



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
HIGH COURT CRIMINAL CASE NO 77 OF 2012
(CORAM J. A. MAKAU J)

REPUBLIC.....PROSECUTION

VERSUS

- 1. JACOB MICHUBU ALIAS ISAAC NKUNJAACCUSED**
- 2. JULIUS M' KAIRIBIAACCUSED**
- 3. MUSA NTONJIRA M'KAIRIBIA.....ACCUSED**
- 4. ISIAAH KITHAKA.....ACCUSED**

JUDGEMENT

1. The accused **JACOB MUCHUBU** Alias **ISAAC NKUNJA**, the 1st accused; **JULIUS M'KARIBA**, the 2nd accused, **MUSA NTONJIRA M'KAIRIBIA** the 3rd accused and **ISIAAH KITHAKA**, the 4th accused are charged with murder contrary to **section 203** as read with **Section 204** of the Penal Code. It is alleged that on the 30th day of March 2009 at Rwongone village , Mbwetha Sub-locatipn, Kilimambio Location; Igembe District within Eastern Province jointly murdered **JAMES MURUNGI**.

2. This case started before Hon. Lady Justice Lesiit who heard one wetness before she disqualified herself from handling this case and referred the case to me. The matter was thereafter directed to proceed from where it had reached and I heard four (4) witnesses PW 2, PW 3, PW 4 and PW 5.

3. That on 28th February 2015 I ruled that all the four accused persons had a case to answer. Each of the accused person gave sworn testimony and opted to call combined six (6) witnesses.

4. The Prosecution in support of the charge called five (5) witnesses; most of whom were relatives of the deceased. The facts of the prosecution case are as follows:-

That on 30th March 2009 **PW 1 Stanley Mbae Athendi** was seated at his home when his brother Harrison Kaume came with Gitonga and James Murungi (deceased) pushing a bicycle. That as it was late Gitonga went away leaving PW 1 with Harrison. That Murungi (deceased) was on the bicycle which Harrison and Francis Gitonga were pushing. **PW 1** testified that James Murungi was so injured that one of them was holding him while the other was pushing the bicycle. He enquired from Kaume why they were pushing James on the bicycle who told him he had been beaten. He then suggested that they keep him overnight and take him to hospital the next day. That James slept in the house and was moaning of the injuries. PW 1 borrowed money the following day and took James to the Maua Hospital where James was treated as an outpatient and PW 1 was allowed to go home with James. That when PW

1 went back home with James he died during the night of 31st March 2009. PW 1 called Chief Karimi and informed him of the deceased death over the phone. That police came for James' body and took it to Maua Methodist Hospital Mortuary. PW 1 confirmed James Murungi (deceased) was his brother.

5. **PW 2 Francis Gitonga** testified that on 30th March 2009 he was on his way home when he heard someone he knew screaming at 6.30 p.m. He proceeded to the scene and told the people to stop assaulting that person and if he had wronged them to take him to Court. PW 2 testified that at the scene he found Isaiah Kithaka the 4th accused; Nitonjira alias M' Kairibia; the 3rd accused; Nkunja alias Kachanja; the 1st accused and Kinyua M'Kairibia the 2nd accused, beating a person lying on the ground as his hands were tied. PW 2 identified the person being beaten as James Murungi. That three of the assailants had sticks and one had hammer and were all beating him all over. PW 2 warned them to stop beating James Murungi but they did not heed to his warning but instead continued beating James Murungi. PW 2 testified that brother to James Murungi came to the scene, one Harrison Kaume. He picked a stone and warned the assailants and they all left. PW 2 and Harrison borrowed a bicycle and took James Murungi to his home, a distance of about 1 kilometre. PW2 later left for his home. He later received information that James Murungi died the following day. He testified that the deceased was his brother-in-law as PW 2 is married to his sister. He testified that the accused are not his relatives save Isaiah Kithaka whose mother is his cousin and that he has no grudge against any of them. PW 2 testified the four people he named were the accused in the dock.

6. **PW 3 Severina Karabu Douglas Ndatu** testified that she is an hotelier at Kaaria. That she recalled on 30/3/2009 at around 3.00 p.m Isaiah Kithaka, Nkunja Gachanga and Ntonjira and Kinyua came to her hotel. That Kinyua entered into the hotel leaving the others near the door to the hotel and on seeing James Murungi he said the person he was searching for is here. That the other three joined Kinyua and forcefully took James Murungi outside the hotel. That Kinyua went to nearby shop for a rope which he used to tie his hands and they started beating him with sticks and hammer all over the body. PW 3 asked them why they were beating James Murungi and they told her to let them go as he would speak ahead. That the four left with him as PW 3 returned to her hotel. The following day PW 3 received information that the four beat James Murungi till he died. PW 3 had known James Murungi as a customer. PW 3 testified the four people she mentioned were known to her before the incident and that she has no grudge with any of them. She testified that the four people she mentioned were the four people in the dock. She named the 1st accused as Nkunja Gachanja, the 2nd accused as Kinyua M' Kairibia. The 3rd accused as Ntonjira M' Kairibia and the 4th accused as Isaiah Kithaka. PW 3 testified she knew James Murungi but did not know his relationship with the four accused persons.

7. **PW 4 Dr. Njeru Charles Muchangi**, testified that he worked at Nyambere District Hospital between 2008 - 2014. He testified that he carried a post-mortem on the body of one James Murungi Ngunjiri. He stated he had a post-mortem report of James Murungi Ngunjiri dated 8/4/2009 in which he had carried out the post-mortem at around 4.00 pm on that date at Maua Methodist Hospital Mortuary. He then reported that he gave details and conditions of the deceased body. On the external appearance he testified that the head had a deep cut at scalp, parietal region. No skull fracture, bruise near eye and ear, chest with multiple bruises; 6th rib fractured; multiple bruises on both upper and lower ribs with no fracture; scrotum bruised; testes swollen, internal injuries were that there was blood and air in the chest cavity. The right lung had collapsed due to pressure of the blood and air. The other systems were normal. PW 4 formed the opinion that the cause of death was severe chest injury due to secondary right lung collapse resulting from air and blood found in the chest cavity. He said there was history of the deceased having been attacked and the injuries were possibly from the attack. He said the source of information was from relatives of the deceased. PW 4 testified he conducted post-mortem in presence of a police officer and relatives of the deceased. That he signed and stamped the report and produced the post-mortem as exhibit - 1. He testified the deceased died within 24 hours from time of the attack and weapon used were both sharp and blunt.

8. **PW 5 NO. 58585 PC Benedict Kaloki Muli**, the investigating officer testified that on 31/3/2009 while he was on duty at Maua Police Station one James Murungi (deceased) reported to him and PC Kamene as having been assaulted on 30/3/2009. The deceased was then referred to Maua Methodist Hospital for treatment. On 1/4/2009 PW 5 received report of death of James Murungi at the deceased's

home and the police officers visited the deceased's home. The body was transferred to Maua Methodist Hospital Mortuary. Post-mortem was carried on the deceased body on 8/4/2009. On 9/5/2009 the 4th accused Isaiah Kithaka was arrested, the 3rd accused Ntonjira M' Kairibia was arrested on 23/4/2009. PW 5 testified that as a result of his investigations he established that the deceased was a guard at Miraa Shamba owned by the four accused persons who were accusing the deceased of having sold miiraa from the shamba and failed to release the proceeds to them and that caused them to attack the deceased. PW 5 testified that the 1st and the 2nd accused were later arrested but he was able to see them while taking their finger prints at Maua Police Station. PW 5 testified the four accused persons are the four accused persons in the dock. PW 5 testified that the deceased mentioned his assailants are the accused persons by their names. PW 5 testified further that all the four accused were mentioned by the witnesses.

9. That at the close of the Prosecution case, the accused were found to have a case to answer and were put on their defence with each of the accused person opting to give sworn testimony and opting to jointly call four witnesses in support of their defence.

10. **DW 1 Jacob Michubu M'Mukiri** testified that on 30/3/2009 he was at Kiengu Market selling clothes with his brother from 6.00 am to 6.00 p.m. He testified that he was with Joseph Magete and spent the night at the said market. He testified that he knew James Murungi (deceased) but that he does not know anything about the cause of his death though the deceased knew the people who assaulted him before his death. He stated though PW 2 stated he saw him, he lied and that though PW 2 testified he was with Harrison Kaume; the said Kaume was not called as a witness. He stated that PW 2 and PW 3 conspired to lie. He further stated that PW 3 had grudge with him because his brother had stolen miraa of Kasisi Gitonga in 2004. He stated PW 5 lied because when the deceased reported to police he stated he was assaulted by people he knew very well giving names of Ntonjira and Kinyua and after his death witnesses were called who gave different names. He stated he was framed with this offence because his wife went to police and he was found to have refused to support her and his children. He stated he was taken to Atheru Gaiti AP Camp when PW 1 came and said he is called Kachanja and he is the one who had assaulted his brother. He stated he was taken to Maua Police Station and referred to as Kachanja Nkunja which name is not his but all the same they added it as alias. He concluded his defence by stating he is not related to the 2nd, the 3rd and the 4th accused. He prayed for O.B for 31st March 2009 to see what James Murungi stated. During cross-examination the 1st accused agreed his names were called at time of plea taking and he responded to the names as recorded. He added the name Isaac Nkunja is not his name but his name is Jacob Michubu. He admitted. PW 1, PW 2 and PW 3 knew him. He stated PW 3 lied because he did not accompany the deceased to police to make a report. He further stated PW 5 lied because he was bribed by PW 1, PW 2 and PW 3.

11. **DW 2 Josiah Ngota Magete** gave evidence as witness for the 1st accused stating that he had a business of selling clothes at Kiengu market with the 1st accused. That on 30th March 2009 they were selling clothes at the said market from 8.00 am to 6.30 p.m after which they proceeded to do accounts of the day. He testified that the 1st accused was not involved in the murder of the deceased as he was not with him the whole day. He further stated when he saw the accused after his arrest he told him he was arrested for refusing to support his wife and children and as a result of which some people said he had killed someone. On cross-examination DW 2 stated that he did not know the 1st accused other names.

12. **DW 3 Julius Kinyua M' Kairibia**, the 2nd accused testified that on 30/3/2009 he was very sick and he called Julius Mwithane (DW 4) to take him to Meru Level 5 hospital where he was attended to and given medication and released home. The treatment note was marked as MF1-D2 to be produced by it's marker. DW 3 testified he returned back to Maua at 6.00pm and found a house where he spent the night. The following day DW 3 and Julius Muthane left for their homes. He denied being involved in the deceased death and stated that he did not know the deceased. He stated that though PW 2 mentioned him, he lied as DW 3 was at Meru the whole day. He admitted he has no grudge with PW 2. As regards PW 3 who mentioned him he stated she did so as they are not in good terms as he had been cut his hand by her brother one Paul, who was a thief and reported him to police. He was later shot by the police in August 2008. DW 3 testified he did not know how the deceased met his death.

13 **DW 4 Julius Mwithali M'Thethea**, witness for the 3rd accused testified that on 30th March 2009

he was with the 3rd accused at his home at Kenichia Gichunge when DW 3 who was unwell asked him to take him to the hospital. That they left at around 7.00 am for Meru Level 5 Hospital as he was suffering from malaria and typhoid. He stated at the hospital the 2nd accused was given a letter to get medicine. That after treatment they went to Maua town where they spent the night as they missed transport home. That they left for their respective homes the following morning. During cross-examination DW 4 admitted he did not go inside the clinic with the 2nd accused and did not know whether the 2nd accused saw the Doctor or not.

14. **DW 5 Isiah Kithaka Murungi (ID NO. 11544554)** testified that he is not an accused person in this matter and produced his National Identity Card as exhibit D 3 bearing the names Isiah Kithaka Murungi. He stated though he is the 3rd accused in this criminal case his name is not amongst the accused persons. That he has been sitting in this case in the fourth position as the fourth accused person. He added Isaac Kithaka is not himself and that he does not know that person. He testified that on 30th March 2009 he was arrested and put in cells for 18 days without any charge which was contrary to the constitution. That he was later taken to Meru High Court and charged with HCCRC 53 of 2009 and HCCR 58/2009. That on 30/3/2009 he was at his home from morning up to 1 p.m when he left for a meeting from 2.00 p.m at Karuri Primary School for school parents meeting which ended at 5 p.m. That after the meeting he left with school chairman to see his sick wife as his wife is a school teacher. That DW 5 and the school chairman stayed at DW 5's home up to 8.00 p.m when he left his home. That after 2 months PW 1, PW 2 and PW 3 in company of AP found him at Atheru Gaiti market and had him arrested. He was arrested and taken to Maua Police Station where he was explained the reason for his arrest was that he was alleged to have murdered the deceased, who he knew. He denied the allegation. He testified that PW 2 and PW 3 who mentioned him lied because of the variance of timing between 6.00 p. and 7 pm. and for their failure to explain where they were coming from. He testified he was framed by PW 2 and they had fought over his money which he had stolen from water project and that he conspired with PW 3 to frame him.

15. **DW 6 DOUGLAS GITONGA** witness called by the 4th accused who he described as Isiah Kithaka Murungi and a parent for Karuru Primary School testified that on 30/3/2009 there was a big ceremony at school for PTA and that DW 6 was school chairman. That ceremony ended at 5.00 pm after which DW 6 and the 4th accused proceeded to the 4th accused home to see the 4th accused wife whereby he stayed with them up to 8.00 p.m and left for his home. He stated after 2 months he heard of the 2nd accused's arrest and charging over this offence. He denied the involvement of the accused with the deceased murder as he was with him from 2 pm up to 8.00 pm on 30/3/2009.

16. **DW 7 MUSA Ntonjira M' Kairibia**, the 3rd accused denied any relation with the 1st, the 2nd and the 4th accused persons. He testified that on 30/3/2009 he was cultivating at his land with Joseph Mung'athia (DW 8) from 8.00 a.m upto 4 p.m after which they proceeded to Irirui market where they stayed upto 8.00 p.m after which they left for their respective homes parting at the 3rd accused's gate. He denied having been involved in the assault of the deceased who died thereafter. He denied having known the deceased or seeing anyone being assaulted on 30/3/2009. He stated that the prosecution witnesses lied. DW 7 testified he had grudge with PW 3 because her brother cut DW 7's brother's hand.

17. **DW 8 Joseph Mungathis M'Kiarao**, witness for the 3rd accused, testified that on 30/3/2009 he was from 8.00 am cultivating with the 3rd accused at his shamba up to 4.00 p.m and thereafter went to Iriarui market where they stayed up to 8.00 pm when they left for their homes parting at the 3rd accused's gate. He testified on that material day they did not witness anyone being attacked by members of the public and he was shocked to learn this 3rd accused was charged with this offence. He termed this case as a frame up against the 3rd accused. He stated that 3rd accused is brother to the 2nd accused.

18. I have carefully summarized the prosecution and defence case in this matter. I have carefully considered the rival submissions by the prosecution and the defence. The four accused persons faces an offence of murder and several issues for determination in this case has been raised which can be summarized as follows:-

(a) Whether an offence of murder has been proved to the required standard?

(b) Whether the perpetrator(s) of the offence of murder were identified or recognized?

(c) Whether the prosecution dislodged the accused's defence?

19. The four accused persons face a charge of murder contrary to section 203 of the penal code. **Section 203 of the Penal Code** provides:

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

20. **Malice aforethought** is a very important ingredient for the offence of murder. The prosecution is under obligation to prove facts which establish **malice aforethought**. The burden lies with the prosecution to prove the charge against the accused beyond any reasonable doubt. The prosecution must prove the accused had formed the necessary intention to cause death or grievous harm to the accused.

21. **Section 206 of the penal code** sets out the facts which constitute malice aforethought as follows:

Malice aforethought shall be deemed to be established by evidence providing any one of the following circumstances-

(a) an intention to cause death of or to do grievous harm to any not;

(b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the actual person 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.

22. The prosecution called two eye witnesses, PW 2 and PW 3. PW 2 Francis Gitonga testified he heard someone screaming and proceeded to the scene and found **Isaiah Kithaka**, 4th accused, **Ntonjira** also known as **M'Kairibia**, the 3rd accused, **Nkunja** alias **Kachanja**, the 1st accused and **Kinyua M'Kairiba**, the 2nd accused armed with sticks and hammer beating James Murungi (deceased) all over the body while lying on the ground and his hands tied. He warned them against beating him and told them to stop but they refused to heed to his warning. They only stopped when the deceased brother Harrison Kaume came and threatened to stone them. PW 3 witnessed the four accused dragged the deceased from her hotel at 3.00 p.m and taking him outside her hotel and in which Kinyua, stated:-"**the person we were searching for is here**".

That they bought a rope from a nearby shop, tied James Murungi (deceased) and started beating him with sticks and a hammer all over the body and on being asked why they were beating the deceased they told PW 3 to let them go as the deceased would speak ahead. PW 4 Dr. Njeru Charles Muchangi who conducted the post-mortem of body of the deceased produced the post mortem report exhibit P 1. The cause of death was due to severe chest injury due to secondary right lung collapse resulting from air and blood found in the chest cavity due to the injuries from the attack by known persons. The result of the post mortem report by PW 4 was not challenged by the accused person or the cause of the deceased's death.

23. The attackers of the deceased James Murungi using sticks and a hammer had in my view an intention to cause death of or do grievous harm to the deceased. PW 2 and PW 3 witnessed the four accused persons beating and hitting the deceased all over the body using sticks and hammer. I note hammer is mostly used to forcefully drive a lot of force to an item which is usually hard and using the same on a person and without caring which part of the body one hits, including delicate part such as head is an intention either to cause death or grievous harm to the person being hit with the hammer. The four accused were just seen at 3.00 p.m by PW 3 Severina Karambu Douglas beating the deceased and when talked to they did not leave the deceased alone but went away with him. PW 2 Francis Gitonga saw them at around 6.30 pm still assaulting the deceased. The accused did not beat the deceased once or twice and left him but for a period close to 3 hours from 3 p.m. to 6.30 p.m. using sticks and hammer. **PW4 DR.**

CHARLES NJERU MUCHIRI, noted the deceased's body had several external and internal injuries. The evidence of PW4 corroborates the evidence of PW2 and PW3 on the injuries sustained by the deceased. The conclusion that can be drawn from the beating of the deceased for close to 3 hours using sticks and hammer while his hand were tied and denying him opportunity to defend himself was no other than to cause death or grievous harm to the deceased. The accused ought to have known or ought to have knowledge that their action or omission would probably cause death or grievous harm to the deceased. I am from the prosecution's evidence satisfied that the prosecution proved beyond reasonable doubt the death of the deceased herein occurred and that the cause of death was due to severe chest injuries due to the secondary right lung collapse resulting from air and blood found in chest cavity due to injuries from the attack from known people.

24. In view of the foregoing I am satisfied from the evidence laid before this Court an offence of murder was proved to the required standard, thus beyond reasonable doubt.

25. Whether the perpetrators, of the offence of murder were identified or recognized? The evidence adduced before this court and as per rival submissions by parties, I have no doubt that the offence was committed during daytime between 3.00 p.m. and 6.30 p.m. and when it was not dark as per evidence of PW1, PW2, and PW3. The circumstances under which this offence was committed was therefore favourable for positive identification of the assailants. The importance of proper identification in such cases which turn on identification or recognition has been considered in several cases. In the case of **WAMUNGA V. REP. (1989) KLR 424** the Court addressed itself thus:

“It is a trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from probability of error before it can safely make it the basis of conviction.”

In the case of **ABDALA BIN WENDO V. R. (1953) 20 EACA 166**, it was held that:-

“where the conditions for identification are difficult, there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced”

26. In the instant case the conditions for recognition were not difficult. The offence was committed during day time. PW2 clearly found the four accused attacking the deceased with sticks and hammer and even engaged them in conversation till the deceased's brother Harrison Karume came to the scene and on threatening them with stone they left. PW3 saw the four accused dragging the deceased from her hotel and escorting him outside. She even talked to them. PW2 gave the names of the assailants to the deceased's brother PW1, and then PW5, the investigations officer. PW3 also gave the accused names to PW5. PW5 confirmed that in the first report he received the names of the accused persons or the assailants of the deceased. In the case of **SIMIYU & ANOTHER V. R [2005] 1 KLR 192**, it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a greater danger on mistaken identity arises. In the case of **GEORGE BUNDI IN M'RIMBONA V. R. CRIMINAL APPEAL NO. 352 OF 2006**, it was stated more serious aspect arises when a witness fail to mention the name of an assailant at the earliest opportunity as this can weaken the evidence.

27. In the instant case PW2, and PW3 mentioned the four accused's names and even the deceased before his death mentioned the accused's names to PW5 being persons known to him. I have taken note that where identification is based on recognition by reason of long acquaintance, that there is no better and justifiable mode of identification than by name. PW5 testified witnesses gave the names of accused persons as attackers of the deceased. Having considered the quality of evidence of the alleged recognition of the four accused, especially the evidence of PW2, and PW3 who knew the four accused prior to the incident and who gave their names to PW5 and the evidence of PW5 who recorded witnesses statements and received accused's names as well as having received the names of the deceased's assailants from the deceased, this leads to my conclusion that PW2 and PW3 recognized the accused persons, as the assailants of the deceased herein.

28. Whether the prosecution dislodged the accused defence? The accused person gave a defence of Alibi and alleged that the prosecution witnesses lied against them. That they were framed for various reasons. That the prosecution's case was inconsistent, contradictory and prayed the same be rejected and they be acquitted.

29. The defence by **JACOB MICHUBU** alias **ISAAC NKUNJA** is of alibi. He testified that on 30.3.2009 he and **DW2 JOSEPH NGOTA MAGETO** where the whole day and evening at Kienga Market where the two were selling clothes before they proceeded in the evening to taking account. DW1 urged PW1 did not mention him in his evidence. That PW2 lied when he mentioned him. He also faulted the prosecution for failing to call Harrison Kaume, as a witness as he is alleged to have witnessed the assault of the deceased his brother. He further alleged PW2 and PW3 conspired to lie against him. He further states he had no grudge with PW2, however he stated he had grudge with PW3 because PW3's brother had stolen Miraa of Kasisi Gitonga in the year 2004. He also stated PW5 lied because when the deceased went to report he reported he was beaten by the people he knew very well and gave names of Ntonjira and Kinyua but witnesses gave different names. He claimed he was framed for this offence as his wife complained he had refused to support her and his children. He also stated he was not related to any of accused persons.

30. The 1st accused defence of alibi was raised for the first time in his defence, that he was not at the scene of the crime. PW2 stated clearly that he saw the four accused attacking the deceased with sticks and hammer. He stated that these were people known to him and even gave their names. He was at close range when the incident was taking place and it was not dark. He talked to them and even warned them against their acts. He was even found at the scene by Harrison Kaume, brother to the deceased, who on threatening to stone the accused they left the deceased. PW2 testified he has no grudge with the 1st accused. PW2 evidence placed the 1st accused at the scene of crime. The 1st accused did not challenge the evidence of PW2 nor did he put it to PW2 that he was not at the scene. Similarly PW3 testified on how the 1st accused and the others dragged the deceased from her hotel and how she witnessed them attack the deceased. She even talked with them. Her evidence squarely put the 1st accused at the scene of the crime. Her evidence was not similarly challenged through cross-examination. The issue of there being grudge between PW3 and the 1st accused because of PW3's brother having stolen miraa of Kasisi Gitonga was not raised in cross-examination. PW5 evidence was not challenged on the report given to him by the deceased during cross-examination on the issue of failing to call Harrison Kaume thus do not affect the prosecution's case. **SECTION 143 OF THE EVIDENCE ACT** does not require the prosecution to call a particular number of witness to prove a fact unless specifically spelt out by statute, however the prosecution has a duty to call all relevant witnesses to prove the truth and it can only be faulted if failure to call witness is coated with ulterior motive. In **BUKENYA V. R. [1972] EA. 549** the Court held:-

“The Court can only draw an adverse inference that had the witness been called their evidence would have been adverse to the prosecution case.”

The 1st accused did not point out what evidence that would have been adverse to the prosecution case had Harrison Kaume been called as a witness. It is on the other hand not possible for prosecution to call the crowds at the scene as witnesses but an only call some of the witnesses. The 1st accused did not state in his defence how his failure to support his wife and children could be connected with this case and how the same would lead to his being framed and by who in this matter and for what purpose.

31. I have carefully considered the 1st accused defence of alibi also allegation of being framed and have come to the conclusion for reasons I have stated herein above that his defence is an afterthought as the prosecution's evidence dislodges the defence of alibi and placed the 1st accused at the scene of this crime. He was therefore recognized by PW2 and PW3 and the role he played was disclosed. I reject his defence and find it to be without support. I believe the evidence of the prosecution witnesses especially PW2, PW3, PW4 and PW5.

32. The 2nd accused's defence is a defence of alibi. He gave evidence as DW3. **JULIUS KINYUA M'KAIRIBIA**. His defence is that on 30.3.2009 he was very sick and on the material date he was

taken to Meru level 5 Hospital for treatment by **DW4 JULIUS MWITHALII MITHETHENE** and that on return to Maua Town as there were no transport they spent the night at Maua and left for their home the following day. He denied that he was involved in the murder of the deceased. He stated that he did not even know **JAMES MURUNGI (DECEASED)**. He stated PW2 lied when he mentioned him adding they have no grudge. He stated that PW3 mentioned him because they have a grudge as he was cut by PW3's brother who was a thief and upon reporting him to police he was later shot and killed by Police.

33. The accused defence of alibi was not stated at the earliest opportunity through cross-examination. It was raised in his defence. PW2 and PW3 who in their evidence mentioned the 2nd accused and stated the role he played at the time of attack were not challenged in their evidence through cross-examination. The 2nd accused did not point out through cross-examination that he was not at the scene of the crime. He stated he has no grudge with PW2, then why would PW2 who has no grudge with the 2nd accused make a serious accusation against him in an offence that has serious sentence? On PW3 he stated she has a grudge with him because he was cut by PW3's brother who was a thief and he reported to police. PW3's brother was shot. The 2nd accused did not state the role played by PW3 in his attack by her brother neither did he put it to PW3 that she has a grudge with him due to his brother having attacked him and having been shot by police. PW3 during Cross-examination she stated her family has no grudge with the 2nd accused. I found PW2 and PW3 who placed the 2nd accused at the scene of crime to be credible witnesses and I believe them; that they saw and recognized the 2nd accused at the scene of crime. They clearly stated the role he played at the time of the attack. I find the 2nd accused's defence to be a mere denial and an afterthought. I reject the same and find that he was one of the people who attacked and inflicted serious injuries to the deceased. That prosecution evidence through PW2, PW3, PW4 and PW5 dislodged the 2nd accused defence of alibi. The 2nd accused did not produce any transportation receipt, or accommodation receipt or treatment notes to show that indeed that on 30.3.2009 he was away as he had stated. As I say this I am aware that the burden of proof always lies with prosecution and accused has no burden or duty to prove that his defence of alibi or his innocence but has to put some doubt in the Court's mind. In the instant case I am satisfied the prosecution has through its witnesses' evidence dislodged the defence of alibi in respect of the 2nd accused.

34. The 3rd accused defence is a defence of alibi. He gave evidence as DW7, and his name as **MUSA NTONJIRA MIKAIKIRIBA**. He stated that on 30.3.2009 with **DW8 JOSEPH MUNGATHA M'KIARAO** were cultivating at his shamba from 8.00 a.m. upto 4.00 p.m. When they left for Irirui Market where they stayed upto 8.00 p.m. and left for their respective homes. That he denied having assaulted **JAMES MURUNGI (DECEASED)** who he stated he did not know. He testified that he did not know PW2 and that the prosecution witnesses were against him. He said **THURANIRA GITONGA** (May be he meant PW2) lied because he said he saw them beating accused at 7.30 p.m. and later said it was 6.30 p.m. He said PW3 stated she saw them beat the deceased. He stated that he knows PW3 but has grudge with her because her brother had cut his brother's hand in 2008

35. The 3rd accused defence of Alibi was not raised at the earliest opportunity during prosecution case but was raised in defence. The 3rd accused did not challenge the prosecution witness's evidence through cross-examination. PW2 and PW3 evidence put the 3rd accused at the scene of crime. The 3rd accused was well known to PW2 and PW3. The 3rd accused admit that point and as such I find as the offence took place during broad day light there was no mistaken identity of the assailants. The matters raised in defence were not put to any of the defence witnesses to respond. I therefore find that the 3rd accused defence is a mere denial and an afterthought. Such defence should have been disclosed and put to prosecution witnesses and before the close of the prosecution case. I observed the demeanour of the prosecution witness especially PW2, PW3, PW4 and PW5 and I found them to be credible witnesses. PW2 and PW3 placed the 3rd accused at the scene of crime. His allegation of grudge with PW3 is without basis as the issue was not put to PW3. The defence that the evidence is fabricated against the 3rd accused is without supportive evidence and I find it to be baseless.

36. The 4th accused defence is a defence of alibi. He gave evidence as **DW5** stating his name is **ISAIHA KITHAKA MURUNGI (ID/NO.11544554)** and produced his National identity card as exhibit D3 under the said names. He alleged that he is not an accused person in this case as the fourth

accused in that position which he has been responding to is “**ISAAC KITHAKA**” who is different from him. He denied the offence stating first that on 30.3.2009 he was arrested and put in cells for 18 days without being charged **CONTRARY TO THE CONSTITUTION** and taken to Meru Court and charged with Criminal Case No. 53/2009 and 58/2009. His second reason of defence is that on 30.3.2009 he was at home upto 1 p.m. When he left for a meeting at Karuruni P. School, which went on upto 5 p.m. when he left for his home with **DW6 DOUGLAS GITONGA**, the School Chairman, who was going to see the 4th accused wife as she was unwell. That they parted at 8.00 p.m. That after two months he saw PW1, PW2 and PW3 in company of an A.P. Who asked him to arrest him without giving an explanation. That he was then arrested. The 4th accused stated that he knew the deceased. He said he was mentioned by PW2 and PW3 in this case. He stated that PW2 lied when he said he saw him beat the deceased at 6 p.m. and later said it was 7 p.m. and for his failure to explain where he was coming from when he saw the 4th accused beating the deceased. He alleged PW3 Statement to Police was different from the one she gave to Court. He further stated the name of the deceased mentioned in this case is **JAMES MURUNGI** and is different from **HCRC 58 2009 and 53 of 2009**. He stated he was framed by PW2 as they fought over his money which was stolen from his water project. That PW2 conspired with PW3 to frame him.

37. The 4th accused did not disclose his defence of alibi till at the time he was giving his sworn defence. He did not take the earliest opportunity to build up his defence through cross-examination. On the issue of not being the fourth accused and his name not being among the accused persons is far from the truth. The names of the accused in the charge sheet read as follows:-

“a) Jacob Michubu Alias Isaack Nkunja

b) Julius M'Kairiba

c) Musa Ntonjira M'kairibia

d) Isaiah Kithaka”

The 4th accused name as per exhibit D4 is **ISAIAH KITHAKA MURUNGI**”. There is no accused person by the name **ISAAC KITHAKA** as alleged by the 4th accused. The accused's first two names are stated in the charge sheet. There is no other pending case dealing with this matter as the other two were withdrawn and/or consolidated with this matter. The 4th accused has been taking part in these proceedings without objection. I therefore find that the 4th accused **ISAIAH KITHAKA** is the fourth accused in this matter and that **ISAAC KITHAKA**, allegedly the 4th accused is not a party in this matter. The fact that particulars gives the name of **ISAAC KITHAKA** do not change the facts of who the accused persons are.

38. The 4th Appellant did not in his cross-examination put it to the witnesses that as of 30.3.2009 he was under arrest and unable to be at the scene of crime nor did he produce evidence to show that he was in custody or in cells. As regard the second reason of being at P.T.A. Meeting and at his home he did not put questions to the prosecution witnesses nor produced school register to show that he was in a meeting at the time of commission of the offence so as to dislodge the prosecution witnesses evidence. He alleged that PW2 and PW3 who knew him mentioned him. He said PW2 lied as he stated the offence was committed at 6 p.m. and later it was 7 p.m. and that he failed to explain where he was coming from when he found the 4th accused beating the deceased. The issue of the time when PW2 saw the deceased being beaten was also raised by the 3rd accused. I took the evidence of PW2 and upon perusal of the Court proceedings it reveals that PW2 stated:-

“This was about 6.30 p.m. I proceeded to the scene and told the people to stop assaulting the person -----”

The 3rd and 4th accused assertion that PW2 gave different times is not true as it is not supported by Court record. The issue of where PW2 was coming from was not raised during cross-examination and the 4th accused did not disclose its relevancy to this matter as the most important evidence was what PW2

witnessed irrespective of where he had come from or where he was going. As regard the statement of PW3 given before Court being different from the one given to the police, the 4th accused who had opportunity to produce or cause production and show the statement to the witness and Court and apply to produce it to Court as exhibit did not do so. I therefore find no basis for such submission. In the instant case the name of the deceased is given as **JAMES MURUNGI** and this Court is concerned with the case before it as of now but not cases which have been either withdrawn or terminated and whose records have not been produced before this Court. The 4th accused claimed he was framed by PW2 over claim for money which he had stolen from his water project and that PW2 and PW3 conspired to frame him. The 4th accused did not raised the issue of being framed by PW2 or PW3 during cross-examination. He did not even give reason why PW2 and PW3 would plan to conspire against him. On the issue of having been detained for 18 days contrary to **CONSTITUTION** I find even if that was so, the issue is not an issue of this Court sitting in a criminal matter but an issue for a Constitution Court to deal with and if any claim it is for compensation and may have nothing to do with this criminal case. I therefore decline to make a finding on that issue.

39. From the evidence of PW2, PW3, PW4 and PW5 I find that the prosecution evidence dislodges the 4th accused defence of alibi. I find PW2 and PW3 evidence to be credible. I believe that evidence and find no reason why the two would have lied against the 4th accused. I find the 4th accused defence to be a mere denial and an afterthought and reject the same.

40. Having considered the prosecution's evidence in its totality and defence of all the four accused persons and their witnesses, I am convinced that the 1st, the 2nd, the 3rd and 4th accused person are the ones who caused the injuries on the deceased **JAMES MURUNGI**, which caused his death. The 1st, the 2nd, the 3rd and the 4th accused; I find had mental capacity to form the intentions to cause death to the deceased herein; consequently I find the 1st accused **JACOB MICHUBU ALIAS ISAACK NKUNJA**; the 2nd accused **JULIUS M'KAIRIBA**; the 3rd accused **MUSA NTONJIRA M'KAIRIBIA** and 4th accused **ISAACK KITHAKA** guilty of murder contrary to **SECTION 203 OF THE PENAL CODE** as read with **SECTION 204 OF THE PENAL CODE** and Convict them accordingly.

DATED AND SIGNED AT MERU THIS 18TH DAY OF NOVEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2015.

In the presence of:

for State

Mr. Nyanyire for Accused.

C.C.

DELIVERED BY HON. LADY JUSTICE F. GIKONYO - JUDGE ON BEHALF OF HON. JUSTICE: J. A. MAKAU - JUDGE