittal.”

37. On cross examination by counsel for the 1st and 2nd accused, he stated that, “Why was your house burnt after the incident? The burning of the house did not involve this matter. Kaithingi’s mother did not want me to get the shamba. Kaithingi wanted me to continue on the shamba but the mother wanted me to get out as she saw I was getting profits. It is not true. When we went to the scene about 2-4 am with the police the 1st and 2nd accused were not there. They had been arrested and were in custody. At the scene it the police and I only. [It is put to the witness that the 1 & 2 accused did not tell where the items recovered were taken]. The boda boda rider Murithi and the person who gave the phone were not there. We first found the items on the road. I did not know where the items were. It was just that we found the items on the road on our way to the shamba. The shamba that I had leased for Kaithingi was 0.50 points. (1/2 acre). I found there were no miraa stolen. We went with the police all over the shamba and we found no miraa had been picked. I found it was not true that there was miraa stolen from the shamba. [Witness is referred to PW 2 testimony at P. 25 of record]. I know Dorothy Kathambi she is a sister to the deceased we did not have a grudge but she wanted me to get out of the shamba but the brother did not want me to cease leasing. When she testified, she said I had beaten Joseph earlier. She had a grudge with me as I was making profits on the miraa but her brother Joseph did not want me to leave. Why did you not ask question on her testimony? It was when Kathambi saw me with the police that she said these things. Kathambi was not near when the incident happened. It was only because she saw me with police. [Witness is referred Harrison Muthuri PW8]. I heard this testimony. That I used a jembe to hit the deceased. It is not true.”
38. On re-examination, he stated that, “PW1 the deceased’s mother and his sister PW2 said they were not happy when I got the lease on the miraa shamba.”

Submissions

39. The prosecution submitted that it proved beyond reasonable doubt the 3 elements of murder as set out by the Court of Appeal in Anthony Ndegwa Ngari v Republic (2014) eKLR. It urged that there was indeed malice aforethought in that there was no miraa which was found in the farm which the 3rd accused had leased from the deceased and which the 1st and 2nd accused were hired to guard. It urged



that the 3rd accused's motive behind the causing the death of the deceased was the parcel of land which he had leased, and relied on *Stephen Ariga & Another v Republic* (2018) eKLR and *Eunice Musenya Ndui v Republic* (2011) eKLR. It urged that the injuries inflicted upon the deceased which led to his death were consistent with the testimony of the prosecution witnesses as well as the exhibits produced in court. It urged the court to find the accused guilty of murder and convict them.

40. The 1st and the 2nd accused did not file any submissions.
41. The 3rd accused submitted that he was not the person who inflicted the serious injuries on the deceased. He urged that there was no evidence to show that he instructed the 1st and 2nd accused to beat the deceased. He faulted the prosecution for failing to establish a case of murder against him, a prayed that he be acquitted. He relied on *Isaack Kimathi Kanuachobi v Republic* Nyeri Court of Appeal Cr. Case No. 97/1997 (UR), *Boru Halkano Dido v Republic* (2019) eKLR and *Tekerali S/O Korongozi & 4 Others v Republic* EACA 259.

Analysis and Determination

42. This being a murder case, the prosecution must prove beyond reasonable doubt the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused and that there was malice aforethought.

Death and cause of death

43. There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. PW7 testified that the post mortem concluded the cause of death as a fracture in his head caused by a blunt object. PW1 told the court that when she went to see the deceased body at the mortuary, his clothes were blood stained, his head had an injury and the skull was split.
44. The issue in contention is whether the said death was caused by an unlawful act of omission or commission on the part of the accused.

Identification of the assailants

45. From the evidence on record, PW1's husband had leased a miraa farm to the 3rd accused. That miraa farm was being guarded by the 1st and 2nd accused. On the material day, PW3, the eye witness, was awoken from his sleep by some commotion outside. "...People were shouting about a Miraa thief. I came out to see the Miraa thief. I came out and went to the road where there was a commotion. I found Kaigonji having an injury on his head and noise bleeding. I found Bernard and Kithinji at the scene (2nd and 1st accused). The 1st accused was holding the deceased on his trouser at the back Bernard was standing beside...I never saw Cosmas that night."
46. His evidence was corroborated by that of PW8 who testified that, "...I saw Bernard and Kithinji beat Joseph. I saw Bernard beating Joseph using a "Rungu" he was beating Joseph with the rungu all over the body. Kithinji was also beating Joseph Kithinji also had a Rungu which he was using to beat Joseph. Bernard and Kithinji went with Joseph as they were beating him."
47. PW2 talked about an earlier altercation between the deceased and the 3rd accused. She testified that, "...I asked Cosmas why he had finished Jose because he had earlier on threatened my brother. He had then beaten him but I asked him to take him to the police. He took him to Maua Police Station on my insistence. My brother was taken to Kangeta for a month. Cosmas told me that he wanted my brother to be disciplined. This was in 2014. Cosmas had complained that Jose was chewing his Miraa."



48. PW7 testified that he forwarded a blood stained jacket and a plastic container containing blood of the deceased to the government chemist for DNA profiling. He then produced the exhibit memo and a report by the government analyst as exhibits in court. In his said report, the government analyst concluded that the DNA profile generated from the bloodstains on the jacket matched the DNA profile generated from the blood sample of the deceased.
49. PW1 with corroboration by PW2 and PW4 had seen the two accused persons at about 8.00pm on their way to the farm and on enquiry they said they were on their way to guard Miraa crop which they had harvested from the 3rd accused's shamba. At about 10.30pm, PW5 heard the deceased on his way to bed talk to some people outside their house, and at 11.00pm PW2 heard a noisy knock on the deceased's door. PW3, PW4 and PW8 had no difficulty whatsoever placing the 1st and 2nd accused at the scene of the crime. PW5 the boda boda rider placed the injured deceased with the 1st and 2nd accused at 4.00am when he went to pick them on instructions of the 3rd accused when they asked him to take them to police station.
50. PW3 told the court that, "When I saw Kaigongi that night, I shown [shone] the torch on him...Bernard is the 2nd Accused. I recognized him as I used my torch. I spoke to him, Kithinji is the 1st accused. I also saw him that night and recognized him as I shown [shone] my torch. I knew the two. They are village mates. I knew them well. I never saw Cosmas that night."
51. PW4 stated that, "I heard the people talking to my brother Kaiyongi at 10:30 am I recognized the voices to be those of the 1st and 2nd accused.....The 3rd accused was not there that night...I have known the 1st and 2nd accused since childhood. Katheru was a school mate."
52. PW8 testified that, "On the date and I saw Bernard and Kithinji arresting a thief, I run had a torch light. I am the one who had a torch."
53. PW7 informed the court that the 3rd accused was arrested because he had been mentioned by PW8, as having assaulted the deceased. However, when PW8 testified, he stated that he only saw the 1st and 2nd accused at the scene on the material day. Even when he followed them to Mulika, the 1st and 2nd accused continued to beat the deceased as they waited for the 3rd accused to arrive.
54. PW1, PW2 and PW4 identified the 1st and 2nd accused when in the early evening of day that deceased was killed, they had gone for the deceased from his house. There is no confusion that the 2nd accused was also referred to as "Katheru or Gatheru" as variously pronounced."
55. It is thus clear from the evidence led by the prosecution witnesses that the 3rd accused was not at the scene of the crime on the material day. Other than evidence that the 3rd Accused was the employer of the 1st and 2nd accused, there was no evidence of common purpose, within the meaning of section 21 of the Penal Code, in the assault of the deceased which led to his death. PW8 denied having recorded a statement that the 3rd Accused had joined in the beating of the deceased, and the defence statements of the 1st and 2nd Accused, being evidence of co-accused who may seek to exonerate themselves from the offence, is of little weight.
56. From the totality of the evidence tendered by the prosecution and defence, this court finds that the prosecution proved beyond reasonable doubt, by direct evidence, that the 1st and 2nd accused herein are the persons who in fact caused the death of the deceased.
57. The next issue is whether there was malice afterthought, which is defined under Section 206 of the Penal Code as follows; "Malice aforethought shall be deemed to be established by evidence proving any



one or more of the following circumstances—(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

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

58. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the *Penal Code*. What can be deduced from section 206 is that malice aforethought can be either direct or indirect, depending on the facts of each case. That position has been clearly elucidated by the Court of Appeal in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR as follows:

“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 in 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...”

Verdict

59. This root cause of this murder is the miraa farm the 3rd accused had leased from the family of the deceased. It was alleged that the deceased was, on the material day, caught stealing miraa from the said farm by the 1st and 2nd accused. We all know it is wrong to steal, but is it a justification to take away someone’s life? Of course not. The offender must be dealt with in accordance with the rule of law not rule of the jungle! The 1st and 2nd accused had no right to take the law into their own hands by beating the deceased to death. They ought to have followed the due process of the law by reporting the matter to the police. If everybody decided to take matters into their own hands every time another person wronged them, there would be no one left in this world! Besides, PW7, who visited the scene informed the court that there was no miraa to steal, as the same had already been harvested.

60. When the 1st and 2nd accused thoroughly beat the deceased with rungus, as testified by the eyewitnesses PW8, they had knowledge that their actions would probably cause the death or grievous harm to the deceased. When PW3 and PW5 got to the scene, they found the deceased nose bleeding and he had an injury on the head. PW8 testified that when the 1st, 2nd and the deceased got to Mulika, they still continued to beat the deceased, who was completely subdued, as they waited for the 3rd accused to arrive. The overzealous protectors of the property of the 3rd Accused who beat the perceived thief to pulp unto death must be held to account in accordance with the law!



61. This court, therefore, finds that the prosecution has proved malice aforethought on the part of the 1st and 2nd accused.
62. The involvement of the 3rd accused in the beating of the deceased that led to his death was not proved beyond reasonable doubt.

Orders

63. Accordingly, for the reasons set out above, this court finds the 1st Benjamin Kithinji and 2nd accused Bernard Mutura guilty of the offence of murder c/s 203 as read with 204 of the *Penal Code* and convicts them.
64. This court finds that the prosecution failed to establish a nexus between the 3rd accused Cosmas Kirimi and the commission of the offence, and acquits him.
65. The 1st and 2nd Accused's bonds are cancelled and they will be detained pending sentencing proceedings of the date to be fixed in consultation with Counsel.
66. The respective security bonds for the accused are discharged and security shall be returned to the depositors.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF FEBRUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. E. Kimathi for the 1st & 2nd Accused.

Mrs. Ntarangwi with Ms. Athieno for the 3rd Accused.

Ms. Nandwa, Prosecution Counsel for the DPP.

