



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
[CORAM: A. C. MRIMA, J.]
CRIMINAL CASE NO. 21 OF 2018

REPUBLIC.....PROSECUTOR

-versus-

- 1. JAMES MUHIRI MWITA *alias* NYABOBE**
- 2. PETER MUCHUMBE MWITA *alias* MUCHUMBE**
- 3 NICODEMUS MWITA JAMES *alias* OKWACHI..... ACCUSED**

JUDGMENT

1. **Simion Chacha Mwita** (hereinafter referred to as '**the deceased**') was attacked in his house at Nyamesangora village in Kuria West Sub-County within Migori County by a weapon-wielding gang in the morning of 03/08/2018. He died instantly.

2. Out of police investigations **James Muhiri Mwita *alias* Nyabobe** (hereinafter referred to as '**the first accused person**'), **Peter Muchumbe Mwita *alias* Muchumbe** (hereinafter referred to as '**the second accused person**') and **Nicodemus Mwita James *alias* Okwachi** (hereinafter referred to as '**the third accused person**') were arrested and charged with the murder of the deceased. The first and second accused persons were step-brothers of the deceased whereas the third accused person was a son to the first accused person.

3. They all denied the information. A trial was held.

4. The prosecution called six witnesses. **PW1** was a neighbour to the accused persons and the deceased. He was called **Paul Matiko Mwita**. **PW2** was **Dr. Awinda Victor Omollo**. The wife of the deceased testified as **PW3**. She was **Tabitha Robi Chacha**. A sister to the deceased and the first and second accused persons one **Mogosi Mwita Nyabobe** testified as **PW4**. **PW5** was a neighbour to the deceased. He was one **Jacob Mutongori Ng'oina**. **No. 54282 PC John Meli** attached to the DCI Kuria West District testified as **PW6**. He was the investigating officer. For the purposes of this judgment, I will refer to the said witnesses according to the sequence in numbers in which they testified.

5. **PW3** and **PW5** were eye-witnesses. They narrated what they witnessed in the morning of 03/08/2018.

6. PW3 was asleep with her husband, the deceased, and their 3 children in their house. At around 06:00am she was suddenly woken up as their house was pelted with stones. The house had an iron-sheet roof. There was great commotion. She heard many people shouting in Kikuria language. They demanded that the deceased goes out of the house. Both the deceased and PW3 recognized the voices of some of the members of the group as those of the accused persons herein. The deceased declined to go out of his house as he feared for his life. PW3 instead went out of the house and the deceased immediately locked himself inside. The deceased was physically-challenged.

7. PW3 saw a crowd of people in the compound. She estimated them to be around 50 people. More people however kept on streaming to the home. PW3 saw and readily recognized the accused persons herein. They were her close family members. PW3 confirmed that the voices she had heard while inside her house were truly those of the accused persons. All the accused persons were variously armed. The first accused person had a long iron rod. The second accused person had a panga and the third accused person had a nut. PW3 also recognized other people in the crowd. According to PW3 the accused persons were leading the crowd. The accused persons did not live within the Komamange village where the deceased had established a home. They hailed from Komasinje village which was very far from the home of the deceased.

8. The accused persons addressed PW3. They ordered her to produce one **Benard Moi**. PW3 knew who Moi was. Moi was a brother to the first and second accused persons. He was also a step-brother to the deceased. Moi was by then alleged to have disappeared. Since Moi was not at her home PW3 so informed the accused persons. The accused persons did not accept her answer and ordered her to sit on the ground. She obliged.

9. The accused persons kept on calling and demanding that the deceased comes out of the house. The deceased did not. The accused persons then decided to demolish the house in order to access the deceased. PW3 witnessed the accused persons demolish her house. As the accused persons were busy demolishing the house PW3 moved away from where she had been ordered to sit down. She stood at their immediate neighbour's house. She was about 50 metres from her house. She could still see the rest of the events as they unfolded. The accused persons managed to demolish the house. They gained access into the house. They removed the deceased from the house amid a vicious struggle. The accused persons carried the deceased shoulder-high as they removed him from the house.

10. The accused persons placed the deceased in the compound. They began assaulting him. They demanded him to produce Moi. PW3 saw the second accused person cut the deceased on the back and the leg with the panga. The third accused person hit the deceased with the nut on the chest and the abdomen. The first accused person hit the deceased on the mouth with the iron rod. PW3 testified that the accused persons collectively assaulted the deceased until he lay motionless on the ground. PW3 knew that the accused persons had killed the deceased.

11. PW3 heard the accused persons asking where she was. She then ran away to Kehancha Police Station through Ikerege and Getonganya centres. She reported the matter to the police.

12. PW3 was aware of the family dispute. The dispute involved the inheritance of land. The father of the deceased and the first and second accused persons was polygamous. He married 2 wives. The deceased was from the house of the first wife whereas the first and second accused persons were from the house of the second wife. The dispute was longstanding. A lot of reconciliation and mediation had been undertaken by the local administration in vain. The family was finally advised to file a succession cause in Court. The deceased filed a succession cause in Kehancha court. The case was scheduled for hearing on 09/09/2018. PW3 was also aware of other 2 criminal cases between the brothers in the same court.

13. PW5 also witnessed how the deceased died. As said, PW5 was a neighbour to the deceased. In the morning of 03/08/2018 PW5 was at his home. At around 07:00 am he heard screams on the road leading to the house of the deceased. He rushed towards the road. He saw a large crowd of people. He recognized some of the people as his fellow villagers. He also recognized some family members of the deceased. The family members of the deceased stated that they wanted to have a family discussion with the deceased.

They were also armed. The first accused person had a long iron rod while the second and the third accused persons had pangas.

14. PW5 followed the crowd. The caravan found its way to the home of the deceased. PW5 saw PW3 and her two children at the home. PW5 then asked the first accused person what was wrong. The first accused person warned PW5 from interfering with family matters and ordered him to keep off. PW5 stepped aside as he watched the events unfold. The accused persons asked all non-family members not to interfere with their operation.

15. The accused persons called the deceased and asked him to get out of the house. The deceased declined. PW5 sensed danger. He then decided to take action to rescue the deceased. He rode a motor cycle. He aimed at rushing to the AP Camp at Ikerege and report the matter. It took him around 6 minutes to reach the Camp. He informed the police. The police insisted that they could not move to the scene until they were directed by the Area Chief. The police tried to reach the Chief over the phone in vain. PW5 returned to the scene.

16. When PW5 returned, he found that the house of the deceased had been partly demolished, but the deceased was still inside. He stood around 20 metres from the house. The accused persons struggled to pull the deceased out of the house. Finally, they managed to get the deceased out of the house and they began assaulting him. The accused persons were in the company of a woman. PW5 stated that there were many people in the homestead but they all stood on the side of the compound. PW5 estimated the number of the people to be around 200. The accused persons and the deceased were at the middle of the compound. Everyone watched what happened.

17. The accused persons vented their anger on the deceased with the weapons. The first accused person used the iron rod to hit the deceased all over the body. PW5 also witnessed the second and third accused persons cut the deceased with pangas. The woman had a stick and also assaulted the deceased. The joint venture continued until the deceased was still on the ground. They then left.

18. PW5 went to where the deceased was. He observed him closely. He saw injuries on the head and the face. He then covered the deceased with a blanket as they waited for the police.

19. PW5 did not know whether the deceased and the accused persons were siblings but he was aware that they were family members and were engaged in a land dispute. PW5 had previously leased part of the disputed land from the deceased and the accused persons were not happy of that. The matter escalated to Kehancha police station where it was amicably resolved. PW5 had no grudge with the accused persons.

20. PW4 was a sister to the deceased. Her mother was the mother of the deceased. Their mother was the first wife to their father who had 2 wives. PW4 lived in Namba Tano in Kehancha town. She was the eldest daughter in the family.

21. PW4 was called by the deceased in the morning of 03/08/2018 at around 06:00am. The deceased told PW4 that his house had been surrounded by attackers who included the accused persons. The deceased informed PW4 that his life was in danger and that he had locked himself inside his house. The deceased gave PW4 the names of the accused persons. PW4 knew the accused persons well as they were her step-brothers. PW4 could hear the sounds of commotion in the background. The deceased asked PW4 to rush to Kehancha police station and seek assistance before it was late. PW4 rushed to the police.

22. The police acted with speed and left with PW4 in a police vehicle. They were two police officers. As the police were about to reach the home of the deceased they met the accused persons on the way. The accused persons were leading a crowd of people and they were celebrating. The road was bad and the vehicle moved slowly. PW4 saw the accused persons clearly. They were armed. The first accused person had both a blood stained shirt and panga, the second accused person had an iron rod and the third accused person had a club. As the vehicle moved slowly PW4 asked the accused persons if there was anything wrong at the home of the deceased. The first accused person told PW4 that they had finished him. He also said that they should just go and collect the body to the mortuary.

23. The police proceeded to the home of the deceased. PW4 found the deceased lying dead. She observed the body and noted several injuries on the forehead, mouth, chest among other places.

24. PW4 further testified that the police photographed the body of the deceased and the scene. They then collected the body and left. The body was taken to Pastor Machage Hospital Mortuary in Migori town for further police action.

25. PW1 did not witness the incident. He was at the Kehancha police station during the time when the incident occurred.

26. As the police from Kehancha police station were still at the scene, a team from the DCI Kuria West arrived. They were PW6 and 2 other officers. PW6 observed the body and noted several injuries on the head and the rest of the body. He also saw a partly demolished house. PW6 interviewed several people at the scene. PW3 narrated what had happened to her husband, the deceased. The body was photographed and taken to the mortuary.

27. PW6 commenced investigations. He returned to the office after taking the body to the mortuary. While in the office with some witnesses including PW3 a group of people came to the station. They reported the disappearance of one Bernard Moi. PW3 identified the accused persons as among those who had killed the deceased. The accused persons were arrested for questioning.

28. PW6 recorded all the witness statements. PW6 formed an opinion that the accused persons were part of the group that killed the deceased. He then made a decision to charge the accused person with the murder of the deceased. PW6 then escorted the accused persons for mental assessment on 08/08/2018. They were all found fit to stand trial.

29. PW6 organized for a post mortem examination which was conducted on 09/08/2018. The autopsy was conducted by PW2. PW2 observed severe parlor of the palms, soles and buccal cavity. There was conjunctivity. The head had 6 deep cut wounds. The maxilla was fractured. There was a deep cut injury on the right eye ridge. The body had dry blood. The skull had comminuted and depressed fractures. The 8th rib was fractured. The brain tissue was disturbed. PW2 formed the opinion that the cause of death was severe open head injury caused by deep cut wounds secondary to assault. PW2 filled in a Post Mortem Report.

30. PW6 visited the home of the accused persons on 09/08/2018 but did not recover any weapon that was likely to have been used in the attack.

31. The accused persons were formally charged on 01/10/2018 with the murder of the deceased. PW2 produced the Post Mortem Report as an exhibit. PW6 produced the Mental Assessment Reports for the accused persons, the photographs and the Certificate thereof as exhibits.

32. PW6 was aware of the pendency of cases between the parties. They included Kehancha Succession Cause No. 31 of 2017. There was also a criminal case where the deceased had been charged with maliciously damaging the accused persons' houses. PW6 was categorical that the pendency of a land dispute did not sanction the killing of the deceased.

33. The prosecution then rested its case. The Court found each of the accused persons had a case to answer. They were all placed on their defenses. The accused persons opted for and gave sworn defenses. They called 2 joint witnesses. They were **Thomas Kiambe Itembe (DW1)** and **Chacha Alfred (DW2)**.

34. The first accused person denied the charge. He stated that in the morning of 03/08/2018 he was accompanied by the second accused person to Kehancha police station. They met the DCIO and reported the disappearance of their brother Moi. Their brother Moi had disappeared the day before, that is on 02/08/2018. It was the first accused person's testimony that the DCIO tracked Moi's phone number to Ngarango area in Maasailand. The first accused person stated that the DCIO asked them to trace their brother there.

35. The first and the second accused persons proceeded to Maasailand and reported the matter at the Ngarango police post. They were informed that the police were working on the matter and were asked to await any outcome. They returned to Kehancha police station to give the DCIO some feedback. To the first accused person's shock he was arrested on arrival at the station on allegations of killing the deceased. The first accused person therefore raised an *alibi* defense.

36. The first accused person further stated that the deceased was his own brother and that he left him at his house as he went to Kehancha police station to lodge the report. He affirmed that he never knew how the deceased died. He however acknowledged that there was a land dispute between the children from the first house and those from the second house. He also confirmed that the deceased faced three criminal cases where the first and the second accused persons were the complainants in all of them. The first accused person was clear that all efforts to resolve the land matter amicably through the local administration had hit a dead end.

37. The first accused person suspected that the deceased was behind the disappearance of Moi. To him, the first accused person was overheard saying that Moi will never be found.

38. The first accused person posited that the prosecution witnesses were untruthful. He described PW5 as among those behind to disinherit the second house and as such his evidence was purely fabricated. He contended that the real culprits were arrested but released without any charges being preferred. Apart from the cases in court the first accused person further posited that he related well with the deceased.

39. The second accused person also denied committing the offence. He reiterated the testimony of the first accused person. He re-affirmed that he was with the first accused person, DW1 and another elder when they went to look for Moi in Maasailand. He also stated that his leg was injured on 02/08/2018 and was treated at Pastor Machage Hospital. According to the second accused person he was being framed as a result of the land dispute.

40. The second accused person was cross-examined. He stated that he learnt of the death of the deceased when he was arraigned in Court. That, even when he was arrested on 03/08/2018 he was not informed of anything like the death of the deceased. He decried that PW5 was behind the problems he faced as he had stopped him from cultivating the disputed land. He also raised an *alibi* defence.

41. The third accused person denied committing the offence as well. He stated that he was a student at Komamange Primary School. He recalled that he was in School on the day the deceased was killed. That was the closing day. When he returned home at around 01:00pm he learnt from her mother that his father had been arrested in the morning and he was at Kehancha police station. He was sent to take food to him as his mother was nursing a young child. He proceeded to Kehancha police station and was arrested. The third accused person also stated that the police told him that he was a suspect in the killing of the deceased immediately he was arrested at the station. He also raised an *alibi* defence.

42. DW1 was a relative to the accused persons and the deceased. He also served as the Clan Coordinator. The first and second accused person as well as the deceased were cousins to DW1.

43. DW1 testified that in the morning of 03/08/2018 he was called by the Clan Chairman. It was around 08:00am. He was directed to see the Clan Secretary and rush to the home of the deceased as many people had gathered there. DW1 was to establish the purpose of the gathering and report back to the Clan Chairman. The Clan Secretary was a son to DW1. Since the Secretary lived with DW1 and he was at home that morning they rushed as directed.

44. DW1 arrived at the home of the deceased. He met a large gathering. He estimated their number to be more than 500. He then asked those who were planning to kill the deceased if there was any problem. One of the killers informed him that the deceased had engaged them in a protracted land dispute and that his final day had come. DW1 urged the killers not to harm the deceased, but he was asked to stay out of the matter. The killers were armed with pangas, bows and arrows.

45. The killers also told DW1 that he will not see Moi again. DW1 was shocked. He asked them if they had killed Moi and he was told that it was the deceased who had killed Moi and that is why they had visited the deceased. The killers then gave a very elaborate background of the disappearance of Moi to DW1. They told DW1 that Moi had disappeared on 01/08/2018 and that they had already reported the matter to the police. The police had however traced the whereabouts of Moi to Maasailand.

46. DW1 did not recognize any of the attackers even though he engaged them. He did not either see the accused persons at the scene. He learnt from the killers that the accused persons had gone to look for Moi in Maasailand.

47. DW1 witnessed how the deceased was killed. He was standing around 35 metres away.

48. DW1 was so certain that Moi had been killed. He was also sure that the deceased had a hand in the killing of Moi. According to him, there was ample evidence to that end. In the Kuria customs, DW1 explained, whenever one kills another person then a traditional cleansing ceremony must be conducted. The ceremony involved the killing of a goat followed by a special shaving of the hair. The crowd had recovered a fresh goat skin from the home of the deceased. The deceased was also shaved in the cleansing style. To DW1 the crowd then killed the deceased.

49. DW1 denied accompanying the accused persons to look for Moi in Maasailand. DW1 only saw the accused persons at the police station. DW1 stated that the deceased was killed at around 09:00am and he went to the police station at around 11:00am. He found the accused persons already at the police station by then. DW1 was accompanied by over 200 people to the police station.

50. DW1 was at the station when PW3 gave 7 names of those who had killed the deceased. They included those of the accused persons. DW1 re-emphasized that the accused persons were not at the scene where the deceased was killed. He firmly believed that the accused persons were framed out of the land dispute.

51. DW1 was cross-examined. He stated that he was also the Chairman of Nyumba Kumi Initiative and he was a trained Counsellor. He confirmed that he was at the scene. The crowd kept on surging as people kept on streaming. He recalled asking someone in the crowd if there was any problem and he was told to keep off. He did not see PW3 and PW5 at the scene.

52. He re-affirmed that he was a village leader, a Clan Coordinator and the Chairman of Nyumba Kumi Initiative. He was indeed categorical that out of the 700 people in the crowd he did not recognize or know even a single one. He was also sure that the accused persons were not at the scene. He denied that the accused persons may have been at the scene but he could not find them because of the large crowd. To him, the accused persons were not at the scene at all.

53. DW1 however talked to someone he knew as a neighbour to the deceased who was armed with a club. The neighbour was so angry with the disappearance of Moi that he decided to take part in the killing of the deceased even though the accused persons had taken legal measures to solve the matter.

54. DW1 was emphatic that the deceased was not killed by his family members but by the neighbours and other members of public. He confirmed that he went to the police station immediately the deceased was killed and found the accused persons there. DW1 talked to the accused persons and they informed him that they had gone to the police station on the issue of Moi. DW1 was also clear that if any of the accused persons informed the Court that he accompanied them to Maasailand then that cannot be true.

55. DW2 was informed by DW1 of the commotion at the home of the deceased. They rushed there. He saw a mammoth crowd at the scene. They were around 500 people. The people generally talked about the disappearance of Moi. DW2 recognized several people including PW3 and PW5.

56. Like DW1, DW2 was also categorical that the accused persons were not at the scene. He clarified that it was not that the accused persons could have been at the scene but he could not see them because of the crowd. He affirmed that they were not there. He however admitted that it was not reasonably possible to

see know all the people who were at the scene. DW2 saw the attackers but he could not remember them. He however knew that the attackers were neighbours to the deceased.

57. To DW2, the accused persons were framed due to longstanding land case. He stated that PW5 was used to set up the accused persons.

58. On cross-examination, DW2 stated that he had no problem with the deceased although he was not happy with his efforts to disinherit his brothers, the accused persons. DW2 went to the scene with DW1 and he was surprised to learn that DW1 had said that he did not know anyone at the scene including him. DW2 further stated that PW3 was walking around crying and asking people to help in vain. PW3 was easily visible to all.

59. On how DW2 knew that the accused persons were not at the scene, he said that he asked so many people if the accused person were around and every one answered in the negative. He also carried out his own investigations and so confirmed. He was also aware that the deceased had carried out a cleansing ceremony after the disappearance of Moi. DW2 denied that he was paid to lie in Court.

60. Upon closure of the defence case the matter was left for judgment.

61. I have carefully considered the evidence on record as well as the exhibits. As the accused persons are charged with the offence of murder, the prosecution must prove the following three ingredients:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the ‘actus reus’ of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.

I will therefore consider each of the issues sequentially.

(a) Proof of the fact and cause of death of the deceased:

62. All the prosecution witnesses, the accused persons and the defense witnesses testified that the deceased died. The first limb is hence answered in the affirmative.

63. As to the cause of the death of the deceased, PW2 produced a Post Mortem Report he personally prepared after conducting a post mortem examination of the body of the deceased. He opined that the cause of the death of the deceased was a severe open head injury caused by deep cut wounds secondary to assault. Since there is no any other evidence contradicting that of PW2 on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb is also proved in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

64. This issue is aimed at establishing whether the accused persons caused the death of the deceased and if so, whether it was by an unlawful act(s) or omission.

65. The prosecution’s case was that the accused persons are the ones who killed the deceased. The accused persons denied committing the offence. They raised defences including *alibi*.

66. On the part of the prosecution, the evidence of PW3 and PW5 placed the accused persons at the scene of crime. PW3 and PW5 were eye-witnesses. PW3 was a close relative to the accused persons. She knew all the accused persons quite well. PW5 was a neighbour to the deceased. PW5 had previously dealt with

the accused persons when the accused persons opposed his lease of land from the deceased. PW5 stated that the matter was amicably settled and he has been relating so well with the accused persons since then.

67. The evidence of PW3 was well corroborated by PW5. Both witnesses narrated the events as they unfolded leading to the death of the deceased. There was also the evidence of PW4 which corroborated the evidence of PW3 and PW5 further.

68. There were however several defences raised. One of the defences was *alibi*. It was raised by all the accused persons.

69. The first and second accused persons contended that they were not at the scene when the deceased was killed. They were in Maasailand searching for their brother Moi. They stated that in the morning of 03/08/2018 at around 07:00am they reported the disappearance of Moi to the DCIO at Kehancha Police Station. That, Moi's whereabouts were traced to Maasailand. They alleged that they were asked to search for Moi thereat. They left to that place and returned later in the afternoon to report back to the DCIO. They also reported the matter at Nyaranga Police Post at midday. They returned to the DCIO by around 04:00pm. They were instead arrested and charged.

70. The third accused person stated that he was at school that morning. That, he returned home at 01:00pm and was sent by her mother to take food to his father who was then held up at the Kehancha Police Station. He was instead arrested and charged.

71. I have critically scrutinized the *alibi* defences. Several issues come to the fore. **First**, the third accused person stated that he went to school in the morning and returned home after closing school. That was around 01:00pm. That, on reaching home he was informed by his mother that his father (the first accused person) had been arrested and was held at the Kehancha Police Station. The third accused person took food to his father. When he reached at the station he confirmed that his father was truly in custody. He was also arrested.

72. DW1 stated that the deceased was killed at around 09:00am. That, at around 11:00am he accompanied a group of around 200 people to Kehancha Police station. On reaching there, he found the accused persons already thereat. The accused persons had not yet been arrested though.

73. PW1 stated that the accused persons went to the police station in the afternoon of 03/08/2018 and not in the morning.

74. The evidence of the third accused person and DW1 was at variance with the evidence of the first and second accused persons and PW1. According to the first and second accused persons they were arrested when they returned from Maasailand at 04:00pm. However, according to the third accused person when he reached home at 01:00pm he learnt from her mother that the first accused person had already been arrested and was held up at the station. When the third accused person went to the station he also found his father in custody. To DW1 the accused persons were at the police station as at 11:00am.

75. The issue of when the accused persons were arrested was a factual one. It is expected that such evidence would freely flow from witnesses. In this case the variances and inconsistencies in the evidence went to the core of the matter. They were as well not reconciled. The result was the creation of a serious doubt as to who among the witnesses was truthful.

76. **Second**, the second accused person stated that he was accompanied by the first accused person, DW1 and another person whose name he could not remember when they went to Maasailand to search for Moi. The second accused person said that '*...Thomas is my witness and he is in Court.*'

77. When DW1 testified he denied ever accompanying the accused persons to Maasailand. In his own words during cross-examination DW1 stated that '*...If the accused persons told the Court that I accompanied them to Maasailand on 03/08/2018 then that is not correct. I did not accompany them to that place....*'. On re-examination DW1 stated that '*... I am truthful in this case. I did not accompany the*

accused persons to Maasailand...'

78. One cannot afford to ask about such a glaring difference.

79. **Third**, there is no doubt that there were so many people at the home of the deceased that morning. According to DW1 and DW2 the people were between 500 and 700. Be that as it may, DW1 and DW2 were very categorical that the accused persons were not at the home of the deceased.

80. DW1 was a village leader, a Clan Coordinator and a Chairman of Nyumba Kumi Initiative. However, DW1 did not recognize even one of the persons who were at the scene. DW1 stated that '*...Out of the 700 people there is no single person I knew by name...*'

81. On the other hand, DW2 had the following to say: -

.... I was called by DW1 and informed of the commotion at the home of the deceased. I accompanied DW1 to the scene. DW1 knew that I was at the homestead of the deceased and I am surprised if DW1 said that he didn't know anyone at the scene. I had gone to the scene with him.

82. DW1 and DW2 were so determined to drive the point that the accused persons were not at the scene. DW1 variously stated as follows: -

...Had the accused persons been there I would have recognized them. The people told me that the accused persons had gone to look for Benard Moi in Maasailand....

.... It is true there were many people at the scene over 700 people and I want to confirm that it is not that I did not see the accused persons at the scene due to the mammoth crowd but they were not at the scene at all....

83. DW2 said as follows: -

...The crowd was around 500 people.....

... I want to state clearly that the accused persons were not at the scene. It is not that they were at the scene but I could not see them but the truth is that they were not at the scene at all....

... I carried out my own investigations and confirmed that the accused persons were not at the scene.

84. The question which now calls for an answer is whether it is reasonable possible that one was able to confirm the presence or absence of the accused persons in the crowd of around 700 people.

85. It must be noted that the crowd was not orderly and there was commotion all over. Further, was it also possible that DW1 would not recognize even a single person out of the 700 people who had gathered more so given that he was a village leader, a Clan Coordinator and a Chairman of Nyumba Kumi Initiative? What of the evidence of DW2 connoting that DW1 was not truthful as DW1 knew that DW2 was at the scene?

86. On who killed the deceased, DW1 stated as follows: -

.... Those who had planned to kill the deceased told me that the deceased had involved them in a protracted land dispute and that they were by then fed up and had decided to wrap up the matter...

... The neighbours did not have any land dispute with the deceased....

... The one I talked to was a neighbour to the deceased. He was armed with a Maasai rungu

(club). This man was only a neighbour and not a relative. He was so angered with the disappearance of Benard Moi that he decided to take part in the death of the deceased even though the accused persons had instead decided to pursue the matter through legal means....

... I confirm that those whom killed the deceased are not family members of the deceased but neighbours or other members of the public...

87. DW2 stated as follows: -

... I saw people demolishing his [deceased] house and then killed him. I cannot confirm who killed the deceased....

.... The neighbours killed the deceased but not the family members....

.... The family members were not involved in the death of the deceased....

88. The above excerpts portray the witnesses as very inconsistent and out to craft a pre-determined position. It is clear that the witnesses were so determined to absolve the family members of the deceased from any allegation of killing the deceased. They are unbelievable.

89. Apart from the *alibi* defenses the accused persons further alleged that they were framed so as to be disinherited. From the record the deceased had filed a succession cause in Court. The matter was still pending. Going by the accused persons position, the deceased was the main protagonist in the land matter. Given that the deceased was by then dead one therefore wonders who was framing the accused persons and for what purpose.

90. There was also another angle to the whole matter. It was on the disappearance of Moi. The deceased was largely suspected to have been behind the disappearance and possible death of his step brother Bernard Moi. The first and second accused persons together with DW1 and DW2 were so clear on the issue. The issue was however not proved. That issue taken in isolation was able to drive the accused persons to the scene.

91. This Court had an opportunity and watched the witnesses testify. The prosecution witnesses were candid and straight-forward. They also withstood and were not shaken in cross-examination. This Court formed the opinion that the witnesses were truthful and credible and their evidence reliable. That was however not the case with the accused persons and their witnesses. A witness who deliberately causes a Court to see him/her as otherwise not a straight-forward person runs the risk of his/her evidence regarded of no probative value or such little value, if any.

92. In this case there was a choreographed attempt by the defence to absolve the accused persons of their presence at the scene. I have also taken into account the fact that there was nothing that could have hindered the recognition of the accused persons by those who were at the scene including PW3, PW4 and PW5.

93. By placing the prosecution's evidence on one hand and the defences on the other hand I am inclined to find, which I hereby do, that the defences are perfectly dislodged by the overwhelming prosecution evidence. There is hence no doubt that the accused persons were at the scene as alleged and proved by the prosecution. The accused persons were variously armed and they are the ones who caused the death of the deceased. There is cogent and well corroborated evidence to that effect.

94. The accused persons acted together to further a common intention and as such the doctrine of common intention under **Section 21** of the **Penal Code** Chapter 63 of the Laws of Kenya comes to play. The Court of Appeal in **Njoroge v. Republic (1983) KLR 197** explained the doctrine as follows:

...If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided

that the death was caused by the act of someone of the party in the course of his endeavor to effect the common object of the assembly...

95. In the case of **R v. Tabulayenka s/o Kirya (1943) EACA 51** the Court of Appeal of East Africa held that common intention may be inferred from the accused presence, their actions and omissions of either of them to disassociate himself from the assault.

96. I therefore find that all the accused persons were part of the orgy of violence that gripped the home of the deceased that morning. Each one played an active role in causing the death of the deceased. The totality of the evidence is that the identification of the accused persons by recognition as the assailants was not in error. The second ingredient is likewise answered in the affirmative.

(c) Proof that the said unlawful act or omission was committed with malice afterthought:

97. I will now consider the third limb as to whether there was malice aforethought on the part of the accused persons in committing the offence at hand.

98. The starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

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

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

(c) An intent to commit a felony.

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

99. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.

100. My Lordships in the above case went on to say that: -

In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...

101. And in the case of ***Mary Wanjiku Gitonga –vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)*** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record. (emphasis added).

102. In this case malice can be gleaned from the events as they unfolded towards the death of the deceased.

103. According to DW1 those who attacked and killed the deceased informed him that the deceased had engaged them in a protracted land dispute and that his final day had come. DW1 urged the killers not to harm the deceased, but he was asked to stay out of the matter. The attackers therefore made their decision quite clear. DW1 admitted that the neighbours had no land dispute with the deceased. Therefore, the neighbours were not the killers.

104. The issue of the land dispute was put forth by all the accused persons and their two witnesses. There had been a series of disagreements between the accused persons and the deceased in respect of the inheritance of their father’s land. The dispute culminated with the filing of a succession cause in Kehancha court alongside various criminal cases. The local administration at various levels had also attempted to resolve the impasse in vain.

105. There was also the issue of disappearance of Moi. It also came out clearly that there was a general consensus among the accused persons and the community that the deceased was behind the disappearance of the deceased. Infact DW1 among others talked of the discovery of the fresh skin at the homestead of the deceased and the special shaving by the deceased. To him that was cogent proof that the deceased had carried out a traditional cleansing ceremony after killing Moi. He also said that one of the attackers had told him that Moi would not be found again. Indeed, that is why the attackers demanded the deceased to produce Moi. It was a revenge mission.

106. There is also the manner in which the attackers carried out their mission. DW1, DW2 and PW5

heard screams from the direction of the road leading to the home of the deceased. PW5 followed the screams and met the accused persons leading the convoy. The accused persons lived in a different village from that of the deceased. PW6 estimated the distance to be around 3kms apart.

107. The attackers were publicly armed. They walked to the home of the deceased. They also chanted on the way. They attracted members of the public whom they decisively warned ‘*to keep off their family matter*’. They took time to demolish the house of the deceased. They eventually managed to pull the deceased and killed him in public view

108. As the attackers went away they met PW4 and the police on the way. They blatantly told PW4 that they had finished him [the deceased]. They asked the police to go and take the body to the mortuary.

109. There was also the issue of the injuries inflicted on the deceased. They were so many. They covered the whole body. According to PW2, PW3, DW1 and DW2 the injuries were inflicted by both sharp and blunt objects. The head had 6 deep cut wounds. The skull suffered several fractures. The head was almost crushed with massive fracture of the maxilla. The ribs were shattered. An attack of such magnitude leaves no doubt that the assailants intended to kill the deceased.

110. By putting the foregone issues on the table, it is clear that the accused persons planned the execution of the deceased. They also carried out their mission with precision. The events were well planned. The events did not happen in a spur of the moment.

111. I hence have no doubt in my mind that there was a clear manifestation of malice on the part of the accused persons in executing the death of the deceased. The third ingredient is also answered in the affirmative.

112. The prosecution has proved all the ingredients of the offence of murder against each of the accused persons. I hereby find the accused persons herein **James Muhiri Mwita alias Nyabobe, Peter Muchumbe Mwita alias Muchumbe** and **Nicodemus Mwita James alias Okwachi** guilty of jointly murdering **Simion Chacha Mwita**. The first and the second accused persons are hereby convicted under **Section 322(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

113. Pursuant to **Section 189** of the **Children Act, No. 8 of 2001** I shall not enter a conviction against **Nicodemus Mwita James alias Okwachi** who is by now aged around 15 years old. However, the guilty finding against him remains.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of November, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Muniko Counsel for the Accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.