



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 60 OF 2017

*(Formerly Machakos HCCR No. 23 of 2016)*

REPUBLIC.....PROSECUTION

-VERSUS-

STEPHEN KIMONDIU NZUE.....1<sup>ST</sup> ACCUSED

JAMES MUTUA MWEL.....2<sup>ND</sup> ACCUSED

BONIFACE MUSEMBI MUTUA.....3<sup>RD</sup> ACCUSED

JOHN NGULUI NGESI.....4<sup>TH</sup> ACCUSED

RICHARD WAMBUA MUTISO.....5<sup>TH</sup> ACCUSED

JOSEPH MUOKI NGEI.....6<sup>TH</sup> ACCUSED

BENJAMIN NZIOKA MUTUNE.....7<sup>TH</sup> ACCUSED

BENJAMIN NGUMU NGESI.....8<sup>TH</sup> ACCUSED

JUDGMENT

1. Stephen Kimondiu Nzue, James Mutua Mwei, Boniface Musembi Mutua, John Ngului Ngesi, Richard Wambua Mutiso, Joseph Muoki Ngei, Benjamin Nzioka Mutune, Benjamin Ngumu Ngesi hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> accused are charged with the offence of murder contrary to section 203 as read with section 204 of the penal code, Cap 63 Laws of Kenya.

2. The particulars are that on the nights of 7<sup>th</sup> and 8<sup>th</sup> May 2016, at Ukwisini village, Kasikeu Location, Mukaa Sub-County, the 1<sup>st</sup> – 8<sup>th</sup> accused persons jointly murdered Francis Muteti Mwei.

3. The prosecution called six (6) witnesses in support of its case while all the accused persons gave sworn evidence without calling any witness.

**Prosecution's case**

4. **PW1 was a protected witness.** Her evidence was that on 06/05/2016, she went to a women's go round ceremony and their father went to a different ceremony of his child at his brother in law's place in Kindwale. Her husband's niece had already been married. Their elder brother and other relatives went for this ceremony. Her husband slept there and returned the next day. Their father arrived home at 10pm and told her that he had been followed by a person with a torch whom he did not know well. He guessed that the person was from Muya's family. He said it was Muasya wa Muya whom he saw. He also said that he had been beaten in the middle of the head by Muasya's brother called Mwanja wa Muya who also took his bag. He was heavily bleeding on the face and PW1 put salt on the wound. She then advised him to take panadol. It is noted that PW1 interchangeably referred to the deceased as her husband and her father.

5. Her brother and others returned that night but she never saw them. She went to sleep and so did her father. As she slept, she heard the dogs barking and shouted that the bag thief had returned. After a while, she heard people outside followed by a bang on the door. Those banging

ordered them to open failure to which they would burn them with petrol. She took a big flashlight and opened the door.

6. There were about 25-30 people outside. There was moonlight and she identified accused 1-Mutua James wa Muya, accused 2-Stephen Kimondiu Ondua, accused 3-Musembi Mutua, Muli Mutua, Ngei Musyoni, accused 4-Ngului Ngesi, accused 6-Michael Ngei, Mutuku Musyoni, accused 8-Ngumu Ngesi, Kiamba Musyoni, Wambere Wamutiso, accused 7-Njoka Mtune, Ombwa Mutiso, Kiilu Njoki, Mwendwa King'oli, Muasya Muya and Mwanya Muya.

7. Further, she testified that the people were armed for example Kamwana had a maasai rungu and Wambua Mutiso (5<sup>th</sup> accused) had a panga. The rest had clubs. Kimondiu called PW1's father saying that he would show him the person who had beaten him. It was only her and her husband, Francis Mwai who were inside the house. Her husband went to the door and asked who the people were.

8. Musengi responded that it was *nyumba kumi* and they wanted to take her husband to Wambua wa Mutiso to know who had beaten him. PW1 and her husband accompanied the people to the said home which was about 440 steps away. They passed through two homes before reaching there. Mwanya Muya-the person who had injured her husband was in that crowd. James Mukua Mwai told her husband to carry meat and bread.

9. Her husband was told that he would be killed and burnt while at Wambua Mutiso's home. All women including her were ordered to leave by Kimondio Stephen (1<sup>st</sup> accused). She arose and left and her husband never returned. Nzioki Benjamin Mutune (7<sup>th</sup> accused) said that they would crucify her husband like Jesus. They said that her husband was bewitching people with the meat and loaves he used to carry. She never tried to intervene. At 6.00am the next day, her neighbour Peter Nzue informed her that they had killed and burnt her husband.

10. They left for the police station to report and were carried by a vehicle from Sultan Hamud police station on the way. They went to the scene where they found her husband dead and burning on the left side. She was present during the post mortem and the cause of death was a big cut on the head. Her husband was aged 65 or 67 years and they had seven children. It is only the accused persons who were arrested as the rest are in hiding. She said that she could identify the accused persons by name and respectively identified accused 1-8 as follows; Stephen K. Nzue, James Mutua Muya, Musembi Mutua, Ngulu Ingesi, Wambua Mutiso, Michael Ngei, Benjamin Nzioki Mutune, Ngumu Ngesi.

11. Further, she proceeded to testify that on the material night, the 1<sup>st</sup> accused was the one who called her husband from the house and he had a stick. 2<sup>nd</sup> accused was the one who said they would kill him. She identified 3<sup>rd</sup> accused's voice as the person who banged the door and demanded that they open. The 4<sup>th</sup> accused said that they would crucify him like Christ. The 5<sup>th</sup> accused had a stick and wanted to beat her and her husband. The 6<sup>th</sup> accused had a stick and oil and was even lighting the matchsticks at her husband. The 7<sup>th</sup> accused had a stick and was the one crucifying her husband. She said that she had no grudge against the accused persons.

12. Upon cross examination by Mrs Nyaata (for 1<sup>st</sup> – 3<sup>rd</sup> accused) she said that the deceased was her husband not father. She reiterated that she could identify all those persons and said that the 1<sup>st</sup> accused Stephen Kimondio was her nephew, and neighbour staying about 300 metres away. She said that their home is on a hill hence the noises could not be heard.

13. She proceeded to explain that the 2<sup>nd</sup> accused is James Mutua Mweu, her husband's brother and their neighbour. The 3<sup>rd</sup> accused Bonface Mutua is a son of 2<sup>nd</sup> accused. Prior to that date, the relationship between the deceased and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused was good. When the deceased went home, he was being followed but she did not see the person following him.

14. Her husband was giving her all those stories while outside the house and he was seriously bleeding. As they talked, Benjamin Ndolo, her brother was there. Ndolo told her to seek medical assistance but the deceased said that he would go to the hospital the next day. She said that she was the one who opened the door and saw the group in a semi circle. She had a big torch and was able to identify all those 25-30 people.

15. These people were known to her and were not making noise. She was at the door in a petticoat when the 1<sup>st</sup> accused called her husband out, who came out immediately. Besides Mweu and family (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused), there are other families there. Her husband is of the Mweu family. She didn't know what may have happened before the Mweu family went there. The intruders called themselves *nyumba kumi*. She accompanied her husband to Wambua's home and that is where it was said her husband was bewitching Wambua's family.

16. They said that her husband was to be shown the person who had injured him and she believed them without knowing their unlawful agenda. She wasn't present when he was killed but found him already dead and burning. Though there was no village elder in the group, Mwema Mwinzi a village elder was present, but doing nothing. She did not know how he came there.

17. She never heard them say that her husband was to be taken for cleansing. She wondered where to report as it was at night. She never sought assistance from any neighbour. Peter and the accused are her only neighbours. She recorded what she witnessed in her statement and acknowledged her statement (DMF1) which was shown to her but was never produced. She had known the 3<sup>rd</sup> accused since birth and she identified him by voice as he banged the door.

18. In cross examination by Mr. Wasolo, for the 4<sup>th</sup> – 6<sup>th</sup> accused she said there were no noises from the villagers and she just found them gathered outside her house. All the accused persons are her neighbours. The 4<sup>th</sup> accused is about 600 steps from her house and he wore blue jeans, and the 5<sup>th</sup> accused is about 450 steps away, while the 6<sup>th</sup> accused is about 60 steps away and was wearing grey trousers and a white shirt. Nzioka (7<sup>th</sup> accused) wore a khaki trouser. She said the 4<sup>th</sup> – 6<sup>th</sup> accused were in that group but couldn't say exactly where they were standing.

19. She said she saw Wambua in his home but was not told exactly why her husband had been taken there. They said that he used meat and

bread to bewitch people. She saw her husband's bag at Wambua's and they had removed meat, sheet and his clothes. Wambua was with his wife and children and there were other people e.g Mwema, Nzioka, Simeon etc. She agreed that it was the community that was involved in this matter. They were told to go away and she left alone.

20. She named the females present as; Menze Muthioni, Nzimbili Muya, Mutiso, Muthoki Nzoki, Kimondio etc. All of them were people from their home and they were in the team against her. The 5<sup>th</sup> accused was holding a panga with a red handle, while the 6<sup>th</sup> accused (*Michael*) had oil pouring out though she never mentioned him to the police. The police did a random arrest and some people are into hiding. She left the deceased at the 5<sup>th</sup> accused's place and could not tell how he went to the scene. At the scene, the fire was on but the firewood was not much. It was lit that morning.

21. Upon cross examination by Mr. Hassan for the 7<sup>th</sup> and 8<sup>th</sup> accused she said that those who started this have not been arrested. The people who went to her home spoke in Kikamba. When she returned home, she was too tired and just slept and told no one about the happenings as she was in deep shock.

22. She used a big solar torch for lighting as there is no electricity at home. She heard the deceased scream once at the scene. There were more people at the 5<sup>th</sup> accused's home than those who had been at her home, and they were calling each other. The 7<sup>th</sup> accused said in Kikamba that the deceased would be crucified like Christ but she did not put that in her statement. When she left him at the 5<sup>th</sup> accused's, he was not badly off. She was not there when the deceased was removed from that home.

**23. PW2 Peter Nzue**, a nephew of the deceased, testified that on 07/05/2016, he left his place of work at 11.00pm and arrived home at 12.20am. He received a call from his step brother (1<sup>st</sup> accused) who informed that a witch had been arrested together with his bag. He asked him to go but he opted to sleep as he was tired. After about an hour, he heard noises from the deceased's home. Those knocking said that they would burn the place if the door was not opened. He identified the voices of the 1<sup>st</sup>, 3<sup>rd</sup> accused and his father. He called the 1<sup>st</sup> accused but his phone was off. Before sleeping, he heard the 1<sup>st</sup> accused knocking at the deceased's house.

24. He asked the deceased to open the house as no one would hurt him. The deceased opened the door and he heard them speak. The people then left with the deceased. After a while, he heard the deceased saying *"don't kill me instead take me to my house and kill me from there"* He heard no more and went to sleep. At 5.00am the next morning, he was called by an old friend who asked him why he had left his uncle to be killed.

25. He checked the area and saw a big fire. He then heard the deceased's wife calling him and he asked her to see him. She explained everything to him. They got into his car and went to the scene where they found the body on fire. His brother, Mutua Mweu, was seated beside him. They met the police on their way to Sultan. The police went with Mbithe. He saw the deceased's burnt body at the hospital and witnessed the post mortem. He heard the voices of the 1<sup>st</sup> – 3<sup>rd</sup> accused that night.

26. In cross examination by Mrs Nyaata, he said that the 1<sup>st</sup> – 3<sup>rd</sup> accused were known to him and the 1<sup>st</sup> accused was his step brother, 2<sup>nd</sup> accused his uncle and 3<sup>rd</sup> accused his cousin. From his home to that of the deceased is 100 meters. He reiterated that the 1<sup>st</sup> accused called him. It was alleged that his uncle was a witch. After hearing the noises, he went and sat outside but did nothing. There was noise and he heard the voices of three people in that crowd. It was the 1<sup>st</sup> accused who knocked for the deceased to open. He agreed that he never saw the crowd as it was at night and also agreed that he never saw the 1<sup>st</sup> – 3<sup>rd</sup> accused that night. He however said that one cannot mistake a voice that he knows.

27. He later learnt that the deceased was injured before he went home and also learnt that Mwanja Muia was one of those who had injured him, but he had disappeared. It was not said where the deceased had gone bewitching. The incident was done by the Mwei family. Besides the 1<sup>st</sup> – 3<sup>rd</sup> accused, the rest are villagers, though he added that they have no village and are all one family. The deceased had an injury on the head and the whole body was burnt save for the head and legs.

28. Upon cross examination by Mr. Wasolo, he said that he slept and did not know what happened. There is a small stream between him and the deceased while the 3<sup>rd</sup> accused is the one closest to him at home. He agreed that he never witnessed anyone committing the offence. They used a motor vehicle as they had to go to the scene through the police station. The people responsible were more than eight. No one was released after arrest and there are those who have disappeared.

29. In cross examination by Mr. Hassan, he said that he arrived home at 12.20am after leaving at 8-9am, and was tired. There were many voices and he was not too tired to identify them. He agreed that he did not witness the beating.

**30. PW3 Benjamin Kin'geli Kisee** a brother-in-law of the deceased, stated that on 07/05/2016, he was living at the deceased's home. On that day, they had a dowry function for his brother's son and he remained taking care of animals. The deceased delayed in returning. As he slept at 11.30pm, he heard screams and the dogs were barking. He woke up took a torch and flashed downhill. He heard a voice saying *"Shine the light for me I have been beaten"*. He asked who it was and the person repeated the same words.

31. He was able to identify him as the deceased and went to where he was and assisted him to his house. The deceased told him that Mwanja Muia had beaten him, while crossing the river after alighting. At the Kiosk of Muthui Mutuku, someone flashed at him and introduced himself as Muasya Muia, whom he knew as a cousin. They walked together and parted to branch to their homes.

32. The deceased said he climbed slowly and before reaching the tarmac, he saw someone with a bright torch, and he ran away but the person gave chase. He caught up with him and hit him on the head and face. This person was Mwanja Muia. The deceased pretended to be dead and the assailant left him alone. PW3 said he was given all that narration by the deceased while at the verandah where the deceased's wife was applying first aid on him.

33. The items in the deceased's bag *i.e* torch and phone were taken away and upon returning to the scene with the deceased, they only found the torch. The deceased refused to go to hospital and they all went to sleep. He heard dogs barking and on waking up, he identified the voices of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused. He heard the 3<sup>rd</sup> accused say, "Come out mzee we have come. We are nyumba kumi" The others were shouting for him to come out. Mutua Muia, (*the deceased's brother*) told the deceased to come out as he was going to see his father that day. The 1<sup>st</sup> accused assured the deceased that no one would hurt him. The deceased's wife asked him to go out since they were his relatives.

34. Mutua Muia told the witness that the deceased was going to be killed. The deceased took the bloodstained shirt, tie and suit to them and they checked. Muasya said how he had escorted the deceased and how Muia had beaten him up. The 1<sup>st</sup> accused then asked the deceased to take them to the scene of the beating. They all went and the deceased insisted that he wanted his missing items. Muasya Muia responded saying that the said items were in the home of the old man. They left with the deceased and PW3 remained with Muasya Muia. Ngumo congratulated Muasya for the good plan. PW3 went to the home of the deceased's daughter and explained to her and her husband the happenings.

35. The following morning, they received news that the deceased had been killed and burnt. He later went to the scene and confirmed the report.

36. Upon cross examination by Mrs Nyaata, he said he is a brother to the deceased's wife and he started living with them in 2014. The 1<sup>st</sup> – 3<sup>rd</sup> accused were known to him as he had interacted quite a lot with them. He did not identify the deceased's voice immediately. He had injuries on the head. It was just the two of them when the deceased gave him the story. The bleeding stopped after the first aid. They went out again and returned to the house and continued talking.

37. He said they did not call for help and further that the family members' phones were off. He identified the voices of those who came for the deceased. The 3<sup>rd</sup> accused was the first and he hit the door with the shoe as he ordered the deceased out. He confirmed having disagreed with the 3<sup>rd</sup> accused on some occasions, as he was shouting at PW3 during their self-help group. The 2<sup>nd</sup> accused shouted that the deceased would see his father that day. The 1<sup>st</sup> – 3<sup>rd</sup> accused stated as follows; "uncle come out, we want to know who injured him".

38. PW3 admitted that he did not see the 1<sup>st</sup> – 3<sup>rd</sup> accused that night and he did not go to the 5<sup>th</sup> accused's with the group. Mbithe ran away because of the ongoing, while Mwema Mwinzi was not in that crowd. Mbithe had a torch, and so PW3 was able to see all the people who were about 25. There was an allegation of a witch doing rounds. Muasya and Mwanja went into hiding. He said he left that home in August 2018. It is PW2 who told them what had transpired though they did not approach him to assist.

39. Upon cross examination by Mr. Wasolo, he said that he identified 13 people though more were involved, and they were from the entire village. The 4<sup>th</sup> accused was among the crowd and the deceased was taken to the 5<sup>th</sup> accused's home. He agreed that he never saw both 4<sup>th</sup> and 6<sup>th</sup> accused in the crowd. Muasya and Ngumo remained but they followed them. He said he did not go to the 5<sup>th</sup> accused's home. Ngumo was the one beating the deceased, he said.

40. The function which the deceased had attended was at Kalii in Makindu. The deceased had an injury on the head but never wanted to go to the hospital. He saw the body at Kilome mortuary and the deceased's hands had been chopped off, and some parts of the body were burnt. Some culprits disappeared and some never ran away.

41. Upon further cross examination by Mr. Hassan, he agreed that he never saw anyone beat the deceased. Muasya and Ngumo spoke boastfully in his hearing. He didn't know if they knew who he (PW3) was. He agreed that he did not see the person who hit the door, and he did not talk to the people present. He used a torch to identify 13 people. The deceased was the one screaming. In re-examination, he said that he could not identify the deceased at first because his voice had a problem.

42. **PW4 Dr. Simon Wambua Mueke** from the ministry of health headquarters identified himself and testified that on 13/05/2016, he was based in Mbagathi and he performed the post mortem on the deceased's body. The findings were;

- Minimum body changes
- Grossly burnt from head-left knee-upper part of right thigh. Severest and deepest burns on the left side of the head left upper limb. The rest of the burns were superficial. Head had five deep cuts, largest was 8cm; Open scalp fractures. Dry blood stains from fracture sites. The cuts were 3cm, 4cm, 8cm (2 cuts) respectively.
- Open fracture on head
- Other cuts were upto the scalp bone
- Burns, both deep and superficial on ears and left side of head, left upper limb, left arm
- Carbon particles in the right lung

43. He found the cause of death to be severe head injury and burns which were above 80%. He produced the report as **Exb 1**. Further, he told the court that he is a specialist in gynecology and is a senior deputy administrator at the ministry and had gained experience in pathology.

44. In cross examination by Mrs. Nyaata, he said that a sharp object was used to inflict the injuries. He couldn't tell whether the deceased was burnt alive but the presence of carbon particles in the lungs meant that he was burnt alive. He couldn't tell at what point the deceased was cut.

45. Upon cross examination by Mr. Wasolo, he agreed that he is not a pathologist. He however stated that with brain leakage, one can only live for four minutes. In this case, there was brain leakage. Mr. Hassan had no questions for the witness.

46. **PW5 P.C Johnstone Changule** of Sultan Hamud police station, stated that on 08/05/2016 at 8:56am, he was at the station when I.P Kenga informed him of an incident at Kitivo. He proceeded there with OCS C.I Ng'ang'a and Cpl Muli. There was a river and a big crowd at the scene. They crossed the river and found the body facing the flow of the river. It was burning with logs on it and it had injuries on the head which were prior to the burns. They removed the body and were accompanied by the deceased's relatives to Kilome nursing home for post mortem. The CID took over the case before any arrest was conducted.

47. In cross examination by Mrs. Nyaata, he said that they went to the scene as three officers and the police driver. James Kimatu is not known to him and he did not identify anyone in the crowd. They found the body still burning and they interfered by removing the logs of fire. One side of the body and the left ear were badly burnt. He had worked for long in the area and had never heard of witchcraft complaints. He confirmed that the cuts were by a sharp object and photos were taken he said.

48. When cross examined by Mr. Wasolo, he said that he did not go through the witness statements. Mwanja Muya is not known to him and he never followed him. The body was in the river but on a heap of sand made by the water. Kimato the investigating officer is also not known to him.

49. Upon cross examination by Mr. Hassan, he said that they were at the scene for 30 minutes and the people there declined to talk to them.

50. **PW6 PC Mark Okoth** of DCIO Mukaa sub-county said he was the current investigating officer after taking over the matter from P.C Fred Ambasa who had also taken over, from another officer. He said the initial investigators were at CID Nairobi. Sgt Kimato did a statement that a report was received from the wife and relatives of the deceased.

51. The report was that the deceased was attacked and robbed on his way home from a dowry negotiation. The deceased had met Muasya Mwanja and they parted. A group of 20 people went to the deceased's home and took him for questioning about the assault of their uncle. As a result, he was assaulted and burnt. The accused were arrested at different times and he was not aware of the information that led to their arrest.

52. Upon cross examination by Mrs Nyaata, he said that he was aware of the role of an investigating officer. James Kimato who was the initial investigating officer never visited the scene. The witness started investigations in 2017 and agreed that there were no photographs taken. He relied on Kimato's statements, and heard nothing about witchcraft. He didn't know who attacked the deceased but he went home and was allowed to sleep. Kimato did not state the injuries sustained by the deceased after attack by the first person.

53. He said PW5 visited the deceased's home. No indication was given as to why the 1<sup>st</sup> – 3<sup>rd</sup> accused were charged. From Kimato's statements, the attackers' names were not given. He denied that random arrests were done. He also denied that the attackers were still at large. He didn't know why the administrators (chief, elder etc) were not arrested.

54. In further cross-examination by Mr. Wasolo, he stated that the accused were arrested based on the information from the deceased's wife. She gave the names of those she saw. He said the 6<sup>th</sup> accused is not on the list of suspects. The incident involved a crowd from the village and witchcraft claims. He didn't know how the 4<sup>th</sup> and 6<sup>th</sup> accused were arrested. Mwanja Muya was never taken to him and is not mentioned in Kimato's statement. There has been no complaint over Mwanja's involvement in this matter.

55. Upon cross examination by Mr. Hassan, he said that he could not tell why Mwanja Muya was not a suspect. He didn't know where the beating of the deceased took place. He agreed that he would go to assist a neighbour under attack. The accused wanted to know who had attacked the deceased. The deceased's wife was present upto when she was chased away by the crowd. No one was in control of the crowd and their actions. The deceased was accompanied by two people while the accused were accompanied by a crowd. The crowd was of 20 people or more. The accused were the ones who went to the deceased's home. He didn't know what more they did but the deceased was found dead the next day.

56. When placed on their defence all the accused persons elected to give sworn statements. Despite indicating they would call witnesses they ended up calling none.

57. The 1<sup>st</sup> accused, **Stephen Kimondiu Nzue**, testified that he was from Kaskeu, Ukuisini village, and was a primary school teacher but unemployed at the time of testifying. His evidence was that the deceased was his father's brother whom he knew well. On the night of 7<sup>th</sup>/8<sup>th</sup> May 2016, he went to his house and slept. He then heard Mwanja Munya calling him at around midnight. Mwanja asked him to accompany him to the 5<sup>th</sup> accused's home. Reaching there Mwanja and his cousin Muasya asked him to sit on a stone and identify the coat on the ground. He replied that it belonged to his uncle, the deceased.

58. The 5<sup>th</sup> accused was present with his wives and children. People started arriving and he was told to call his uncle so that he could be told what those items were. The uncle but his uncle could not be reached. He was then told that the people were fed up with them and asked him to call his relatives to explain why they were bewitching them. He called James Mutua (2<sup>nd</sup> accused) and his son and both were unreachable.

59. He called the 2<sup>nd</sup> accused's other son, (Muli Mutua), and told him to tell his father that he (1<sup>st</sup> accused) was under attack. The 2<sup>nd</sup> and 3<sup>rd</sup> accused and others arrived. Neighbors also arrived and there was too much noise. He called PW2 whom he told what was happening but PW2 did not go to where they were.

60. Further, he testified that his father has two wives and his mother is the 2<sup>nd</sup> wife. That they have squabbles over land etc and Peter (PW2) is involved in the squabbles. The bag with the coat had chapati and cooked intestines as well. He accompanied other people, who were in excess of 30, to the deceased's home. He went because he feared for his life and the life of the deceased.

61. The deceased was then called out and the 1<sup>st</sup> accused saw a big injury on his head. He asked who hit him and it came to light that Mwanja Muia was the one who had beaten the deceased. They proceeded to the 5<sup>th</sup> accused's home to enquire as to why Mwanja had beaten the deceased. He called the village elder, Muema Mwinzi, who arrived and people listened to him. The deceased explained that he had carried the food items from the feast.
62. The village elder explained that if the deceased was a witch, the Kikamba ceremony called ngata could determine the truth. It was decided that the ceremony be done that night and the deceased was accompanied by his cousin, Kiamba Musyoni, the village elder, Mwanja Muya and Muasya Muya. The other people left for their homes and upto that time, nobody beat the deceased. He went to his house and slept and his phone went off as the battery was low.
63. The next morning, he saw people running from the neighboring village and there was a crowd at the river. He heard that Francis (deceased) had been killed. He went there and found the police tying the body. He sought permission to attend the family meetings but was told to hold on for the head teacher. He later received call from a teacher and was advised that officers were going for him. In Kaskeu, there was a group protecting sand and burning witches. A *mzee* named Mutungi had been set ablaze in Kitui for being a witch. He denied any involvement in the incident and said that those who injured the deceased like Mwanja were never charged.
64. In cross examination, he said that he tried to assist in order for the deceased not to get injured. He doesn't believe in witchcraft. He is from the same family with 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> accused. The deceased's wife was present and she saw what happened up to the point she went to sleep. The deceased who was a well behaved person said that he was beaten by Mwanja. He said he went to sleep alone and left the rest.
65. The 2<sup>nd</sup> accused **James Mutua Mwei**, from Kasikeu-Makueni testified that he was a watchman in Machakos. He said the deceased was his brother and they lived well before his death. That on the night of 7<sup>th</sup> May 2016, he was called by the 1<sup>st</sup> accused and asked to go and assist the deceased who had been attacked. He called the 3<sup>rd</sup> accused but could not reach him and so called Muli. Later, his children, 3<sup>rd</sup> accused and Muli, went for him and they all proceeded to the home of the 5<sup>th</sup> accused. They found around 25-30 people including the deceased and deceased's wife already there.
66. While there the village elder was called and people demanded to be shown the witch. The village elder advised that the deceased be taken to Willy's (*in Kibwezi*) who deals with witches. The deceased was then taken for that examination by Muema, Mwanja and Muasya and he went home. The next morning, he was called by villagers and informed that his brother Francis had been killed at the river. He went there and found the body but left before the arrival of the police. The deceased's brother in law (Mutua) asked him to show him the body but instead led him to the police from where he was arrested and charged.
67. Upon cross examination by the prosecution Counsel, Mr. Kihara, he said that suspected witches are taken to Willy. He did not attend the burial as he was already under arrest. Someone else had been burnt in that village. Mutua and others (Mbithe) prepared a list of suspects and they were arrested. He went home that night before the deceased was taken to Kibwezi. His home is about 2km from the scene. He denied killing his elder brother.
68. Upon cross examination by Mr. Wasolo, he said that he found food at the 5<sup>th</sup> accused's home and the people present said that it belonged to the deceased. There were people from the three villages some of whom disappeared to date.
69. The 3<sup>rd</sup> accused **Boniface Musembi**, a mason from Kaskeu stated that the deceased was his paternal uncle while the 2<sup>nd</sup> accused is his father. On the night of 7<sup>th</sup> May 2016, he was asleep at home when he heard his father (2<sup>nd</sup> accused) and his brother (Muli) talking outside his house. Muli told him that the 1<sup>st</sup> accused had called and said that Muli, 2<sup>nd</sup> and 3<sup>rd</sup> accused should go and assist the deceased at the 5<sup>th</sup> accused's place. They went and found many people including Mwanja and Muasya Muia, and the 1<sup>st</sup> accused who was sitting down. They were ordered to sit down and a crowd of 20-30 people surrounded them. He heard someone saying "*you have bored us with your witchcraft*". The deceased was not present.
70. They were ordered to go to the deceased's home where the crowd asked the deceased's wife to call the deceased in order for him to explain about a bag. The deceased had injuries when he came out and Mwanja said he had beaten him for a reason. They left for 5<sup>th</sup> accused's home with the crowd where they found the village elder, Muema Mwinzi. The village elder said that witchcraft issues are not for the police. The deceased was to be accompanied to Kibwezi by Mwanja Muya, Muasya Muya and their cousin Kiamba Musyoni. As a young person he could not go for such a matter.
71. The next morning, he left early for Sultan and his cousin from Nairobi called to ask what was happening. At Kaskeu market, he heard of a police vehicle which had come to carry the deceased's body. On Monday at 10.00am, the 2<sup>nd</sup> accused called him from the police station. He went there and got arrested. He said that the people who took his uncle for ngata are the ones who beat him.
73. Upon cross examination by Mr. Kihara, he said that it was the deceased's wife who gave out the names of the suspects. He never saw the suspect meat and denied that his uncle was involved in witchcraft. A certain wife of the deceased's step brother used to complain of finding meat at her doorstep. Mwanja and Muasya are aged between 35-40 years and were the ones complaining against the deceased. The list was of those who had gone to the deceased's home.
73. In cross examination by Mr. Wasolo, he said that they found food in a bag and jacket and couldn't tell how it ended up there.
74. Upon further cross examination by Mr. Hassan, he said that the village elder represents the government and his orders are obeyed. Upon returning from the deceased's, they found a bigger crowd of about 60 people at the 5<sup>th</sup> accused's home. According to the crowd, the 1<sup>st</sup> and 3<sup>rd</sup> accused were among the witches. The people who have disappeared from the village are Mwanja, Muasya Muya and Kiamba Musyoni.

75. On re-examination, he said that Kaula Musyoni had complained about meat being poured at her doorsteps and that the deceased represented their entire family.

76. The 4<sup>th</sup> accused **John Ngulu Ngesi**, a farmer testified that on the night of 7<sup>th</sup> May 2016, he was asleep at home. The next morning, his wife informed him about vehicles on the road and he further learnt from Masokoni people that Francis had been killed. He proceeded to church instead of the river after which he passed Kitivo market and confirmed the report about the deceased. Further, he said he never went nor heard anything from the home of the 5<sup>th</sup> accused which is 1km away from his. That PW2 had sworn that no man in that village would live.

77. When cross examined by Mr. Kihara, he said that he wouldn't know where PW2 was during the incident. PW2 was known to him but they had never collided. The list was done by PW2, Mbithe and Mbithe's brother who he had never collided with. Him and the deceased used to visit each other. He had never known the deceased to be a witch.

78. In cross examination by Mrs. Nyaata, he said that a person called Mutungi had been killed for being a witch. PW2 stays in Nairobi but his home is in Kaskeu. On further cross examination by Mr. Wasolo, he said that PW2 is a distant nephew to the deceased.

79. The 5<sup>th</sup> accused **Richard Wambua Mutiso** from Mukwisini village, testified that the deceased was known to him and their homes share a boundary. Their homes are 500 metres apart. On the night of 7<sup>th</sup> May 2016 at about 11.30pm, Muasya Muya went calling at his house but he did not respond as he had a toothache. Muasya was saying, "Richard what are you doing in the cattle shed?" Muasya insisted that there were clothes outside.

80. He went out with his wife and Mwanja joined them, but left to call the 1<sup>st</sup> accused. He saw the coat and a small bag but did not open it. Mwanja arrived with the 1<sup>st</sup> accused. Mwanja and Muasya said that the items belonged to the deceased. Mwanja sent the 1<sup>st</sup> accused to call his relatives as they were tired with the witchcraft business.

81. The 1<sup>st</sup> accused called the 2<sup>nd</sup> and 3<sup>rd</sup> accused but missed both of them. He then called Muli and they arrived i.e 2<sup>nd</sup> and 3<sup>rd</sup> accused and Muli. Muasya was screaming so loudly saying that they had found the village witch and people arrived in their numbers. The villagers together with 1<sup>st</sup> and 2<sup>nd</sup> accused went to the deceased's home and returned with the deceased who had an injury on the head.

82. The village elder, Mwema Mwinzi arrived and made enquiries about the ongoings. He said that it was not a police case and that the deceased should be taken to Kibwezi to undergo a ngata ritual. The people who took the deceased for the ritual were; Muema Mwinzi, Muasya Muya, Mwanja Muya and Kyamba Musyoni.

83. The village elder told them to go and sleep. He said that the deceased was never beaten on his compound. The next day, he woke up at 6.30am and went to the dentist as his tooth was really aching. On his way back, he met people who said that his uncle had been killed. He was later arrested from home.

84. Upon cross examination by Mr. Kihara, he said that he didn't know the person who took the items to his home but said that Muasya and Mwanja knew. The deceased who had been at a feast, had been on the road with Mwanja. He said he was woken up by Mwanja and Muasya. He confirmed having built the deceased's house together with another, and he used to go to there. He blamed Mwanja Muasya for his arrest. He said he visited the doctor on 8<sup>th</sup> May 2016 which was a Sunday.

85. On further cross examination by Mrs. Nyaata, he said that Muasya was the first to go to his house that night. The crowd was making so much noise. The 1<sup>st</sup> accused was in a lot of trouble and Muasya and Mwanja were telling him many things. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused were forced to go to the deceased's home. It is Muema Mwinzi who directed that the deceased undergoes the ngata cleansing. The route taken by the village elder and team was to pass through the river. There was no electricity and it was dark.

86. The 6<sup>th</sup> accused **Joseph Muoki Ngei** of Ukusuni village Kaskeu, testified that the deceased was a brother to his paternal grandfather and his home is 800 meters from theirs. The deceased was of Mukuyuni village and they are separated by a hill. On the night of 7<sup>th</sup>/8<sup>th</sup> May 2016, he slept in Katimba Baptist church with David Kimuli, Samuel Manthi, Wambua Manthi and Boniface Mutuku.

87. Further, that he had been in church since 4pm for choir practice. They were informed by Sunday school children and worshippers about a person who had died in the river. He called his brother Michael who informed him that teacher Francis was dead. He was arrested at home two months after the incident. His name was not on the list of suspects.

88. Upon cross examination by Mr. Kihara he said that he heard that all men would be arrested, but some disappeared. Mbithe is known to him and he has no issues with her. His elder brother was at home when he was in church. The other brothers are young. In 2016, he was 22 years old. Their home is on a lower ground compared to the deceased's. The police threatened him with death. He was arrested with the 5<sup>th</sup> accused and he didn't know the person who gave his name.

89. The 7<sup>th</sup> accused **Benjamin Nzioka Mutune** from Kaskeu location, testified that on the night of 7<sup>th</sup> May 2016, he was harvesting honey in the bushes with his children, Joseph Taalu Nzioka and Maurice Wambua Nzioka. They finished at around 1.00am as his beehives are in various places. They passed the 2<sup>nd</sup> accused's place and on reaching the 5<sup>th</sup> accused's place, they found a crowd and heard screams. He told his children to go away. He then saw the deceased and deceased's wife seated and left them alive. He was arrested at Kaskeu while selling sugarcane and he didn't know the reason for his arrest.

90. Upon being cross examined by Mr. Kihara, he said that he keeps bees and that he harvests when it's a bit dark. He was in the forest from

7.30pm. He is a pastor and not just a member of church. Referring to Numbers 23:23 he said Christians don't entertain witchcraft. There was a crowd at the home of the 5<sup>th</sup> accused but he did not stay there nor check on anyone. The deceased was in Salvation Army church and was a treasurer.

91. The 8<sup>th</sup> accused **Boniface Ngumu Ngesi** from Vukuchwini village Kaskweni, testified that on the night of 7<sup>th</sup> May 2016, he arrived home at 7.00pm with his wife, as they had returned from a funeral. At 12 midnight, they heard noises from uphill and went outside. The noises were from his elder brother's home, Julius Ngesi. They went to his home, about 100 meters away, and on reaching there, they realized the noise was far beyond.

92. They saw light on the hill top and saw a crowd going down. The crowd passed and one child told him that a person had been found at the 5<sup>th</sup> accused's doing witchcraft and that the person would eat ngata. Him and his wife returned home and slept. The next day, they went for mass at 8.00am and later heard about the death. He was arrested in October 2017 while selling vegetables at the market.

93. On being cross examined by Mr. Kihara, he said that from his home to that of the 5<sup>th</sup> accused is 1km and 1 ½ kms to the home of deceased. He is not related to the deceased's family and didn't know why the police took over a year to charge him. He stated that many men from their village have disappeared. He was arrested together with the 7<sup>th</sup> accused and knows nothing about witchcraft.

94. On further cross examination by Mrs. Nyaata, he said that the crowd was of 20-30 people and was noisy. There are many other homes beyond his place. Answering Mr. Wasolo, the accused said he never followed to confirm whether the ngata ritual would be performed. In answering Mr. Hassan he said he was not given the reason for his arrest and he was not involved in the investigations.

95. After the close of the defence case Counsel for the accused persons filed written submissions while the prosecution relied on the evidence on record.

### **Analysis and determination**

96. I have keenly looked at the evidence on record and duly read the submissions made on behalf of all the accused persons. To secure a conviction for the charge of murder as defined under section 203 of the penal code the prosecution has to prove three ingredients *to wit*;

- a. The fact and cause of death.
- b. That the death was caused by an unlawful act of commission or omission by the accused (*actus reus*).
- c. That the accused had malice aforethought (*mens rea*), while committing the said unlawful act.

### **The fact and cause of death**

97. The fact of the deceased's death is not in dispute and it was further confirmed by the witnesses who found his body burning at the river as well as the post mortem report. The cause of death is however disputed. On behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, Mrs Nyaata submits that the post mortem was performed by PW4 who is not a qualified pathologist hence the possibility of errors cannot be ignored.

98. On behalf of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons, Mr. Wasolo submits that it is not clear whether the deceased died out of the burns or the deep cut on the skull.

99. It is indeed true that PW4 admitted that he is not a pathologist. He however testified that he had gained experience in pathology and had been in practice for 32 years. Apart from his findings, the evidence shows that the deceased had been severely assaulted on the head and was found in the river burning. His body had severe burns assessed at 80% which PW4 found to have been inflicted while alive. It is therefore my considered view that there was corroborative evidence with regard to the cause of death and in the absence of rebuttal evidence from an expert, I am convinced that the cause of death was sufficiently proved.

### **Proof that the death was caused by an unlawful act of commission or omission by the accused.**

100. This case is purely based on circumstantial evidence as there was no eye witness to the beating and burning. The Court of Appeal, in **Abanga alias Onyango –vs- Rep Cr. A No.32 of 1990(UR)**, set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards 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.”**

101. In the case of **Sawe v Republic [2003] KLR 364** the Court of Appeal stated thus:

**1. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

Also see **Rex v Kipkering Arap Koske & 2 others [1949] EACA 135; Simon Musoke v R [1958] EA 71; Omar Mzungu Chimera v R Criminal Appeal No. 56 of 1998 (UR).**

102. In the course of the proceedings, it became clear that the person who PW1 kept referring to as dad and father was actually her husband, (the deceased). I have no doubt that she positively identified all the accused persons because they were her relatives and fellow villagers. Further, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused confirmed that they were actually at the deceased's place on the material night (7<sup>th</sup> May 2016) as well as at the home of the 5<sup>th</sup> accused where the deceased was taken by the crowd.

103. PW1 testified about what each of the accused persons said during the assembly at her home but agreed that by the time they were ordered to leave the 5<sup>th</sup> accused's home, the deceased was in good condition and she had not witnessed anyone attacking him.

104. PW2 was neither present at the deceased's nor 5<sup>th</sup> accused's homes on the material night. He admitted that he never witnessed anyone committing the offence. What he told the court is what he allegedly heard being said at the deceased's home. His evidence was that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused were very well known to him and he identified their voices during their assembly at the deceased's home since his home is close to that of the deceased. I do not doubt that the three mentioned accused persons were known to PW2. However, his evidence on their utterances did not corroborate that of PW1.

105. He told the court that those knocking on the deceased's door threatened to burn the place if the door was not opened. He did not specify who made that threat. He went on to say that he heard the 1<sup>st</sup> accused knocking at the deceased's house and asking him to open the door as none would hurt him. That the deceased opened the door and he heard them speak and they left with him and after a while he heard the deceased saying "*don't kill me instead take me to my house and kill me from there.*"

106. An analysis of PW1's and PW2's evidence on the identification show they are not similar. I would expect the testimonies of the two witnesses to match with regard to what each of the accused (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>) allegedly said. PW2 who was in his house could "hear and see" what was going on in the deceased's compound and house. Besides the 1<sup>st</sup> -3<sup>rd</sup> accused persons PW2 did not mention the other accused persons.

107. It is also not lost to this court's mind that when the deceased arrived home on the material night he told PW1 that he had been beaten in the middle of his head by Mwanja Muia. Besides the serious injury on the head he was bleeding from the face. The person who injured him, and was present throughout the night was known but he has never been arrested by the police to date.

108. On his part, PW3 testified that he identified the voices of the 1<sup>st</sup> – 3<sup>rd</sup> accused persons but agreed that he did not see them on the material night and did not accompany the crowd that went to the 5<sup>th</sup> accused's home. PW3 categorically stated that he did not see the 4<sup>th</sup> and the 6<sup>th</sup> accused in the crowd on the material night. He did not mention the rest of the accused persons.

109. The evidence of the investigating officer (PW6) was not helpful and it appears that the handling of the matter by various investigators compromised the quality of investigations. PW6 had no idea as to why the 1<sup>st</sup> – 3<sup>rd</sup> accused were charged and his further evidence was that the statement of the initial investigator did not give the names of the attackers.

110. What is clear from the evidence is that none of the prosecution witnesses saw any of the accused persons beating the deceased either at his home or at the 5<sup>th</sup> accused's home. It is also clear from the evidence that when the deceased arrived home, he had already been assaulted and he mentioned to PW1 and PW2 that his assailant was Mwanja Muia. PW3 testified that he even heard Muasya Muia talking about how the deceased had been beaten by Mwanja Muia. I note that Mwanja Muia and several others were adversely mentioned throughout the proceedings but were never arrested nor charged. They could be among those who disappeared.

111. The deceased's problem started on his way home that night. He arrived home already injured and PW1 said he was seriously bleeding. There is no evidence showing that any of the accused persons is the one who injured him. Secondly there is no evidence showing that anyone injured the deceased either at his home or while at the 5<sup>th</sup> accused's home. A village elder "Muema Mwinzi" who is said to have been at the 5<sup>th</sup> accused's home was not called to testify yet he is an administrator. His evidence would have assisted the court in knowing what really transpired.

112. From the evidence, I am convinced that a decision was reached on the material night to take the deceased for cleansing in Kibwezi and that his murder occurred in between the decision making and the journey to Kibwezi. This is buttressed by the fact that his body was recovered from the river, which was some distance from where the night commotions were happening.

113. There is also evidence to show that the journey to Kibwezi involved crossing the river. Further, there is evidence that the 1<sup>st</sup> -3<sup>rd</sup> accused were from the same family with the deceased and that they enjoyed a good relationship. Both PW1 and the 2<sup>nd</sup> accused testified to that fact. In my view, 1<sup>st</sup> – 3<sup>rd</sup> accused sufficiently explained their presence at the homes of the deceased and the 5<sup>th</sup> accused.

114. In light of the fact that a crowd was involved and the people mentioned adversely were never charged, it is impossible to conclude that

within all human probability, the crime was committed by the accused persons. It follows that the evidence adduced does not irresistibly point to the accused persons and not anybody else as the perpetrator/perpetrators of this offence. As stated earlier the investigations here were hurried and important leads to the real perpetrators were overlooked ignorantly or deliberately.

115. My finding is that the evidence before this court does not satisfy the requirements set out in the principles for assessing circumstantial evidence in order to found any conviction. The accused persons will benefit from the doubt created in the court's mind.

116. For my part I find the charge of murder not proved against any of the accused persons who I hereby acquit. They shall all be released unless lawfully held under separate warrants.

**SIGNED AND DATED THIS 19<sup>TH</sup> DAY OF MAY 2021 AT MILIMANI NAIROBI BY:**

**H. I. ONG'UDI**

**JUDGE**

**DELIVERED THIS 29<sup>TH</sup> DAY OF JUNE 2021 IN OPEN COURT AT MAKUENI BY:**

**GEORGE DULU**

**JUDGE**