



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 97 OF 2006

REPUBLIC.....PROSECUTOR

-VERSUS -

ANNAH WAIHERA MACHARIA.....1ST ACCUSED

RUTH WANJIRU MAINA.....2ND ACCUSED

DANIEL NJOROGI KIMOTHO.....3RD ACCUSED

JOSEPH KINYURU KIRIMBI.....4TH ACCUSED

ELIUD KIMANI MWAI.....5TH ACCUSED

PETER CHEGE MWANGI.....6TH ACCUSED

JOSEPH MACHARIA.....7TH ACCUSED

JUDGEMENT

The accused persons are charged with murder contrary to **Section 203** as read with **204** of the **Penal Code**. It is alleged that on the 12th June 2004, they jointly murdered David Macharia Mwangi at Kamae village, Lari Division of Kiambu District. They all pleaded not guilty to the charge.

The brief facts of the case are that the deceased was married to the first accused Anna Waithera and PW4 Hannah Wanjiru. The first accused lived with her children in her home at Kamae village while the younger wife PW4 lived in Kirasha market in Kamae location with the deceased. The deceased was a farmer and regularly tended to his crops and animals on the land where the first accused lived.

On the 12th day of June 2004, the deceased left his house where he lived with PW4 and went to the farm with some casual labourers. In the evening, the deceased did not return to PW4's house where he used to reside. Relatives including the deceased's brothers PW1 Peter Githinji and PW5 Peter Muhoro started looking for him. On the 14th June 2006, PW1 and others went to the house of the 1st accused who said she had not seen the deceased since the 12th June 2004 in the evening when he left her home to return to the younger wife's house. The search intensified after the matter was reported to the Area Chief and to Lari Police station. The Criminal Investigation Department (CID) officers from Kiambu later took over investigations. Accompanied by relatives of deceased and a crowd from the village the officers were led to Kamae forest by the 4th accused. After a long night search, the body was recovered from a water falls in the forest. Photographs of the scene and the body were taken before the body was removed

to the City Mortuary. The 1st accused, her sister the 2nd accused and others were arrested and interrogated on the death of the deceased. Investigations were conducted which led to the arraignment in court of the seven (7) accused persons.

The prosecution called twelve (12) witnesses in this case. PW1 the elder brother of the deceased and a resident of Kabuku in Limuru testified that it was on 15th June 2004, when he was informed by one David Njunge that the deceased had gone missing for three days. PW1 travelled to the deceased's home at Kamae village where he found the 1st accused and her daughter-in-law. Efforts to inquire from the 1st accused the whereabouts of the deceased did not bear fruit. PW1 reported the matter to the police at Lari. The 1st accused and her children were arrested. PW1 further testified that 5th accused Eliud Kimani was arrested at Kamae on allegations that he was the one who disposed of deceased's body. With the help of PW2 Munga alias Kung'u, the 4th accused was arrested at Maai Mahiu who then led police to the recovery of the body.

PW2 a resident of Maai Mahiu testified on how the 4th accused went to his home on 19th June 2004 at 7.30 p.m. He told PW2 that he wanted to escape to Narok and requested PW2 to hide him in his home shortly before he could prepare to leave. The 4th accused told PW2 that he had been given money by the 1st accused with three other people to kill the deceased. PW2 promised to help the 4th accused but instead assisted police to arrest him. The accused was arrested from Maai Mahiu on the 23rd June 2004.

It was PW3's evidence that he is a son-in-law to the 1st accused and that he lent the 2nd accused Kshs.5,000/= on 14th June 2004 on her request. She had wanted Kshs.10,000/= from him but PW3 did not have that amount. The witness was aware that the deceased had gone missing and that there was a search party in the village looking for him. PW3 joined the police and members of public to Kamae forest for the search. He was present when the 4th accused assisted the police to recover the body of deceased from the river. He further testified that he witnessed the arrest of the 5th accused by CID officers.

PW4 was the second wife of the deceased. She testified that she had been married to the deceased for about three (3) years before his death and that they had one young child. She said the deceased had disagreed with the 1st accused his first wife even before he married the witness. 1st accused had left the matrimonial home and returned only three (3) weeks before the death of the deceased. According to PW4, the deceased cultivated his land which was at Kamae village where the 1st accused lived and also reared animals. On 12th June 2004, the deceased left PW4's home in the morning with a worker called Mama Fiona and went to work in his farm. He used to return to PW4's house in the evening after a day's work where he used to live. On the material day, the deceased failed to return home and could not be traced for the next few days until the recovery of his body in the forest.

PW5 a brother to the deceased reported to Uplands Police Station that the deceased had gone missing. He found the police not cooperative and made another report to Kiambu CID office on 22nd June 2004. When the CID officers took over the case, PW5 joined them together with the members of public in search for the deceased. The 4th accused who had told PW2 that he was given money by the 1st and the 2nd accused to kill deceased led the police to the forest where he showed the police the body of the deceased. It had been thrown in a waterfalls in the river. PW5's testimony was that the 1st accused had deserted the deceased for quite sometime and only returned to the matrimonial home about one year before the incident.

PW6 was employed as a herdsboy by the 2nd accused in her home at Kamae village. He knew the 1st accused, her children including the 7th accused and the deceased. He testified that 7th accused lived in his parents home at Kamae. The witness recalls that one evening when he returned to the 2nd accused's home after his day's work of grazing goats he found the 1st, 2nd, 5th and 7th accused in the kitchen. He overheard them discussing how some unnamed person should be given medicine to stop bothering 7th accused. The 5th accused was also an employee of the 2nd accused at the material time. PW6 had been told by the 2nd accused earlier that the 7th accused often fought with the deceased. When the accused persons noticed that PW6 was behind the kitchen and therefore likely to hear what they were saying, he was instructed by the 2nd accused to pick a jericin and go to the river to fetch water. PW6 left

and when he returned, he found the accused persons still in the kitchen. He was again sent away from the house by the 2nd accused to go and join her husband and help him count the goats.

The following day in the evening, PW6 found the four accused persons in the home of the 2nd accused together with three other people including the 3rd accused. He left them there and returned to the forest to search for some lost goats. After the incident PW6 was removed from the home of the 2nd accused by his mother. He later recorded his statement with the police.

PW7 Sgt. John Ngomoli of Lari Police station received the report from PW1 that his brother had gone missing. He went to the house of the 1st accused accompanied by PW8 and recovered a wet jacket hanged in the bathroom. PW4 identified the jacket as the one the deceased wore on the 12th June 2004 when he left her house to go to the farm. On 25th June 2004 the 3rd accused Daniel Njoroge surrendered to the area Chief PW8 and told him that it was Chege and Kinyuru (4th and 6th accused) who had killed the deceased while he only played the role of disposing of the body using his bicycle. He led PW7 to his house where the bicycle was recovered. The 3rd accused was re-arrested by Kiambu CID officers for further interrogation.

PW8 the Chief of Kamae location accompanied PW7 to the house of the 1st accused on the 16th June 2004 after the deceased had gone missing for four (4) days. He was present when the wet jacket of deceased was recovered from the house. The 1st accused told the two witnesses that she had washed the jacket. PW8 said the jacket was very wet at that time. The CID Kiambu gave four names of suspects who they wanted to PW8 to assist them in the arrest. These were Chege, Kinyuru, Kimani, Njoroge and Mwangi (6th, 4th, 5th, 3rd and 7th accused). The 3rd accused surrendered to the chief's camp on 25th June 2004 at around 7.00 a.m. a day after his name was given as a suspect. The 3rd accused gave names of three people as suspects namely Kinyuru, Kimani and Chege to PW8. Information regarding the whereabouts of the 4th accused was received and with his assistance the deceased's body was recovered.

PW9 is one of the officers who arrested the 7th accused in Busia and escorted him to Kiambu police station where he handed him over to the investigators.

PW10 Dr. Moses Njue conducted the postmortem of the body of deceased. He found a deep transverse cut on the neck which had severed all the blood vessels. He formed the opinion that the deceased died of hypolaemic shock (massive loss of blood).

PW11 took photographs of the body at Kamae Forest and produced them in evidence.

The investigating officer PW12 testified that he took over the case from OCS Lari Police station who had five suspects in his custody. He visited deceased's home where the 1st accused lived. He told the court that the 4th and 5th accused were arrested separately and at different places. It was the 4th accused who assisted PW12 in the recovery of the body at a waterfalls in Kamae forest. The 6th and 7th accused were also arrested. The 1st accused assisted PW12 to recover the murder weapon from her house whereas a bicycle believed to have been used to transport the body to Kamae forest was recovered in an unoccupied house. PW12 described the state of the body and its wrappings of a blanket which was then inserted in two manila sacks. Two heavy stones were tied to the sacks to prevent the body from floating. PW12 also arrested the 2nd accused in whose presence and in whose home meetings to plot the killing of the deceased were held by some of the accused persons. The witness produced the exhibits recovered in the course of his investigations. These were the two sacks, 2 stones, a blanket, a panga and a bicycle.

The accused persons denied the offence in their unsworn statements of defence. The 1st accused said she was the elder wife of the deceased and that the deceased went to her home on 12th June 2004 around 7.00 a.m. She said that the deceased, herself and one Mama Fiona worked in the shamba the whole day. In the evening a cousin of the deceased namely Muigai came home and later left with the deceased. The deceased used to work in his farm during the day and spend the nights in the home of his 2nd wife. The 1st accused denied the offence.

The 2nd accused also denied committing the offence. She said her child was sent from school on

13th June 2004 and she went to one Patrick Ngugi PW3 to borrow money for school fees. She wanted Kshs.10,000/= but Ngugi could only afford half the amount which he gave her. Her husband was sick and he sent PW3 to return the child to school the following day. It was on 17th June 2004 that the 2nd accused learnt that police officers from Lari were looking for her. She said she went to the police station where she was locked in the cells for interrogation. She denied the offence and is still denying it. She said that the 1st accused is her sister and the 3rd accused her brother while the 7th accused is her nephew.

The 3rd accused told the court that on 12th June 2004, he was in Mau Narok where he had gone to buy potatoes to go and sell in Ukambani. He worked with one John Maina the husband of the 2nd accused in the business. He took John Maina home at Kamae for Maina was unwell. He then left for Mau Narok. When he returned home at Kamae on the 23rd June 2004, he found his wife, son and sister the 2nd accused under arrest. He was informed that police were looking for him and he therefore went to the chiefs camp the following day where he was also arrested and handed over to CID Kiambu. He was shown a bicycle by PW12 who alleged it belonged to him (3rd accused) but he denied the allegation. The 3rd accused denies the offence saying that he does not know the 4th, 5th and 6th accused.

The 4th accused said he is a businessman at Maai Mahiu and that on 12th June 2004 he was at his place of work at Maai Mahiu. He did business of buying diesel from lorries for sale. He was arrested on 23rd June 2004 around 2.30 p.m. in a drinking place by police officers in civilian clothes. Other customers ran away and since he was too drunk, the police caught up with him and arrested him. The reason for arrest was not explained to him. In a private car outside the premises, he found several civilians. Other people were in the police landrover. The civilians in the landrover identified the 4th accused to the police before he was driven to Kamae Forest where the officers used vehicle headlights to conduct a search up to 3.00 a.m. He was later taken to Kiambu police station where he was charged with the offence which he denies.

The 5th accused said that on 17th June 2004 around 10.30 a.m. as he worked in the farm of the 2nd accused, he heard a whistle at Kirasha. He learnt that the deceased had gone missing and that the area residents were setting up search parties. He joined them in the search but the deceased was not traced. The following day, he was arrested in his employer's farm as he worked with the 3rd accused and his wife. They were taken to the Chief's office where they found one Robert PW6 who said he knew them. They were taken to Lari police station and later to Kiambu police station where he was charged with the offence. He denies committing the offence.

The 6th accused said he was arrested on 1st September 2006 in his home area of North Kinangop in a bar together with other patrons. They were taken to Nyahururu police station. The arresting officers asked them to pay them Kshs.3,000/= each to be released. He had no money to bribe the officers and he was warned that a case would be framed against him. On 4th September 2006 he was taken to Kiambu Police station where he stayed for 47 days before being charged with the offence. He denies the offence.

The 7th accused said he is a resident of Kamae village. On 13th June 2004 he had just returned home from Busia where he had gone to buy utensils and edible oils for sale in Nairobi. He was informed that his father the deceased had left home with his uncle one Muigai in the evening of the previous day and had not returned. He left for Busia the following day accompanied by his friend one Zack. The two were arrested by officers from Busia police station and stayed overnight in the cells. The following day the 7th accused was escorted to Kiambu police station. He was told he would be treated as a witness before being charged with the offence in this case. He denies that he was involved in the murder of his father.

The evidence in this case is circumstantial since there was no eye witness to the unlawful act which caused the death of the deceased. The evidence require to be subjected to the laid down principles applicable to circumstantial evidence.

The issues for determination in this case are twofold:

- a) whether the seven accused persons did the unlawful act which caused the death of the

deceased;

- b) whether the accused persons had the intention to kill the deceased.

The burden of proof lies squarely on the prosecution to establish that the accused persons committed the offence. It is a cardinal principle that the burden in a criminal case does not shift to the accused person unless an accused person raises a defence to which the law requires that he/she satisfies the court in that regard. The standard of proof is beyond any reasonable doubt.

The ingredients of the offence of murder which the prosecution must prove are:

- a) the death of the deceased and the cause of that death;
- b) that the accused persons committed the unlawful act which caused the death; and
- c) that the accused persons had malice aforethought.

The first accused was the elder wife of the deceased who was living separately from him. The deceased had married a second wife PW4 after the 1st wife left home. PW4 testified that the deceased looked after the home of the first accused when she was away. When she returned to the matrimonial home, the deceased did not live there. However, he continued working in his farm where the 1st accused and her children lived. The deceased lived in their rented house about 2 kilometres from the farm. There was evidence from his brother PW1 that the deceased and the 1st accused were at loggerheads due to disagreement over property. There were frequent fights between the deceased and the children of the first accused. PW1 told the court that the first accused incited her children to beat their father and that in one incident, his arm was broken by 7th accused. There was a lot of pressure on the deceased to share out his property among the children of the 1st accused. In her defence, the first accused did not comment on the alleged frosty relationship with the deceased. It should be noted that the accused has no legal obligation to comment since the burden of proof is on the prosecution.

The first accused was said to have held two meetings in the house of the 2nd accused with the other accused persons including the 7th accused. She was heard by PW6 saying that the person who was disturbing Mwangi should be given medicine. PW6 who was an employee of the 2nd accused understood the person referred to, to mean the father of Mwangi, the deceased. PW6 knew the families of the 1st and 2nd accused well. He had knowledge that through the 2nd accused that 7th accused used to fight the deceased. The meetings were held on two consecutive days according to the witness and that every time he went to where the attendants were, he was instructed to leave. PW6 was to learn later that the deceased had been killed.

From the house of the first accused was recovered a wet jacket which the deceased wore on the material day. No explanation was given as to why the jacket was washed several days after the deceased died. However, this jacket was not produced in evidence for a reason not explained by the investigating officer. The deceased went missing on 12th June 2004 when he went to work in his farm where the first accused lived and he was last seen alive on that day. There is no evidence that the deceased was seen away from his farm on the material day. The first accused said in her defence that the deceased spent the day there.

The investigating officer PW12 testified that he was assisted by the first accused to recover the murder weapon namely, a panga from her house which was hidden under the timber floor. In the course of his investigations, PW12 learnt that the first accused is the one who gave the 5th accused the job of disposing of the body. The only other evidence in this regard came from PW2 who was told by the 4th accused that the 1st and 2nd accused had hired him together with the 3rd, 5th and 6th accused to kill the deceased and to dispose of the body.

In her defence the first accused denied the offence but did not mention anything to do with the allegations of the meetings held in the house of 2nd accused or the recovery of the panga. Her defence

dwelt on how she was arrested and subsequently charged. The prosecution placed the first accused in the meetings in her sister's house where most of the accused persons were gathered to hatch the plan and develop strategies to execute the plot. The first accused did not allege that any of the key witnesses PW6, PW1, PW4 and PW12 had any grudge against her in order to frame the case against her. The prosecution's evidence was credible and not dislodged in the defence. I did not believe the defence of the first accused that the deceased left her home in the evening of the 12th June 2004 with his cousin Muigai. The said Muigai was not called as a witness by the 1st accused.

The 2nd accused was said to have hosted the meetings in her house believed to have been used for planning the crime. PW6 was her employee who also knew her sister, the 1st accused, the deceased and his son the 7th accused. PW6 testified that he went to the kitchen where the 1st, 2nd, 3rd, 5th and 7th accused met and he was served with food and instructed to go outside. He sat behind the house and heard what the 1st accused was saying about the person who was a bother to her son and how he would be dealt with. Neither the 1st nor the 2nd accused challenged PW6's evidence in their defence. The 2nd accused was said to have borrowed money from PW5 the son-in-law of the 1st accused to finance the killers. However, there was no evidence on how the money was utilized. The defence of the 2nd accused was that the money was to pay school fees for her child who had been sent away from school. PW5 was the one who was sent by 2nd accused's husband to return the child to school but did not mention of any money for fees given to him by the 1st accused. Evidence from PW2 was that the 1st and 2nd accused are the ones who hired the 4th accused together with others to kill the deceased.

PW6 told the court that the husband of the 2nd accused did not live in her home. He used to stay with his 3rd wife at Kamae market but came to the home to check on his animals. The 2nd accused was the employer of the 3rd and 5th accused who were present in the meetings and who were later arrested as suspects for the murder. The 2nd accused did not make any attempt to dislodge the evidence of PW6 in her defence.

The 3rd and 5th accused were employees of the 2nd accused. The 3rd accused said he was working with 2nd accused's husband in a potato business and that he was at Mau Narok on the material day. The 5th accused admitted that he was an employee of the 2nd accused and was arrested while working in her farm. He denied any involvement in the murder of the deceased. However, it was PW6's evidence that the 3rd and 5th accused attended the two meetings in the house of the 2nd accused. PW12 said the 3rd accused is the one who informed him about the murder weapon in the house of the 1st accused and which the 1st accused later assisted PW12 to recover. According to PW7 and PW8, the 3rd accused surrendered to them and said he had vital information on the killing of the deceased. He said the deceased was killed by four people. However, he only gave three names being those of the 4th, 5th and 6th accused. This was 13 days after the death of deceased, yet the 3rd accused had not reported the crime to the area Chief or to the police assuming that he was innocent. He would not have known about the whereabouts of the murder weapon had he not been involved in the murder. PW7 and PW8 testified that he was led by the 3rd accused to his house where he recovered the bicycle. It was wrong for the 3rd accused to conceal the commission of the crime. He ought to have reported to the relevant authorities. It places him in the category of a principal offender even assuming he did not take part in the killing. The 3rd accused also told PW8 that it was the 4th accused who had more information on the death of deceased. The prosecution have adduced evidence that 3rd and the 5th accused met with the 1st, 2nd and 7th accused in the house of 2nd accused.

However, any evidence by 3rd accused against the 4th, 5th and 6th accused is not reliable being that of an accomplice.

The 6th accused said he was arrested in a bar in his home area and taken to Nyahururu police station and subsequently to Kiambu police station where he was charged with this offence which he denies. According to him, the other people who were arrested by the police paid bribes and were released. The only evidence against the 6th accused is that of 4th accused who is an accomplice.

PW2 assisted police to arrest the 4th accused who had gone hiding in his home at Maai Mahiu to evade arrest. He told PW2 that he was involved in the killing of the deceased after being paid by the 1st

accused. It was the 1st accused who gave him Kshs.10,000/= to share with 3rd, 6th and 7th accused for the job. He volunteered to show the police where the body of the deceased was. Police would not have recovered the body without his assistance. The evidence of PW1, PW2, PW3, PW9 and PW12 was overwhelming the his defence of the 4th accused that he was not involved cannot be the truth.

The 7th accused said he returned home from Busia where he had gone to buy his merchandise on 13th June 2004 and then left on 14th June for Busia from Kamae. He was subsequently arrested on 26th June 2004 at Busia. PW6 saw the 7th accused whom he knew well in the meetings held in the house of the 2nd accused. He was with his mother the 1st accused when she said that the person who was disturbing him (7th accused) was to be given medicine. PW12 said that investigations revealed that the 7th accused funded the killers. It is important to note that the accused does not explain where he was on 12th June 2004 when the deceased was killed. Neither does he say when he left Kamae for Busia before returning on 13th June 2006. There is evidence that the 7th accused used to fight with his father demanding share in deceased's land, animals and crops. He was the son of the deceased and may have been angered by his father marrying a 2nd wife which act would have negative consequences on his inheritance. The attendance of the planning meetings places the 7th accused in the group of people who planned the killing of the deceased. His disappearance from home after the incident and his failure to explain his whereabouts on the material day confirms the evidence of PW6, PW1 and PW12 concerning his involvement. This court did not believe the accused's defence that he had nothing to do with the murder of the deceased.

The defence submitted that the evidence of PW6 required corroboration because he was a minor when the incident occurred. It is my considered opinion that the evidence of PW1, PW2, PW4, PW7, PW8 and PW12 corroborated PW6's evidence as regards the motive of the murder and the planning meetings held by the accused persons before the deceased was killed.

The prosecution have presented to this court the following circumstances:

Firstly that the deceased's relationship with the first and 7th accused was very strained and that it deteriorated when he took a younger wife leading to the first family putting pressure on the deceased to share out his property. The deceased resisted the demands which resulted in hostility against him by the 1st and 7th accused.

The issue which arises is whether motive is relevant in proving a crime. This arises from the bad relationship between the 1st and the 7th accused on the one hand and the deceased on the other hand. The prosecution have adduced evidence through PW1, PW4 and PW6 to support the poor relations caused by refusal by the deceased to share out his property and which imputes the motive by the 1st and 7th accused to kill deceased.

It was held in the case of **Limbabula vs. Republic Court of Appeal at Kisumu Criminal Appeal no.140 of 2003** that:

“Motive is an important element in the chain on presumptive proof and where a case rests purely on circumstantial evidence and may be drawn from facts though proof of it is not essential to prove a crime.”

The case before me is mainly based on circumstantial evidence and this court is entitled to hold an inference that the 1st and 7th accused had a motive to kill the deceased.

Secondly, that a few days preceding the death of the deceased, the 1st, 2nd, 3rd, 5th and 7th accused met in the house of the 2nd accused and hatched a plot to eliminate the deceased.

Thirdly, that the 3rd, 4th, 5th accused were among the persons who executed the plan at a fee and disposed of the body which was thrown in a waterfalls in the forest about 20 kilometres from the scene and was tied with heavy stones to prevent floating with a view of concealing the crime.

Fourthly, that the body was only discovered upon the 4th accused cooperating with the police and murder weapon recovered with the help of the 3rd and 1st accused.

Fifthly, that the cause of death was massive blood loss due to the neck injury caused by a sharp object which was consistent with the panga recovered by PW12.

Sixthly, that the deceased was last seen alive in the home of the 1st accused who had earlier on called meetings of the several people including 2nd, 3rd, 5th, and 7th accused where discussions on how the deceased would be eliminated took place.

There is no direct evidence on who inflicted the fatal injury on the deceased which resulted in his death. However, there is evidence that the 1st, 2nd, 3rd, 4th, 5th and 7th accused played roles which led to the elimination of the deceased. The 1st, 2nd, 3rd, 5th and 7th accused were involved in the planning of the crime a few days before the deceased died. The 3rd, 4th and 5th accused were involved in the planning as well as the execution and disposal of the body according to the evidence of PW1, PW2, PW8, PW11 and PW12. The 4th accused assisted the police in the recovery of the body. This court has found their defences wanting and incapable of displacing the prosecution's evidence concerning the commission of the crime and in particular the existence of a common intention. It is clear that the six(6) accused persons planned and designed with common intention and knowledge to kill the deceased. In my view, the accused persons had knowledge that all their acts put together was to bring the life of the deceased to an end. The accused persons formed a common intention to execute an unlawful purpose in conjunction with one another which resulted in the commission of the offence.

There is no evidence that the 4th accused was present during the initial meetings. Although PW6 mentioned there were three other people in one of the meetings, he did not name them. The 4th accused was subsequently recruited in the execution of the unlawful purpose whose final leg was to dispose of the body far from the scene of crime. This is the part that the 4th accused played as demonstrated by the evidence of the prosecution. When he went to hide in PW2's home at Maai Mahiu the 4th accused said that he was involved in the act of killing the diseased. Even if he was not present at the planning stage, the 4th accused was aware of the common intention of his colleagues and any act or omission resulting from the initial intention constitutes the commission of the crime.

In the case of Fransica Ngina Kagiri vs. Republic Court of Appeal Nyeri 2007 (unreported) which was cited with approval by the Court of Appeal Nairobi in the case of Musenya Ndui vs. Republic Criminal Appeal No. 534 of 2010 the court defined common intention thus:

“Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been proven to start with.”

For the 4th accused, the common intention can be said to have developed in the course of the events commenced by the designers of the crime. The criminal act by the 3rd, 4th, and 5th accused was done in furtherance of the common intention which culminated in the participation of all the accused persons in the criminal act namely the 1st, 2nd, 3rd, 4th, 5th and 7th accused.

As regards the 6th accused, there was no evidence to link him with the designing and planning of the criminal act. His name was mentioned by the 4th accused when he confessed to PW2 and by the 3rd accused when he surrendered to PW8 the chief of the area. The chief was in the company of the O.C.S. Lari police station at the material time. There was no independent witness to support this evidence of accomplices. The evidence is therefore incapable of sustaining a conviction as it was held in the case of Rashid Thomas vs. Republic [2008] eKLR:

“It is also a firm rule of practice that the evidence of an accomplice witness requires corroboration and that the court may only and in appropriate circumstances convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself and the assessors, where the trial is held with the aid of assessors as was done in

this case, on the dangers of doing so. See Kinyua vs. Republic [2002] 1KLR p 256.

Having accepted that there was no eye witness to the heinous act which ended the life of the deceased and having outlined the circumstances put before this court by the prosecution, I now proceed to apply the laid down principles. In the case of Sawe vs. Republic [2003] KLR, the Court of Appeal held that:

- “1) *In order to justify conviction on circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilty.*
- 2) *Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*
- 3) *The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*
- 4) ...
5. ...
6. ...
7. *Suspicion however strong cannot provide the basis of inferring guilty which must be proved beyond reasonable doubt.”*

The case of Sawe was cited by the Court of Appeal Nairobi in the case of Mabel Kavati & Another vs. Republic Criminal Appeal no. 509 of 2010 where the court upheld a conviction by the superior court based on circumstantial evidence and where the appellants had acted in common intention. The facts before me briefly are that the deceased was last seen alive on 12th June 2004 in the home of the 1st accused. The 1st accused admitted that she worked in the farm with the deceased and one Mama Fiona the whole day. Although she said that the deceased left her home in the evening with one Muigai, there was no evidence to support the fact that he ever left that home. The jacket he was wearing on the material day was found wet in the house of the 1st accused by PW7 and PW8 several days after the deceased went missing. The recovery of the murder weapon and the meetings held in the home of the 2nd accused led by the 1st accused who gave proposals on how deceased was to be eliminated all point to the guilty of the 1st accused.

The 2nd accused hosted the meetings which were also attended by the 3rd, 5th and 7th accused place all the four (4) accused in the arena of the designing of the killing of the deceased with a common intention. The 4th accused accompanied by the 4th and 5th accused disposed of the body of the deceased after killing him. PW12 said his investigations revealed that the heinous act was carried out by the 3rd, 4th and 5th accused as the 1st and 2nd accused watched at a distance.

Section 111 of the **Evidence Act** provides:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially with the knowledge of such person is upon him.”

The provision places the burden of proving that the circumstances implicating him fall within any exception or exemption from the operation of the law on the accused. None of the accused herein has presented a defence capable of displacing the prosecutions evidence in regard to the existing circumstances and concerning the common intention. The defences of the 1st, 2nd, 3rd, 4th, 5th and 7th accused persons do not create any reasonable doubt in the prosecution's case. The circumstances and chain of events from the meetings held among the accused persons, the disappearance of the accused after

spending the day at his farm where the 1st accused lived and the recovery of the body within the help of the 4th accused who claimed he was hired by the 1st and 2nd accused was consistent. The existing circumstances point guilt in the killing of the deceased to no other person or persons except the six (6) accused persons: 1st, 2nd, 3rd, 4th, 5th and 7th accused persons. The evidence on record leaves only one irresistible conclusion that the six accused persons were the murderers of the deceased with each playing his or her role be it planning, execution, paying the killers or disposing of the body. All of them acted with a common intention of eliminating the deceased which mission was finally accomplished by the team.

Where the accused persons are charged with committing murder jointly, it is necessary that the prosecution adduces evidence to place the accused persons in the group of people who killed the deceased or plotted the murder. I come to a conclusion that the prosecution have satisfied the court that the 1st, 2nd, 3rd, 4th, 5th and 7th accused each played a part in the killing of the deceased. I find that the prosecution have established that the six (6) accused persons were responsible for the act which brought to an end the life of the deceased.

The 6th accused is in his own category. There was no evidence that he attended the planning meetings. Although he was implicated by the 4th accused, there is no evidence to corroborate the evidence of an accomplice which I have already pointed out that it is not sufficient to convict him. I find the 6th accused not guilty of the unlawful act which caused the death of the deceased.

This court now proceeds to examine the evidence with a view of establishing whether the six (6) accused persons had malice aforethought when they killed the deceased. There is evidence of meetings which laid strategies of eliminating the deceased called by the 1st accused and hosted by the 2nd accused with the 3rd, 5th and the 7th accused in attendance. The meetings were followed by the actual killing of the deceased using a panga. The throat of the deceased was severely cut in a transverse manner cutting off all the main blood vessels. This serious injury would not have been inflicted with any other intention but to kill the deceased. Coupled with the planning meetings and the manner in which the body was disposed of with view of concealing the crime, I come to a conclusion that the six (6) accused persons premeditated the killing of the deceased. I find that they had the intention to kill the deceased.

It is my finding that the 1st, 2nd, 3rd, 4th, 5th and 7th accused murdered the deceased. I convict them as charged under **Section 203** as read with **Section 204** of the **Penal Code**.

The 6th accused is hereby acquitted of the offence. He is hereby set at liberty unless otherwise lawfully held.

F. N. MUCHEMI

JUDGE

Judgement dated and delivered in open court on the **27th** day of **February 2014** in the presence of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th accused persons, Mr. Tunya for 6th accused and holding brief for Kanyangi for 1st, 2nd, 3rd, 4th, 5th and 7th accused persons and Ms. Maari for Ogoma for the State.

F. N. MUCHEMI

JUDGE