



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 03 OF 2017

(consolidated with HCCR.NO.9/17)

REPUBLIC.....PROSECUTION

VERSUS

JOSPHAT MAINA MUTAHI

LABAN GACHENGA NGATIA

JOSEPH KAHIHU WAGITUI

DAVID NDERITU MURIITHI.....ACCUSED

RULING AND JUDGMENT

The four accused persons **JOSPHAT MAINA MUTAHI, LABAN GACHENGA NGATIA, JOSEPH KAHIHU WAGITUI** and **DAVID NDERITU MURIITHI** are jointly charged with Murder contrary to section 203 as read with section 204 of the Penal Code.

According to the consolidated information dated 3rd January 2018 on the night of 14th and 15th May 2017 at Gachuiro in Mathira West Sub County, Nyeri County within the Republic of Kenya jointly with others not before the court they murdered **MARTIN IRUNGU GATHONI** *alias* **WAGATHONI**.

The prosecution called 10 witnesses who included 2 police officers, PW8 who visited and secured the scene, and PW9 who was the Investigating Officer.

At this stage the court is expected to determine whether the prosecution has established a *prima facie* case to warrant the accused person to be put on their defence. What amounts to a prima facie case was stated in the case of **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** which was cited with approval in by the Court of Appeal in **Anthony Njue Njeru -Vs- Republic [2006] eKLR**. *The court stated:*

“It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction” ...

Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence.

It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit,

or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” (emphasis mine)

The Evidence

The case for the prosecution is that on the 13th May 2017, A4 David Nderitu Muriithi who is a cousin to PW1 **Patrick Muriithi Maina** and PW2 **Benson Wahome Maina**, and nephew to PW7 (mother to PW1 and PW2) **Anne Kagure Maina**, alleged that his sheep or goats had been stolen. He rang PW2 and told him as much. He also told him that he suspected PW1, and wanted to ask him about it. PW1 is the elder brother of PW2.

PW2 aware of the bad blood that existed between A4 and PW1 told A4 to wait until the following day 14th May 2017 so that they would discuss the issue in his presence.

The following day PW2 met A4 at the local shopping Centre and told him he was going home and they could meet there to discuss the issue. PW2 went home and informed his father one Richard Maina about the impending discussion. He did not find his brother PW1 at home. His father told him to call him as soon as A4 arrived. Later PW2 in the company of his wife proceeded to the home of A4 to confirm that the meeting to discuss the issue of the stolen animals was still on. According to PW2, A4 told him that the meeting would not be necessary as he was no longer pursuing the issue. PW2 went back home and reported to his father and left for Nyeri. When he reached Nyeri he asked his son to call his grandmother (PW7) to tell her they had arrived. The boy told him that his *Cucu* was crying. He called her himself. She was crying. He dropped his wife and child and turned back picking his uncle one Jeremiah Wanjohi on the way. They tried to call his mother and brother PW1 as he drove back in vain.

On arrival he parked in A4's compound as he saw people at gate leading to his home. He walked to the home met his father who told him that A4 had come with a group of people and they were trying to eject PW1 from his house. He saw his mother standing at PW1's door. He saw A4, A3, one Nderitu and others who are at large. He asked A4 what had happened yet he had told him the matter was over? A4 told him that he had come for PW1 so that he could show him the other thieves, including one Wambugu PW10. There was a lot of tension as evidenced in the testimonies of PW1 and his mother PW7.

According to PW1, that evening he bought some meat and went to pick his wife from the salon at General China Shopping Centre. When he arrived at the *boda boda* parking at the shopping centre, he saw A3 get up to make a call, he heard what A3 said in the call that “*jamaa amekuja na ile mbuzi walikuwa wakichinja*” (that guy has arrived with the goat they were slaughtering).

He went, collected his wife, they went home, where she cooked supper and they ate with their children and went to bed. Around 9:00pm he heard the sound of motor bikes, three of them in the compound and thought they were his visitors. Then he heard a voice asking at his mother's house “where is Muriithi?” It was the voice of David Nderitu his cousin, A4. He heard his mother's voice ask what the problem was and the response from David was – “we must kill him today” and with that the group headed for PW1's door and began to knock. That prompted PW1's mother, PW7 to go to his house and stand at the door obstructing their entry. A4 told her twice they had come to kill her son. PW1 stood behind her asking what this was all about. PW7 telling them trying to stop them from entering her son's house. The two identified A4, and 2 others who were at large Kibuchu and Kabao and A3, Joseph Kahihu. Those people were saying they wanted to kill PW1, Benson Wambugu PW10 and Irungu Gatheru.

To reduce the tension from the homestead PW2 told his brother PW1 to leave with his uncle. The rest of the group went in search for Wambugu PW10. PW1 testified he followed them at a distance and watched them enter the home and demand for him to come out only for his mother to scream he was not in. At some point someone said that Wambugu and Irungu were at Ruthagati shopping Centre. The group went there and called them from the bar where they were drinking and everyone was told by A4 to go to General China Shopping Centre.

According to PW2 when he arrived at General China, he found when the others Wambugu and Irungu had been traced. A brother to Nderitu Kabao told A4 to go and report the issue of his stolen goats at the police station and abandon the rest of the issue there. The talk about reporting to the police appeared to tone down the group. PW2 testified that his uncle told him it appeared they had agreed to solve the problem. That is when he decided to leave having told them to report to the police the following day.

According to PW1 when everyone arrived at General China, that is where a fight broke out. According to PW10 it was PW2 who was leading the interrogation asking about the stolen goat and who else had participated in the theft apart from PW1.

Irungu the deceased was complaining that he had been made to come to General China for nothing, he had burnt his fuel as he had to ride his *boda boda* there and who was going to pay? It was then that A4 hit him on the back with a piece of wood. A2 tried to separate the two but A4, Kabao and Kibuchi began to beat A2 he was seriously injured. He collapsed prompting A1 to call an ambulance.

Irungu the deceased had tried to intervene when A2 was being beaten and he too was attacked by A4, A3, Kabao, Kibuchi. Deceased ran away and was followed by A3, A4, Kabao and Kibuchi. PW1 alleged that A3, A4 and Kabao hit deceased with sticks and metal bars. However, it turned out from his statement that when deceased ran away from the scene at General China, he, and PW10 also ran away for fear of their lives. In fact PW1 told the police that Irungu, upon sensing that his life was in danger, took to his heels. That after some time those who had chased him came back to where the rest of the group was. PW1 leant the following day the Irungu was dead.

PW6 **Esther Mumbi Wandeto**, testified how she received a call from one Joseph Muthee (identified as 1st accused) at 12:36am on 15th May 2017 warning her not to leave her house as they were chasing goat thieves.

PW5 **Joseph Mwangi Wandeto**, a brother to PW6 and sister to mother of the deceased learnt of the deceased's death on 15th May 2017 at

7:00am from PW6. He went to the scene and found the deceased lying dead in a banana plantation in the shamba of Muthee Kibebe.

Around midnight of 14th May 2017 the in charge Tumutumu Police Post rang PW8 **CPL David Omudeki** informing him that one victim of assault by the name Laban Mwangi A2 had been escorted to PCEA Tumutumu hospital by members of the public. At 4:00am on the morning of 15th May 2017 he visited the A2 at the hospital. He had a head injury and was not talking.

At 7:05am 15th May 2017 a report was made by three members of the public that there was the body of Martin Irungu Wa Gathoni lying in the shamba of Esther Mumbi at General China Trading Centre.

He informed the OCPD Mathira West. They met at the scene with him and other officers. The body was lying in a lot of blood. They removed it to Karatina District Hospital mortuary. There were no weapons at the scene.

The matter was taken over by the CID in the form of PW9 the Investigating Officer. He testified that he visited the scene of murder on 15th May 2017 at 18:20pm. Upon inquiries from unnamed members of the public he found there, he learnt that A1 and A2 were suspects. On 18th May 2017 he arrested A2 upon his discharge from Tumutumu Hospital. He testified that other witnesses told him that the deceased was attacked by A4 and others on allegations that he (deceased) and others were responsible for stock theft cases in the area, that an officer at Kiamacibi police station denied any report of stock theft from that area. He said A1 was identified by PW1. That motive was that 4th accused had lost his sheep and he chose to engage members of the public to assist him to investigate the case. That A2 was arrested as among those who were hitting the deceased. He proceeded to charge the 4 accused persons.

The Law:

The Penal code provides:

203. Murder

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

204. Punishment of murder

Any person convicted of murder shall be sentenced to death.

206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

Analysis

From the testimonies on record, and the evidence of PW1, and the investigating officer it is evident that the 2nd accused came to the scene at General China when a crowd had formed. His participation in the whole scenario was to try and stop the fight that erupted when Irungu the deceased was being beaten. A person who intended to hit the deceased actually missed and hit him causing him serious injuries. There is no evidence that he was in the group of boda boda riders who went looking for the goat thieves at Ruthagati Shopping centre. He was not seen at the home of PW1 or that of PW10. Hence there is no scintilla of evidence to tie him to any of the ingredients of the offence to warrant his being put on the defence.

For A1, PW6 introduced testified that he called her on the material night to tell her not to leave the house because 'they' were chasing thieves. On the other hand, it is not clear why he would call PW6 and not any other person.

PW6 made a lot of capital out of the alleged call in her evidence in chief. She alleged that A1 told her that they were 'chasing goat thieves to kill them' only to deny the statement in cross-examination. She does not say whether A1 told her he was among those chasing the thieves, on whether he had witnessed the chasing of the thieves. It is evident from PW1 that A1 was at General China Trading centre where a crowd of over 40 people had formed. It was the testimony of PW1 that A1 is the one who called the ambulance to when he noticed how seriously injured A2 was. The ambulance came and picked A2 and took him to Tumutumu PCEA hospital where the police found him. There is however no evidence that A1 and A2 were in the group that went to PW1 and PW10's homes or to Ruthagati in the search for Irungu(deceased) and Wambugu PW10.

The investigating officer charged A1 because of the alleged conversation with PW6 and the evidence that he called the ambulance that picked A2 because that was proof of his was present at General China shopping centre. Clearly those two facts alone do are insufficient to tie the A1 to the offence.

Similarly, by the time A4 and A3 and others are said to have chased Irungu (deceased) A2 had left the scene in the ambulance. A2 is not mentioned as any of the persons who chased the deceased or hit him with anything. The Investigating officer's assertion that the fact the he sustained injury was evidence of not only his presence at the scene but also participation in the committing of the offence is not borne by evidence.

The A3 and A4 were mentioned as having been in the group that went searching for the suspects of the alleged theft of goats, they were mentioned as being among those who chased the deceased from General China shopping Centre, only for him to be found dead later. A4 is mentioned as the person who alleged that his goats or sheep were stolen by PW1, PW10 and Irungu (deceased).

Submissions.

I have carefully considered the rival submissions by counsel for each accused person and for the state.

Determination

From the foregoing consideration of the evidence and the law it is evident that the prosecution has not established a prima facie case to warrant the A1 and A2 to be put on their defence. With regard to each one of them I make a finding of not guilty as provided for under s. 306 (1) of the Criminal Procedure Code.

With regard to A3 and A4 I find that the prosecution has established a prima facie case to warrant each be placed on his defence and each will be placed on his defence in compliance with s. 306(2) of the same code.

Dated, delivered and signed in open court at Nyeri this 8th Day of February 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Court Prosecutor: Ms.Kiu

Accused Persons: present

Counsel for accused persons:

Waweru Macharia for Accused 1, holding brief for Maina Karingithi for Accused 2.

Gathiga Mwangi for Accused 3

Ombongi for Accused 4.

Mumbua T Matheka

Judge

8/2/19

JUDGMENT

Following the ruling on 8th February 2019 out of which Accused 3 and Accused 4 were put on their defence – the issue for determination is whether the prosecution had proved its case beyond a reasonable doubt against each of the accused.

In his defence Accused 3 – **Joseph Kahihi wa Gitui** made an unsworn statement of defence He told the court that on 14th May 2017 he was at Kiawarigi shopping Centre until 10:00pm having drinks at Wananchi Bar. On his way home just after 10:00pm he found a crowd at General China Shopping Centre and upon inquiry he was told that some people were being looked for. He stood to watch.

Some people left for Ruthagati to collect those who were being looked for. He saw the deceased come with his friend one Benson Wambugu. He testified that the two began to argue and one Patrick Muriithi –PW1 gave the deceased a knife with which he stabbed Laban on the head. That Laban fell down and it was because of the deceased's act of stabbing Laban that led to the crowd chasing the deceased

towards Gachuiro school. He never moved from where he sat until the ambulance came and Laban was taken to hospital. Later the deceased's motor bike was collected from the scene by two Administration Police Officers.

Accused 4 David Nderitu Muriithi's testimony was that on the material night he was at General China Shopping Centre until 9:00pm and left for home. About 9:30pm he heard the sound of many motorbikes passing to the home of his cousin Richard Maina Nderitu. He went to check but on his way heard people talking in loud voices and screams. It was approximately 30m away from his home.

Upon arrival he found about 20 people who were saying that PW1 – his cousin and others were stealing other people's goats. These boda - boda people were now demanding that Patrick get out of the house.

Soon thereafter Patrick's brother Benson Wahome came and persuaded Patrick to get out of the house – which he did. They left in Benson Wahome's car followed by the boda- boda people. He did not know where they went but went to his home to sleep.

About 10:30pm he heard noise at General China approximately 500-600m from his home. Motorbikes were hooting and revving. He heard screams. He went to check. He found people were over 50 people. The deceased was fighting with Laban- Laban defeated the deceased who produced something with which he stabbed Laban who collapsed.

People now chased the deceased who ran away towards Gachuiro Primary School. Laban had collapsed. Accused 1 rang an ambulance while he, and some other people laid Laban aside. The ambulance came and took Laban away. He remained at the scene at General China. He had no idea that deceased died/how he died.

He denied any knowledge about deceased being a goat thief, he denied inciting the crowd over his stolen goats – he conceded that indeed his goats had been stolen, but he reported to the chief as he did not know who had stolen them, neither did he have any reason to accuse the deceased of the theft.

On cross-examination he said he was at PW1's home when he heard people say that he was one of the goat suspects. He said people did not say that the deceased was a thief but that Benson, PW1's brother is the one who said that there were people who were stealing with PW1. He said there were people saying that PW1 was a thief. This was said at PW1's and his mother was there, he confirmed that the people who came there were boda- boda riders and a big crowd of about 15 people. He denied calling these people. He said he was present when deceased attacked Laban but he could not tell who gave chase to the deceased.

DW1 Purity Wairimu Muchiri, accused 4's neighbour testified about the noise that was heard from General China, while they were sleeping. She said she and her husband went to General China to see what was happening, they went about 11:30pm and found that Laban had already been stabbed, lying down unconscious, bleeding from the face. She did not see who stabbed him- that she saw accused 4 assisting Laban.

On cross-examination she said PW1's home was nearer hers approximately 30m that she heard the screams and noise on his home that night but did not go there because they have a bad relationship- that explained why she could go to check on the noise at General China approximately 500-600m away. She said she did not know the deceased and she never saw him that night.

DW2 Patrick Githae Njeri heard the commotion in the home of PW1, he found people there , motor bikes and a Probox motor vehicle. He learnt that there was rounding up of goat thieves. They left and he left. About midnight he heard screams from General China – he found 2 people who were fighting being separated – the deceased and Accused 2. It was then that the deceased injured Accused 2 and he fell. Deceased ran away and part of the crowd followed him while he and the rest of the crowd remained at the scene assisting Laban, Accused 2. He said that he was not sure whether he found the Accused 4 at the scene.

Under cross-examination he said he heard people talking about lost goats. He said he did not find the PW1 at General China.

At the close of the defence, for Accused 3 it was submitted the accused 3's defence was that the deceased fought with one Laban- Accused 2; that no one saw Accused 3 follow the deceased to scene where he was found dead. That the only evidence was that the accused 3 was at the scene. That there was no evidence that he was in the mob that actually killed the deceased.

He relied on **Sawe Vs.Republic (2003) eKLR** on the standards for circumstantial evidence.

Republic Vs.Alfayo Otieno Ogunga Criminal Case 26 of 1993.

Republic Vs.Pears Waeme Okumu & 3 others (2017) eKLR.

Republic Vs.Philip Mwangi Chege (2006) eKLR

For the 4th accused written submissions were filed on 28th March 2019. The main argument for the 4th accused was that he was not among those who chased the deceased and that he had an alibi as to where he was – not at the scene where deceased was killed, but at the scene where deceased had hit Accused 2, leaving him unconscious. He relied on **Kiarie Vs. Republic (1984) KLR** on the argument that an accused person is not expected to prove his alibi- and on **Uganda Vs Sebyala & others (1969) EA 204** where the Judge observed that all an accused's alibi had to do was create a doubt in the mind of the court as to the strength of the case per prosecution.

That the only reason the 4th accused was in the dock was because he raised concern over his stolen goats.

I have carefully considered the evidence before me and the defence raised by the 2 accused persons. The case for the prosecution was that

the deceased and the PW1 were rounded up together with others at the behest of Accused 4 for being goat thieves. That Accused 4 took boda boda riders to the home of PW1 and to the bar at Ruthagati to look for the deceased. Both Accused 3 and Accused 4 were in the home of PW1 when the crowd went looking for PW1. The case for the prosecution was that it was because of the Accused 4's incitement of boda boda riders to look for the persons who stole his goats that the accused person was killed by a mob.

It is clear from the defence that even if that was so, there was an intervening factor- the deceased attacked and injured Accused 2 and ran away- that it was out of the crowd's anger for what the deceased and that the crowd chased him. That the killing of the deceased by the mob was not directly connected to the Accused 4's complaint about his stolen goats but as a result of the fight the deceased engaged with the Accused 2.

The case for the prosecution is that Accused 4 led the crowd that went for PW1. Upon leaving his home they went in search of Benson Wambugu the other suspect. PW1 specifically testified that he saw Accused 3 and Accused 4 knock on Wambugu's door asking for where he was. That after all three were traced, PW1, deceased, and Benson – it was Accused 4 who said they all go back to the General China. It was PW1's testimony that it was Accused 4 who hit deceased with a piece of wood and a fight broke out between them.

That Accused 2 tried to stop the fight but Accused 4 and others beat him up. One Joseph Kahuthu gave one Nderitu Kabao something he aimed to hit deceased with but missed and that Accused 2 who fell down and the deceased ran away- followed by Accused 3, Accused 4 and others. The A3 and A4 called witnesses who testified that they did not go after the deceased when he was chased by the mob.

PW1's testimony that he saw Accused 3 and Accused 4 hit deceased with sticks and metal bars, or that he heard one Kabao say they had killed him or that now it was PW1 and Benson Wambugu's turn to be killed, was not corroborated by any other witnesses for the prosecution. This part of his testimony was also not in his statement. In fact in his statement he stated that during the commotion the deceased sensed his life was in danger and he ran away. He stated also that when the deceased ran away he was followed by **some** people from among the crowd that had formed. Hence although PW7 the mother to PW1 said she saw A3 at her home, was among that crowd, the evidence that he followed the deceased, was such was dislodged by his defence as there was doubt as to whether he hit or followed the deceased.

However, PW2 confirmed that he found Accused 4 in his parent's home leading the pack that was looking for the PW1.

PW7, the mother to PW1 corroborated the testimony of PW1, PW2 that Accused 4 led the gang that went in search of the goat thieves and refused to listen to the advice to go to the police station.

If the 4th accused had not raised the accusations against PW1, the deceased and others, that they were goat thieves, and had heeded the advice to report the matter to the police, the crowd would never have gone looking for the these three as goat thieves. It is at the behest of A4 that a mob formed to look for those who had stolen his goats. That is a fact.

The question then is, having found that as a fact, should the 4th accused be let free, yet his utterances and actions led to the death of the deceased herein in the hands of unknown persons? I think that the ordinary Mwananchi to whom the song is sang daily that 'usichukue sheria mikononi mwako' must have some concreteness. In this case the evidence is clear that the 4th accused, instead of reporting to the authorities authorised by law to deal with this issues, chose his own mode of alternative justice that instead of producing his stolen goats led to the death of the deceased.

Having heard his defence, A4 had no intention of killing the deceased. He did not participate in killing the deceased, but he lost his goats and though he denied it, the evidence is there that he started the search for the deceased and others calling them goat thieves, utterances that led to the formation of the mob which he led to the home of PW1 and in search of 'the other thieves'. He cannot be allowed to do that and go scot free.

That is where, in my view, s. 179 of the Criminal Procedure Code comes into action. It states;

s. 179 of the Criminal Procedure Code provides:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

Section 191. provides for the Construction of sections 179 to 190

The provisions of sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 179.

The application of Section 179 was given by the Court of Appeal in the case of **Rashid Mwinyi Ngusya and Another –Vs- Republic [1997] eKLR** in which it was held: -

“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to

conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial...Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code.”

In Kalu v Republic (2010) 1 KLR The Court of Appeal dealt with the issue of substitution and stated thus:

‘... All the provisions of the Criminal Procedure Code which are under the heading: - **“Convictions for Offences Other Than Those Charged”** and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is a minor and cognate to that of murder...”

Again in **Robert Mutungi Muumbi v Republic [2015] eKLR** the Court of Appeal said:

The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged.

*An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, **the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.** (See **ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398.**)*

*Spry, J. explained the essence of the first consideration as follows in **ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294**, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:*

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

The key ingredient of murder is the causing of death of a person by the unlawful act of another with malice aforethought. Manslaughter subtracts the malice aforethought. In this case the 4th accused did not himself cause the death, but did something which he was aware of, that led to the cause of the death. He has all along been aware that one of the reasons he was before this court is the act of assigning the PW1 and the deceased the title of goat thief, causing members of the public to go after them and leading them to look for them. In my considered view those acts fall squarely into the provisions of s. 96. Of the Penal Code which provides for the offence of : **Incitement to violence and disobedience of the law.** It states:

*Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, **utters, prints or publishes any words, or does any act or thing**, indicating or implying that it is or **might be desirable to do**, or omit to do, any act the doing or omission of which is calculated—*

(a) to bring death or physical injury to any person or to any class, community or body of persons; or

(b) to lead to the damage or destruction of any property; or

*(c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, **is guilty of an offence and is liable to imprisonment for a term not exceeding five years.***

The offence of incitement is seen inside the offence the accused was charged with. It is a case of where the offence proved is included in offence charged.

Hence, For the 4th accused avert Nderitu Mureithi, I substitute the charge of murder with the offence **Incitement to violence and disobedience of the law c/s 96 of the Penal Code. I find him guilty of the offence of incitement to violence c/s 96 of the Penal Code and convict him accordingly.**

For the 3rd accused I give him the benefit of doubt acquit him accordingly.

Dated, signed and delivered in open court this 27th day of June 2019 at Nyeri.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant: Juliet

Ms. Ndung'u for state

Mr. Mugo for the accused person

Accused persons present

Judge