



REPUBLIC OF KENYA



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**Republic v John & another (Criminal Case 24 of 2014)
[2023] KEHC 21900 (KLR) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 24 OF 2014
EM MURIITHI, J
AUGUST 16, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

KENNEDY MURIERA JOHN 1ST ACCUSED

PETERO KABERIA KIRANJA 2ND ACCUSED

JUDGMENT

1. On 30/5/2017, Kennedy Muriera John and Petero Kaberia Kiranja (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. The particulars of the offence were that on 25/2/2014 at Kiolo village, Kiolo Sub-location, Nkandone Location in Igembe North District within Meru County jointly with others not before court murdered Joseph Kainga M'Arimba.
2. After they denied the charge, the prosecution called 5 witnesses to prove its case.

Evidence

3. PW1 John Kirema testified that, "I am a farmer. I recall on 25/2/2014 at about 2 pm I left home with Mungathia, M'Iriungu and went for lunch Kaero. After that we proceeded to Nkandoni. When we reached a Kiriungu's place on the way to M'imwanya's farm we met some people on the road. At the time I was with M'Iriungu, Stanley Mungathya and Joseph M'Imunya. As we were going to M'Imunya's farm where there had been a boundary dispute with Kaberia. The people we met were Kaberia Kiranya, Kennedy Murieza Kaunyangi Murungi and Mbaya Murungi. All of a sudden, they attacked Joseph M'Imunya and started to cut him. It is Kaberie Kirenya (points at 2nd accused). He used a C-Line (panga) Kennedy Muriera also cut him with a panga (points at 2nd accused). Kaunyangi Murungi also cut him. He disappeared Mbaya Muriungi also cut him with a knife. At that time I



was there. I was standing about 6 metres away. It was on the road in broad day light. When we saw had attacked M'Imunya with panga we run away and I hid in a Miraa farm not far from the scene. While at my hide-out I saw them cut him on the head. They left him lying on the road. After about 15 minutes I emerged from my hide-out and found him lying on the road. I was with Mutua and Stanley Mungathia. We took him to Laare Police Station made a report before taking him to Maua Hospital. He had injuries on the head, face, left hand, and the back. He was treated but he died later on 1/3/2014. He died while in hospital.”

4. On cross examination by counsel for the 1st accused, he stated that, “I was with Stanley Mungathia and the deceased Joseph. We left lunch at 2pm and headed to the farm. The farm was about 1 km away we did not reach the deceased’s farm. We met the 4 attackers at 4pm. We had not reached the Miraa farm. We were a little distance from that farm. We met Kaberia, Kennedy, Kaunyangi Muriugi and Mbaya Murungi on the way. They said they will kill the deceased. It is all of them who said they will kill the deceased. Kennedy (2nd Accused) had a C-Line. I can’t recall how he was clothed. We run after we saw them surround and attack the deceased. I run away after they attacked deceased Stanley and Munyua were with me. I hid about 15 metres away. I saw the deceased sustained injuries on the head, forehead, left hand, and back. Kennedy cut the deceased on the head while the 2nd accused cut him on the back. I hid with Mutua. He also saw the attack. I deny that Kennedy was not there at the scene. The accused are related to each other.”
5. On cross examination by counsel for the 2nd accused, he stated that, “I made circumstances to the police on 15/3/2014. I cannot recall when I made the statement. I stated to my statement that when we met the attackers and they threatened to kill someone we run and I hid on a Miraa Farm. M'Imunya could not run because he was old. We met 4 people I don't recall is I stated in the statement that they were fine. I insist they were four. We came out of our hide-out and found the deceased lying on the road bleeding. There was Michubu Muriungi, Ibrahim Mbaya Murgi, Kaunyangi Murungi and Muriera John. I knew them before that incident. They are related and they are children of Murungi Murungi is deceased. I do not know if Murungi had brothers. Neither can I tell who his father is. The deceased was the son of M'Rimba Mungathia is the son of M'Rimba. He is a brother to the deceased. Mutua is son to M'Riungu. On that day I was at the scene. It was M'Imunya who had hired us it is his farm but I do not know the title number. He had a boundary dispute with Kaberia. I do not know the title number of Kaberia. He has a house on that farm. M'Imunya has not built on that farm but was cultivating. It is not true that there was no boundary dispute between M'Imwara and Kaberia. None of Kaberia's children was present at the scene. I cannot recall what type of clothing Kaberia had. I insist I witnessed the incident with my own eyes. I did not see any other people on that road. The incident occurred in Kiliungu shopping centre. The incident occurred at 4pm. The boundary dispute is in court in Meru. The deceased was older to me by far. None of his children was with us.”
6. On re-examination, he stated that, “I run away when I saw them round and cut the deceased. Where I hid, I could see well what was happening I saw them cut the deceased.”
7. PW2 M'Iriungu Mutua testified that, “I am a farmer. I recall 25/2/2014 at about 2pm, we left Kaelo with, Joseph Kainda, Mungathia and PW1. We were four of us. Joseph Kainda M'Arimba is the deceased. We were going to Nkandoni in the farm of Kainga M'Imunya. Before reaching there, we met the 1st and 2nd accused pointing at them) with Pangas. They were 4. These were Muriera, Mbaya, Kaunyangi and Kaberia. The ones in court are Muriera and Kaberia. I know them. Before the indent I had not known the accused. Pointing at the 2nd accused, he started separating us because he had a dispute with the deceased. He was the leader of that group. Kaberia lurched at the deceased, once I saw that the deceased had fallen down after being cut. I run away. Kaberia cut the deceased on the back and head. I was with the deceased then. The deceased was old. I was about 2 metres from where the



- deceased was being cut. I run to a Miraa farm. After the attackers left, we went and took the old man to hospital. I could see the road where they were from where I was hiding. I was with Kirema (PW1) and Mungathia. Our hide-out was about 50 metres from where the assault was taking place. When we went where he was, the deceased was still conscious. He had injuries to the back, and right hand and head. We took him to Laare Police Station to report before taking him to hospital. He later died on 1/3/2014. While in hospital. I am 70 years now. The deceased was younger than me.”
8. On cross examination by counsel for the 1st accused, he stated that, “I knew the 1st accused that day. That is the first time I met him. I came to know him name later. I saw him later in court. He had a slasher on that day I cannot recall the type of clothing he was wearing. Kaberia (2nd Accused) told the deceased that they will kill him that day and even uproot his teeth. The deceased tried to run away but when they cut him, he fell down. He was cut on the head by Kaberia (2nd Accused). The others cut the deceased was on the ground. Muriera and the others had pangas. It is Kaberia who had a boundary dispute with the deceased. Muriera’s father is a brother to Kaberia. I insist that Muriera was amongst the four who attacked the deceased. It is not true that Muriera was not present.”
 9. On cross examination by counsel for the 2nd accused, he stated that, “The deceased was my son in circumcision. In the statement to the police I stated that we met Michubu Murungi, Ibrahim Mbaya Murungi, Kaunyangi Murungi and Muriera John. They had pangas. I had not known them before that day. It is Mungathis who gave me the names as he knew them well. I never attended any Police Parade for identification. When they told us they will kill us, we run away to a Miraa farm. There were no other people at the time along that road. We were at the time going to the farm to wait for lands people so that they can put the boundary. I do not have any summons to show that we had been called to a boundary dispute. None of us four who had any panga. There was no case, it was a boundary dispute. We first passed at Laare Police Station before going to Maua Hospital. I was with Mungathia and Gerald. It is Mungathia who reported to the police.”
 10. PW3 Stanley Mungathia M’Arimba, testified that, “I live in Kaelo in Laare. I am a Miraa businessman. I recall on 25/2/2014 at about 2 pm, I was at Kaelo Market. I was with Kirima, M’Iliungu Douglas Gitonga and Joseph Kaenga. We had finished eating at Kaelo Joseph Kaenga asked us to take him to his farm so that they would pin point the boundaries Kaberia Kiranya. When we reached Nkandone, we found a road leading to Kiolo. We followed it. We then found Kaberia, with Micubu Murungi, Kaunyangi Murungi, and Ibrahim Mbaya Muriungi and Kennedy Muriera John. I can see two of them in court. These are Kaberia Kiranja (points at the 2nd accused) and Miriera John (points at 1st accused). The four were on the road armed with C-Line (the long sword) Kaberia said they will kill us. He did not want the boundary to be demarcated. With that threat, we turned and started to run away towards where we were coming from. Some of us entered some farms and hid there. Joseph Kaenga followed the road and the attackers pursued him. They caught up with him and cut him on the right shoulder and he fell. They also cut his neck and left wrist. The first to cut the deceased was the 2nd Accused. After the deceased fell down, the others started to cut him. They left him for dead and went away. We then came out of our hiding places and put him in a vehicle. We reported to Naari Police station. We then took him to Maua Methodist Hospital. I saw his injuries as a) on the right shoulder b) the right jaw c) left wrist. When they were assaulting the deceased I was about 80 metres away. When they confronted us, we were about 40 metres away. There was nothing between us and them when they threatened us with death. Joseph Kaenga died from the injuries he sustained. I have known the accused for about 10 years. They are neighbours. The deceased had been known to me for over 30 years. He had a dispute with the 2nd accused. The land belonged to my father and the father of the 2nd accused. It was shared between my father and the father of the 2nd Accused. I do not have any grudge with any of the accused. I witnesses all that I have told the court.”



11. On cross examination by counsel for the 1st accused, he stated that, “I have known the 1st accused for about 10 years. He is a neighbor. The deceased was my brother. The 1st accused was carrying C-Line. The 2nd accused likewise had C-Line. The deceased run on the road. I run faster than the deceased. When I reached near the road, I diverted into a farm while the accused run through onto the road. I saw the 1st accused assaulted the deceased at the back. I was there when all this occurred.”
12. On cross examination by counsel for the 2nd accused, he stated that, “The 2nd accused’s father is my uncle. The 1st accused is the son of the 2nd Accused’s brother. Murungi Kiranja is the brother to 2nd accused. He is a cousin to the deceased. Kaunyangi Murungi, Micubu Murugi Ibrahim Mbaya Murungi are sons to Murungi Kiranja. Muriera Kennedy (1st accused is a son to John, Murungi. I have forgotten the plot No. The farm is in Nkandune on the road to Kiolo. The deceased’s home is at Kalindi. My home is at Kaelo. From Kalindi to Nkandone where the disputed land is is approximately 800 metres. From Kaelo to the farm is about 1km. The 2nd accused has a home at Nkandone. His home is about 100m to the disputed land. I know where the land is situated. The fare to that land from either of the location I have mentioned is Kshs. 20/=. I had done my business from 10am to 2 pm. I took the deceased because he was my brother. It was I and four other men. They were his friends. The land officers were coming to help demarcate the land. The date had been fixed by the officers I also had an interest with that land. It was I and the deceased only who were interested with the land. The land dispute has been there for long. I have never cultivated it. It was the deceased who was cultivating it. It is my father M’Arimba who had a share. He divided it to his sons. M’Kiranja hadalso distributed his share to his children. The 2nd accused has constructed on a portion of that land. The people we met were from Murungi’s family. It is not true. There was no dispute between the deceased and the family of Murungi. Where we met there are no shops. I and the others run to the farms where we hid. All the attackers pursued the deceased being assaulted by the deceased. All the attackers were having C-Line. There were no other people at the scene. The road to Kiolo is not busy with traffic. It is not true that I want the accused to be jailed so that we can take the land. It is not true that the land is several kilometres away from the points I have mentioned.”
13. On re-examination, he stated that, “I know the land. I witnessed the whole incident. The deceased was assaulted by the 2nd accused.”
14. PW4 DC Riro Kimenya of Kiutini Police Post testified that, “I recall on 25/2/2014, I was at Laare Police Station when Stanley Mungathia reported that the deceased Joseph Kainga M’Arimba had been assaulted by 5 people who included the 2nd accused. That they had a land dispute. That on the material day, they were going with surveyors from Maua to go and put a boundary between the deceased’s land and that of the accused. They left Kahero shopping centre where they had lunch. When they reached Kiliungu shopping Centre which is on the way between Laare and Mutwati. On reaching about 130 meters onto the right off the road as you go to Mutwati the accused Kaberia Kiranga, Ibrahim Mbaya, Kaunyangi Muriungi Michubu Muriungi and Muriera John emerged while armed with pangas and told the deceased together with Stanley and John Kirema (PW3 & PW1) that they will kill them. They started running away. Stanley and John Kirema entered on Miraa farm. The deceased who was elderly was unlucky and could not run fast. Then accused caught up with him and cut him with pangas. They cut his right side of the face, right side of the neck, on his shoulder, his right hand was chopped off/severed. He was also injured on his left forearm. The report was recorded and the deceased was taken to Maua Methodist Hospital where he was admitted. On 28/2/2014, I visited him at the Hospital. He could not talk to me because of his condition. He had been stitched. On 1/3/2014, Stanley Mungathia reported that the deceased had passed on. I visited the scene on 11/3/2014 with a fellow officer. I made a sketch plan of the scene which I have in court. I wish to produce it as evidence (produced as PEXH 1). I charged the 2, Kaberia Kiranja and John Murieka. The other 3 disappeared. The two I charged



- the one in court (points at accused 1 & 2). The 1st accused is a brother to the deceased. The 2nd accused is a grandson to Michubu who is still at large. I recorded statements and charge the accused with the present charge.”
15. On cross examination by counsel for the 2nd accused, he stated that, “I investigated the case personally. Ibrahim Mbaya, Kaunyagi Muriungi and Michubu Muriungi were part of the attackers. The first 2 are children of Michubu. John Muriera is a grandson to Michubu Muriungi. Michubu Muriungi was a brother to the deceased. I established that there was a boundary dispute. I did not investigate to establish the plot number. It was an inherited land by the brothers. It was a family land. The same had been distributed to them. On that day they were going with surveyors to mark the boundary. The 1st accused was arrested in Kiutini area. I was not there when he was arrested. It was after a week from the date of the offence. The 2nd accused was arrested one month later while he was in church attending prayers. From my investigations, I visited the scene it was on the road that had branched from main road from Laare to Mutwati. The attackers emerged from behind some kiosks. It was at Kilungu market. I see OB No. 82/25/2/2014. It was recorded at 20:45 hrs, a report was made that one Joseph Kainga M’Arimba was seriously cut by Kaberia Kiranja, Ibrahim Mbaya and Michubu Muriungi who had waylaid him at a Miraa farm. However, I visited the scene, it is then when I was shown where they way laid him. According to the report, he was waylaid at a Miraa farm. I see PExh 1, it is my Sketch Plan. The attack occurred about 132 ft from the main road. There is another diversion from the 1st diversion heading to Ngandone Primary School. There is a farm along that road where my witnesses run to and hid. It is a Miraa Farm it had a live fence. There was no barbed wire. At that time. I did not see any barbed wire. There was a second Miraa farm which had a large live fence. I did not recover any weapon from the deceased. I did not establish that John Kaberia was working anywhere then. According to the witnesses John Kaberia was with the other attackers. I did not visit that land that was the subject of the dispute. From information I got the deceased had a home on the disputed land. Henry Mungathia was a brother to the deceased. He is a brother to the 1st accused. I do not know if he had an interest on the disputed land. The dispute was between the 2nd accused and the deceased. It was a boundary dispute. I did not establish that Kaberia home was far at Kiutini, I got information that after the incident he disappeared to establish a home at Kiutini. I do not agree that Kaberia does not have interest in the land the subject of the dispute. I never recovered any of the panga’s used in the attack. The information I got from the brothers that Kaunyangi was arranging his sons to attack the deceased Ibrahim Mbaya is a son to Kiranya Kaberia. I am not lying. It is not true that I did not investigate the case. I have not traced the other 3 attackers.”
16. On re-examination, he stated that, “The scene of crime was at a junction off the main road. I saw OB No. 82/25/2/2014. It was entered by PC Patrick Egato. This was the initial report. After my investigations I established that it was not at a miraa farm as indicate in the OB No. 82. The accused were arrested after a month or 2. It was not able to recover any weapons. I visited the scene. I investigated the case. I recorded statements from eye witnesses. They mention the 2 accused.”
17. PW5 Dr. Sammy Githu Wachira, a medical Superintendent of Nyambene sub-County Hospital and MOH Igembe South produced the deceased post mortem report which had been filled by his colleague Dr. Michael Kariuki on 10/3/2014, as P exhibit No. 1. The deceased body had multiple cuts (7 in number). There was a cut on the right shoulder (15cm long sustained) left shoulder (16cm long) sutured, a cut on the right side of the face 16cm long, a cut on the left side of the face extending from the lip to the ear (20cm long), a cut on the back at the scapula and a cut on the mid back 18cm long sutured and finally a cut on the left forearm amputating the forearm below the elbow. The respiratory system had bilateral hemorrhagic pleural effusion (there was blood in the chest cavity on both lungs) and there was hemorrhagic effusion in the cardiovascular system (blood surrounding the heart). There was faecal



peritoneal effusion with a perforated peptic ulcer in the digestive system (the ulcer had perforated the stomach – part of it getting out into the abdominal cavity). He opined that this was aggravated by the physical injuries. On the head, there was a sub-scalp haematoma (blood under the skin on the scalp) and there was visibly swollen brain tissue caused by the injury. He made an opinion that the cause of death was cardio respiratory arrest due to hemorrhagic shock secondary to deep cuts aggravated by septic shock arising from the perforated ulcer.

18. On cross examination by counsel for the 2nd accused, he stated that, “At the place of signing there is no date given. I graduated in Dec, 2013. I was posted to Maua Methodist in 2014 March. The document had already been done by that time. I replaced Doctor Kariuki as superintendent of Nyamene District Hospital. Dr. Karikui was my MOH in 2014. As at 10/3/2014 was not familiar with Dr. Kariuki’s signature. The report has not disclosed who inflicted the injuries upon the deceased. We usually indicate the death certificate number in the post mortem report. I do not have the death certificate itself.”
19. DW1 Kennedy Muriera John, the 1st accused herein, gave sworn testimony that:

“I am Kennedy Muriera John. I hail from Kandone Laare Division of Igembe North Sub County. I worked as a boda boda operator.

I am aware of the charges.

I know Joseph Kainga, He is a brother to my grandfather. On 25/2/2014, I was at my home. I used to live at my aunties’ house, it was at Kiolo. My aunties’ home. I left home at 7:30 am and took a boda boda from my aunties and went to work. I worked up to 1:00 pm when I went to a hotel for Lunch. I later went back to work and worked until 6:00 pm. I bought super to take to my grandmother as usual. I got home at my grandmothers at about 6:30pm and I found a commotion at home and on enquiry I did not get any information and I went to my uncle Michubu’s house and he told me that Kainga had been killed. He did not tell me what had killed him. I also asked Mr. Mbaya, my other uncle and he told me that the matter did not concern me and chased me away. I went to my auntie’s at Kiolo. My auntie was not there. I got to Kiolo at 1:00 pm. My auntie came at about 8:00 pm and I told her what had transpired and she told me she would go to the place in the morning. In the morning she went to my mother’s home and later in the evening at 8:00 pm. I met her at home when she came and she said what had gone on at my grandmother’s home did not concern me. I continued to stay and work at Kiolo.

On about 23/3/2014, while at Church AIPCA Kandoni while playing instruments at about 11:00 pm, the security of the church told me someone was calling me. I was arrested by police officers in civilian uniform. They took me by a private vehicle and took me to Laare Police Station where they informed me that I was being charged murder of Joseph Kainga, Joseph Kainga used to give me work to carry miraa from Laare to the market.

The deceased was injured on 25/2/2014. I do not know when he was killed. I am aware that there was a report made by Stanley Mungathia to the Police Station on 25/2/2014.

He did not name me in the report as among the attackers.

I pray that the Investigating Diary be produced dated OB 82/25/2/2014.



20. On cross-examination, he said:

“I worked as Boda Boda rider. I used to go Laare to Maua. I was stationed at Laare. On this day I was working at Laare.

I used to work with others at Laare operating Boda Boda but we were not organized as a group.

Do you have anyone to come to court. I was not admitted in the Boda Boda group as I had dropped from school.

Did you not know others who you worked with at the stage?

No. I worked at the stage for about 3 months before I was arrested I did not know the Boda Boda operators at the stage.

At 1:00 pm I went to eat lunch at a hotel called Famous Hotel. I went alone.

Is there anyone who saw you in the hotel?

I do not know if they keep receipts for person who eat at the hotel but that is where I went for lunch.

You went with 2nd accused at 2:00pm and beat up the deceased.
accused.

He is a brother to my grandmother. I also used to know the deceased who is his brother.

I do not know that there was a dispute between the deceased and 2nd accused. I used to live with my auntie.”

21. DW2 Petero Kaberia Kiranja, the 2nd accused herein testified that:

“I come from Murera. I work a cow herder. I know Joseph Kainga. He was my cousin. His father and my father are brothers.

On 25/2/2014, I had taken my cows to Murera. I do not know about what happened.

I woke up and took my cows at 8:00 am to Murera. I got to Murera at 9:00 am. I stayed at Murera until 7:00 pm when I came back home. It is about 1. Km from my home to the grazing land.

I never left home after 8:00am p.m.

I got arrested on the matter. I know who arrested me. Mungathia is the one who arrested me. He found me at home at Murere. He was with other Police Officers.

I was taken to Kiutine Police Station, He said that I had cut up Kainga. I said I did not know about such matter. I said I had not gone to Kathurine and I did not know anything about Murera and Kathurine is about the distance from to Maua. It is very far. I was being told about the happenings after 4 days. I heard he had been killed.

I was informed by Kindia by a Police call. Kindia said that Kainga was killed by 3 people, Michubu Murungi, Kaunyangi Murungi and Mbaya Murungi. They are brothers, sons to my brother Muriungi Kirainya.

It is not true as stated by witnesses that I attacked Kainga. We had a quarrel with Mungathia. He said that I had taken his wife. That is he named me.



My mother had been married at Keiker, Laare Later she was chased away with sons Mutuma and I. When my mother was chased away she bought a shamba where we lived.

I do not have a grudge.

She was chased away from the area.”

22. On cross-examination he said:

“On 25/2/2014 at 1:00 pm. I was at Murera.

I was grazing my cows. I do not know where they are.

OB DWEX. NO. 1 Persons read in the Diary. It is not true I was among the persons who cut the deceased. I got the report after 4 days at Murera.

The 1st accused is known to me. He is a child of Muriungi Kiranja. I knew the deceased as my cousin. My father and Kainga’s father are brothers.”

Submissions

23. The prosecution did not file any submissions.

24. The accused submitted that the prosecution’s case was not well corroborated that they are the ones who caused the death of the deceased. They urged that since they were not known to the witnesses, it was pertinent to have an identification parade, and cited *R v Turnbull and Others (1976) 3 ALL ER 549* and *Ajode v Republic (2004) eKLR*. They urged that the evidence adduced by the prosecution failed to establish beyond reasonable doubt the act of unlawful killing of the deceased. They submitted that the alibi defences they raised are plausible in view of the contradictions and insufficiency of the evidence of the prosecution.

Analysis and Determination

25. 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.

26. There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. PW5 testified that the cause of death was cardio respiratory arrest due to hemorrhagic shock secondary to deep cuts aggravated by septic shock arising from the perforated ulcer.

27. 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.

28. On the material day, PW1, PW2 and PW3 accompanied the deceased to his farm where they were going to meet the surveyor for purposes of demarcating the land. On reaching Kiriungu’s place, they met Kaberia Kiranya, Kennedy Muriera Kaunyangi Murungi and Mbaya Murungi on the road. PW1 testified that, “All of a sudden, they attacked Joseph M’Imunya and started to cut him. It is Kaberie Kirenya (points at 2nd accused). He used a C-Line (panga) Kennedy Muriera also cut him with a panga (points at 2nd accused). Kaunyangi Murungi also cut him...Mbaya Muriungi also cut him with a knife. At that time I was there. I was standing about 6 metres away. It was on the road in broad day light. When we saw they had attacked M’Imunya with panga we run away and I hid in a Miraa farm not far from the scene. While at my hide-out I saw them cut him on the head.”



29. His testimony was corroborated by PW2 and PW3. PW2 testified that, "...we met the 1st and 2nd accused pointing at them) with Pangas. They were 4. These were Muriera, Mbaya, Kaunyangi and Kaberia. The ones in court are Muriera and Kaberia. I know them...Pointing at the 2nd accused, he started separating us because he had a dispute with the deceased. He was the leader of that group. Kaberia lurched at the deceased, once I saw that the deceased had fallen down after being cut. I run away. Kaberia cut the deceased on the back and head...I was about 2 metres from where the deceased was being cut...I could see the road where they were from where I was hiding. I was with Kirema (PW1) and Mungathia. Our hide-out was about 50 metres from where the assault was taking place." On cross examination by counsel for the 1st accused, PW2 stated that, "The deceased tried to run away but when they cut him, he fell down. He was cut on the head by Kaberia (2nd Accused). The others cut the deceased was on the ground. Muriera and the others had pangas. It is Kaberia who had a boundary dispute with the deceased. Muriera's father is a brother to Kaberia. I insist that Muriera was amongst the four who attacked the deceased."
30. PW3 testified that, "...We then found Kaberia, with Micubu Murungi, Kaunyangi Murungi, and Ibrahim Mbaya Muriungi and Kennedy Muriera John. I can see two of them in court. These are Kaberia Kiranja (points at the 2nd accused) and Miriera John (points at 1st accused). The four were on the road armed with C-Line (the long sword) Kaberia said they will kill us. He did not want the boundary to be demarcated. With that threat, we turned and started to run away towards where we were coming from. Some of us entered some farms and hid there. Joseph Kaenga followed the road and the attackers pursued him. They caught up with him and cut him on the right shoulder and he fell. They also cut his neck and left wrist. The first to cut the deceased was the 2nd Accused. After the deceased fell down, the others started to cut him."
31. PW3 affirmed that he did not have any grudge with any of the accused.
32. PW4 visited the scene on 11/3/2014 and made a sketch plan. From his investigations, he established that that there was a boundary dispute and the attack occurred about 132 feet from the main road.

The Defences

33. The two accused persons had similar defence that they were at work, respectively, as boda boda operator and cattle herder when their relative - grandfather and cousin - was killed on 25/2/2014 and they had nothing to do with the killing.

Identity of the assailants

34. There is no dispute that the incident took place in broad day light and therefore the circumstances for identification by recognition were favourable. PW1 confirmed on cross examination the identity and prior knowledge of the attackers as follows, "There was Michubu Muriungi, Ibrahim Mbaya Murgi, Kaunyangi Murungi and Muriera John. I knew them before that incident. They are related and they are children of Murungi Murungi is deceased."
35. PW3 stated that, "I have known the accused for about 10 years. They are neighbours. The deceased had been known to me for over 30 years. He had a dispute with the 2nd accused. The land belonged to my father and the father of the 2nd accused. It was shared between my father and the father of the 2nd Accused."
36. This court is satisfied that the accused were placed at the scene of the crime by PW1 and PW3. PW3 acknowledged that he had known the accused for about 10 years and they were neighbours.



37. The testimonies of the 3 eye witnesses, PW1, PW2 and PW3 were corroborative, consistent and sufficient to prove that that the accused were indeed the people who caused the unlawful death of the deceased. PW1, PW2, PW2 and PW4 confirmed that the murder was instigated by a long standing boundary dispute between the deceased and the 2nd accused. It is said that the 2nd accused was opposed to the land being demarcated.
38. Despite the accused's defences, the consistent testimony of the prosecution witnesses leads this court to find that the prosecution proved beyond reasonable doubt by well corroborated evidence that the death of the deceased was caused by an unlawful act of assault and cutting up the deceased on the part of the accused.

Malice aforethought

39. The next issue is whether there was malice afterthought, which is defined under Section 206 of the Penal Code as follows:

“206. 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.”
40. 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.
41. The Court of Appeal in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR considered the question of proof of malice aforethought and held 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 *Chesakiv. 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 *Rexv. TubereS/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...”

42. PW5 testified that the body of the deceased had multiple cuts on the shoulders, face, back and left forearm, amputating the forearm below the elbow, coupled with other injuries on the respiratory system, digestive system and the head. The manner in which the accused inflicted those injuries on the deceased is an indication that they had knowledge, as required by section 206 (b) of the Penal Code, that their actions would probably cause the death or grievous harm to the deceased and the presence of malice aforethought is established.
43. This court finds that the prosecution proved beyond reasonable doubt that the accused, with malice aforethought, killed the deceased.

Orders

44. Accordingly, for the reasons set out above, the court finds the accused, Kennedy Muriera John and Petero Kaberia Kiranja, guilty of the offence of murder contrary to section 203 as read with 204 of the Penal Code.
45. It has been established that the 2nd accused Petero Kaberia Kiranja is deceased. As with abatement of appeals (under section 360 of the Criminal Procedure Code) on the death of the appellant, the 2nd accused’s trial is terminated upon his death.
46. Accordingly the court shall only enter a conviction for the offence of murder c/s 203 as read with 204 of the Penal Code against the 1st accused only.
47. The case against the 2nd accused is marked terminated upon death.
48. Mitigation and sentencing proceedings shall be had on a date to be fixed in consultation with Counsel for the accused and for the DPP.

Orders accordingly.

DATED AND DELIVERED THIS 16TH DAY OF AUGUST, 2023

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. Igweta Advocate for the Accused.

Mr. Masila Principal Prosecution Counsel for DPP.

