



**REPUBLIC OF KENYA**

**IN THE HIGHCOURT OF KENYA AT EMBU**

**CRIMINAL CASE NO. 8 OF 2009**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**JAMES MATHENGE WAMAE ..... 1ST ACCUSED**

**GERALD MAINA MURIMI.....2ND ACCUSED**

**DANIEL MWANGI WAHURA.....3RD ACCUSED**

**JOHN KARIITHI MATHENGE.....4TH ACCUSED**

**JOHNSON NDEGWA KAMURI.....5TH ACCUSED**

**ISAIYA MWANGI MAINA.....7TH ACCUSED**

**ANTHONY MUTHIE MURIMI(ALIAS KIRINYAGA).....8TH ACCUSED**

**J U D G M E N T**

James Mathenge Wamae, Gerald Maina Murimi, Daniel Mwangi Wahura, John Kariithi Mathenge, Johnson Ndegwa Kamuri, Isaiya Mwangi Maina and Anthony Muthie Murimi stand charged with the offence of Murder Contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars as stated in the information are as follows;

**JAMES MATHENGE WAMAE, GERALD MAINA MURIMI, DANIEL MWANGI WAHURA, JOHN KARIITHI MATHENGE, JOHNSON NDEGWA KAMURI, ISAIYA MWANGI MAINA AND ANTHONY MUTHIE MURIMI (alias) KIRINYAGA: On the 24th day of April, 2009 at Kianwe village in Kirinyaga district of central Province jointly with others not before court murdered JANE NYARWAI MAINA:**

The 6th accused person passed away on 14/12/2012 as per the signal received by this court on 29/4/2013.

The accused were jointly charged with the Murder of the deceased, Jane Nyarwai. The cause of death was confirmed by (PW5) Dr. Stephen Wangombe as being severe head, chest and brain injuries. He produced EXB12 being the post mortem report.

(PW4) SAMUEL OGANGA OWINO a psychiatrist by profession examined the accused persons and found each fit to stand trial. He produced EXB1-11 (P3 FORMS) to that effect. The prosecution called

a total of twenty witnesses, and this is their case. PW1 (JOHN MURIUKI MUSA) who is the local chief of the area gave evidence that on 27/5/2008 the deceased made a report that her house had been surrounded by twenty heavily armed men, upon which he directed the sergeant to proceed there, but the sergeant found three men who were family members of the deceased. He instructed them to come to his office where they introduced themselves as members of the teacher's family with one of them informing him that he was a brother of the teacher's late husband and he had gone to ask for keys to his small room and that is when a commotion arose. He summoned a meeting whereby three women claiming to be Mathenge's wives showed up, but he advised them to maintain the status quo. According to him the deceased proceeded to report the matter to CID who also advised her to file a succession cause.

He further stated, that on the 24/4/2009 he received a call from one of his informers that a group of people calling themselves "Anti- Mungiki", were forcing people to close down their businesses, as they wanted to flush out Mungiki sympathisers. He proceeded to the scene and together with some officers tried to calm the crowd but they instead, started moving towards Kiambu direction, only for them to see smoke billowing from somewhere and learn that it was from Nyarwai's home. He however testified that he could not identify anyone and that he went to the deceased's house and found that the house and car had been torched.

PW3 P.C. SALUIN KAVITA gave evidence that he was called by the OCS to accompany him to Kiambu trading centre where the house of the deceased had been torched. On the way they tried to stop a group of people numbering two hundred but they were unsuccessful. At the scene they found the deceased's body behind the cattle shelter. It was his evidence that after proceeding to Kiambu trading centre they found accused 4, 5 and 7 armed with a panga and two rungu which he produced as EXB2A and 2B. He however on cross examination could not remember what accused 4 was carrying. He stated that accused 7 had a rungu and a panga while accused 5 had a rungu which he could not identify but said the latter also had a panga.

(PW8) Michael Murithi Njage gave his testimony to the effect that he knew the deceased as he had worked for her neighbour Jesse Mwai for two and half years. He testified that on the 22/4/2009 there was a meeting conducted at night at Kawaaro, where men numbering around three thousand from surrounding villages were in attendance. He too was in attendance. They discussed issues of Mungiki and security. It was his testimony that Anthony Muthie (**Accused 8**) supported by accused 1 (James Wamai) stated that he had been locked by the deceased in her house and beaten by Mungiki members. He further testified that after everybody had addressed the meeting one Chomba said he did not agree with Accused 1 and told him to go to his home. The witness left at 11.00 pm. The following day on the 23/4/2009 he went to the deceased and informed her of what had transpired the previous night. The deceased later sent her worker Antony Muranja Njanja with whom he worked from 8.00 pm onwards on security duties. He later on advised the deceased to be sending her workers as he would no longer be giving her information about the security meetings. On the 24/4/2009 he woke up at 6.00 a.m and while tending to the cows the Accused 1 came to him informing him that people were to go to Kiambu.

On his way there at around 9.30 am he met a group of people whom he knew, among them were accused 1 and 2 making noise armed with clubs and pangas and they ordered him to go back. He went back with them. On reaching his employer's gate Accused 8 (Antony Muthie Murimi) started pointing at him with a Club and ordered him not to enter. It was his testimony that he followed them until they reached the deceased's house and the 8th accused alias Kirinyaga was the 1st to enter. Young men threw stones breaking window panes. Accused 8 Alias Kirinyaga told people to enter the deceased's house.

On hearing the noise the deceased who was at the back washing clothes came and asked the group what they wanted. Accused 8 alias Kirinyaga then asked the mob to follow him so that he could show them where he had been locked up. Being accompanied by ten men who are not in Court they entered the house with the deceased and stayed there for about five minutes. When they came out the deceased had three injuries which she did not have before they entered the house.

He further gave testimony that accused 8 alias Kirinyaga cut the deceased on the back of her neck as he watched at around 10.00 a.m. All this time he remained at a distance waiting for them to leave after

watching the same.

He further testified that it was Accused 8 who set the house on fire using petrol from Motor vehicle KAH 159C, which was in the garage and belonged to the deceased. He further stated that Accused 8 removed the vehicle, cut the petrol tank with a panga and poured petrol round the house and then asked for a match box and set the house on fire. With the help of ten men they threw the deceased in the cow paddock. All this while the witness was standing outside the gate while the others were inside. He reiterated that it was the accused 8 who stood next to the deceased and murdered her.

He finally left the gate with Anthony. They proceeded to Kienja where the group set ablaze the house of Karaba whom they alleged was a Mungiki member. He then went home. He feared being arrested so he did not go near the police.

Afterwards he decided that he would not keep quiet and on the 19/5/2009 he made a report to the CID in Kerugoya after the accused had been arrested. It was his testimony that he appeared before an identification parade and identified accused 8 and had no problems in identifying him as he knew him very well as they had grown up together.

PW6 (Patrick Wanjohi Murimi) stated that on the 24/4/2009, he left his house to his place of work and then proceeded to kiriko area to check on somebody, who was meant to give him work. It was his testimony that he was then called by two people who informed him that there was trouble in that area hence they could not do the work he had given them in the area. They then proceeded to Kianyaga area near the tea factory area accompanied by Peter Gichangi Murimi, where they met Githinji Mwai, James Mwangi and Josephat Mwangi and worked there until 3.00pm. After work they went home as there was tension in the area. It was his evidence that he knew Accused 8 as he was one of the people he had given work that day. Accused 8 had not reported for duty that day. He produced the book as EXB13 to confirm that. His evidence was corroborated by PW7 (John Githinji Mucheke).

PW9 (Florence Wanjiru Njiru) testified that on the 24/4/2009 the deceased called her at around 7 a.m. at her home requesting her to go and see her as she was unwell. On her way at the junction of Thunguri-Kiangai at 11.00 a.m. which is almost a mile from her home she met with almost three thousand people who told her to move out of the way. She moved into the house of one Muriuki Kavoi and while she was there she saw the home of Samuel grandchild of Munene burning. She testified that it is the people she met on the road that had gone to Samuels house but she could not tell if they are the ones who burnt the deceased's house. However, from where she was she could see smoke emanating from the deceased's house. She tried to call her in vain. She further stated she could not identify the people who told her to keep off the way. She later received a report of the death of the deceased and her burnt home.

(PW10) Njeru Kinyua testified that in April 2009 while at his house he got a report that the wife of Maina Kiangai wanted to see him as he was being chased by Accused 1. Accused 1 was alleging she was not Maina's wife and she should go home and hand him the keys to the motor vehicle.

It was his testimony that he had arbitrated over many differences between the family members and had sometimes informed the deceased to go and file a succession cause. After obtaining a letter from the chief the land was to be divided among the three widows. It was while at his home that he heard that the homestead of Maina had been set ablaze and the vehicle burnt. The deceased's daughters wanted Accused 1 arrested before they could bury their mother.

PW11 (Antony Chomba) who was a domestic worker to the deceased stated that on the 24/4/2009 he woke up at 6.30 am. and milked the cows. He chatted with the deceased who informed him about accused 8 alias (Kirinyaga) who had worked for her and after a spare wheel got lost the accused left and returned three days later to demand for his pay. He also stated that he never saw the accused in the deceased's home. He went to fetch fodder 3 kilometers away and on his return he found the deceased's house and the vehicle on fire and his employer dead. She had a cut on the back of her head and the body surrounded with many stones outside the house near the cattle boma.

PW2 (Maina Wanjiru) a nephew of the deceased received the report of her death and came to take care of the home. However on 3/5/2009 Accused 1's son chased him away.

PW12 (Pius Kiprono Njeli) the OCS Baricho police station testified that on 24/4/2009 10.30 a.m he received a report that young men had gathered at Kiangai trading centre Kirinyaga East. On his way there, together with his deputy they learnt that the house of Keene had been burnt. They went to the deceased's home and found the same burning. He also saw the deceased's body with a bleeding head. He also identified the photos taken at the scene as EXB1 (i-xxv).

They followed the group and they met Johnson Ndegwa, John Kariithi and Isaiah Mwangi who were armed with rungas and pangas. They were arrested and the pangas and rungas handed over to the OCPD Kirinyaga.

PW13 (Cpl. Joseph Ochieng) a CID officer testified that on 24/4/2009 he was summoned by the DCIO together with the investigating officer. They went to the scene of murder at Kiamui village and found the deceased's house on fire. A pick up Nissan sunny was completely burnt, the water tank had been turned upside down. There were broken buckets and basins. They tried to find out what had transpired from the 1st accused and the mother in law of the deceased who said they knew nothing. They later learnt that Accused 1 was the chairman of vigilantes of Mungiki. His testimony was corroborated by that of PW20 Josephat Cheleon.

He further stated that as they were leaving they met one Gerald (accused 2) who was holding a club, accused 3 and 6 who had big clubs walking away towards Kiangai and arrested them. The 1st accused was arrested after inquiries and not during the incident as recorded in his statement. It was his testimony that the 1st accused told them that he was a member of a vigilante group which he chaired. The group's purpose was to remove the Mungiki. This witness was aware of these two groups as there was a lot of tension between them. He further testified that he could not tell if any of the groups was engaged in unlawful activities and that he never learnt that the deceased was Mungiki. He said in cross examination that the deceased was killed by many people beating her with stones and clubs.

PW14(SSP Sebastian Kirunja) based in Nyeri testified that on the on the 24/4/09 he was at Karatina police station when he received a call informing him that a group of people was gathered at Miiri trading centre armed with weapons. It was his testimony that after informing the OCS he left for the scene but did not find the people. He was informed that the group was at Kiangai. He was joined by the Karatina flying squad and they found a group of about two thousand people armed with pangas, axes and rungas moving westwards. When they alighted they were surrounded and informed that these people were going to flush out Mungiki people and ordered him to go back to Nyeri. He alerted the OCPD Kerugoya and left for Karatina where he met the OCPD whom he briefed.

PW15 (Cpl. John Mugo No.5864) of Nyeri police station Crime services testified that on the 25/4/09 at 9.00 a.m. he proceeded to Kiini village, in Kiangai sub location to the home of Jane Maina Nyarwai accompanied by Cpl. Cheboi of CID Kirinyaga and took photos of the deceased's body at Kerugoya Mortuary, 23 closer view of injuries on the body, 24 facial view of the deceased's body for the scene (EXB3(i-xxiv)). He produced a certificate to that effect (EXB15).

PW16 (Caroline Wangari Maina) who is the daughter of the deceased stated that on the 24/4/09 she was at work at Dimaini tea factory when she received a call from Joseph Murenge which made her rush home as her mother was not picking her call. While on the way they got a report that her mother was already dead. She testified that on the 22/4/09 her mother had told her that her shamba boy Muthie Kirinyaga told a group of people that she was a Mungiki Member. She also told her that the 1st accused had told the same to the people at Kahuro. She had advised her to report. She went home on 26/4/2009 and observed the scene. She identified her mother's body for post mortem.

PW18 (C.I. Pascal Kyemba No. 230938) on the 19/5/09 conducted an identification parade in respect of Accused 8. Three witnesses (PW8, PW9, PW16) identified him (EXB16). The accused said he had nothing to say and was satisfied with the way the parade was conducted. He testified that he followed all

the parade requirements and produced the forms he signed in respect of the parade as EXB16.

PW19 (Patrick Ongumbo Gisemba) of CID stated that in early January 2009 the deceased came to Karatina and reported a case of obtaining by false pretences involving three hundred thousand shillings and that she identified the culprits as they were coming out. The deceased had withdrawn the money from Co-operative Bank and that she could identify the motor vehicle they had used. It was KAJ Toyota corolla. He stated that he found the motor vehicle at Languinta hotel Karatina and arrested one suspect Daniel whom they took to the station and charged him but they did not recover the money.

The deceased indentified Daniel and on investigation they found that he came from the same area as the complainant. He was charged but on the day of hearing he never appeared in court. He later learnt that the deceased who was the complainant had been stoned to death.

All the accused persons gave sworn statements in their defence. Accused 1 stated that the deceased was his brother's wife. He said he was arrested on the same day of the killing. He was on his way to his tea farm when the same happened which is a thousand metres from the scene. He stated that he never heard any noises and that he was arrested from his home after which he was taken to Kerugoya police station. It was his testimony that he had no problems or any case with the deceased.

He refuted the testimony of one witness who said that he and the deceased were not in good terms. He denied being a member of Mungiki or Mungiki vigilante. Instead he said he was a member of Kienja Tea Centre.

The 2nd accused Gerald Maina Murimi from Kiangai Kirinyaga County in his defence stated that on the 24/4/09 that he was a shamba boy who used to operate from home and would report at 7.30 a.m. - 1.30 p.m. He stated that on 24/4/2009 he worked up to 1.30 pm and while on his way after delivering tea at Kienje Tea Collection Centre on a foot path he met two men who stopped him and asked him who he was. Five others appeared from the bush and wanted to know what was happening in the village and he informed them, that he did not know what was happening. While still there another appeared speaking in Kiswahili saying people were to be arrested. Three GK land rovers appeared and those who were in them produced guns, and he lay down. He was arrested and taken to Kerugoya Police Station He denied killing the deceased.

His witness DW1 (Rhoda Ngina Mathenge) testified that she knew him since 2007 as he lived near their home and had been her shamba boy up to the time he was arrested. On the 24/4/09 at 7.30 a.m he reported on duty and worked up to 1.30 p.m. as they picked tea up to that particular time and then left to sell the tea leaves at Kianje Tea Buying Centre. He did not return to take care of her cattle, and the following day she went to his home to inquire about the receipt and basket that he had gone with and that is when she learnt that he had been arrested the previous day. The next time she saw him was in Court where he had been charged with murder of the deceased. She reiterated that she was with Accused 2 on that day from 7.30a.m-1.30p.m.

The 3rd accused Daniel Mwangi from Kiangai in his defence stated that on the 24/4/2009 he was at home when he was called by Patrick Muchiri who asked him to go to town where he used to charge batteries and take his battery for him. It was while on his way there that he was arrested by police from Kerugoya, and was not told why he was arrested until he was brought to Court. He denied knowing the deceased as she was not from his area.

The 4th accused John Karithi Mathenge from Kiangai in his defence stated that on the 24/4/09 he was on duty at Mavutha Wangai's doing casual work of carrying fertiliser and finished at 1 p.m. Upon being paid he departed for his home. On his way he met a police vehicle and the officers arrested him and took him to Baricho Police Station from where he was charged. He stated that he was not carrying anything at the time. He also denied killing the deceased saying he did not know her. His witness Martha Wangari Mwai (DW2) testified that on the 24/4/09 she had given accused 4 casual work on her farm and he worked from 8.30 a.m-1 p.m. When he had lunch. She stated that John Kariithii Mathenge Accused 4 had worked for her since 2005. She later learnt he had been arrested.

The 5th accused Johnson Ndegwa Kamuri stated that on 24/4/2009 he worked on his home shamba upto 1 p.m. It was his intention to milk his cow but had no milking jelly hence he decided to go to the shops. While on his way to Kiangai he met police officers who arrested him. He was not armed when he was arrested and taken to Baricho Police Station. He was thereafter charged. He had known the deceased as a teacher.

The 7th accused Isaiah Mwangi Maina in his defence stated that on the 23/4/09, he got permission from his place work and went home. He was to report back on the 24/4/09 at noon. While on his way back he met a police land rover whereupon he was harassed and arrested and him taken to Baricho Police Station and later to Kerugoya Police Station.

The 8th accused Anthony Muthie alias Kirinyaga who hails from Kiangai stated that he used to work at Ndima tea factory as a casual worker. He stated that on the 24/4/09 he woke up and prepared food for his animals and thereafter arrived at his place of work at 8 a.m. and worked up to 5 p.m. and then went home.

It was his testimony that on the 25/4/09 he went on duty and worked up to 5 p.m. His contract expired on 1/5/2009 and he was to resume duty on 1/6/2009. He was however arrested on 16/5/2009 7.30 p.m. at Kiangai town. He was arrested by two men and taken to Kerugoya Police station. He stated that he knew of the charges while in Court. He stated that he knew the deceased very well since 1996 as she was a teacher in his primary school. He left school while in standard 7 for lack of fees. Her daughter Carolyne Wangari was her lover and they used to visit each other often. In the year 1998 he went to their home to work for them, and further that he lived there as a lover of the daughter of the deceased. It was then that the deceased employed her as a worker from 1998-5/1/09. It was his evidence that he was sacked because of being Carolyne's lover. He denied killing the deceased saying he only learnt of her death when he was charged.

Mr. Kamanthi for 1st Accused elected to make no submissions. Mr. Mogusu for 2nd, 3rd, 4th, 5th 7th and 8th Accused in his submissions stated that there was no evidence to connect the accused persons to this offence. Their defence was not shaken he submitted. Mr. Miiri the learned State Counsel on his part submitted that the circumstantial evidence pointed at all the accused persons as having committed the murder.

I have carefully considered the submissions made by both counsels. I have equally considered the evidence by all the witnesses and the accused persons herein. The fact of death is not disputed. The cause of death was found by Dr. Stephen Wang'ombe (PW5) to be severe head, chest and brain injuries. He produced the post mortem report (EXB12). It is therefore clear from the cause of death that the deceased's death was not a natural one. She was therefore unlawfully killed.

The accused persons before being charged were all assessed for mental fitness by Dr. Owino (PW4) who found them to be mentally fit to stand trial. The issue for determination is whether the accused persons caused the death of the deceased person. Murder is defined under Section 203 of the Penal Code as follows:-

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

Murder is established by two ingredients viz:-

***(i) The unlawful act or omission (actus reus)***

***(ii) Malice aforethought (Mens rea)***

I would wish to first deal with the first ingredient. Was it the accused persons who killed the deceased person? The deceased person appears to have had a problem or misunderstanding with the family of her late husband. This is confirmed by the report PW1 (chief) received on 27/5/2008. He however stated that the issue had been sorted out. PW10 also alluded to these family differences and that he had arbitrated

over the same on several occasions. In both instances the deceased complained against 1st accused who is her brother in law.

On the date of the murder of the deceased, her house and vehicle were set ablaze. Police officers (PW3, PW12, PW14) who testified confirmed to the Court that they did receive reports of a group of people numbering over 2000 armed with pangas, rungas and axes moving around. They could not be controlled and they were saying how they were going to flush out Mungiki adherents. After visiting the deceased's home, PW12 and other officers followed a group of people and they met 4th, 5th and 7th accused who were armed and they arrested them. They further met 2nd and 3rd accused with big clubs and walking towards Kiangai. They arrested them also.

The reason they arrested them was because they were armed and were headed to Kiangai. The 2nd, 3rd, 4th, 5th and 7th accused gave sworn defences denying the charges. They each explained where they had been on this day. DW1 and DW2 supported the evidence of the 2nd and 4th accused respectively. Besides being arrested because of being armed with the said weapons PW12 did not give any evidence linking the said accused persons to this offence. In fact the offence they may have committed would have been being in possession of dangerous weapons in a public place.

None of the other witnesses indicated that they saw the 2nd, 3rd, 4th, 5th and 7th accused at the home of the deceased doing anything. They may have had the said weapons and rungas but the issue is whether they used them to commit the offence they are charged with. They have all denied having been anywhere near the scene of crime. It was therefore important for the prosecution to avail evidence that would place the 2nd, 3rd, 4th, 5th and 7th accused at the locus quo. They failed to do so.

I now wish to look at the evidence touching on the 1st accused. As I stated earlier the 1st accused was a brother in law of the deceased. The Chief (PW1) and PW10 had received reports of him harrasing the deceased over his deceased brother's property. PW10 had presided over several disputes between the deceased and her inlaws. PW8's evidence was that the 1st accused was the chairman of the security team in the village where he worked. He had attended a security meeting on 22/4/2009 where the 1st and 8th accused were present. The 8th Accused had told the meeting that the deceased was a Mungiki person. He was supported by 1st accused. The security team's agenda was to flush out Mungiki adherents. On the 24/4/2009 morning he was forced by 1st and 2nd Accused to follow a group that went to the deceased's home and caused mayhem. He stated that the 1st accused was on the deceased's compound when she was injured, and her property destroyed. He does not however state that the 1st accused did anything related to this offence.

PW13 Cpl. Joseph Ochieng in his evidence stated that in the course of their investigations they interviewed the 1st accused and his mother who denied any knowledge of the happenings. But they found out that the 1st accused was the chairman of the vigilantes of Mungiki who were disturbing members of the public. The 1st Accused in his defence denied the charge and even denied hearing any noises on this date in issue. He was arrested on the same day the deceased was killed. He denied being a Mungiki vigilante. The charge facing the 1st accused is not his membership of Mungiki vigilantes but his participation in the killing of the deceased. PW10 even told the court that the deceased's daughters had said their mother would not be burried before the 1st accused had been arrested.

There is no direct evidence linking the 1st accused with the killing of his sister in law. There however appears to be suspicion that through his chairmanship of the vingilante group they committed this heinous crime because they believed she was a Mungiki sympathizer. In the case of **SAWE VS REPUBLIC [2003] KLR 364** the Court of Appeal stated thus

***“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

It was the duty of the prosecution to avail evidence before this court to confirm their suspicion. So far there is none.

Finally, I come to the evidence touching on the 8th accused. The evidence linking him to this offence is that of PW8. He stated that 8th accused had told the security meeting of 22/4/2009 that the deceased was a Mungiki adherent. And she had locked him in a house where he was beaten by Mungiki members.

On 24/4/2009 morning he was ordered by 1st and 2nd accused to follow a group armed with rungas and clubs upto the the deceased's house. The first to enter was the 8th accused. His evidence which I set out in the body of this judgment shows what the 8th accused did on this date of the deceased's killing. The 8th accused has denied the charge. He stated in his defence that he had worked for the deceased from 1998 – 5/1/2009. And prior to the date of his employment to the date of his sacking he was having a love affair with Carolyn Wangari (PW16) the deceased's daughter. And further that it was this relationship that led to his sacking.

The said Carolyn Wangari testified before this court as PW16. The defence did not cross examine her over this alleged relationship with the 8th accused who was her mother's shamba boy. I therefore find this to be an afterthought meant to embarrass PW16. There is however something between the deceased and the 8th accused that did not go right. The deceased had on 22/4/2009 told PW16 that 8th accused had given information to people in Kahuro that the deceased was a Mungiki member. This confirms the evidence of PW8 on the meeting of 22/4/2009 night. The evidence of PW16 is that the security at the time was bad as alleged Mungiki followers were being killed. PW8 did not give his report of what he had witnessed until 19/5/2009. He says it was because of insecurity and fear. This is against the background that all the accused persons had been arrested. In fact the 1st – 7th accused had first appeared in court on 8/5/2009. The 8th accused first appeared in court on 29/5/2009.

PW20 Cpl. Josephat Chelion testified that on 16/5/2009 7.00 p.m. he received intelligence information that the 8th accused had been spotted at Kiangai. He and others went for him. The 8th accused told him that on this date of incident he was at Ndim Tea Factory where he worked as a casual. PW20 checked the Register for that day and confirmed that accused 8's name was there. And if his name was there did PW20 establish if the 8th accused had been there throughout the day or not? There is no evidence that PW20 did so. The 8th accused had in his defence maintained that he was at Ndim Tea Factory working on this date of the killing.

This issue of the 8th accused's name being in the register of Ndim Tea Factory for 24/4/2009 showing that he was working has poked holes into the evidence of PW8. Had PW20 been keen to establish the exact time 8th accused was at the factory, then maybe the testimony of PW8 would have withstood the test. This again boils down to the issue of suspicion and I refer to the case of **SAWE VS REPUBLIC (Supra)**.

Having evaluated the evidence of both the prosecution and the defence, I do find that the prosecution did not prove the charge against all the accused persons beyond reasonable doubt. For my part I find all the accused persons not guilty and acquit them under Section 322(1) of the Criminal Procedure Code.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 17TH DAY OF JULY 2013.**

**H. I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Ing'ahizu for State**

**Mr. Mugusu for 2nd- 5th, 7th & 8th Accused**

**Mr. Mugusu for Mr. Aremi for 1st Accused**

**All Accused**

**Njue CC**