



**Republic v Mukira & another (Criminal Case 36 of 2016)  
[2023] KEHC 1360 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1360 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 36 OF 2016  
EM MURIITHI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SILAS MUKIRA ..... 1<sup>ST</sup> ACCUSED**

**STANLEY THIAINE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. On 25/7/2016, Silas Mukira and Stanley Thiaine (the accused persons) were arraigned before this court with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. It was alleged that on 24/6/2016 at Machaka sub location, Kianjai location, Tigania West District within Meru County, the accused persons jointly with others not before court murdered Laibuni M’Igweeta.
2. They denied the charge and the prosecution called 5 witnesses to prove its case, and, when put on their defence, the accused gave unworn statements in defence and called 3 witnesses each.

**Evidence**

3. PW 1 Esther Makena gave sworn testimony that, “...I recall 24/6/2016 at about 10 p.m, I was in my house in the kitchen. I was with Laibuni my husband. We were cooking. A child aged six years by the name EM was also present. I had locked the kitchen door with a nail from inside...Then Silas Mukira pushed the door using a sword called C-line. He was wearing a motorbike helmet. Those who stormed the kitchen were 3 in number, Silas Mukira, Stanley Thiaine and a 3<sup>rd</sup> person whom I did not recognize. When they entered the house, Silas hit Laibuni with the C-line. Laibuni fell down. Then they killed him. Before they killed the deceased. We were trying to defend ourselves. The deceased hit Silas on the head with a Thermos the Helmet fell down. It is then I recognized that it was Silas. I knew them as they were village mates. Silas had purchased trees from me for Kshs. 50,000/= which he had not paid us. We reported him to the Njuri Ncheke. We took a he-goat to the Njuri Ncheke. Silas was not happy



and he wanted to stop it. When I shouted “Silas don’t kill my husband”, he was surprised. Thiaine was at the door but when he heard I had recognized Silas it is then he entered the house. It is then that cut me on the right hand and on my head above the neck. They also poured paraffin on me at the left back (witness shows the injuries of burns on her upper back on the left side)...We had a case in Tigania where Thiaine had been ordered to pay my husband costs. He wanted my husband dead so that he could avoid paying the costs. After I fell down I lost my consciousness. When I woke up, I went to my bedroom. I told the 6 year old child I had been cut by Silas. I called 2 neighbours. They took me to hospital Meru. The police came to take my statement in hospital. Silas is the 1<sup>st</sup> accused while Thiaine is 2<sup>nd</sup> accused (witness points at the accuseds).”

4. On cross examination by counsel for the 1<sup>st</sup> accused, she stated that, “...We were in the kitchen. I cannot recall what day it was. But it was at night about 10 p.m. In the kitchen, we were using solar torches. It was 1 foot with enough lighting. It was on. They broke it. The door was locked with a nail. It was 3 inches...I told the police that Silas pushed the door with C-line...They went with the c-line. Those who attacked us were three (3) in number. There were others outside. Silas Mukira is not related to me. It is only on the business deal of trees that we had. He had my debt of Kshs. 50,000/=. The trees belonged to me and my husband...It is now 4 years since the debt arose. They went with the documents relating to those trees. It is not true that I am implicating Silas because we claim that he owes us. When we were attacked by the 3, we started to fight. I did not scream as they surprised us and stormed the kitchen. The Thermos broke into pieces. Silas has a helmet of a motorbike. He owns a motorbike. I recognized him after his helmet fell off. He was about 1 meter from where I was standing when I recognized Silas... The attackers had a c-line and panga...was taken to hospital Meru. I have documents that I was injured and was treated for it...Martin Maitima is also a neighbour.”
5. On cross examination by counsel for the 2<sup>nd</sup> accused, she stated that, “When the attackers stormed the kitchen, the torch was on. When they attacked us, it fell after I had recognized them. The other two had hoods on their heads. If the helmet had not fallen, I would not have recognized the 1<sup>st</sup> accused. The hoods of the other attackers never fell. I told the police I had recognized the 2<sup>nd</sup> accused. I did not tell the police that the 2<sup>nd</sup> accused owned us costs. It arose in 2006 but he had refused to settle. Since 2006, Thiaine had never come to my place regarding the issue of the costs. My kitchen is made of timber. Silas was the first to enter the kitchen followed by Stanley. Statement read to witness, I hear it is recorded that he stood on the doorstep and that I recognized him by voice. I do not know if Laibuni had another wife...The attackers had torches which they entered flashing. At no time did they switch off any of their torches. I can’t recall how long the incident took...The distance between my home and Kianjai is Kshs. 20/=. I do not know that the 2<sup>nd</sup> accused was at Kianjai market upto midnight on that day. I saw them at my place. They attacked us.”
6. On re-examination, she stated that, “...I had my torch. We were cooking food. The 2<sup>nd</sup> accused was hooded. I recognized him through voice and his face which was not covered. The debt of Silas was a little bit old. It is now 4 years since the debt arose. I do not know if the deceased had another wife.”
7. PW2 James Koome Marimba testified on oath that, “...In 2014, I used to cut blocks of building stones at Kibirichia in the border of Nanyuki and Meru County. In 2013 I was also cutting blocks. About July or August of 2013, I got an order to cut blue gum trees. The order was given to me by the owner, one Thurania. He said he wanted the blue gum trees for roofing of a house. He said he wanted the timber cut in 4 x 2 and 3 x 2 pieces for the blue gum trees. I gave the order to (pointing) to the 1<sup>st</sup> accused Mukira. I knew Mukira as he had a power saw. I knew him for about (1) year. He had his own power saw and I would hire him to cut trees for me when I had an order. I gave him figure on which I had measured the order. After cutting the trees Mukira said he will give me a young man to show me where the timber was to pick it. The young man was not known to me. I hired a vehicle and while there,



the young man came and we went to load the timber. We went and loaded the timber and took it to person who had given me the order Thuranira. After about (2) days the person called Thuranira after receiving the timber said it was not all there. I called Mukira and he told me he would find out whether some timber behind. We went with Mukira to the land of Laibuni. We found the timber had all been taken. Those present there probably Laibuni had taken some off cuts using a cattle card. I told Mukira to give me another timber or I would not pay him full price. Mukira said we should go to Laibuni to see whether he had taken. We went with Mukira to Laibuni's place called Machaku area. We found Laibuni and we told him we had found out some pieces missing. Laibuni said he had carried the timber by mistake along with the off cuts. I went and looked for transport from Stanley Mambo who carried the work for me and we took it to Thuranira's home at Mimaro. After delivering the timber, I called Thuranira and after his representative confirmed all work was done, he paid me. I then paid Mukira KShs. 28,000/= with added shillings on top. Later an officer from the police came to where I worked and asked me whether I knew Mukira. I told him I knew Mukira and that he used to cut timber from me. He asked whether we had any other business together. I explained to him how I had worked with Mukira. I recorded my statement at my place of work. At Laibuni's home, I did not ask Mukira his relationship with Laibuni."

8. On cross examination by counsel for 1<sup>st</sup> accused, he stated that, "We had a timber business with Mukira and Laibuni. I am the one who gave Mukira the job to cut the trees. We had no difference between me and Mukira or Laibuni."
9. On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, "I do not recall the year. It could have been 2013. Between the time I went to the police and the time I recorded the statement, it was about (1) year. Laibuni: I knew Laibuni before the incident. I went to his place, I knew Laibuni as a person who had bought land near my place. I knew his wife. I see her in church but I do not know her name."
10. PW3 Martin Maitima testified on oath that, "...I am a Njuri Ncheke for our area. I remember that on a month and year that I cannot remember, while at Machaka, there was an old man who died. He is Laibuni. Mzee Laibuni sent me to go to Mukira. Mukira is the first accused (pointing). Mzee Laibuni sent me to Mukira's place to ask for debt from him. Mukira told me he had no debt for Mzee Laibuni. I reported back to Mzee Laibuni. We stayed for a long time – it is over (1) year. Mzee Laibuni was asking for a debt but I do not know the details. Later Laibuni died. I knew Mukira for a long time since he was a child. I also knew the 2<sup>nd</sup> accused as we were neighbours. When I heard of his death I went to his home to confirm. I later recorded my statement. I called to record a statement after about 3-4 months after the death of Laibuni."
11. On cross examination by counsel for 1<sup>st</sup> accused, he stated that, "I knew Mukira from his childhood. During his life he had never been involved in a criminal offence."
12. On cross examination by counsel for 2<sup>nd</sup> accused, he stated that, "...I have nothing to show that I am an elder of Njuri Ncheke. I know elders of Njuri Ncheke have identification documents. Mzee Laibuni had (2) wives. One is Lucia Laibuni, the 1<sup>st</sup> wife. The 2<sup>nd</sup> was called Makena Laibuni (PW1) who is in court. Is it true Mr. Laibuni had differences with his children? I do not know about that. The first wife had left home and the 2<sup>nd</sup> wife came into the home of the first wife. I do not know that the children of the 1<sup>st</sup> wife had thrown mzee Laibuni from home over disagreements about the 2<sup>nd</sup> wife. I have not heard of the differences, even at Njuri Ncheke...Lucia who had been chased away came back to Laibuni's home. She farms at Laibuni's farm but lives at her father's home."
13. PW4 Doctor Kinoti Yvonne Ntinyari, a medical officer at Meru Teaching and Referral Hospital produced the deceased post mortem report which had been filled by her colleague Dr. Mohamed Noor,



as P EX No. 1. The deceased body, which was in a state of moderate decomposition, had 2<sup>nd</sup> – 3<sup>rd</sup> degree burns and multiple deep cuts to the head, neck and chest and multiple deep cut on the scalp, largest on the left parietal region measuring 8 cm long and 5 cm deep. There was a very deep cut wound at the back of neck with transaction of major vessels anteriorly up to the trachea. There was a stab wound to the left peri-umbilical region with evisceration of the small gut, and a stab wound around the mediastinum (central part of the chest). There was a perforation in the small bowel, a linear fracture left parietal, a transected cervical vertebrae cord transaction, a cut on cervical vertebrae and a cord transection at the cervical vertebrae. The cause of death was found to be exsanguination following multiple stab wounds and deep cut back of neck with transaction of major vessels.

14. On cross examination by counsel for the accused, she stated that, “I am not the one who did the postmortem. Death occurred on 23/6/2016 according to the postmortem. During the postmortem it was not possible to assess the time of death. The time of death is recorded at the police station. Weapon used? From examination findings it could be a sharp object. The deceased bled profusely. If he had clothing they would have been soaked with blood. The debris were not shown. The main injury: From the documentation, all the injuries were life-threatening but the one of immediate case in the cord transection in the spinal code. There was a deep cut on the back of the neck, leading to the cutting of the spinal code. Burns on the deceased: I am not able to say what came before the other between the cuts and the wounds.”
15. PW5 Cpl Njuguna Kinuthia, the investigating officer herein testified that, “On 24/6/2016 at midnight, I was in my residence at night and I was Chief Inspector Kangete who told me to join OCS Tigania police station with Chief Inspector Mwaura. I was accompanied by (2) officers PC Maroo and PC Macharia. We went to a village known as Machaka where I found one person (male) lying in the kitchen dead with multiple cuts and the body was partly burned. I enquired from the neighbours who informed me that the person who happened to be a woman was badly injured and left for dead and the neighbours had taken her to Meru hospital. With the help of the officers we carried the body and ferried it to Meru hospital mortuary. The deceased was Laibuni Igweta. The lady who was taken to hospital was Agnes...After we took the body, we went back to the scene to collect evidence. It is late at night so we waited until the following morning. The following morning I realized that we had left a chopped off hand at the scene and I collected it and took it to Meru mortuary. The lady was so traumatized I could not record a statement at that time. Later an after convincing her to talk and she told me those who attacked her, her and her husband knew them and that is why she was brutally attacked when she identified them. I made a call while still at Meru town to the OCS at Tigania and the OCS facilitated the arrest of the accused persons. At the hospital the lady said she could identify Silas Mukira and another called Thiaine. These are names that I gave to OCS. I prepared an application at Tigania courts seeking the custody of the accused but the court ordered that they be released on bail while I conducted the investigations. The persons I applied for order of custody are before the court as the accused. After some days I went to the lady and I recorded a statement from her and other witnesses. I compiled a file for the ODPP for perusal and advice. I was advised to charge and the (2) persons were charged for the office before the court. I confirmed the persons who the OCS arrested that day are the (2) accused (pointing) at the accused. When I saw the lady at the hospital, she had multiple cuts and her face was burnt and she was swollen all over and she did not see me as her eyes were closed by the swelling.”
16. On cross examination by counsel for the accused, he stated that, “Before the transfer, I worked at Tigania West from March 2013 to July 2016. I knew the area well. In the course of the investigation I did not get to know where the 2<sup>nd</sup> accused used to work. I did not investigate their source of income. I also did not know where his home was. I also did not know the home of the 1<sup>st</sup> accused and where he worked. I only knew having come from Machaka sub-location. The deceased and wife also come from the same location. I did not know where they work. I did not know their homes. I cannot estimate.



I was ordered to go to the scene on 24/6/2016 by the DCIO at about midnight. I arrived and found the OCS and some few police officers and some neighbours. They were many neighbours. The night was- I do not recall. On the day of arrest, I am not the one who arrested. The arrest was on 25/6/2016. The arrest was at a time not indicated. According to the file, the OCS and another my name indicated arrested the accused. I found them on the way. I was not there when the arrest was effected. The persons arrested that day were – Jeremiah Tharibo and Stanley Thiaine. Jeremiah Tharibo was a retired teacher as I established. He was arrested in connection with the incident. He is not one of the accused. After investigation and presenting the file, the ODPP advised Tharibo be released...I cannot remember what the accused was doing when he was arrested. I sent OCS to assist. I was not there when he was arrested. I do not know what he was doing when he was arrested. I am the one who investigated the matter. I knew that nothing was recovered by way of weapons. I was at the scene. When he (2) accused were arrested nothing was recovered from them connecting them to the crime. The accused must have bled? There was blood. The suspects had no injuries. The blood on the deceased. It is not necessary to do any forensic investigation. It was not necessary. PW1 said you relied on her evidence? It is true. That you knew that the deceased had another wife? I did not investigate that matter. That the sons of the other wife had threatened PW1? I visited the scene and I did not see any other wife. I have heard from the accused saying that the deceased had another wife who lived away and whose sons had called PW1 threatening the life of witnesses. I did not investigate that aspect as I did not get the information. It would have been important information to be investigated if I had got it at the time. The motive of killing? What I adduced was that there was a beef between the (2) accused and the deceased. 1<sup>st</sup> accused had a debt between him and the deceased. I was transferred to Turkana due to this matter. The debt was being handled by Njuri Ncheke. I needed that to verify the information obtained in the matter. I do not know the circumstances of the dispute as I started investigations...When I was transferred I handed over file to P.C Robert Ngeno to investigate, to proceed with the investigations as the matter could not be left hanging. P.C Odoyo took over the matter from P.C Ngeno. Its procedure. That you recorded the statements of the accused? Yes I remember recording statements from the accused. [statement of 2<sup>nd</sup> accused, Stanley Thiaine] Arrested while at Kianjai? Is it true – According to him he was nowhere near the scene or the incidental day. Why did you disbelieve him? I did not believe him because there is a room for him to be heard before the court. I brought the matter before the court for deliberation. [witness is told accused said that he demolished a building for them] It is not true. We truth about Tharibo is that DPP said that he be released.”

### **The case for the 1<sup>st</sup> accused**

17. DW1 Silas Mukira Kaugiria, the 1<sup>st</sup> accused, stated in his unsworn defence that, “...I used to cut trees and firewood for schools..I deny the charge. I know deceased Laibuni. I knew him as I used to see him in the village. I got to him in 2020. On 24/6/2016, I had gone for work at Mutionjuri Secondary at Kianjai. I had asked one Jeremiah Igweta for the job..I finished the work at 12.00 noon. I was with Jeremiah Igweta. He was my colleague. He is my witness. After 1.00 I left the school and went home at Karithiria where I reside. I got home at 5.00 p.m. I never left home again. I found my wife Linet Njekei with my children... We have been married for 15 years. We have children aged (3) and 6 years...At home I found my wife with another neighbor at shamba near Isiolo. The lady is called Kagendo. She is my neighbor and Kiende where I have a shamba. After bathing my wife told me the lady had come to seek money for school fees...She said wanted Kshs. 20,600/= while she will refund when she sold her land. I told her that I did not have the money and we agreed that she will spend the night at my place and I will get her the money the following day...I know P.w 1 as I used to pass by the road at outside her home. I knew she was the wife of the deceased (P.w 1 sister Makena). It is not true that I attacked them with a c-line. I do not have a c-line. I do not have a helmet. I have an old bike which did not have a helmet. It is not true that I hit the deceased as I never left my home. I do not have any burns on my



body (lifting off his shirt). I never bought any trees of the deceased for 50,000/=. I recall in 2013 the deceased called me and told me he had some trees he wanted to split into timber. He said he wanted the trees to produce timber for construction. The timber was valued at Kshs. 25,000/=. I paid the money through David who was my business colleague. The money was paid cash. I never had any business conversation with the deceased's wife. I have never been called by Njuri Ncheke. There was one Njuri Ncheke elder called to testify. P.w 1 has never taken me to court for the alleged debt. I got to know that he died in 2016. It was 27/6/2016 when police officer came for me from home. He told me he came from Ngundune police station. He introduced himself as Kimathi who later testified before the court. He said I was required by OCS. I went with him at Ngundune Police station at 8.00 p.m. It was said that I had been burned all over the body with tea. He never told me who had said. He removed my clothes. He looked at me and told me to put back my clothes. I slept at Ngundune police for (7) days. I was brought to court in July...I was never told what the reason of arrest. They were only beating me asking me to call for my relatives to bring 130,000 /= for them to release me. I have stayed in remand since 2016. I was released in 2016 on bond. I stayed on bond for some time and was remanded in June 2018 and I have been in custody since then. I think the reason I was arrested is that the deceased and his wife had not agreed to sell the trees. This is because after I had dealt with the deceased in 2013, I met with P.W 1 and she asked me whether I was the one who had bought the trees. She said I had used the deceased to go to spend the money with prostitutes. I think she is the one who framed me. I pray the court to release me. I have not disagreed with anyone in my life. It is a frame up.”

18. DW2 Jeremiah Imunya Igweta testified on oath that, “I work as a timber operator and firewood cutter. I know the 1<sup>st</sup> accused Silas Mukira. I have known him for about 10 years. I am not related to him. It is a business relationship. We do not reside in the same village. I reside at Mutionjuri and he resides in Kathama. It is different locations. He is not my neighbor. It is about 8 km apart. I only know him at the market where we kept our power saw. I know that Mukira was arrested on 27/6/2016. We were supposed to go to work together and when I called him and I did not get him on phone. I called his wife and she told me that he had been arrested by police and taken to Ngundune Police station. I went to Ngundune police station and I found him. On the following day at the police station I asked why Mukira had been arrested. The police officer called Kinuthia and he told me that they were investigating but if I gave him money Mukira would be released. He told me if I produced 130,000/= he would be released. I asked him why. He said others were paying him same amount. I did not pay. On 24/6/2016, did Mukira know Laibuni? I only knew him in 2013, Mukira had been given a job by the said Laibuni. We did not have any relationship with the deceased. Mukira told me to go with the buyer of the timber to Laibuni to see the timber where the timber were at another shamba Uringo. This is not deceased's home. It is a shamba. We went and saw that the deceased had timber. We counted the feet of the timber was 1400 feet reached Kshs. 25,200/=. We paid the money with David. We paid the deceased. I have never had any complaint about the timber 2013. On 24/6/2016 I was with Mukira at Mituntu and we were cutting trees. At 12.00 noon we left and went home. Mukira went to his home and I stayed behind as it's my area. Mukira could not have done the act of killing. I have never heard Mukira Disagree with anyone. Wife of deceased, sister Makena? I do not know her. I have never seen her before. (Witness is shown the wife of deceased in court). It cannot be true because the cutting of trees is for small contracts of 3,000/= or so not 50,000/=”
19. On cross examination by the prosecution, he stated that, “Mukira is not neighbor. It is 8 k.m from where I live to his place. I have worked with Mukira for about 5 years in the work of splitting timber. I got to know him during our work. It was the wife of Mukira who informed me of the arrest and I went to police station. I never reported that I have been asking for money. He threatened me. He said if we did not pay he would frame him up with this case. (Why did you not report to IPOA or the OCS) I did not report because he is a police officer. I have not lied to court. I got to know the deceased in



2013. We never did any deal with the deceased after 2013. I did not know of any other dealings with the deceased after 2013. I was with Mukira upto 12.00 noon. I then went home. Mukira also went to his home. I did not tell what he did after 12.00 noon as I went to our home. We work as a job becomes available. I went with Mukira everyday as we went to a market place. When I got work I would invite him. It was not every day that we went with Mikira and got a job. I would not know of every contract that Mukira got with the deceased or any person.”
20. DW3 Linnet Nchekei gave sworn testimony that, “...I know Silas Mukira. He is my husband. I married him in 2011. We have 2 children the first is 10 years and 2<sup>nd</sup> is 3 years. I know Mukira is facing a murder charge. I do not know the deceased. I got to know him when the accused was arrested. My husband works as a timber cutter. He splits timber. He goes to places where he gets a contract. On 24/6/2016, I recall my husband left at 5.00 a.m. to go to Maua. He came back at 5.00 p.m. He was alone. He came at 5.00 p.m. and I gave him water to go for his bath. He came to the house and started talking with his children and he never left. Usually after getting home he stays with his children. He was arrested on 27/6/2016. He was arrested by two officers. I asked them why he was arrested. It is at 6.00 p.m. It’s said I will get to know from the station. I did not follow up. In the following morning I went to Ngundune police station. It is 30/= by bodaboda. When I got to the police station I asked a police officer who told me Mukira was a murderer and he said if I gave him kshs. 130,000/= he would release him. I went away. I do not recall when Mukira was brought to court. I have lived with accused. I have never seen him quarrel or disagree with any person. I saw Esther Mukiri. I know her. She is in court. I have not heard that she had reported Mukira to Nchiru. I do not know where Njuri ncheke. I pray that the court release Mukira as I do not know him as a violent man. I am still at his home with the children. 1 child going to school. I take the child to school.”
21. On cross examination by the prosecution, she stated that, “Accused left home at 5.00 a.m. and came back at 5.00 p.m. I was with another lady and one Priscilla Kagendo. She had come visiting at about 3.00 – 4.00 p.m. She had come to borrow money for school fees of her children. She did not get my husband. I told her to wait for him. She could not get back home. She spent the night in our home. It is one house. We were together with her. We stayed at the table room until 9.00 p.m. In the evening. My husband was not with us. My husband did not go anywhere. He never left the bed. I would have heard him leave. I told my mother that accused had been arrested. I did not tell anyone else. I called Kaugiria. She lives nearby. When we went to police station I was with the lady and I found one Jeremiah at the police station. Why did you not report that demand of money? I just kept quiet. I did not report and I did not have the money. I am not lying.”
22. DW4 Priscilla Kagendo Ntongai gave sworn testimony that, “...I know Silas Mukira. I have known him for 5 years. He is the 1<sup>st</sup> accused (pointing). I know he is charged with murder. It is said he killed a person. I do not know. It is said he killed the person in June of 2016. I know he was arrested on 27/6/2016. I had gone to his place on 26/6/2021 to borrow money. I had gone to borrow money to take my child to nursing at Chuka. I had gone to borrow 24,000/=. He did not give me. He told me that there was a group which would visit him on 30/6/2021 and I should wait for that date. It is said deceased was killed on 24/6/20216? Were you at his home on that date? I was at the place on the date he is said to have killed. I stayed there until 27/6/2016. I was there on the 24/6/2016 when he was arrested, it is when we went to follow him up at the police station. He was arrested on 27/6/2016. I was at the accused home and we spent the night until he left the next day.”
23. On cross examination by the prosecution, she stated that, “I know Mukira 1<sup>st</sup> accused. I used to work for him at his shamba. The shamba is near my place at Mugae. I got to the accused’s place and I did not find him and I stayed with his wife and when it got to 5.00 p.m. the accused came. He greeted me and asked me how I was and I told him that I had gone to borrow money I take the child to school.



I went to his place on 26/6/2016. I stayed at his place on the 27/6/2016 when he was arrested and the following day 28/6/2016 we went to follow him up at Ngundune police station. We went with his wife. Do you know what happened on 25<sup>th</sup> and 24<sup>th</sup> June 2016. I cannot tell what happened on 24/6/2016 as I was there on 26/6/2016.”

24. On re-examination, she stated that, “It is said the accused killed deceased on 24/6/20216. Were you at Mukira’s or not? (witness hesitates). I was not at Mukira’s place on that date.”

### **The case for the 2<sup>nd</sup> accused**

25. DW1 Stanley Thiane Kamuila, the 2<sup>nd</sup> accused herein, in his unsworn defence testified that, “I work as a store operator of goods, cereals. I had also work as a loader. I worked in the trade for over 15 years. I am alleged as the 2<sup>nd</sup> accused in this matter. Murder on 24/6/20216 at 10.00 p.m. I am aware of the charge. On the day I left home at 8.00 a.m. and went to my store at Kianjai market called Capital stores. This was on 24/6/2016. We stayed there with one Nyaga when he said he wanted to send me to Tharaka Nithi to bring cereals. He called his staff, Justus Akwalu, David Mutuma and I. I gave Akwalu who was our manager money to by 150 bags of cereals, sorghum. This was at 1.00 p.m. on 24/6/2016. He had already booked a lorry. We went by the lorry with Mutuma, Akwalu and I together with the driver. We went to a town called Mukothima in Tharaka Nithi-county. We arrived home at 3.00 p.m. We started shopping for millet. After buying the required quantity we called for the vehicle and we started loading. David and I were packing the bags on the lorry. We finished parking the lorry with millet at 5.00 p.m. Akwalu paid for the cereals. As he paid, we tied up the cereals on the lorry. We left the town at about 5.00 p.m. After travelling for 5 kilometres the vehicle broke down and the driver called for a mechanic from Mukothima market to come and repaired the vehicle. We finished the repairs on the vehicle until 3.00 a.m. on 25/6/20216. We started our journey from Meru. We got to Kianjai Market at 7.00 am. This was on 25/6/2016. When we arrived we found a watchman called Pastor Omari Kauri with luggage outside the store, and we started unloading the goods, before we had finished, two police officers arrived in a police vehicle and they arrested me. When I asked them why they arrested me they hit me in the ear, right ear by a fist and telling me I would be informed at the police station. As we arrived at Tigania Police station, another man who was in the vehicle was together with me taken to officer in charge of crime. We were beaten and asked to explain why we had killed a person. He demanded that we pay each Kshs. 130,000/= so that we may be released. It was the police officer who spoke as P.w 5. I told him that I could not raise the money. The other one paid and he was released. He is a teacher. I had worked with Akwalu, David Mutua and Peter Omar for 10 years. I knew them well. I will call them as witness. The deceased was known to me since 1980’s. In 2004, while at a bar we disagreed and we fought while drunk. He reported me to the police at Tigania Police station. I was charged at Tigania Law courts and I was convicted and sentenced for 3 years. I left jail in 2007. I got convicted. I also found that he was also convicted and got saved. From 2007 we were reconciled by the church and we lived peacefully. From this time we did not disagree and we remained friends. P.w 1, the deceased’s wife told the court. When the alleged killing happened, I was not at Meru. On 24/6/2016 at 10.00 p.m. I was at Tharaka Nithi Mukothima market which is over 60 kilometers away from the place. I was at Tharaka Nithi. I did not see the deceased anywhere that day.”
26. DW2 Justus Akwalu testified on oath that, “I work as a food dealer. I buy food for Kapital stores. I am employed by Kunyanga. I know Stanly Thaine, 2<sup>nd</sup> accused. I know he is accused of murder. On 24/6/2016 we had been sent by our employer Kunyanga to go and buy millet at Mukothima in Tharaka Nithi County. We left Kianjai at 1.00 p.m and got to Mukothima at 3.00 p.m. We bought millet and started to set. At 5.00 p.m. our vehicle broke down. The driver called a mechanic. The mechanic came and repaired the vehicle and the vehicle restarted its journey at 3.00 a.m. We got to Kianjai at 7.00 a.m. When we started off loading the police came and arrested Thiane and we were left working as they



- had arrested him while we were with him at night. We were with Thaine and David Mutuma. Thiaine never left us. We were all at work. It is not true that Thiaine killed a person on 24/6/2016 at 10.00 p.m. We were with him all the time.”
27. On cross examination by the prosecution, he stated that, “I have known Stanley Thiaine for a long time. It is about 10 years. We have worked together. I was working as a person who bought the cereals. Stanley worked as a loader – off loader, the driver of the vehicle? I did not know the drivers name. It was our employer who knew his name. On 24/6/2016 I had worked for a long time. It was about 2 years. You did not know the name of driver? It was not one driver. The employer could get different drivers. We went to pick the millet at Mukothima. It was at a store of a person called Kakega of Tharaka. We did not have any delivery documents. We only used to count the number of bags and after we paid it was packed in the vehicle. John Laibuni Igweta. I did not know him.”
28. DW3 Daniel Mutuma gave sworn evidence that, “I now work in stores as a loader and packer. I know Stanley Thiaine. I have known him for about 10 years. He worked as a store packer. Just like me. On 24/6/2016 at 10.00 p.m. Stanly Killed Laibuni? It is not true. We were with him at 1.00 p.m. when we left Kianjai and we went to Mukothima by lorry. We were with Thiane, Akwalu and a driver. We went to Tharaka at a place called Mukothima. We had gone to pick millet. We had been sent to the owner of Capital stores Kunyanga. From Kianjai to Mukothima is along distance. We got there at 3.00 p.m. We loaded the millet and on our way back about 5 km the vehicle broke down. The driver called a mechanic and the mechanic came and started repairing the vehicle. We started our journey back at 3.00 a.m. and got back to Kianjai on 25/6/2016 at 7.00 a.m. We started off loading and just then police officers came and arrested. When we asked we were told he will know at the police station. There were no police officers some in civilian clothes. Between 24/6/2016 and 25/6/2021 Thiaine never left us. We were with him all the time. At 10.00 p.m. on 24/6/2021 we were with him at Tharaka. The distance between Kianjai and Mukothima is over 70 kilometers.”
29. On cross examination by the prosecution, he stated that, “I have known Thiane for 10 years before 2016. The vehicle was being driven by a driven who we did not know. The vehicle did not belong to Kunyanga. It was hired by Kunyanga. I did not know the driver. Akwalu is the one who called the vehicle and paid for the goods that we bought. We went for the millet from Mukothima. It was at a store. It is Akwalu who knew the place. I had worked in the store and other stores for 10 years. It is Akwalu who got the money from our boss. Our work was to load. We went to Mukothima. I am not telling a lie.”
30. DW4 Peter Omari Karuri testified on oath that, “I work as a watchman. I work as watchman at Kunyanga’s place. I report at 6.00 p.m. in the evening and leave at 6.00 a.m. I usually leave at about 6 – 7.00 a.m. in the morning. I know Thiaine, the 2<sup>nd</sup> accused. We used to work together at Kunyanga’s capital stores. On 24/6/2016 at 10.00 p.m. Thiaine killed Laibuni? It is not true. I saw Thiaine when he was going to buy food at Tharaka. I saw him on 25/6/2016 when they were off loading goods after they came from Tharaka. I did not go with him to Tharaka. They found me at the store at 7.00 a.m. They were with Akwalu and Mutuma. Akwalu is the person who would go to buy goods and pay for them. Mutuma’s work is to pack and off load goods. Thiaine was also a loader. I was there at 7.00 a.m. I was waiting for them. They ..As I waited for them.”
31. On cross examination by the prosecution, he stated that, “On 25/6/20216, Stanley Thiaine and others came at about 7.00 a.m. I had been told that they had gone to Mukothima. Stanley Thiaine works with me. I have known him for 5 years. He had been employed at a monthly pay by Kunyanga. Daniel Mutuma used to go by vehicle. He used to go by any vehicle where he got a casual job. He was not on monthly pay at Kunyanga. On 24/6/20216 at 1.00 p.m. I was not at work. I saw him on 25/6/2016 in the morning. I was told they went to collect millet. I do not know who was driving the vehicle. I do



not know whose vehicle it was. I had worked at Kunyanga's store for 2 – 3 years by 2016. The vehicle was hired. It was being used to carry goods. I can't say whose vehicle it was.”

32. On re-examination, he stated that, “The vehicle was a hired vehicle. There were other vehicles that were being used. Stanley Thiaine. He was employed and demand basis.”

### Submissions

33. 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 the accused persons were identified by PW1 by both voice and recognition, and relied on *Tyson Mudola & 2 others v Republic* (2019) eKLR, *George Mbaya Gitinji v Republic* (2019) eKLR, *Wamunga v Republic* (1989) KLR 426, *Safari Yaa Baya v Republic* (2017) eKLR, *Choge v R* (1985) KLR 1 and *Vura Mwachirumbi v Republic* (2016) eKLR. It urged that there was a common intention between the accused persons to do grievous harm to the deceased, as they, in the company of others, cut the deceased severally and burned him. It urged that the accused persons set the house on fire after attacking PW1 and the deceased and left them for dead, and cited *Stephen Ariga & another v Republic* (2018) eKLR and *Eunice Ndui v Republic* (2011) eKLR. It urged that the accused persons' unsworn evidence, which was incapable of being tested for veracity, did not rise to the level where it could raise doubt in the prosecution's case or shake the credibility of the prosecution witnesses, and relied on *Mercy Kajuju & 4 others v Republic* (2009) eKLR. It urged that the accused persons' alibi defences, were first brought up during their defences, as the prosecution witnesses were not cross examined on them, and cited *R v G N K* (2017) eKLR. Furthermore, the evidence on recognition by PW1 displaces the alibi defences completely. It urged the court to find the accused persons guilty of murder and convict them accordingly.
34. The 1<sup>st</sup> accused submitted that the evidence of his identification was not fool proof as the circumstances prevailing were not conducive or proper and free from error, and relied on the Court of Appeal cases of *Cleophas Otieno Wamunga v Republic* (1989) eKLR and *Maitanyi v Republic* (1986) eKLR. He urged that he relied on an alibi and the law does not require him to prove his innocence, because the burden of proving his guilt remains on the prosecution throughout. He urged that it would be unsafe to convict him based on the weak case of the prosecution, and sought to be acquitted under section 215 of the *Criminal Procedure Code*. He relied on *Anthony Ndegwa Ngari v Republic* (supra), *Republic v David Ruo Nyambura & 4 others* (2001) eKLR, *Elias Kiamati Njeru v Director of Public Prosecution* (2015) eKLR and *Kiarie v Republic* (1984) eKLR.
35. The 2<sup>nd</sup> accused urged that since the prosecution's case was based on circumstantial evidence, the prosecution needed to satisfy that the circumstances surrounding the alleged murder unerringly pointed to him, and no other as the perpetrator of the offence. He faulted PW1 for failing to explain to the court how she had identified him, because physique and voice alone are insufficient to identify anyone, and relied on *Abanga Alias Onyango v R* Cr. App. No 32 of 1990, *Cleophas Otieno Wamunga v Republic* (supra) and *Changawa Mweri Ngoka v Republic* (2014) eKLR. He raised the defence of alibi to corroborate his evidence that he was not at the scene of the crime as he had accompanied two other people to purchase millet at Tharaka Nithi County. He faulted the prosecution for failing to adduce evidence to rebut his defence, and cited the Court of Appeal cases of *Victor Mwendwa Mulinge v Republic* (2014) eKLR and *Erick Otieno Meda v Republic* (2019) eKLR. In his view, it was pointless for the prosecution to delve into the issue of malice aforethought as it had failed to link him to the unlawful act that led to the death of the deceased. He urged that the prosecution had failed to prove its case against him beyond reasonable and sought to be acquitted.



## Analysis and Determination

36. 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 persons; and that there was malice aforethought.
37. There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. It was established by PW4 that the cause of the death of the deceased was exsanguination following multiple stab wounds and deep cut at the back of neck with transaction of major vessels.
38. The issue in contention is whether the said death was caused by an unlawful act of commission or omission on the part of the accused persons.
39. PW1 testified that on the material day, she, her husband, the deceased herein, and a minor namely EM, were in the kitchen cooking. Then the 1<sup>st</sup> accused, who was wearing a motorbike helmet, pushed the door, which had been locked with a nail from inside, with a C-line sword. Once the door was open, the accused persons and a 3<sup>rd</sup> person, whom she did not recognize stormed into the kitchen. It was then that the 1<sup>st</sup> accused hit the deceased with the C-line sword, and he fell down. In a bid to defend himself, the deceased hit the 1<sup>st</sup> accused on the head with a Thermos and the helmet fell down. That was when PW1 recognized the assailant as the 1<sup>st</sup> accused, whom she previously knew because he was her village mate. The 1<sup>st</sup> accused had purchased trees from her for Kshs. 50,000/= which he had not paid them, and when they reported him to the Njuri Ncheke, the 1<sup>st</sup> accused was unhappy. The 1<sup>st</sup> accused was surprised when he heard her shout, “Silas don’t kill my husband.”
40. The 2<sup>nd</sup> accused, who was standing at the door, entered the house when he heard PW1 shout the name of the 1<sup>st</sup> accused. The 2<sup>nd</sup> accused cut her on the right hand and on her head above the neck. The accused persons also poured paraffin on her at the left back and she lost consciousness. The 2<sup>nd</sup> accused wanted the deceased dead so that he could avoid paying him the costs he had been ordered to pay in a case in Tigania. After she regained consciousness, she went to her bedroom and told the 6-year old child that she had been cut by the 2<sup>nd</sup> accused. She then called 2 neighbours and was taken to the hospital.
41. Her evidence was corroborated by PW5, the investigating officer. He testified that when they visited the scene, they found the deceased lying in the kitchen with multiple cuts and his body was partly burned. He stated that they also collected the deceased hand which had been chopped off.
42. The doctor, PW4 also stated that the body of the deceased had 2<sup>nd</sup>-3<sup>rd</sup> degree burns and multiple deep cuts to the head, neck, chest and scalp.

## The defences

43. The 1<sup>st</sup> accused alluded to an alibi in his unsworn defence. He testified that, on the material day, he was working at Kianjai with DW2 Jeremiah upto to 12 noon when he went home. He stayed at home with his wife DW3 Linet together with his children for the rest of the day. Kagendo, their neighbour, also spent the night at their place. He denied either owning a c-line sword or purchasing trees from the deceased, although he recalled doing some timber business with the deceased in 2013, which would later be the reason for his arrest.
44. DW2 Jeremiah Imunya Igweta stated that he was working with the 1<sup>st</sup> accused on the material day at Mituntu, and at 12.00 noon, every person went to their home. On cross examination by the prosecution, he stated that, “...I was with Mukira upto 12.00 noon. I then went home. Mukira also went to his home. I cannot not tell what he did after 12.00 noon as I went to our home.”



45. DW3 Linnet Nchekei, the wife to the 1<sup>st</sup> accused testified that, "...On 24/6/2016, I recall my husband left at 5.00 a.m. to go to Maua. He came back at 5.00 p.m. He was alone. He came at 5.00 p.m. and I gave him water to go for his bath. He came to the house and started talking with his children and he never left."
46. When DW4 Priscilla Kagendo Ntongai was cross examined, she stated that, "...I got to the accused's place and I did not find him and I stayed with his wife and when it got to 5.00 p.m. the accused came... I went to his place on 26/6/2016. I stayed at his place on the 27/6/2016 when he was arrested and the following day 28/6/2016 we went to follow him up at Ngundune police station. We went with his wife. Do you know what happened on 25<sup>th</sup> and 24<sup>th</sup> June 2016. I cannot tell what happened on 24/6/2016 as I was there on 26/6/2016."
47. On re-examination, she stated that, "It is said the accused killed deceased on 24/6/20216. Were you at Mukira's or not? (witness hesitates). I was not at Mukira's place on that date."
48. It is clear from the evidence led by the 1<sup>st</sup> accused and his witnesses that DW2 Jeremiah was only with the 1<sup>st</sup> accused on the material day up to 12.00 noon. Although both the 1<sup>st</sup> accused and his wife, DW3 claimed that DW4 Kagendo was with them on that day, DW4 reaffirmed on re-examination that she was not at the home of the 1<sup>st</sup> accused on the material day. The only alibi left standing is DW3 Linet, who maintained that her husband the 1<sup>st</sup> accused arrived home on the material day at 1.00 p.m and never left.

### **The 2<sup>nd</sup> accused**

49. In his unsworn defence, DW1 Stanley Thiane Kamuila stated that he left home at 8.00 a.m. on the material day and went to a store at Kianjai market called Capital stores. At 1.00 p.m, he, Mutuma and Akwalu together with the driver boarded a lorry to Tharaka Nithi to purchase cereals for one Nyaga. At 3.00 pm, they arrived at Mukothima in Tharaka Nithi County and started shopping for millet. They finished loading the bags into the lorry at 5.00 pm and started their journey back. Unfortunately, the vehicle broke down on the way and a mechanic repaired it until 3.00 a.m. They arrived at Kianjai Market at 7.00 am on 25/6/2016, where they found Peter Omari, the watchman outside the store. Just before they could finish offloading the goods, 2 police officers came and arrested him.
50. The testimonies by DW2 Justus Akwalu and DW3 Daniel Mutuma were a rehash of that given by DW1, the 2<sup>nd</sup> accused.
51. DW4 Peter Omari Karuri, the watchman mentioned by DW1, the 1<sup>st</sup> accused, stated on cross examination that, "On 25/6/20216, Stanley Thiaine and others came at about 7.00 a.m. On 24/6/20216 at 1.00 p.m. I was not at work. I saw him on 25/6/2016 in the morning."

### **Identification of the assailants**

52. PW1 had no difficulty placing the accused persons at the scene of the murder on the material day. She testified that she had recognized the accused persons as the assailants, because she knew them prior to the incident. On cross examination by counsel for the 1<sup>st</sup> accused, PW1 stated that, "...In the kitchen, we were using solar torches. It was 1 foot with enough lighting. It was on. They broke it...I did not scream as they surprised us and stormed the kitchen. The Thermos broke into pieces. Silas had a helmet of a motorbike. He owns a motorbike. I recognized him after his helmet fell off. He was about 1 meter from where I was standing when I recognized Silas." On cross examination by counsel for the 2<sup>nd</sup> accused, she stated that, "When the attackers stormed the kitchen, the torch was on. When they attacked us, it fell after I had recognized them. The other two had hoods on their heads...The hoods of the other attackers



never fell...The attackers had torches which they entered flashing. At no time did they switch off any of their torches. I can't recall how long the incident took...The distance between my home and Kianjai is Kshs. 20/=. I do not know that the 2<sup>nd</sup> accused was at Kianjai market upto midnight on that day. I saw them at my place. They attacked us." On re-examination, PW1 stated that, "...I had my torch...The 2<sup>nd</sup> accused was hooded. I recognized him through voice and his face which was not covered."

53. The 1<sup>st</sup> accused admitted knowing the deceased and his wife when he stated that, "I know deceased Laibuni. I knew him as I used to see him in the village. I got to him in 2020...I know P.w 1 as I used to pass by the road at outside her home. I knew she was the wife of the deceased (P.w 1 sister Makena)."
54. The 2<sup>nd</sup> accused was well known to the deceased since he stated that, "The deceased was known to me since 1980's. In 2004, while at a bar we disagreed and we fought while drunk. He reported me to the police at Tigania Police station. I was charged at Tigania Law courts and I was convicted and sentenced for 3 years. I left jail in 2007. I got convicted...From 2007 we were reconciled by the church and we lived peacefully. From this time we did not disagree and we remained friends...I did not see the deceased anywhere that day."
55. The evidence of PW2 and PW3 corroborate the identification by recognition of the accused persons by the material particulars of existence of a claim for payment of Ksh.50,000/- for timber sold to the 1<sup>st</sup> accused and his business associate 2<sup>nd</sup> accused on behalf of the PW2, and of the report of the dispute thereon to the Njuri Ncheke where PW3 was an elder. The 1<sup>st</sup> accused acknowledged owning an old motor bike but he insisted that it did not have a helmet. In further support of the identification evidence, the court notes that the accused were arrested upon information by the witness PW1 at the hospital when she regained consciousness and composure to respond to questions as testified by the Investigating Officer PW5 –

"The lady was so traumatized I could not record a statement at that time. Later an after convincing her to talk and she told me those who attacked her, her and her husband knew them and that is why she was brutally attacked when she identified them. I made a call while still at Meru town to the OCS at Tigania and the OCS facilitated the arrest of the accused persons. At the hospital the lady said she could identify Silas Mukira and another called Thiaine. These are names that I gave to OCS."

56. From this analysis of the prosecution and defence evidence tendered, this court finds that the prosecution proved beyond reasonable doubt that the accused persons herein are the persons who in fact caused the death of the deceased. The evidence of identification based on recognition of persons previously known to the eyewitness PW1 and further corroborated by the nature of the injuries she suffered as testified to by PW5, trumps the alibi defences taken up by the accused. Although the accused is not required to prove their alibi, the court notes that 1<sup>st</sup> accused's alibi did not cover him for the night of 24/6/2016 and the 2<sup>nd</sup> accused's alibi in his sworn evidence and evidence of his witnesses that he was away at Tharaka Nithi buying cereals when their lorry broke down is wholly different for the alibi statement put to witness PW1 in cross-examination that he was at Kianjai market, his place of alleged employment at Capital Stores.
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 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 murder appears to have been fueled by a disagreement relating to sale of timber where the deceased claimed from the 1<sup>st</sup> accused person Ksh.50,000/- for timber. The 2<sup>nd</sup> accused who was also had a dispute with the deceased over the payment of costs in a court case which he acknowledged. The 2<sup>nd</sup> accused is said to have been ordered by a Tigania court to pay the deceased costs, which finding did not sit well with him. The 1<sup>st</sup> accused admitted to have worked with the deceased in 2013 while the 2<sup>nd</sup> accused admitted that the deceased had indeed sued him before a Tigania Court. No sooner had the deceased and his wife, PW1 reported the matter to the Njuri Ncheke, a fact that Njuri Ncheke elder PW4 confirmed, that the accused persons stormed into their kitchen armed with a C-line sword and a panga, ready to finish off the deceased. The motive of the attack to avenge the report of the matter of the debt to the Njuri Ncheke and to avoid making the necessary payments is clear reason behind the attack on the deceased. The positive identification by PW1 of the two attackers as 1<sup>st</sup> and 2<sup>nd</sup> accused placed them at the scene attack making their alibi defence merely a contrived response to the evidence of the Prosecution.
60. Although motive is not relevant to criminal responsibility as prescribed under section 9(3) of the Penal Code, as held in *Choge v. R* (1985) KLR 1, motive may be used to corroborate on circumstantial



evidence of the prosecution witnesses, when taken with other circumstances. The participation of the 2<sup>nd</sup> accused in the attack that led to the killing of the deceased and grievous harm of his wife PW1 establishes a common intention bond between them, making them together with the unidentified third attacker according to the testimony of the eye witness PW1 all guilty of the offence pursuant to section 21 of the Penal Code.

61. The manner in which the injuries were severely inflicted and particularly on the head, neck, chest and scalp demonstrate that the 1<sup>st</sup> accused wanted to get rid of the deceased. When PW1 recognized the 1<sup>st</sup> accused by name, the 2<sup>nd</sup> accused, who was all along keeping watch at the door, pounced on her, inflicting life threatening injuries on her. The accused persons then poured paraffin on her and set her ablaze. PW2's evidence corroborated PW1 as to the transaction for the purchase of timber from the deceased by the 1<sup>st</sup> accused on his behalf and PW3 corroborated PW1 on the existence and report of the dispute as to the payment of Ksh.50,000/- for sale of timber, which was claimed by the deceased from the 1<sup>st</sup> accused. There is evidence on record from PW4 and PW5 that the body of the deceased was also partly burned and his hand had been severed corroborating the evidence of the nature of the attack as testified by the PW1.
62. This court, therefore, finds that the prosecution has proved malice aforethought on the part of the accused persons. Although the 2<sup>nd</sup> accused did not actively participate in the murder of the deceased, he had knowledge, as required by section 206 (b) of the Penal Code, that his actions would probably cause the death or grievous harm to PW1, and it is immaterial that she survived and the deceased died. Similarly, this court is satisfied that the 1<sup>st</sup> accused had knowledge that his actions would probably cause the death or grievous harm to the deceased. The second accused's presence and participation in the attack on the deceased and his wife establishes a common intention with the accused and the unidentified third member of the gang in the testimony of PW1.
63. Having found that the prosecution proved beyond reasonable doubt that the accused persons, with malice aforethought, murdered the deceased, herein, their alibi defences fail. As explained by the Court of Appeal in *Erick Otieno Meda v Republic (Supra)*, an alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial; the alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence he or she has presented in court.
64. Of course, an accused who raises an alibi defence has no duty to prove it. But the court must examine the alibi together with the rest of the prosecution evidence in determining whether a reasonable doubt is raised in favour of the accused. Were the alibi defences raised at the earliest opportunity for them to be tested on cross examination? No, and when in cross-examination the question of 2<sup>nd</sup> accused being elsewhere, it was posed that he was at Kianjai market not at Tharaka Nithi as eventually raised; hence the answer by PW1 that-

“The distance between my home and Kianjai is Kshs. 20/=. I do not know that the 2<sup>nd</sup> accused was at Kianjai market upto midnight on that day. I saw them at my place. They attacked us.”

65. Nor was the 2<sup>nd</sup> accused's alibi defence consistent with the rest of his defence as he had suggested in cross-examination of PW3 that the deceased may have been killed by his estranged family of a first wife, which the witness said he was unaware of. PW3 had said:

“Is it true Mr. Laibuni had differences with his children? I do not know about that. The first wife had left home and the 2<sup>nd</sup> wife came into the home of the first wife. I do not know that the children of the 1<sup>st</sup> wife had thrown mzee Laibuni from home over disagreements



about the 2<sup>nd</sup> wife. I have not heard of the differences, even at Njuri Ncheke...Lucia who had been chased away came back to Laibuni's home. She farms at Laibuni's farm but lives at her father's home."

66. Were the unsworn defences of the accused persons either reliable or credible to corroborate their alibi defences? No. In fact, the testimonies by their witnesses were a mere regurgitation of the events of the material day from the accused persons' points of view. There is indication that the alibi defences were conjured to respond to the evidence of the prosecution witnesses, and they were wholly incapable of raising any reasonable doubt to the consistent and corroborated recognition evidence of the witness PW1.

### **Orders**

67. Accordingly, for the reasons set out above, this court finds the accused persons guilty of the offence of murder contrary to section 203 as read with section 204 of *Penal Code* and convicts them.
68. The Sentencing proceedings shall be held on a date to be fixed in consultation with the Counsel for the accused and for the defence.

Order accordingly.

**DATED AND DELIVERED ON THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Mr. Muthomi, Advocate for the 1<sup>st</sup> Accused.

Mr. Atheru, Advocate for the 2<sup>nd</sup> Accused.

Mr. Masila Principal Prosecution Counsel with Ms. Nandwa, Prosecution Counsel for the DPP.

