



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
CRIMINAL CASE NO. 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MURIUNGI IRIMBA.....1ST ACCUSED

CONSOLATA KONJA.....2ND ACCUSED

VILIVINA KABEA.....3RD ACCUSED

ANDREW MUTURIA.....4TH ACCUSED

FABIAN MAUKI IKUNGA.....5TH ACCUSED

NATHAN KIGACHA KIRUGI.....6TH ACCUSED

CECILIA GATUMI IKOJE.....7TH ACCUSED

AND

BERNARD MUNYAMBU KIRUGI.....8TH ACCUSED

J U D G E M E N T

1. The Accused persons herein, namely: -

a) FRANCIS MURIUNGI IRIMBA.....1ST ACCUSED

b) CONSOLATA KONJA.....2ND ACCUSED

c) VILIVINA KABEA.....3RD ACCUSED

d) ANDREW MUTIRIA.....4TH ACCUSED

e) FABIAN MAUKI IKUNGA.....5TH ACCUSED

f) NATHAN KIGACHA KIRUGI6TH ACCUSED

g) CECILIA GATUMI IKOJE7TH ACCUSED

AND

h) BERNARD MUNYAMBU KIRUGI8TH ACCUSED, are all jointly charged with the offence of murder contrary to

Section 203 as read with **Section 204 of the Penal Code.**

2. The particulars of the offence as per the information presented to this court are that, on the 8th November, 2016 at around 15:00 hours at Kirundi sub-location, Thiiti Location, Tharaka North within Tharaka Nithi County, the above named accused persons jointly with others not before court murdered Sisinoh Kilonzo Kathenya (hereinafter to be referred to as the deceased for ease of reference).

3. When the accused persons were presented to this court, they all denied committing the offence and prosecution called a total of ten witnesses to prove their case. The prosecution's case mainly is hinged on both direct and indirect evidence. The defence on their part gave sworn statements in defence and had no witnesses to offer.

4. The first prosecution's witness **Gedion Njagi Kaiburu** (PW1), told this court that on the material day, (8th November, 2016) at around 2PM he was at his house which was located at Kirundi sub-location where the incident occurred, when he heard loud screams from the homestead of where the deceased resided. He testified that he rushed to the scene and was joined by a neighbour namely, Isaiah Nthiga (PW3) who apparently had also been attracted by the same screams. He continued that he was also joined by one Waikandi Mutiiti and that they all rushed to the homestead of the deceased to find out what was happening. According to him, when they reached the scene, he saw many people around and stopped around 150 metres away because he feared going closer because he feared the family of 1st accused because it had a history of killing people.

5. The witness (PW1) further informed this court that, from where he was standing, he was able to witness what was going on inside the homestead of the deceased. He saw Isaiah Nthenge (PW3) go inside the compound of the accused's home. He stated that he also saw the deceased trying to run away from a group of people who were pursuing him hot on his heels. He testified that the deceased ran onto his motorbike and tried to start the motorbike in order to get away but Andrew Mutiria (4th Accused) stopped him by holding the motorbike while armed with a panga forcing the deceased to run away on foot for his life. The witness further testified that he saw the 4th accused (Andrew Mutiria) cut the deceased on the back as he fled towards the compound of one Pastor Sammy Mutiria, who was a neighbour of the deceased. The witness also stated that he saw Muriithi Kigacha, Joshua Muriithi, Munyuoki, Nathan Kigacha Kirugi (5th accused) and Fabian Mauki Ikunga (8th accused) chasing after the deceased as he fled and that even after being cut with a panga on his back, the deceased continued running away pursued by around 15 people inclusive of the above mentioned persons.

6. The witness (PW1) further testified that he also saw some women namely Vilivina Kabea (3rd Accused), Cecilia Gatumi Ikoje (7th Accused), Elizabeth, Karia Mwazani, Kambura Nkando and Kanini destroying the motorcycle that the deceased had abandoned as he fled for his life. The witness stated that there was an AP Officer who shortly arrived at the scene and stopped the women from further destruction of the motorcycle.

7. He further testified that later he was told by one Kimathi Wa Stephen that he would not see Sisinoh (deceased) again because he had been killed. He went to the scene and found Consolata Konja (2nd Accused) adding firewood to the body of the deceased which already had been set on fire.

8. The witness further testified, at the scene he heard Cecilia Gatumi (7th Accused) bragging that Francis (who had no son of his own) had gotten sons who were able to kill the deceased. The witness added that because the 1st accused did not get sons with his wife (2nd Accused), he had given Sisinoh Kilonzo (deceased) a piece of land in his home as his son in law having been married to 3rd accused a daughter of both the 1st and 2nd accused) and that is how the deceased came and settled in that parcel living with his wife (3rd accused herein) and that the two were blessed children.

9. The witness further testified that he was aware that the deceased and 3rd accused had disagreed and owing to the differences, the deceased had left after staying in the land the 1st accused had given him for around 4 years. He told this court that the deceased had left and was staying at Kathangacini where he had reportedly married another wife. He insisted that when the deceased fled for his dear life, he saw the 3rd, 4th, 5th, 7th and 8th accused respectively chasing him but was not able to witness what transpired when they caught up with him as he was far off and only learnt that he had been killed. He added that he went together with other people to where he had been killed and found his body had been set on fire and that is where he saw the 2nd accused adding more firewood to the fire as it burnt the deceased's body.

10. **Lilian Kendi (PW)**, a child aged 14 years and in class 8 at Maragua primary school, and a daughter to the deceased and 3rd accused, told this court that she used to live with both her parents (the deceased and 3rd accused) before the parents differed.

According to her, her mother stayed at Kirundi with her and her sibling. She informed this court that she lived with her maternal grandparents (1st and 2nd Accused) where her parents had constructed a house in a parcel given to her parents by her maternal grandparents.

11. She testified that on the material day she was at home when her father (the deceased herein) visited them at around 8am.

She stated that when her father arrived, her grandfather (the 1st accused herein) was working on his farm and that he proceeded to the parcel he had gifted to her parents and cut down a tree. She added that her father (deceased) inquired from the 1st accused why he was cutting down the tree and that the questions asked by the deceased agitated the 1st accused who then proceeded to his house and came out armed with a bow and arrows. According to her, her father (deceased) remained calm and dared him to do what he wished before informing her to prepare herself as he was going to take her to her paternal grandparent's home. She testified that her father then proceeded to Kirundi primary school for a parents meeting that had been scheduled for that same day.

12. The witness testified that after her father (deceased) had left for the school meeting, she overheard her grandmother (the 2nd Accused)

and the grandfather (1st accused) at around 9 am planning on how they were going to call people to harm her father and that the 2nd accused went and called some people who started cutting down a live fence that surrounded their house which her parents had constructed in the plot given to them by the 1st accused. She testified that the same people also destroyed their kitchen and chicken coop.

13. She further testified that she heard one Karea Mwangano suggesting that he beats the iron sheets at the chicken pen to attract the attention of her father (deceased) at school meeting which was around 50 metres away. She also stated that one Benjamin Kinoti cut down a tree in their compound after which the same people retreated to some distance from their home and discussed on how to deal with the deceased. The witness stated that she was told not to go near to where they were meeting and shortly thereafter the group sent her and her sibling to the river because they knew the meeting at the school was over and expected her father to arrive at any moment. According to her the group that included her 1st and 2nd accused did not want them to see what they wanted to do to their father (the deceased). She testified that it is her mother (3rd accused) who sent her and her young brother to the river and that while at the river, they heard screams emanating from their home and that they quickly returned back only to find some people surrounding their father (the deceased). She testified that she saw her father dash to the house where he changed shoes and came out wearing gumboots and dashed to where he had parked his motorbike. The girl recalled that before her father came out of the house, the 1st and 2nd accused had threatened that they were going to burn him alive in that house unless he came out. She added that the 1st & 2nd accused, blamed her father (deceased) for troubling them often. She recalled that Isaiah Berece (PW3) arrived as her father was coming out of his house and that Isaiah asked him what was going on and he replied that people wanted to harm him. She added that Isaiah advised him (deceased) to flee from the scene. She testified that her father heeded to the advice and jumped onto his motorcycle to get away but was stopped by one Titus Kimanathi and Mwanthi Kaburu. She added that when the deceased abandoned the motorcycle and tried fleeing on foot, Andrew Mutiria (4th accused) cut him on the back with a panga but the deceased kept on running away as the assailants chased him. She added that she did not follow her father as he was being chased because her mother (3rd accused) told her to go back to the house. She added that she saw one Titus Kimathi and Mwanthi Kaburu destroy her father's motorbike before joining the others who were chasing her father. She testified that later she saw her mother (3rd accused) coming back home and when they asked her where her father was she told them to leave her alone. She further testified that shortly thereafter, she saw some smoke billowing from the direction her father had run to.

14. She further testified that at around 5PM the same day, the Police arrived at their home and arrested their grandfather (the 1st accused) and their mother (3rd accused). She also recalled that at around 6 PM the same day, one Andrew Muthegi went to their home and told them that what the 1st accused had done was not a big deal because even if he was to go to jail he would come out. She further testified that around the same time, she heard the 2nd accused calling on Joyce Kaithi telling her that they had killed her father (the deceased). She also heard her speaking to one Margaret Gatongo telling her that their problem was over as they had killed her father.

15. The witness also testified that the following morning, many people went to their home and that among them was Cecilia Gatumi (7th accused) who remarked as follows:-

“If the dog (referring to the deceased) had not been killed, I would have myself killed Francis Muriungi (1st accused) and Consolata Konja (2nd accused).”

16. Isaiah Nthiga Bereca (PW3), Assistant Chief Kirundi sub-location, where the incident took place, testified that on the material day, he was at his home resting after lunch at around 2PM, when he heard screams and came out of his house and followed the direction the noise had emanated from. He testified that he joined a neighbour one **Gedion Njagi (PW1)** who had also been attracted by the same screams and the screams emanated from the compound of the 1st accused. He told this court that when he got near the scene, he found many people standing on the road just watching and when he inquired he was told by some people that Sisinih was inside the house arming himself to shoot the 1st accused.

17. The Assistant Chief further testified that he asked Gedion to accompany him to the compound inside where the house of the deceased was but the said Gedion Njagi declined telling the Area Assistant Chief that he knew the family at Mwangano well to risk venturing inside. The Assistant Chief undeterred, went alone to the compound of the deceased and that he found the deceased holding his chin and looking at a group of around 20 people. He testified that the deceased was leaning on the wall of his house and that he inquired from him what the problem was and that he noticed a motorcycle parked outside with gumboots tied on the carrier. He also told this court that the chicken coop outside his house had been damaged and a tree had been cut and fell on the compound. The Assistant Chief testified that as he engaged the deceased, the group of people who were standing some 20 metres away noticed that the deceased was not armed with arrows as they had thought and that they quickly moved in to surround the deceased. The witness testified that he tried to pacify the charged crowd but one woman named Kara Mwangano screamed saying;

“Do not let him leave (msiache mtu aende)” and as that was happening, he saw the deceased pushing his motorcycle using an opening through the live fence as the 4th accused (Andrew Muturia (4th accused) ran and caught hold of the motorcycle. He added that the deceased left the motorcycle and then ran away on foot as the 4th accused armed with a knife and others gave chase.

18. The Assistant Chief further testified that as the deceased was being pursued he saw some women and men descending on the motorcycle in an attempt to destroy it and recalled seeing Cecilia Gatumi (7th accused), Vilivina Kabea (3rd accused), Kaaria Mwangano, Consolata (2nd accused), Francis Muriungi (1st accused), Kimathi Gachama, Benard Munyambo and others destroying the motorcycle. He said that one Sergeant Wachira arrived shortly as he was trying to stop them from damaging the motorcycle. He added that at the time the screams were rending all over as the deceased was being pursued up and down. He also recalled seeing one Kimathi Gachamba abusing Sergeant Wachira telling him that it was him who had kept the deceased in that area. He testified that he told him off, telling him that was wrong because due process should be followed in evicting someone and that the 1st accused reacted angrily to the advice. The Chief insisted that he told the 1st accused to follow the law as he tried tracing the sub-area in charge in vain.

19. The Assistant Chief further testified that after a while, he got information that the deceased had been caught and cut. He reasoned with

AP Officer that it was better to go and safe life rather than a motorcycle and they both ran towards the direction the deceased had run into. He added that the AP officer owing to his huge body frame was unable to run fast enough, a fact that forced him to run ahead of him to the scene of crime. He further recalled seeing a crowd of people standing and that he stopped about 50 metres from where they stood to observe what was going on and saw some women gathering firewood and placing them where a body lay. He told this court that he saw Cecilia Gatumi (7th accused), Consolata (2nd accused), Kareya Mwaganu and Vilivina Kabea (3rd accused) gathering pieces of firewood and placing them where the body lay and that fire had already been lit and smoke began bellowing. The Assistant Chief added that he stood from some distance as he also feared for his own safety as he had left behind the AP Officer. When the said officer eventually arrived, the Assistant Chief stated that in his company he proceeded to where the fire was and found that it was the body of the deceased that was being burnt. He added that as they approached the scene, the people who had gathered there dispersed afraid of being identified but he did recognize Joshua Mati, Andrew Mutiria (4th accused), Gitonga Kandu Murungi Mwaganu, Gichari Njagi, and Muthoni Njagi. The Assistant Chief identified the same people as the same ones who had pursued the deceased when he tried fleeing for his life. He recalled that he together with the AP put off the fire which by then was quite intense.

20. **Evans Mwenda (PW4)**, a minor aged 11 years and son to the deceased and 3rd accused, testified also on oath and largely corroborated the evidence of his sister Lilian Kendi (PW2). He testified that he was at home on the material date when his father (the deceased) arrived from Gatangacini. He testified that his father stayed in Gathangacini and had come for a school meeting at Kirundi primary school, where they school together with his sibling. He clarified that they were home on that day (8/11/2016) because by then the school had been closed. He further stated that his father arrived at Kirundi from Gathangacini at around 8 am and found his grandfather (1st accused) cutting a tree in their compound. According to him, his father asked the 1st accused why he was cutting a tree in his compound and that exchanges began before the 1st accused went to his house and came out armed with a bow and arrows. He recalled that his father (deceased) asked the 1st accused why he was arming himself to which the grandfather (1st accused) reportedly replied that he was going to attack him. He added that his father (deceased) got onto his motorbike and left the scene to attend the scheduled school parents' meeting. The child further testified that after his father left both his grandfather (1st accused) and grandmother (2nd accused) made plans discussing how they would call some people. She added that the people were called and before long, they had cut down and destroyed the live fence surrounding their home. The child recalled seeing many people and named, the grandfather (1st accused), grandmother (2nd accused), Andrew Kareya, Karemi, Kachindi Munyoki, Benjamin Nithi, Benjamin Kinoti, Muriuki, Flora Mwathi and Others destroying their live fence and chicken's coop. He also added that their kitchen was destroyed as well before closing the road leading to their home with tree branches cut live fence.

21. The boy further testified that he was then sent together with her sister (PW2) to the river to fetch water as the people went to their grandfather's house for lunch. He corroborated his sister's testimony that while at the river, they heard screams upon which they left water containers and rushed back home.

22. He testified that when they reached home, they found many people surrounding their home and his father was standing next to the house with his motorcycle. He stated that he saw his father push his motorcycle in a bid to reach the road but Andrew Mutiria (4th accused) stopped him. He recalled seeing his father abandoning the motorcycle and running away on foot with Andrew Mutiria in hot pursuit while armed with a panga.

23. The boy further testified that he did not follow his father (deceased) and that when they later asked their mother where his father was but she remained quiet. He told this court that he later learnt about what had happened to his father when he heard his grandmother (2nd accused) come from where his father had run to when he was chased and told her sister one Gatongo on phone that;

“hapa kwetu hakuna shida. Ni Kilonzo tumeuwa.” It then dawned on him that his father had been killed.

24. **Benjamin Mutuura (PW5)**, a teacher at Kirundi Primary school where the school parents meeting took place testified and confirmed that indeed there was a parents meeting in that school on the material date where the parents among them, the deceased attended. He testified that meeting ended at around 2:20 PM and tendered the minutes of the school meeting showing that the meeting indeed took place. He testified that after the meeting had ended, he heard some screams from Kirundi village and that the screams persisted for some time. He added that when he reached Kirundi market, he inquired about what was happening, he was told that there were family squabbles at Kilonzo's homestead. He later learnt that Mr. Kilonzo (deceased) had been killed.

25. **PC Eliud Kibet (PW6)**, the Investigating Officer in this case, testified and recalled that there was a murder incident on 8/11/2016 which was reported to him on 9th January 2016 at Gatunga Police Station by the Officer Commanding Station Makutano Police Station. He testified that the OCS went to the said Police Station with four suspects namely: -

- (i) Francis Muriungi
- (ii) Consolata Konja
- (iii) Vilivina Mutiria
- (iv) Pius Mutawali (a casual worker of the 1st accused).

He was also given some exhibits to wit, a fencing post and 2 sticks which were partly burnt.

26. The officer further testified that after being tasked to investigate the matter, he visited the scene on 10th November 2016 and managed to talk to some people he found at the scene and was able to learn that the deceased was a hardworking man and because he had married the daughter of the first accused, he was given a parcel of land to settle with her (3rd accused) but after about 3 years, differences arose which made the deceased move back to his home in Gathangacini and that before he left the two had been blessed with 3 children, The Officer

stated that he managed to talk to two of the children of the deceased and established that they schooled at Kirundi primary school.

He also told this court that he was able to figure out the cause of altercations which is captured by the statements he recorded from witnesses.

27. He testified that he took some photographs at the scene and later forwarded the same for processing. He identified the photographs he took at the scene and gave descriptions on how he found the scene of crime.

He also recovered a burnt jacket that the deceased wore at the material time and a photograph of the motorcycle. He further testified that he went to the scene he found that the scene where the deceased was killed and his body set ablaze. He further stated on 16.10.2016 when he revisited the scene had been ploughed by a person they could not establish as the villagers were reluctant to reveal who had ploughed it. He tendered the burnt jacket that had been worn by the deceased as P. Ex 4 and confirmed that the body remains of the deceased were collected on 9.11.2016 and that the body comprised only bones adding that the body was burnt beyond recognition.

28. He confirmed that he later in the company of two of the relatives of the deceased attended a post mortem examination on the body remains of the deceased at Meru Level 5 Hospital.

29. **Dr. Maria Muthoni (PW7)** a Medical Officer working at Meru Level 5 Hospital testified on behalf of her colleague Dr. Kilach Carol with whom she had worked with for 1 ½ years, informed this court that the said Dr. Kilach had left civil service and it was difficult to trace her whereabouts. She testified that she was familiar with the said doctor's handwriting and signatures. She testified that according to the post mortem report, the body of the deceased was badly burnt classifying the degree of burns as 4th degree burns which she clarified that the same meant that internal and external examinations was compromised due to severity of the burns. The doctor tendered the post mortem report as P Ex 5 which opined that the cause of death was 4th degree burns and that Death Certificate Number 1127663 was issued in respect of the deceased.

30. **CPL Gabriel Kosgei (PW8)** the scenes of crime officer testified and confirmed that he received Compact Disc (CD) under exhibit memo from on PC William Koech of DCI Tharaka North with a request to prepare therefrom photographic prints. The officer tendered certificates of photographic print he undertook as P Ex 3 (a), exhibit memo as P Ex 3 (b) and photographs marked as Exhb. c to j in respect to the scene of crime. The said photographs were taken by PW6.

31. **George Kinyua (PW9)**, a cousin to the deceased, testified that on the material date he received a call from Isaiah Nthiga (PW3) who informed him that his cousin (deceased) had been killed. He testified that he rushed to the scene and found his cousin's body burnt but still recognized it as part of the face, legs and hands were not completely burnt.

32. He further testified that he later attended a post mortem examination on the body remains of his cousin and helped in identifying it before autopsy was conducted.

33. **Mark Nduyo (PW 10)** the Area Chief, Thiiti location testified and told this court that he knew the deceased well. He further testified that on the material day, he received a call from Sergeant Wachira from Kirundi AP Post that the deceased had been killed. He testified that upon receipt of the bad news he proceeded to the scene and found the body of the deceased burning and that part of the face, hands and legs were completely burnt and was able to recognize the deceased as such.

34. The Chief further testified that he knew the 1st accused had no son and after giving out his daughters for marriage, he called the deceased, his son in law and gave him a parcel of land to settle. The Chief further testified that he was aware of differences which arose between the deceased and his wife (the 3rd accused) which according to him were caused by mistrust between the two.

35. The Chief testified that he tried in his capacity as the Area Chief to resolve the differences but he was unable to find a lasting solution and on one occasion he referred the matter to the Area District Officer who referred the matter back to the family to find a solution.

36. The Area Chief further testified that he knew all the accused persons and that they were all related. He stated that the 4th accused was a cousin to the 3rd accused, and a nephew to the 1st accused, while the 7th accused was a niece to the 1st accused. He also stated that the 8th accused was a family member of the 1st accused.

37. When placed on their defence, all the accused persons chose to give sworn statements.

38. **Francis Muriungi Irimba (DW1)**, the first accused testified and confirmed that the 2nd accused is his wife while the 3rd accused is a daughter while the deceased, his son in law was married to his daughter, (3rd accused). He testified that, on the material day, (8/11/2016), he was at his house working in his garden with the assistance of his wife (2nd accused), his daughter (3rd accused) and one Gitonga. He added that while they were working at the farm at around 8am, the deceased arrived and asked him why he was working on the farm yet he had given it to the deceased. He told this court that the deceased was quite incensed that he challenged him to continue ploughing the parcel if he was a man enough and circumcised one at that.

39. The first accused further testified that the deceased then went inside his house and came out with a bow and arrows and that on sensing danger, he took off and went to the office of the Area Chief to report. He stated that he however did not get the Chief and that he went back to his farm and proceeded ploughing.

40. He went on, that at around 1PM, the deceased went back and that he was furious to find him ploughing his land. He told this court that the deceased went into his house and came out armed with a bow and arrows and that he screamed as his wife and daughter joined screaming as well. According to him, many people came as they were attracted by the screams and in his estimation they were around one hundred

people turned-up.

He added that he ran to the bushes and never got to know what transpired after he went into hiding. He further testified that he only returned home at around 5PM and found the Area Chief and police officers who arrested him and bundled him into a police vehicle before taking him to Gatunga Police Station.

41. He testified that he had no issue with the deceased though he conceded that the deceased and his daughter had separated at the time.

42. **Consolata Konja (DW2)** the 2nd accused and wife to 1st accused also testified in her defence and largely concurred with the defence adopted by her husband in so far as the events of the material day were concerned. She testified that the deceased arrived at their home on the material day at around 8.00 a.m and had an altercation with her husband before her husband reportedly went to Kirundi police post to report. She further testified that the deceased later came at 2pm and armed himself with a bow and arrows forcing them to scream and scamper for their lives. She further added that, many people came but could not tell who they were. To her, the crowd came to rescue them. She told this court that she just ran away into hiding and did not know what really transpired because she ran for around 4KM away from the scene and only came back at around 8pm to find her husband and daughter arrested. She claims that, that is when she learnt that the deceased had been killed and burnt.

43. **Vilivina Kabea (DW3)**, the 3rd accused on her part testified that she was married to the deceased though at the material time, they had separated. She also adopted the narrative given by her father in his defence regarding the events of the material day. She added that the deceased who was her estranged husband returned home at around 2PM after he had earlier arrived at 8am and quarreled with her father. She stated that it is the deceased who armed himself with a bow and arrow and confronted her father forcing them to flee adding that, she went towards the river where she had sent her two children (PW2 and PW4) to fetch water. She testified that she went back home at around 3:30 PM to find a crowd of around 200 people in their compound including her father. She further claimed that she was told to board a police vehicle at the compound because her husband had been killed. She further defended herself that her husband was killed at a place called Makui which in her estimation was around 4Km away. She however did not state how she came to know about that since she claimed that she did not go to the scene where her husband was killed. She insisted that despite separating with her husband (deceased) she had a cordial relationship with him adding that her parents too were in good relationship with him adding that the deceased used to take sugar to her parents wherever he visited them and that they did not plan to kill him.

44. **Andrew Mutiria (DW4)** the fourth accused on his part defended himself on oath and denied committing the offence for which he is charged with. He testified that he had no issues with the deceased and that he knew him as a son in law to the 1st accused who was according to him a neighbour. He further added that in fact he had good relationship with the deceased and that they used to visit each other and even helped each other. He claimed that on the material day he was at his posho mill at Kirundi market and did not hear any screams and that he only learnt about the murder over the radio. He further stated that he did not meet the deceased on that material date and denied being the one who had chased the deceased and caught hold of him when he wanted to flee. He insisted that, on that material day, he did not go into the home of the 1st accused and that he was arrested for the offence after 3 days. He further claimed that the children who testified against him may have been told to lie. He did not however give reasons/basis about the motivation to lie.

45. **Fabian Mauki (DW5)** the 5th accused on his part told this court that he was a neighbour of the 1st accused. He further told this court that he was a barber and that at the material time he was aged 17 years old as he was born in 1989. He testified that he knew the deceased well and that he even assisted him in paying his school fees. He testified that on the material day, he did not meet the deceased and that he was assisting his mother in ploughing land at home which was about 1 Km away in his estimation from where the 1st accused lived. He confirmed hearing screams at around 4pm emanating from the home of the 1st accused but did not go to find out what was going on. He insisted that he did not go anywhere even after hearing screams and only learnt about the murder over 7 o'clock news on the radio.

46. **Nathan Kigacha Kirugi (DW6)** accused 6 testified that he knew the deceased well and had no differences with him. He also raised alibi as his defence insisting that on the material day he was at his home which was about 2 Km away from the home of the 1st accused and that from his home he went to Kirundi primary school to attend a parents meeting as he was a member of the Board of Management of that school.

He confirmed that, the deceased attended the meeting as well and that the meeting ended at 3pm. He testified that the deceased attended the meeting though according to him he appeared anxious and jittery. He further told this court that the deceased left the venue of the meeting after the meeting and went ahead of him. He insisted that he never heard any screams or commotion of any kind and that he was not at the crime scene and only learnt about the murder at 9pm.

47. He faulted PW3 for testifying against him saying that he had issues with him because he wanted to be appointed the Assistant Chief, a seat he was also eyeing.

According to him PW3, wanted to frame him in order to gain an advantage over him.

48. **Cecilia Gatumi (DW7)** accused No. 7 on her part testified and told this court that she had no relationship with 1st, 2nd and 3rd accused person. She also raised alibi as her defence stating that on the material day, she was attending a school meeting at Mama Linda school which she said was near Igondi which according to her estimation was about 2.5 Km away from Kirundi. She insisted that she was at school from 9:30am to 4Pm and that she did not hear any screams. She testified that Gedion (PW1) testified falsely against her because she had previously turned down his advances of wanting to be her lover.

She insisted that she had no grudge against Sisinhoh (deceased) and she did not know who killed him.

49. **Benard Munyambu Kirugi (DW 8)** Accused 8 testified that he was a brother of the 6th accused (Nathan Kigacha) and that he was not

at the scene of crime at the material time. He claimed that his brother (6th accused) on the material day had given him an oxen and that he ploughed the whole day and only retired from work at 6pm.

He testified that he did not hear any screams though he was around 1.5 Km away from the house of the 1st accused. He claimed that he was framed by PW1 because his brother wanted the then vacant position of an Assistant Chief in the area. He further testified that he only heard the news about the death of the deceased but did not bother to go and check out what had transpired.

50. This court has considered the prosecution's case and the evidence tendered. I have also considered the defence mounted by the accused persons. The defence submits that it is the deceased that attacked the 1st, 2nd and 3rd accused persons following which they raised an alarm and that the neighbors alerted by their screams, came to their rescue and that the same in turn resulted in the murder of the deceased through a mob justice.

51. The defence submit that there was no direct evidence linking the accused persons to the murder of the deceased persons and that their arrest and prosecution was based merely on suspicion.

52. The prosecution on its part submits that they have adduced sufficient evidence that has proved their case against the accused persons beyond reasonable doubt. It contends that all the crucial elements of the offence of murder have been proved beyond reasonable doubt. It relies on the case of **Republic versus Mohammed Dadi Korane & 7 Others [2014] eKLR** on that score.

53. It contends that the defence put forward is a mere sham, feeble and it claims that it did not shake their strong case. It contends that all the accused persons tendered sworn statements exonerating themselves from the charge preferred against them without tendering any documentary evidence to support their assertions or calling any witness to corroborate their respective defences.

54. As observed at the beginning of this judgement, the accused persons are charged with the offence of murder Contrary to **Section 203 as read with 204 of the Penal Code**.

Section 203 of the Penal Code reads:

“Any person who of malice causes the death of another person by unlawful act or omission is guilty of murder.”

Section 204 of the Penal Code provides for sanction or penalty as it provides that: -

“Any person convicted of murder shall be sentenced to death.”

The accused persons are therefore facing a serious charge. For a charge of murder to be sustained, going by the above provisions, the following ingredients must be established and proved beyond reasonable doubt and the burden of proof rests on the prosecution as provided under **Section 107 of the Evidence Act**.

55. The three necessary ingredients which the prosecution must establish and prove against an accused person are as follows:

a) The death of the deceased and the cause of that death.

b) That the accused persons committed the unlawful act which caused the death of the deceased and

(c) The accused had the malice aforethought.

56. **(a) The fact of death and its cause**

There is no dispute in this case that the deceased is dead and met his death on 8th November 2016. The medical evidence (P Ex 5) which was the post mortem report tendered by Dr. Maria Muthoni Mwangi (PW7) confirms that fact. The post mortem report (P. Ex 5) is in respect to the body of Sisinih Kilonzo. The badly burnt body was identified by George Kinyua (PW9) and P.C. Eliud Kibet (PW 6) both of who testified in this case. The post mortem report shows that the body was severely burnt and in fact the doctor indicated that she could not examine the external and internal organs because they were completely burnt. She however formed the opinion that the cause of death was 4th degree burns. The doctor (PW7) testified that due to the severity of the burns the doctor concluded that the cause of death was due to 4th degree burns. She testified that a Death Certificate number 1127663 was issued in respect of Sisinih Kilonzo (deceased). Although the doctor testified that she could not ascertain how the brother and a cousin were able to recognize the body of the deceased, George Kinyua (PW9) testified that he was able to see some parts of the body which were not completely burnt and that part of the face remained and that that part of the legs too remained intact and that is how he recognized the body.

57. This court is satisfied that the prosecution proved that element of death beyond reasonable doubt notwithstanding the fact that the body of the deceased was badly burnt.

The Court of Appeal in **Dorcas Jebet Keter and Another versus Republic [2013] eKLR** held that the fact of death could even be established vide circumstantial evidence and specifically, the appellate court quoted with approval a decision in **New Zealand in Republic versus Harry (1952) N ZLR 11 (3rd Digest Supp.** Where the court stated;

“At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body or any trace of the body has been found and that the accused has made no confession of any participation in the crime before he can be convicted. The fact of death should be proved by such circumstances as renders the commission of the crime morally certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.”

58. In this present case the evidence tendered before this court shows that the deceased was attacked after an alarm was raised following screams by 1st, 2nd and 3rd accused that led to the deceased being chased before being killed and set ablaze.

The first ingredient in my view was therefore proved beyond doubt by the prosecution in this matter.

59. ***(b) The element of actus reus that is, if the accused persons committed the unlawful act which caused the death of the deceased.***

The prosecution’s case in regard to the element of *actus reus* to a large extent is based on indirect or circumstantial evidence. This is because apart from the 4th accused who was seen cutting the deceased on his back as he fled, there is no witness who stated that he saw what actually happened to the deceased when the crowd eventually caught-up with him.

60. The prosecution’s case as per the evidence of Gedion Njagi Kaibiru (PW1) directly implicates the 4th, 6th and 8th accused. He stated that he witnessed the 4th accused cutting the deceased on his back as he tried to run away on foot after his attempt to ride away on his motorbike was thwarted. He also stated that he witnessed Nathan Kagacha Kirugi (6th accused) and Fabian Mauki Ikinga (5th accused) chase the deceased as he run for his dear life on foot. The witness did not follow the chase to find out what happened thereafter but the circumstances clearly show that the deceased was eventually cornered and murdered before his body was burnt. The same witness stated that he later went to where the deceased met his demise and met Cecilia (7th accused) at around 50 metres from the scene where the body of the deceased was burnt and that she was holding a panga while bragging thus:

“leo hata kama Francis hakuzaa wavulana leo wavulana wamezaliwa na wamemua Sisinih.....”

61. The same witness also stated that when he arrived at the second scene of crime, he found Consolata Konja (accused 2) adding firewood to the body of the deceased. This in my view is significant as far as the culpability of the 2nd accused is concerned, given the additional evidence tendered by PW2, PW3, and PW4 which I will consider shortly.

62. PW1 stated that when he arrived at the first scene, which is the homestead of the 1st accused, he witnessed the 3rd (Vilivina Kabea) 4th (Andrew Mutiria) 5th (Fabian Mauki) and 7th accused (Cecilia Gatumi) standing on the fence holding pangas in wait as the deceased stood in his house leaning on the wall of his house. It is apparent that the crowd were kept at bay on the mistaken belief that the deceased was armed with bows and arrows and was likely to bounce on anyone going near him and that explains why they immediately stepped in to attack when PW3 engaged him (deceased) in a conversation which made him stand upright leaving the wall of his house thus revealing that he was not armed. The evidence of the Assistant Chief (PW3) brought out that fact clearly.

63. The evidence of PW1 in respect to the part played by 2nd, 3rd, 4th, 5th and 7th accused was corroborated by the evidence of PW3 (the Area Assistant Chief). In the first scene of crime, PW3 stated that he witnessed the 4th accused run after the deceased to thwart his efforts to flee by holding his motorcycle and when the deceased abandoned his motorbike and took off on foot he cut him on his back. The 4th accused was also seen by PW3 pursuing the deceased as he fled from the charged crowd and when PW3 went to the 2nd scene where the deceased was killed and his body was burnt, he met the 4th accused among others around 50 metres from the said scene. That fact in my view leads this court to make an inference that among the persons who killed the deceased Andrew Mutiria (the 4th accused herein) was one certainly one of them.

64. I have considered the defence offered by the 4th accused which is basically alibi but I find the same to be feable and evasive. He says he was at his posho mill on the material day and that the posho mill was at Kirundi market which was not far from the scene of crime yet he claims that he neither heard screams or commotion at the material time or at all during the whole day. However, looking at the evidence of Benjamin Mutiira, (PW5), a teacher at Kirundi primary school, this court finds that the assertions by accused 4 that he did not hear any screams to be far from the truth and evasive. PW 5 stated that when the meeting ended at school, at around 2:20pm, shortly thereafter, he heard screams and that when he left school, he passed by Kirundi market at around 2:31 pm by which time the screams had increased rending the air within the vicinity and the teacher inquired from the villagers at the said market what was happening and he was told that there were some family squabbles. It is therefore surprising that the 4th accused can claim that he did not hear any screams or commotion when he was at Kirundi market and that he only heard that the deceased had been killed over the radio. With the intensity of the noise and the commotion caused it was not possible for the 4th accused to miss all that.

65. I have also considered the testimonies in respect to the 4th accused tendered by PW2 and PW4 both of whom are children to the deceased. The evidence of PW2 in particular got the attention of this court because, she was calm, candid and forthright. I observed the demeanor of both children as they testified and I had no doubt that they were speaking the truth about what they witnessed that fateful day. This is what PW2 stated in part on what she witnessed when she arrived home after being attracted by the screams: -

“After a while Isaiah Nthiga (PW3) came and inquired what was happening. My father told him that the crowd (of people) wanted to harm him. Isaiah told him to flee using a motorbike. My father tried to flee using a motorbike..... my father was about to reach the road when he was caught. He tried to run on foot but Andrew Mutiria (4th accused) cut him on the back. Andrew Mutiria is here (pointing to the 4th accused), he cut my father on the back with a panga. The others chased him”

That vivid description of what took place at the first scene of the crime was more corroborated by evidence of PW4 who also stated clearly that he saw the 4th accused chasing his father as he tried to flee using his motorbike and that he saw him cut him on the back after the deceased left his motorbike and run on foot.

66. In regard to the accused 2 and 3, it is undeniable fact that the deceased was married to the 3rd accused and that the two had differed and separated. It is also undeniable fact that the 1st accused deceased had no son of his son which explains why he might have invited his son in law (the deceased) to live with her daughter in a portion of land within his land.

67. From the evidence tendered, what came out clearly from the evidence of PW1, PW3 and to some extent DW1, DW2 and DW3 is that 1st accused may have changed his mind about gifting the deceased a portion of his land after the deceased differed with his daughter and left to Kathangacini where he was said to have married another wife.

68. The testimonies of the children (PW2 and PW4) about what transpired on the morning of 8th November, 2016 when the deceased arrived home (that is the homestead of 1st accused) from Gathangacini gives a clue of what triggered the quarrels between the deceased and his father in law and a chain reaction that eventually saw him being murdered in the afternoon. From the narrative given by the two witnesses (PW2 and PW4) when taken in totality with the evidence of PW1 and PW3 one can safely draw an inference that the 1st, the 2nd and 3rd accused caused the death of the deceased because they were simply fed up with him. Why do I say so? I have keenly considered the evidence of the two minors and I find that their evidence points to that irresistible fact. The reasons for that conclusion is due to the following;

69. Firstly, PW2 stated vividly that on the morning of the material day, the deceased arrived to find her grandfather (1st accused) cutting down a tree which the girl clearly knew belonged to his father (the deceased). The girl stated that the deceased inquired from the 1st accused why he was felling a tree from his portion of land which according to PW1 & PW3 had been gifted to him (deceased) by the first accused. Of course the 1st accused probably having changed his mind must have felt slighted and that is why going by the evidence of the girl, he went to his house and armed himself with a bow and arrows. I am not persuaded by the narrative given by DW1, DW2 and DW3 that it is the deceased who armed himself because if that was the case the three could have definitely screamed and attract the attention of neighbours. I am also not persuaded that the 2 children (PW 2 and PW4) were coached on what and how to testify in this court.

70. Secondly, again going by the evidence of PW2 and corroborated by PW4 the 1st, 2nd and 3rd accused after the altercation between the deceased and the 1st accused in the morning, planned and eventually executed the plan to cause harm to the deceased. This is what PW2 vividly stated in her evidence;

“My father proceeded to a meeting at Kirundi primary school. At around 9am my grandfather Francis Muriungi (1st accused) discussed with Consolata Konja (2nd accused) that a crowd of people should be called. Consolata then went to call people some people came and started cutting down a fence that surrounded our homestead.....people destroyed the kitchen, and chicken’s house (pen)Karea Mwangano then suggested that he beats the iron sheets of the chicken’s (pen) so that my father could hear and know what was happening.....”

71. The evidence of PW2 on the planning and how the plan was executed was well corroborated by the evidence of PW4. I also find that the evidence tendered by SPL Gabriel Kosgei (PW8) in the form of photographs of the 1st scene of crime further corroborates the evidence of the two children and further dispels the defence contention that the children were coached on how to implicate the accused persons. The photographs (P Ex 3(c) to (g) shows the extent of destruction of the live fence with 3 (6) showing the destroyed chicken coop. The evidence tendered by the children is therefore well corroborated by the above cited photograph and further corroborated by evidence of PW3 who also told this court about the same destruction.

72. The defence have strongly contended that the deceased was murdered through a mob justice by villagers who were attracted by screams made by DW2 and DW3 when the deceased purportedly armed himself and tried attacking the 1st accused. However, I do not find any basis in that contention. The crowd of people that gathered at the homestead of the first accused were certainly either called by accused 1,2 and 3 or were attracted by their screams and incited to attack the deceased. The evidence of PW3 on cross examination clearly brings out this fact. He stated clearly that when he told the 1st accused to follow due process in evicting the deceased from his land, he *“angrily told him off”* and that the group that were bracing for batter” was composed of family members and was composed of only close family members were armed with clubs (rungus) and pangas which shows that they had prepared and planned the attack well in advance as narrated by PW2 and PW4.

73. It is also instructive to note that when PW3 went to the 2nd scene where the deceased was killed and his body burnt, he found the 2nd, the 3rd and 7th accused persons gathering firewood and placing them on the body of the deceased. PW1 also witnessed the same and of significance is what PW1 heard the 7th accused (Cecilia Gatumi) saying. This is what he said under cross examination by defence counsel;

“.....when Kimathi told me that Kilonzo had been killed, I approached the scene, when I went close, I heard Cecilia (7th accused) saying;

“leo hata kama Francis hakuzaa wavulana, leo wavulana wamezaliwa na wamemuua Sisinih.....”

PW1 stated that Cecilia was about 50 meters away from where the body of the deceased was burning. This fact creates a strong link of her involvement in the heinous act.

74. The evidence of PW2 regarding what she overheard Cecilia Gatumi (7th accused) telling people who had come to their home the

following day is also significant. She stated that she heard her tell Consolota; **“If you had not killed that dog (referring to my father), I would have killed you (referring to both the 1st and 2nd accused)”** The 7th accused raised alibi as her defence but the evidence of PW1 and PW3 clearly shows her direct involvement. She was seen by PW1 at the first scene destroying a motorcycle belonging to the deceased with other women and thereafter seen near the scene near of murder bragging that the first accused though he did not have sons had that day got sons who had killed the deceased. The figurative language used clearly shows that there was a plan that was executed to the satisfaction of the 7th accused (Cecilia Gatumi Ikoje). That plan and the act itself was unlawful as it unlawfully caused the death of an innocent person.

75. Thirdly, this court is satisfied from the evidence tendered particularly by PW2 and PW4, that the 1st, 2nd and 3rd accused met with other persons on the material day after the deceased had left for school parents meeting, for purposes of planning how they would eliminate the deceased. There is clear evidence from the photographs (P Ex 3 (b) to (i) tendered by PW8 that the live fence surrounding the compound of the accused, the chicken’s coop and the kitchen were all destroyed by persons who were clearly seething in rage after probably having been briefed of what had transpired in the morning when the deceased turned up in the homestead. The 1st, 2nd and 3rd accused were certainly responsible because PW2 clearly stated that she heard them discuss that they should call people and plan on how to cause harm to their father. The destruction of live fence and chicken’s pen including felling of a tree as witnessed by PW2 and PW4 was a precursor of a heinous crime.

76. The provisions of **Section 21 of the Penal Code** provides that; where two or more persons meet with an intention to execute an unlawful purpose jointly and in the process an offence is committed by one, as a consequence of the plan to do so, each one of them is deemed to have committed the offence. The section states verbatim:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

77. Going by the evidence I have analyzed above, this court is satisfied that the above provisions applies in the case in respect to the 1st, 2nd and 3rd accused persons. They were not seen actually committing the act of killing the deceased but the law presumes that they committed the act by the operation of the law on the basis of the facts laid out above.

78. PW1 stated that he witnessed the 4th accused cutting the deceased on his back as he tried to run away on foot. He also stated that he saw the 6th and 8th accused chasing the deceased and saw the 2nd accused adding firewood to the fire consuming the body of the deceased. He further witnessed the 3rd, 4th, 5th and 7th accused standing on the fence of the 1st accused holding pangas and clubs. PW2 specifically stated that she heard 1st, 2nd and 3rd accused plotting on how they were going to call people so that once the deceased arrived he would be attacked. Her evidence is corroborated by PW4. She also saw the 4th accused cutting her father on the back and saw the 5th accused steal a battery from her father’s motorcycle. PW4 saw the 5th accused (Mauki) and Munyambu (8th accused) remove the radio and battery from the motorcycle and as they attempted to conceal their crime by burning the motorcycle. PW4 saw Sergeant Wachira coming to thwart their efforts. PW4 further recalled seeing 1st, 2nd, 3rd and 4th accused among others chasing his father. It is clear that all the accused persons were placed at the scene of crime and were seen chasing the deceased with crude weapons (pangas and clubs (rungus). The evidence of eye witnesses in respect to recognizing the accused persons is water tight because the said eye witness were close neighbours having interacted with them as neighbours and family members. The fact that the witnesses (PW1, PW2, PW3 & PW4) mentioned other people not before court dispels the defence narrative that the witnesses were against them. This court finds the evidence of the said witnesses reliable.

79. DW4 stated that PW1 was jealous of his business but there was no evidence tendered to prove that fact. DW6 also stated that PW3 testified against him because he wanted the vacant post of the Assistant Chief. This was the same line of defence adopted by the 8th accused who is a brother to the 6th accused. However, the fact that the children of the deceased (PW2 & PW4) and PW1 also mentioned them dispels that notion.

80. Furthermore, DW6 stated that he was at the Parent Teachers Association (P.T.A) Meeting that was attended also by the deceased and tried to use the same to raise an alibi. However, the evidence of PW5 (Benjamin Mutira) the Head Teacher who called the meeting clearly stated that the meeting ended at around 2:20 pm while the event leading to the commission of the crime occurred late in the afternoon at around 3pm which explains how the deceased after the meeting was attacked when he returned to the compound of the 1st accused. The events clearly took place after the school meeting.

81. This court is further satisfied that the circumstantial evidence alone of the events leading to the death of the deceased, together with eye witness accounts of what transpired on the fateful day, unerringly point to it guilt of the accused persons namely accused 1,2,3,4, 6 and 7. The 5th and 8th accused were also mentioned particularly in relation to stealing of motorcycle battery and radio but I find that the prosecution’s case against the two in respect to the element of *actus reus* falls short. In the case of **Musili Tulo versus Republic [2014] eKLR**, the court of appeal opined that;

“circumstantial evidence is as good as any evidence if it is properly evaluated and as is usually put, it can prove a case with accuracy of mathematic.”

The court went ahead and set out the threshold for circumstantial evidence as follows: -

- (i) “The circumstances from which an inference of guilt it sought to be drawn, must be cogently and firmly established;**
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;**

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

82. Going by the above decision, this court is satisfied that the element of *actus reus* has been proved by facts, operation of law (Section 21 of the Penal Code) and circumstantial evidence against the 1st, 2nd, 3rd, 4th, 6th and 7th accused respectively.

83. ***(c) The element of mens rea (malice aforethought).***

This court has analysed at length above the evidence tendered by PW2 and PW4. The children gave a vivid account of how the 1st, 2nd & 3rd accused mooted a plan to harm the deceased after the altercation between the 1st accused and the deceased that morning. PW1 and PW2 as I have observed, were clear and certain in their minds which was demonstrated through their demeanor as they testified in this court. They stated that the grandmother (accused 2) was sent to call some people and when the said people came they embarked on senseless destruction of the live fence and chicken coop. PW2 stated that one of the people namely Kareya Mwangano in fact beat the iron sheets so that the noise therefrom would attract the deceased from the parents meeting at a nearby school. The 2nd accused went to call people to beef up strength with a view to harming the deceased. That act in itself shows that accused 1, 2 and 3 from the beginning harbored ill intentions against the deceased.

84. The fact that PW2 and PW4 stated that their mother sent them to the river to fetch water was a clear indication that the group had planned to cause serious harm to the deceased and wanted to save his children probably from the trauma of witnessing their father being killed. Again the intention was clear. The 1st, 2nd, 3rd accused and all those people who met and later went for lunch at the home of the 1st accused as they waited for the deceased to arrive, had plan to execute an unlawful act which they later did.

This was a carefully executed plan meant to achieve a cruel unlawful end. The evidence of PW2 and PW4 clearly reveals the same.

85. It is also important to note that under the provisions of **Section 206 of the Penal Code** malice aforethought can be inferred from the injuries inflicted on the deceased person from 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.....”

86. In the classic case of ***Tubere S/O Ochieng versus Republic EA (1945) 12 EACA 63, the Court of Appeal of Eastern Africa*** held as follows:

“The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack.”

87. In the present case, the evidence obtaining shows that there was bad blood between the deceased on one hand and the 1st, 2nd and 3rd accused on the other. The deceased had differed with his wife the 3rd accused and the difference saw him move back to his home in Gathangicini where he reportedly married another wife. The same obviously appears to have displeased the family of the 1st accused who appeared to have changed their mind about gifting him a portion of land as a son in law. This is clearly captured by the evidence of DW2 (Consolata Konja) who stated thus:

“.....Gitonga was digging (ploughing) using an oxen. As we proceeded with our work my deceased son in law arrived. He asked my husband (1st accused) why he was ploughing the plot he had given him. My husband told him it was his (1st accused). It is true that the land is ours. My son in law then threatened my husband saying:

“If you are circumcised continue ploughing that parcel!”

That altercation in any view set the stage for what later transpired. The 1st accused might have been hurt by whatever the deceased stated and that is why he hatched a plan to call for reinforcement. It is also instructive that the 1st accused reportedly had no son and that could explain the outburst by the 7th accused at the scene of crime. PW1 heard her say: -

“Leo hata kama Francis hakuzaa wavulana, leo wavulana wamezaliwa na wamemuua Sisinih.”

88. The accused persons (1,2 & 3) raised an alarm against the deceased which attracted family members who hatched a plan and later executed it by chasing down the deceased before killing him and setting his body ablaze. The fact that they killed and set the body ablaze, indicates that they had malice aforethought. Accused 2 & 7 were seen by PW3 gathering more firewood and placing them on the fire that was already burning intensely consuming the body of the deceased.

From the foregoing, I find that the prosecution's case has established all the necessary ingredients to wit cause/fact of death, *actus reus* and *mens rea* against the following:

- i. The 1st accused-Francis Muriungi Irimba
- ii. The 2nd accused-Consolata Konja
- iii. The 3rd accused-Vilivina Kabea
- iv. The 4th accused-Andrew Mutiria
- v. The 6th accused-Nathan Kigacha Kirugi
- vi. The 7th accused-Cecilia Gatumi Ikoje

They are all found guilty as charged and are hereby convicted accordingly. They should have heeded to the advice given by the Area Assistant Chief (PW3) and follow due process of the law in addressing whatever grievance they had against the deceased even if they were fed up with him and never wanted him back in Kirundi at the farm of the 1st accused. They should have simply told him to leave rather than killing him. At the same time, this court finds that though there is evidence that the 5th and 8th accused took part in the events leading to the attack and killing of the deceased, this court finds that the evidence against them did not meet the threshold. It is true that they may have followed the deceased after their efforts to steal the battery in the motorbike and destroy the said motorcycle were thwarted by PW3 and Sergeant Wachira but the evidence connecting them to the actual murder of the deceased is a bit weak and therefore, unsafe to sustain a conviction against them.

They are therefore not found guilty by this court. This means that the 5th accused-Fabian Mauki Ikunga and 8th accused Benard Munyambu Kirugi are hereby acquitted of the charge facing them. The rest of the accused as I have observed are hereby found guilty and are convicted accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF JANUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE