



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL CASE (MURDER) NO. 9 OF 2015

(CONSOLIDATED WITH

CRIMINAL CASE MURDER NO. 18 OF 2015)

REPUBLIC.....PROSECUTOR

-VERSUS-

FRANCIS PATU SIMPANOI ALIAS KORIO.....1ST ACCUSED

PHILIP MWAURA TIMALO2ND ACCUSED

JUDGMENT

1. The Accused persons are charged with two counts of murder contrary to **Section 204** of the **Penal Code**. The particulars are that on 24th January, 2015 at Utheri Wa Lari Farm in Naivasha, jointly with others not before the court, they murdered George Ngugi and on the second count that on 24th January, 2015 they murdered Peter Kibunja Gitau.
2. Their cases were originally prosecuted separately, but were consolidated on 10th June 2015. This file HCCRC No. 18 of 2015, is the lead file. The State availed ten witnesses. All the eyewitnesses were under court sanctioned witness protection and gave evidence under disguise were or concealed.
3. The facts are that on 24th January, 2015 about 8.00 - 10.00am members of Utheri wa Lari land buying company had convened at their land at Maai Mahiu to celebrate their success in a land case. This was at about 10.00am. Thereupon, a group of Maasai, about 40 - 70 of them, then appeared and allegedly attacked the members of Utheri wa Lari group. Eventually, this appears to have been a continuation of a long running land dispute bringing the Maasai, who believe the land is ancestrally theirs, into conflict with the Kikuyu who allegedly purchased and obtained title to the land from settlers in 1972.
4. PW1 (Hooded and in disguise) testified that he was amongst the Utheri wa Lari group of members on the material day at about 10.00am, when Maasais emerged in traditional attire and armed with rungu, swords, spears and sticks. The Maasai attacked the group and a melee ensued. PW1 saw a victim two metres away from him being hit on the head and fall down. He saw the 2nd Accused, Mwaura, hitting people with a rungu, and saw 1st Accused, Korio, slashing the victims. The first person he saw killed by Mwaura and Korio was Kibunja. He said he knew Mwaura 1st Accused for over five years because they traded at Maai Mahiu and Naivasha. Similarly he knew Korio for over 5 years.
5. The attack was sudden and surprising, so the members of the land buying company scattered and hid. Police arrived and started shooting in the air. People then came out of hiding; vehicle windscreens had been shattered.
6. In cross-examination, PW1 said he sells water as a business; that he had a boma at Maai Mahiu; that he was a member of the land company; that they had convened to celebrate a court decision allowing the company to occupy the disputed land; that he had built in the land; that the police had been notified of the meeting; that the police who arrived at the scene came from Kamathatha AP Camp; that from 1 - 2 metres away he saw Mwaura (Accused 2) hit the deceased Kibunja several times, and Korio (Accused 1) cut the deceased with a simi; that he did not know where the accused lived but usually saw them in the streets; that he had spoken to them several times in the past.
7. PW1 added that he had built on and lived in the disputed land for over ten years but was displaced when Maasai/Kikuyu clashes occurred in 1992 and 1997; that there had been a court case going on in respect of the land and they had come to celebrate their victory in the case not to survey it; that he was not aware whether the 1st accused was the leader or Chairman of the Maasai disputants - the Kedong Kitet; When shown the 1st Accused's Identity Card he said that he knew the 1st Accused well from previous encounters as a leader of their rivals but not

as Francis Patu Simpanoi.

8. In re-examination PW1 re-asserted that Korio who he knew and had previously been seeing in Maai Mahiu was the 1st Accused, and that Korio was the one he saw slash Kibunja. He said he did not know the other names of Korio.
9. When PW1 was later recalled to testify he was asked about previous cases relating to the land dispute between the two communities. Shown the Defence documents at page 8 he said he did not know the parties in Civil Case No. 315 of 2010. He said he was aware that there were several cases on the dispute involving the land; that he knew the 1st Accused as Korio, and that in respect of Case No. 315 of 2010 Korio Ole Tuko, and in Republic v Korio case No. 8 of 2015, he only knew the Korio in the present case not the one in those other cases; that 1st Accused was Korio who was one of the attackers. PW1 said he knew 1st Accused as a businessman at Uaso Maai Mahiu from when they used to buy goats.
10. PW2 (Hooded and in Disguise) testified that on the material day he was at his shamba at Maai Mahiu; that at about 11.00am as he joined other farmers, Maasais attacked them using rungu, axes and spears. One Kibunja who was with them was hit on the head and slashed with a simi. According to him Korio first hit Kibunja and he fell, Mwaura also struck him, then Korio slashed the deceased; that Korio is accused 1 and Mwaura is accused 2. He himself suffered injuries on the back from stones thrown by attackers as he was fleeing to hide behind a house.
11. PW2 said identified Korio as he had known him as a resident at Maai Mahiu for 7 years. Police later came and took the injured to hospital. Korio was arrested in court in Nakuru after he, PW2 identified him to the police.
12. In cross-examination, PW2 said people had come to the farm from all over including Muranga, Kikuyu and Kiambu; that he had a title for half an acre and his father had 6 acres; that he knew the accused had cattle bomas in the same farm where the farmers gathered; that there were disputes over the land; that Kori (Accused 1) had a rungu not the walking stick shown to him in court; that he knew Accused 1 as Korio not Francis and Accused 2 as Mwaura. Kibunja was attacked about 100 metres away from where PW2 was; that the farmers were not the invaders.
13. PW3 (Hooded in disguise) testified that he was a member of Utheri wa Lari society. That whilst were celebrating the resolution of the court case on the farm between them and Maasais, about 50 Maasais attacked them with simis, spears and rungu. The farmers fled, and it was when police came and fired into the air that the attackers dispersed. According to him Korio and Mwaura were in the group of attackers, that Mwaura resides near the shamba; that Korio had a rungu, simi and spear; that the two men who died were hit by them; that Accused 1 hit the old man who fell and that he, PW3, was one of people who identified the attackers.
14. In cross-examination, PW3 said he had not been able to live on the farm due to the dispute over the land, that he had a title deed for his shamba out of the 22,000 acres; that the meeting was discussing how they can start sub-dividing; that one of the injured persons was Pastor George who was struck by Accused 1 and also by Accused 2 before being slashed by Accused 1, Korio; that the first attackers were the two accused.
15. PW4 (Identity concealed) testified that he operates a business in Naivasha and had gone to the shamba at Maai Mahiu on 24th January, 2015. There were a large number of people there; suddenly a group of Maasais attacked them; one of the attackers was Korio who he recognized when Korio hit Kibunja with a rungu before cutting him with a panga; the meeting participants scattered and fled. He said he knew Korio because he had lived on the shamba before 1996, and he would see Korio around. He identified Korio as the 1st Accused. He said he also knew Mwaura when he would visit the shamba but he never saw Mwaura during this attack.
16. In cross-examination PW4 said he had farmed on the land since 1982, leaving when there were clashes such as in 1995. On the material day there were about 100 farm shareholders being Kikuyus; that they were invaded by about 70 Maasai and Korio was amongst the invaders; that he also mentioned the name of Mwaura to the police, and that they did not provoke the Maasai.
17. In re-examination PW4 stood by his evidence-in-chief; he said he saw and identified Korio, 1st Accused; that he was about 10 metres away from both accused during the attack; that he could not tell if Korio was a nickname; that he also identified Accused 2 who was armed with a simi and rungu; He said he was about 10 metres away when the attack began on a man he did not know; he identified Accused 2 who was armed with a simi and rungu when he attacked Kibunja; the man Kibunja was known to him and he later died.
18. PW5 (Disguised) testified that on 24th January, 2015 he was in the meeting of Utheri wa Lari members when a group of 50 men invaded and attacked them. He fled and everyone scattered. Later he heard a man died at Kijabe Hospital. Among the group of attackers, he could identify Mwaura, 2nd Accused who had a panga.
19. In cross-examination PW5 said she did not know any of the invaders by name or physical appearance. PW5 was unable to answer how the name of Mwaura came up. In re-examination she confirmed that she did not see anyone whom she knew physically among the invaders.
20. PW6 (Disguised) testified that he went to the Utheri wa Lari farm at 8.00am on 24th January, 2015 and did a walkabout before the meeting of members started at 9.30am. After the Chairman spoke, they started going round the farm when a group of about 70 Maasais surrounded them. The Maasais charged and attacked. The farmers threw stones in self defence, and retreated. Some people were bludgeoned and others slashed with simis. He saw one man, called Maji strike the old Pastor George about 60 metres away. Pastor fell down immediately and other attackers came and slashed the Pastor. After a while he heard gunshots and the invaders fled. He did not see any of the attackers in court.
21. In cross-examination he said the farmers were about 200. He had come from Nyandarua. He did not know which portion of the land belonged to which person. They were there after conclusion of a case, having been previously evicted by the local community. He saw Ole Maji there, but the accused in the dock were unknown to him. In re-examination he said women were the majority of farmers at the meeting.

22. PW7 (in disguise) testified that he identified the body of his father George Ngugi at Kijabe Hospital. It had injuries on the head.
23. PW8 (in disguise) testified that Peter Kibunja Gitau was his father-in-law. He identified the body at Uplands Funeral Home. It had a wound on the back of the head and on the forehead.
24. PW9 Sergeant Peter Wanjama was working at Nyakinyua Police Post on the 24th January, 2015. At 11.00am he was telephoned by the Chairman of Utheri wa Lari Farm Stephen Muiru, who said they had been attacked. He went to the farm about 3 kilometres away with Corporal Mbogo. He saw a large crowd of about 500 people gathered there. The situation was bad. Some people had cut wounds, others were crying and others locked up in their houses. He saw people in red shukas who were armed with rungun, arrows and swords, attacking others.
25. Seeing what was going on, he fired into the air and the fight subsided. The attackers ran away; they were not less than twenty; he did not identify any of them; the victims started assessing their wounds and taking some to hospital. He thus called his boss Inspector Kamau and Deputy OCS Inspector Ngari. Both came to the scene. It was difficult to identify any of the accused in respect of the events of the day; but he was aware there had been problems on that shamba between the Maasais and Kikuyu.
26. In cross-examination he said he was concerned with saving lives not identifying people. He confirmed that he was the investigating officer and did not know if there was a case on the dispute in court. However, he was aware of the existence of **HCCRC No. 8 of 2015 Republic v Korio ole Tuko & Another** a murder case. He did not retrieve any weapons at the scene.
27. PW10 Dr. Peter M. Ndegwa testified as the Pathologist who performed the post mortem on Peter Kibunja Gitau aged about 72 years. He found bruises on the front and back of the head; and the base of the skull was fractured. He attributed the death to sever cranial cerebral injuries due to blunt force trauma consistent with assault.
28. PW10 also produced the post mortem report of George Ngugi, performed by Dr. Titus Ngulungu. He noted a bruise on the left side of the chest and fractures of the ribs Nos. 2 to 6, with blood in the left chest cavity. The head had a laceration with haematoma on left side and there was a brain confusion. In his opinion, the cause of death was severe head and chest injuries due to secondary multiple blunt object trauma, in keeping with homicide.
29. In cross-examination, he testified that the cause of death in both cases was blunt force trauma; he opined that a blunt weapon was used. He also stated that a panga or spear can be used to inflict blunt injuries. In the case of Peter Kibunja Gitau there were no cuts. In the case of George Ngugi there were cuts but no sharp force trauma.
30. The 1st Accused gave sworn testimony as DW1. He said that he lived in Satellite Sub-location of Maai Mahiu Location; that he is a livestock farmer. He stated that he does not go by the name Korio. His name is Francis Patu Simpanoi as per his Identity Card which he produced at D. Exhibit 1. The only Korio he knew was from the Korio family from the same location and he did not know any Korio who had been charged.
31. He testified that on 24th January, 2015 he was at home looking after livestock. The following day he heard that there had been a fracas between Maasai and Kikuyu communities. He said he was the Chairman of the Maasai Community in his village Oiti, that there was a land dispute, that the Maasai had been living in Kedong Valley area before the 1940s; that his home is 8 kilometres from the scene of the incident; that he was arrested for no good reason on 12th March, 2015 in the High Court in Nakuru; that the D.O. and Security Committee had called him for a reconciliation meeting three days after the incident; that he was asked to provide some documents which he did; that a resolution was reached that the two communities should keep away from each other; and that upon his arrest they used a wrong name.
32. In cross-examination he said the witnesses wrongly identified him; that he is well known in the community; that Utheri wa Lari members had seen him in court; that he was the representative of the Maasai in the meeting with the D.O.; that he had never been asked about the incident before.
33. DW2, the 2nd Accused, also gave sworn evidence. He testified that he lived in Nanja Satellite Sub-location and worked in a quarry. He said he was not at the scene of the crime near Pipeline on the material day, and did not know any of the deceased. He heard of the incident pitting Maasais and Kikuyus from villagers whilst at the quarry. He did not know why he was arrested. From what he heard the incident occurred about 100 metres from where his father lives as his father's house was nearest to the scene. At the time his father was in a house in Satellite.
34. In cross-examination he said he was alleged to have been at the scene because his parents live nearest to the scene; that no one advised him why he had been picked up and that he would not be calling any witnesses.
35. He said he was arrested on 17th February, 2015 on his way to hospital; he knew the 1st Accused who is Chairman of the Maasai community. He was not a member of the Chairman's group; but he knew the family of Korio who live at Oiti.
36. In cross-examination he said the prosecution witnesses alleged his presence at the scene because his mother and father are in the area near where the incident occurred. He said he would not be calling his mother or father to testify, but could bring them if asked. He was not told why he was arrested until later on when the police told him he was arrested for murder.

Prosecution Submissions

37. With the foregoing evidence, the prosecution submitted that they had proved their case for murder beyond reasonable doubt and that the defence case did not prove otherwise. They argue the various eye witnesses presented saw the accused persons hit and slash the deceased.

38. As for the post mortem reports, the 2nd deceased's death was proved to be due to severe cranial cerebral injuries due to blunt force trauma. The 1st deceased died of severe head and chest injuries secondary to multiple blunt object trauma.

39. The state sought to prove that: First; the two accused, with others not before the court with malice aforethought, attacked the two deceased persons; and second that malice aforethought was evident from the fact that there was a major grudge between the communities of the deceased and the Accused. The prosecution submitted that the defences of the Accused persons were mere denials.

Defence submissions

40. The defence submissions were four pronged, leading to a conclusion that the 1st and 2nd Accused person could not be linked to the murder of the two deceased persons.

41. Their first prong was that the identification of the Accused person was wanting. That PW9 Sergeant Peter Wanjama the sole police officer who testified, clearly testified that he was not able to identify any of the attackers. Without identification, there was no basis on which the arrest of the 1st and 2nd Accused could be made.

42. Further on this prong of identification, the defence submitted that the reference to 1st Accused merely as "Korio", an alias not used by the 1st Accused did not amount to proper identification. They pointed out that there was another murder case **HCCRC No. 8 of 2015 Republic v Korio ole Tuko** in which one the state had charged the Accused therein for the same murders. The defence sought that the said original file be called for to verify the issue, as the 1st Accused was known as Francis Patu.

43. The second prong was that the post mortem reports for both deceased persons stated that the deaths resulted from blunt trauma. Yet the testimonies of all the eyewitnesses indicated that the deceased were cut or slashed on the head with a panga, knife or simi, in addition to being hit with a rungu. The defence cited **Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** where Nyakundi J stated:

".....In deed prima facie evidence under section 306 for an offence of this nature must be water tight..... In the context of this case I find it unbelievable as PW6 told this court that the deceased was assaulted four times on the head with a piece of wood and yet no iota of evidence found during medical examination by PW7. There is therefore scarcity of evidence in the case on the part of the prosecution to satisfy the element of unlawful cause of death. In this situation the prosecution has fallen short of the threshold on the sufficiency of the evidence to attach culpability at this stage of the trial against the accused....." (Emphasis added)

44. The third prong was that there was no investigating or arresting officer involved in the case nor was any murder weapon recovered. The defence argued that the absence of murder weapons, list of persons injured or their P3 forms, or an arresting officer all contribute to giving an unclear picture of what took place at the scene. The defence cited **Republic v James Ogwang Alichu & Another [2018] eKLR** where Sitati J observed:

"The second of the two issues concerns the arrest of the two accused. No police officer came to court to say how the two accused were arrested and how the decision to charge them was arrived at, In Republic-vs -Pattni (Supra) the court held that "The only inference that could be made from the failure by the prosecution to adduce evidence surrounding the arrest of the accused and his subsequent release had to be that such evidence would have adversely affected the prosecution case. There was a serious doubt as to whether the accused had opportunity to commit the offence charged." In the instant case, the non-availability of police evidence brings to mind a serious question of fact whether the two accused had the opportunity to commit the offence with which they are charged." (Emphasis added)

45. The fourth prong concerns the land dispute. Here the defence argued that there has been a long running dispute between the Maasai and Kikuyu communities in respect of the land where the incident occurred; that the 1st Accused is a prominent leader of the Maasai community and hence can be easily and readily targeted as a convenient scape-goat; that the 1st Accused attended a meeting with the County Commissioner after the incident; that the alleged attack by 50 Maasai against 1,000 people leading to a rout by the Maasai is unbelievable in the absence of mention of any other injured persons.

Analysis and Determination

46. In order to sustain a conviction for murder, the prosecution must prove beyond reasonable doubt:

- a) The death of the deceased and its cause.
- b) That the accused person committed the unlawful act(s) which caused the death, and
- c) That the accused person(s) had malice aforethought.

These criteria emanate from **Section 203** of the **Penal Code** which provides that:

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

47. The contentious issues which arise from the facts and evidence presented in this case are as follows:

- a) The complaint and the Charges against the Accused.
- b) Identification of the Accused persons.
- c) Whether the evidence proves beyond reasonable doubt that the murders were committed by the accused persons.

The Complaint and the charges against the accused

48. Throughout the cross-examination of the prosecution eyewitnesses, the defendants raised doubts about how the case against them was initiated relative to the historical disputes and cases between the two communities regarding the land in question. They referred to the case of **Republic v Korio ole Tuko and Ole Mapii alias Mavii Naivasha HCCRC No. 8 of 2015**.

49. I had the file for the above case (HCCRC No. 8 of 2015) availed for my perusal. The case was commenced on 10th February, 2015, about fourteen days after the incident occurred. The charges against the two accused persons therein are an exact replica of the charges in the present case against Accused 1 and 2. From the early proceedings in that case, it is clear that Korio Ole Tuko and Ole Mapii had not been arrested and were still at large. The proceedings suggest that at least one accused was never arrested although warrants of arrest were issued.

50. According to the proceedings on 20th July, 2015 the DCIO Naivasha was summoned to explain why the accused persons had not been arrested. On 25th September, 2015 the prosecution told the court that the charge sheet relates to the same deceased as in **HCCRC No. 9 of 2015** and **HCCRC No. 18 of 2015**; and that they were consolidated on 9th June, 2015. On 10th February, 2016 the prosecution told the court that the accused were still at large.

51. On 14th March 2016 the DCIO Naivasha addressed the court in HCCRC No. 8 of 2015 as follows:

“..... We sought for warrants of arrest which were issued. The suspects cannot be named by complainants. It has taken time to apprehend them. Korio ole Tuko was identified by complainant in Nakuru and arrested. He was charged in court.

Ole Mapii has not been arrested. He has crossed the border to Tanzania and could have surfaced. We are pursuing him.”
(Emphasis added)

Despite the arrest, subsequent entries in the proceedings in HCCRC No. 8 of 2015 indicate that the accused persons were never arrested and were still at large.

52. Subsequently, 1st November 2018, the prosecution orally applied to withdraw the case HCCR No 8/2015 on the grounds that the two accused were never arrested. The case was then withdrawn under **Section 82** of the **Criminal Procedure Code**. The court pointed out that the record *incorrectly shows that the case involved the same accused in HCCRC No. 9 of 2015 and HCCRC No 18 of 2015* (the present consolidated cases).

53. The present consolidated cases are **Republic v Philip Mwaura Timalo HCCRC No. 9 of 2015** which commenced on 17th February, 2015 and **Republic v Francis Patu Simpanoi alias Korio, HCCRC No. 18 of 2015** which commenced on 13th March, 2015. The curious twist in the latter case is that the accused was slapped with the alias name of Korio, which alias he has denied throughout the hearing, insisting he is known only as Francis Patu Simpanoi, and not Korio. I have used the word slapped upon due consideration, because there was no evidence presented, independent of the alleged victims, to show that the alias was a name generally and properly attributable to the 1st accused. The other curious twist is that the prosecution did not explain the fate or whereabouts of the person known as Korio Ole Tuko who was identified and arrested in HCCRC No. 8 of 2015 Naivasha.

54. In light of the statement by the DCIO that Korio Ole Tuko was indeed identified by the complainants in Nakuru and arrested, it was essential that the linkage be made between the person named as Korio Ole Tuko who was arrested, and the 1st Accused in the present case. Alternatively, an explanation ought to have been availed as to why Korio Ole Tuko was not charged. Equally, it was important to ensure that the investigating officer who made the offence - investigation - identification linkage and the decision to charge the 1st Accused after slapping the alias “Korio” should have been availed to testify on that issue.

55. In my view, the failure to avail the investigating officer to explain the alias was critical and cast a dark cloud of doubt on the prosecution’s case in light of the 1st Accused’s denial that he had any alias. This leads to the next issue on the identification of the accused persons.

Identification of the accused persons

56. In their evidence, PW1, PW2, PW3, PW4 all testified that they saw the 1st Accused hit the deceased during the attack. By strange coincidence they all referred to him only as Korio.

57. PW1 said he was merely 1 - 2 metres away when he saw Korio slashing the victims using a simi. He said he knew the 1st accused as a leader or Chairman of the Maasai group. He said he did not know Korio by any other names. According to PW1 who said he knew Korio for five years, the first person to be killed was Kibunja. The attack on Kibunja was witnessed as follows.

58. PW2 said he saw Korio hit Kibunja who fell and then he slashed the deceased. He saw all this from 100 metres away. He said he identified Korio as a resident at Maai Mahiu for seven years. He also stated that he identified Korio to the police at Nakuru. How this identification was done to the police was not testified to as no arresting or investigating officer was called.

59. PW3 said Korio was in the group of attackers; that the two men who died were attacked by Korio and Mwaura; that the victims were hit and slashed; that Korio was arrested in Nakuru in March 2015 as they attended a case. He said Korio was one of the leaders of Kedong Kitet. Notably, PW3 did not specifically state that he personally saw the accused hit Kibunja or George, although he said the two men who died were attacked by Korio and Mwaura.

60. PW4 testified that he was nearby when Kibunja was hit with a rungu. He said that one of the attackers was Korio who struck Kibunja with a rungu before cutting him with a panga.

61. Despite the apparent unanimity of these four witnesses that the 1st Accused hit and slashed Kibunja, it appears to me strange that all of them only knew 1st Accused as Korio despite living in Maai Mahiu in close proximity to the 1st Accused. It is also curious that none of these witnesses gave a description of the so called Korio.

62. From this evidence, the sense I get is that the PW1, PW2, PW3 and PW4 may have obtained the name Korio from the case in HCCRC No. 8 of 2015 or from any of the other cases shown by the defence to be ongoing in Nakuru. All of the four witnesses uniformly said they saw Korio slash Kibunja. However, in the Post Mortem report on Kibunja, Dr. Ndegwa did not find any injuries on Kibunja caused by sharp cuts from pangas, simis or knives despite PW1 saying he saw him being slashed from 2 metres away. This does not add up. To me, the evidence appeared rehearsed.

63. The attack on George Ngugi was also allegedly witnessed by PW1 and PW3.

64. PW1 said he was 2 metres away when Mwaura was hitting the victims with a rungu. He said he knew Mwaura from trading at Maai Mahiu and Naivasha.

65. In his testimony, PW2 did not say that he saw Mwaura attack George Ngugi. He did say, however, that Mwaura had a rungu.

66. PW3 said Mwaura was in the group of attackers and amongst the injured persons was George. He said Mwaura resides near the disputed shamba, and that the two men who died were attacked by Korio and Mwaura. He said Mwaura hit him (PW3) with stones. In cross examination PW3 said Mwaura (Accused 2) hit George with a rungu. He did not know where Mwaura was arrested.

67. PW4 testified that at the scene he saw Mwaura, who he knew because he visited prior to the fight. He said:

“Mwaura was on the shamba. He wore a sword and a rungu but I never saw him fight.”

This is despite PW1's opposite testimony that he was only 2 metres from Mwaura and that the man he saw hit people with rungus was Mwaura.

In cross-examination PW4 said he mentioned the name Mwaura to the police. Then in re-examination PW4 contradicted his earlier evidence that he never saw Mwaura fight when he said:

“Mwaura had a rungu and a panga on either side.... I stood close to him when the men arrived, I was about 10 metres away. Both men were together. There were many armed men in the group. All attacked, including hurling stones. The man called Kibunja was assaulted and later died”

68. PW5 also gave contradictory testimony. He said in evidence-in-chief that among the group of attackers he was able to identify Mwaura who had a panga in the course of the fight. However in cross-examination he said:

“I did not know any of the invaders by name or by physical appearance. Mwaura whom I have named in my evidence-in-chief.....I have forgotten.”

The record of proceedings shows that PW5 was unable to answer the question how the name of Mwaura came up. His evidence is not credible.

69. Similarly, stark contradictions are seen in the evidence of PW 4 who said he saw and identified 1st accused at the scene and that Korio:

“I only recognized Korio the old man. He struck Kibunja with a rungu before cutting him with a panga”.

In re-examination PW 4 said that:

“...Kibunja was assaulted and later died. He was attacked by group but I do not know who exactly....”

70. Equally, PW6 said the attackers charged at them with rungus, and that he saw Pastor George being struck and he witnessed the slashing.

In concluding his evidence-in-chief, he said that **“None of the attackers are here in court”**

71. All in all, the evidence of the events, and particularly of identification of the accused persons, appears to me to have been contrived or conformed to an intended outcome. With respect to the 1st accused, the evidence clearly has the undertones of having emanated from and being geared towards the fact that the 1st accused was a well-known leader of the Maasai community in the area deeply involved in disputing the right of the kikuyu community to settle in the disputed land.

72. With respect to the 2nd accused, although PW1 and PW3 stated that they saw him hit the deceased persons with a rungu, he was a convenient target for implication because, according to PW3 he lived near the disputed shamba. Further, there is the contradictory evidence of PW4 that he never saw the accused fight despite being only ten meters away from him, then stating in re-examination that the 2nd accused also attacked them including by hurling stones. The contradictions are a cause for caution in accepting the credibility of the said evidence, given the absence of investigatory verification

73. As discussed more fully below, it was the duty of the prosecution to avail all evidence, both inculpatory and exculpatory, in order to assist the court in determining the truth and to meet the ends of the proper administration of justice.

74. In absence of evidence as to how the accused persons were identified to the police, investigated and arrested, I caution myself that it would be unsafe to accept the evidence of identification, without more, as being sufficient to achieve the standard of proof beyond reasonable doubt.

75. To this end I close this analysis by citing the approach to issues of identification that was emphasized in the case of **Francis Kariuki Njiru & 7 Others vs. Republic Cr. Appeal No. 6 of 2001 (UR)** where the Court of Appeal stated:

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:

“.....It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.”

76. As earlier stated, in my view there were serious inconsistencies in the of identification of the two accused, made worse by the fact that not a single report appears to have been made to the police; no identification was made to the police, no investigation to connect the accused with the perpetration of the incident, no investigation of the veracity of the identities and of the alias, and no descriptions of the accused to the police. All these gaps necessitate my being even more careful on identification in this matter.

Whether the evidence availed proved beyond reasonable doubt that the accused committed the murders

77. It is trite law as entrenched in the Kenya Constitution 2010 under **Article 50 (2) (a)** that an accused person is presumed to be innocent until the contrary is proved. To this end, the **Evidence Act Cap 80 at section 107 (1)** provides that:

“whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”

78. Thus, in our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state, nor is it for the accused to prove his innocence. That burden of proof of an accused’s guilt rests solely on the prosecution throughout the trial. Some critical aspects of the evidence in this case are as follows.

79. Evidence of the post mortem reports: According to Dr. Ngulungu, the death of George Ngugi was caused by severe head and chest injuries attended by hemothorax and subdural hematoma due to multiple blunt object trauma in keeping with homicide. The chest showed bruises on the left of chest and injuries to the 2nd to 6th ribs. The deceased’s head had a laceration on the left and subdural hematoma. According to Dr Ndegwa who presented the report, Dr Ngulungu noted the laceration as being **“a wound by a blunt object measuring 26mm x15mm on top of head”**. There was, however, no evidence that the deceased was hit with a sharp object.

80. The injuries on Kibunja are not compatible with the overwhelming eyewitness testimony to the effect that after the deceased was hit with a rungu, he was then: cut with a panga (PW1), cut with a simi (PW1); slashed with a simi (PW2); slashed with a knife (PW3); cut with a panga (PW4).

81. On the other hand, the post mortem report of Dr Ndegwa on the body of Peter Kibunja Gitau opined that the cause of death was severe cranio-cerebral injuries due to blunt force trauma consistent with assault. The head had subcutaneous contusions at the posterior parieto-occipital scalp area, and massive subdural hematoma resulting in increased inter-cranial pressure; and the base of the skull was fractured. Dr. Ndegwa was clear that there were no cuts on the deceased.

82. Evidence of police investigations: PW9 Sergeant Peter Wanjama, limited his evidence to confirming that there was a large gathering at the farm when he went there following a report by the chairman of the farmers; that he shot into the air and the fight subsided. Critically and tellingly, he added that:

“...I was not able to identify any of the attackers.....All sides claim ownership of the shamba. It is difficult to identify any of the accused in respect of the events of that day.” (Emphasis added)

83. In cross examination he said that he did not have a list of the persons injured; that he did not know if there were cases filed about the injuries/attack; that he was aware of the murder case 8 of 2015 R v Korio; that he did not know why the accused were charged; and that he did not know why the two accused are in court.

84. The Government pathologist was expected to testify, but eventually did not attend court. No weapons were produced in court either.

85. In *Bukenya & Others v Uganda [1972] EA 549* the court addressed itself as follows on the role of the prosecution in endeavoring to ensure a reasonable fully investigated case is presented to court:

“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.” (Emphasis added)

86. Further, in the case of *Juma Ngodia v Republic (1982-88)1 KAR 454*, the Court of Appeal held as follows regarding the role of the prosecutor in respect of witnesses:

“The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution.” (Emphasis added)

87. I agree with the defence in their submissions that it was absolutely critical for the prosecution to avail the evidence of the investigator and arresting officer in this case. This is particularly relevant in the present case given the following: how the case commenced, the complaints made and identification of the accused, the investigations done; and how it mutated from the charges for murder against Korio Ole Tuko who was in fact arrested, to a charge against **Francis Patu Simpanoi alias Korio**; and the inclusion of an alias to the name of the first accused.

88. I think that to a certain degree, given the conduct of the prosecution case, the accused in this case were not accorded their full rights to a fair trial under **Article 50(2)(j)** of the Constitution:

“(j) to be informed in advance of the evidence the prosecution intends to rely on, and have reasonable access to that evidence”

89. It is a matter of great concern to the Court that the linkage between the events that occurred at the scene of the crime at the shamba, and the identification and arrests of the accused persons, through to the investigative aspects of the case were not made manifest here. They are shrouded in secrecy and intrigue. There is unclarity as to how the case came to be prosecuted without any evidence of an investigation, notwithstanding the seriousness of what happened and the fact that the consequences are all so clear and dire.

90. In the case of *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR*, the court held as follows with regard to the prosecutions responsibility to avail trial material:

“The right to be provided with material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.”

91. I am alert to the fact that it is almost impossible for a prosecution case not to have some discrepancies. I am also aware of the Court of Appeal’s decision in the case of *Joseph Maina Mwangi -vs- Republic, Criminal Appeal No. 73 of 1993* where it held:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

92. In the present case, I consider the overall discrepancies to be so fundamental as to be capable of resulting in serious prejudice to the accused persons.

93. I would go as far as to state that this court has been deprived of substantive and critical material evidence of the chain of complaint-identification-arrest-and investigation in this case. I have already highlighted all these aspects. Given the entirety of the circumstances discussed herein, and taking particular note of the evidential gaps, it is therefore impossible for this court to reach just ends through just means.

94. Ultimately, I am unable to find from the evidence adduced, that the prosecution's case against the accused persons has been proved beyond reasonable doubt, and on the strength of such evidence as has been availed a conviction of the accused would be unsafe.

95. Accordingly, the case is dismissed and both of the accused persons are set at liberty unless otherwise lawfully held, and sureties discharged.

Administrative directions

96. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

97. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

98. Orders accordingly.

Dated and Delivered at Naivasha this 25th Day of November, 2020

R. MWONGO

JUDGE

Delivered via Teams videoconference in the presence of:

1. Ms Maingi for the DPP
2. Mr. Rono for the Accused
3. Accused 1 - Francis Patu Simpanooi
4. Accused 2 - Philip Mwaura Timalo
5. Court Clerk - Quinter Ogutu