



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**Criminal Case 19 of 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. STEPHEN WAMBUA MUTISYA.....ACCUSED**

**2. PETER MUIA MUTISYA.....ACCUSED**

**3. STEPHEN KIILU KITUKU alias NJORO.....ACCUSED**

**JUDGMENT**

The accused were presented before this court on 17<sup>th</sup> October, 2011 on an information dated 29<sup>th</sup> March, 2011 charging them with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged in the information that on 12<sup>th</sup> March, 2011 at Miu village, Kivaani Location in Kangundo District within Machakos County, the 3 jointly with others not before court murdered **Peter Mutuku Nzuki**. The accused entered a plea of not guilty and their trial proceeded in earnest.

**Dr. James Muoki** (PW1) was the medical officer then based at Kangundo District Hospital. He testified on behalf of **Dr. Masenge**, who had conducted the post mortem on the body of **Peter Mutuku Nzuki**, hereinafter "*the deceased*." According to the postmortem report authored, signed, stamped and dated by **Dr. Masenge** he had formed the opinion that the cause of the deceased's death was severe head injury with multiple compound fractures.

**Solomon Kathiaka Nzuki** (PW2) is the brother of the deceased. He identified the body of the deceased to **Dr. Masenge** for purposes of the postmortem aforesaid.

**Emma Mutindi Mutuku** (PW3) is the wife to the deceased. On 10<sup>th</sup> March, 2011 at around 9p.m, whilst in her matrimonial house, she heard people shouting outside, stoning her house and breaking windows. They threatened to set the house ablaze unless she opened the door. She lit a lamp, opened the door and sat on a chair. First to enter the house according to her was the 1<sup>st</sup> accused, followed immediately by his stepfather, **Nzioki Mutwii**. Upon entering, the 1<sup>st</sup> accused immediately threw a stone at the lamp and it went off. **Nzioki Mutwii** complained aloud that her husband had bewitched the 1<sup>st</sup> accused's daughter. Holding the Bible high, she responded to the accusation by stating that she knew nothing about the accusation. The 1<sup>st</sup> accused was furious and ordered her out of the house. Out there she met the 1<sup>st</sup> accused's wife who held her hand and ordered her to come along with her. The 1<sup>st</sup> accused, his wife and the witness then headed for the pastor's house. On the way, the 1<sup>st</sup> accused hit her on the shoulder with a stick. At the house of the Pastor, **Major Musyimi**, he asked the 1<sup>st</sup> accused why she had taken her to him the but 1<sup>st</sup> accused told her to explain herself. In the end the pastor persuaded the two to leave her alone.

They did so and the witness ended up spending the night at the Pastor's house. The following day she reported the incident at the Chief's Office where she was given 2 police officers who escorted her back to her house to assess the damage. As they were doing this her husband, the deceased, arrived

The deceased had apparently been telephoned regarding the previous night's incident by one of his brothers. The Chief who was present advised them to report the matter to the DC so that the 1<sup>st</sup> accused could be summoned to explain his actions. They did so and the 1<sup>st</sup> accused came and stated that he wanted a medicine man called to their house so that he could remove the charms or spells that the deceased and his wife harboured. The deceased acceded to the request and they all left.

On 12<sup>th</sup> March, 2011, there were KNUT Elections at Kangundo. The deceased and his wife being teachers proceeded to Kangundo for the event. When done and on their way back, the witness alighted from a vehicle and proceeded home. However the deceased told her that he was going on to Kivaani market to meet somebody. The deceased never came back. On 13<sup>th</sup> March, 2011, she was informed of his death by **Lucia Makau**, a wife to one of the deceased's brothers. They immediately left for Kangundo Police Station and reported the occurrence. After recording the statement, she was taken to Kangundo District Hospital Mortuary where she saw the deceased's body. She observed 3 cuts on the forehead, left side of the head and the upper lip. She did not know however, who had inflicted those injuries. She knew all the accused. The 1<sup>st</sup> accused was her step cousin; the 2<sup>nd</sup> accused was a brother to the 1<sup>st</sup> accused whereas the 3<sup>rd</sup> accused was her neighbour. The 1<sup>st</sup> accused had a grudge with the deceased as he believed that the deceased had bewitched or cast spells on his children. In conclusion, she had attended the postmortem conducted on the body of the deceased and helped to identify it to the doctor.

Cross examined by **Mr. Muema**, learned counsel for the accused, she confirmed that she had heard the 1<sup>st</sup> accused and his wife's voices during their attack on her house. She was screaming to the crowd to attack the house. She conceded that the 1<sup>st</sup> accused, his wife and the 2<sup>nd</sup> accused were not her friends. Before the 1<sup>st</sup> accused threw a stone which put off the lantern lamp, she had already seen and recognized him. She heard the allegations of the deceased's alleged sorcery for the 1<sup>st</sup> time at the DC's Offices though the complaints were common in the village. She knew the 1<sup>st</sup> accused's daughter. She was normal. She had never been taken for cleansing. She did not know what happened to the deceased. All she knew was that his body was collected from the road. She could not tell whether he was lynched by members of the public.

**Simon Mutiso** (PW4) is a neighbor. On 12<sup>th</sup> March, 2011 at about 9.45 p.m he was preparing to retire to bed when he heard a child crying on the road. He then heard voices of many people approach his house. He opened the door and someone suddenly ran from the crowd and entered the house. The 2<sup>nd</sup> accused then complained that it was him who had opened the door for him. He was pursuing him. He threatened to burn his house. Soon thereafter he heard the 1<sup>st</sup> accused claim that the person who had entered his house was a witch who had killed 2 of his children whom he was taking to the mortuary. He moved closer to him and he recognized him as the 1<sup>st</sup> accused. At the same time the 3<sup>rd</sup> accused moved close to him. He is his brother's son. He then heard people forcing the window to his bedroom open. The 3<sup>rd</sup> accused then rushed and entered the house through the said window, opened the door and left. He never saw him again. The crowd then surged towards the door. He stood at the doorstep and restrained them. Their intention was to enter and beat up the person who had dashed in to the house. That person was the deceased. However, the crowd surged forward, overwhelmed him, and pushed him and he fell down. The crowd had threatened that if he continued resisting, they would punish him the same way as they intended to do with the deceased. The crowd entered the house and caught the deceased and left with him. He did not follow them. The next day he saw a crowd on the road. He went there only to be met with the body of the deceased which had been cut on the forehead and hand. During the encounter at his house, there was moonlight which assisted him to see some of the people whom he was able to recognize as the accused. He knew these people very well as they came from his village and were infact his relatives. He spent a lot of time speaking to each one of them. He was even familiar with their voices. He could not therefore have mistaken them. The moon emitted enough light that enabled him to recognize all the accused.

Cross-examined, he was emphatic that the children who were screaming from the road were the 1<sup>st</sup> accused's. The assumption was that they had been bewitched. Indeed the entire village knew that they had been bewitched. There were rumours to that effect and that the deceased was responsible. The 3<sup>rd</sup> accused had entered his house through the window and opened the main door and thereafter slipped away. He tried to resist the crowd from entering the house but he was overwhelmed and he fell on the ground. It was then that the crowd grabbed the deceased and left with him. Witchcraft was a common phenomenon in the village though.

**John Makau Kyalo** (PW5), a civil servant, was in his house on 12<sup>th</sup> March, 2011 at about 10.00 p.m when he heard noise from the road. He went to the road where he found the crowd surrounding the deceased. On asking what was happening, he heard the voice of the 1<sup>st</sup> accused respond that the man who had bewitched the children was down there. He went on to say that two of his victims were being taken to the mortuary and more will follow. He saw the deceased on the ground seriously injured. He then went back home. The following day at around 9.00am as he was preparing to go to church he received a call from the area Assistant Chief who directed him to Kangundo Police Station to record a statement. He did so. Otherwise he had recognized the 1<sup>st</sup> accused at the scene because there was bright and clear moonlight. He saw him clearly as he stood very close to him, in fact only a metre away. He was a person he knew very well as they came from the same village. He was therefore not mistaken in his recognition of the 1<sup>st</sup> accused. On the day before the incident he had heard that the public had marched to the DC's office claiming that the children of **Kithyiani** had been bewitched by the deceased. He did not however see the 2<sup>nd</sup> and 3<sup>rd</sup> accused at the scene.

Cross-examined, he maintained that he came from the same village with the accused. He did not see the 2<sup>nd</sup> and 3<sup>rd</sup> accused at the scene. He understood the 1<sup>st</sup> accused to mean that the children who had been bewitched by the deceased were the ones being taken to the mortuary. Villagers were irate with the deceased for casting spells on their children.

Chief Inspector of Police, **Samuel Mata** (PW6) was at the material time the OCS, Kangundo Police Station. On 13<sup>th</sup> March, 2011 he received a call from **Daniel Nzomo**, the Chief for Kivaani Location in Kangundo District who informed him that someone had been killed at Miu Village. He immediately proceeded there and found the body of the deceased. He made inquiries from the crowd present but hit a brick wall. He removed the body to Kangundo District Hospital Mortuary. He revisited the scene later in the day and was successful in getting information as to the circumstances leading to the death of the deceased. A neighbor of the deceased (PW4) volunteered information that the accused together with others still at large had gone to his house and removed the deceased therefrom. The deceased had sought refuge in his house. The following morning he had found the deceased dead. On the basis of that information, PW6 caused the arrest of the accused and charged them with the offence.

Cross-examined, he stated that he had found PW4 alone with his family. The accused had come to his house late at night. Prior to that event, the witness came to know that the family of the 1<sup>st</sup> and 2<sup>nd</sup> accused had gone to the DC's office claiming that the deceased had bewitched the child of the 1<sup>st</sup> accused. They had threatened to take action against the deceased but the D.O 1 had calmed them but warned them not to do anything untoward to him. He was not aware of rumours going round that the deceased was bewitching children. Nor did he see the children who had allegedly been bewitched by the deceased. He denied that he had acted on rumours in charging the accused. That then marked the close of the prosecution case.

Placed on his defence, the accused elected to give sworn statements but called no witnesses. The 1<sup>st</sup> accused stated that on 12<sup>th</sup> March, 2011 he woke up and went to work and came back at about 4pm. At about 7pm, his child was possessed by demons and he took her to a local pastor for prayers. He came back at about 8.30pm and slept. The following day, the clan elder called a meeting to discuss the fate of the child. During the meeting, information filtered through that someone had been killed in the village. That person was the deceased. He discounted the evidence of PW3 and PW4 that he had gone to their houses.

The 2<sup>nd</sup> accused testified that on 12<sup>th</sup> March, 2011 he woke up and went to the farm where he remained until 1pm. At about 2pm he went to Salvation Army Church for Gospel Music and came back at about 5pm. Being a Sunday School Teacher, he decided to read the Bible in preparation thereof. He thereafter slept and the following day as he was going to church, he met with some people who informed him that a person had been killed near the gate of PW4. Nonetheless he proceeded to church. He disputed the testimony of PW4 that he had seen him in his compound. PW4 hated him because he had befriended his daughter which relationship PW4 did not approve.

Finally, the 3<sup>rd</sup> accused testified in his defence that on 12<sup>th</sup> March, 2011 he was in the butchery where he worked the whole day. At about 6pm he left for home, ate and slept. He had heard that a child belonging to a preacher called **Nzomo** had been possessed with evil spirits. He knew the deceased. He did not go to the scene where his body was discovered as he was at his place of work. Though PW4 was his paternal uncle he lied when he testified that he had seen him enter his house and remove the deceased. He lied against him because he had a dispute with his parents over land and had threatened them that in the event that they succeeded against him, he would run them out of town. Thus his evidence was calculated to nail the 3<sup>rd</sup> accused on behalf of his parents. He wanted him locked away so that he could take their land.

Parties thereafter elected to file and exchange final written submissions. It was subsequently done. I have carefully read and considered them. As I see it, the issues for determination in this case are basically two;-

- Whether the deceased was murdered.
- If so, whether he was murdered by the accused persons

Beginning with the 1<sup>st</sup> issue, the fact of death of the deceased in this case has not been challenged nor is it in dispute. Indeed a post mortem was conducted on the body of the deceased by PW1. In his testimony, the doctor was emphatic that the cause of death was severe head injury secondary to multiple compound fractures. The post mortem report was tendered in evidence. Finally, all the prosecution witnesses called as well as the accused were unanimous that the deceased passed on.

Did the deceased pass on naturally, accidentally or was it as a result of a deliberate act or omission of another person(s)? We must appreciate that murder is committed where a person(s) causes the death of another with malice aforethought and by unlawful act or omission. Malice aforethought is essentially the *mens rea* in a murder case. Malice aforethought is defined in section 206 of the Penal Code in these terms:-

***“Malice aforethought shall be deemed to be established by evidence proving any one of more of the following circumstances –***

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

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

***c) An intent to commit a felony***

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

On the basis of the evidence on record, there is no way that the deceased could have passed on due to natural causes. PW1, **Dr. James Muoki** on behalf of **Dr. Masenge D.N.** testified on 16<sup>th</sup> November,

2011. He produced a post mortem report. The report at page 2, under the head “*external appearance of body*” lists deep compound fractures on the head, deep cut on the left cheek and loose teeth. I do not think that the deceased would have inflicted these injuries on himself. It must have been inflicted by another person(s.) Considering the manner the injuries were inflicted, there could have been no other intention but to kill the deceased. The attackers were focused on the deceased’s head and more than one object was used to inflict these injuries. The intention here was clearly to kill, cause grievous harm and or commit a felony. The injuries inflicted point to grievous harm and at the very least, a commission of a felony. Accordingly, malice aforethought as described under section 206 of the Penal Code is established.

Who then committed this murder? According to the prosecution, it is the accused who murdered the deceased because he was suspected to be a witch and had in fact bewitched the 1<sup>st</sup> accused’s children and other children in the village. However, the accused on their part deny involvement in the crime. They have all advanced *alibi* defence.

Is there evidence nonetheless, linking the accused to the crime. From the record, such evidence can only be of identification as well as circumstantial. There is no direct evidence to link the death of the deceased to the accused. PW2 testified that she had gone with the deceased to Kangundo for KNUT elections. When done, they came back home. She alighted at a stage near home but the deceased told her he was going to see somebody at Kivaani. He never came back till the next day when she received information that the deceased had been killed and his body was lying along the road. Again from the evidence, the other person last to see the deceased alive was PW4. On 12<sup>th</sup> March, 2011, at about 9.45 pm whilst in his house, he heard a child crying along the road. Suddenly he heard voices of many people approaching his house. He opened the door and came out. Suddenly, a person who turned out to be the deceased dashed from the crowd and entered his house. The crowd was baying for his blood for being a witch who had caused a lot of misery to the school children in the village and threatened to burn his house. They wanted to enter the house forcefully and eject the deceased. The witness stood his ground and pleaded with the crowd not to take the law into their hands. He pleaded with them to address their concerns or grievances to the local Administration. The crowd could not be persuaded. The crowd overwhelmed him, pushed him to the floor and entered the house, grabbed and left with the deceased. The next day, he was informed that the deceased had passed on. Among the crowd, at his home though, he was able to recognize the accused. They were all from his village. In fact the 3<sup>rd</sup> accused was his nephew. During the encounter, it was the 2<sup>nd</sup> accused whom he recognized first. He complained loudly that it was him who had opened the door for the deceased and threatened to burn down his house. Immediately thereafter, the 1<sup>st</sup> accused entered the fray. He stated loudly that the deceased who had entered the house was a witch who had killed 2 of his children whom they were taking to the mortuary. According to the witness, following these utterances, he moved closer and recognized that it was the 1<sup>st</sup> accused who was making those utterances. At this juncture the 3<sup>rd</sup> accused moved close to him. He was his brother’s son. He asked him why people wanted to burn his house. Before he could answer, the 3<sup>rd</sup> accused ran passed him, entered the house and opened the door and disappeared. When the door was opened as aforesaid, the crowd rushed towards it intending to enter forcefully. Though he tried to restrain the crowd by standing at the door, he was soon overwhelmed and he fell down as a consequence. The crowd entered the house and took out the deceased who was later found dead the following day. On the basis of all the foregoing the accused can only be connected to the offence if they were recognized at PW4’s house and also at the scene of crime, which was along the road. The accused could also be linked to the crime if there is circumstantial evidence. PW4 claims to have recognized the accused at his house.

How was he then able to recognize the three accused among the crowd? He stated that during the incident at his house, there was moonlight which assisted him to see them sufficiently to be able to recognize them. He stated that the moon was bright. This fact too was also confirmed by PW5. Further, he was in close proximity with each accused person at some point in time. They were people he knew very well and who were in one way or another related to him. He also talked to them and spent a bit of time with each one of them. His house too was lit with a lantern. Thus he was confident that he had recognized them.

The accused have impugned this testimony on the ground that though PW4 stated that there was moonlight, he did not state whether it was full moon and the intensity of the moonlight emitted. That the

circumstances obtaining at the scene were difficult and could not therefore have enabled him to see and recognize them. It was at night and a crowd of people were involved. In any event, this was evidence of a single witness which must be treated with caution. It matters not that this was a case of recognition as opposed to facial identification.

I appreciate and it has been stated time and again that evidence of visual identification can bring a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. See **Paul Elole & Another vs Republic, Cr. App. No. 2000**. How is the evidence of identification in difficult circumstances to be tested? The guidelines were laid down in the now famous case of **Maitanyi vs Republic (1986) KLR 198**. It was stated therein that-

***“...when testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available and whether the witness was able to make a true impression and description.”***

In the instant case, PW4 was categorical that there was moonlight that emitted enough light that enabled him to see the accused sufficiently to be able to recognize them. He was supported in this by PW5 who was at the scene where the deceased eventually met his Waterloo. Besides the moonlight, there was a lantern in his house which provided further light. He was not at all cross-examined on this aspect of his evidence. In any event, these are people he knew very well. In fact they were relatives. Indeed the 3<sup>rd</sup> accused was even a nephew. He spoke to each one of them in close proximity. They had not disguised themselves as to make their recognition difficult. He spent a lot of time with them pleading with them not to harm the deceased but leave the whole case to the local Administration. The witness was not under any threat of attack by the crowd that would have interfered with his view and or perception of the accused. I do not see any reason why this witness would have picked on only these accused persons in the crowd if he did not see them. The 2<sup>nd</sup> accused claims that PW4 is framing him with the case because he disapproved of his relationship with his daughter. I do not think that the 2<sup>nd</sup> accused is genuine in these accusations; if it was true why did he not put it to him in his cross-examination? The 3<sup>rd</sup> accused too has brought in the angle of family dispute with regard to land as having provided the necessary impetus for this witness to frame him with the case. How about his testimony against the 1<sup>st</sup> accused? I do not think that this witness would have romped in the 1<sup>st</sup> accused so as to frame the 2<sup>nd</sup> and 3<sup>rd</sup> accused. In any event, this was only raised by the 3<sup>rd</sup> accused for the very first time in his defence. He did not take it up with the witness when he testified. I think that these s

stories about PW4 framing the 2<sup>nd</sup> and 3<sup>rd</sup> accused were merely conjured up by the 2<sup>nd</sup> and 3<sup>rd</sup> accused so as to escape their culpability. I do not believe those stories at all.

Besides visual identification of the accused by the witness at the scene, PW4 recognized them as well. It is true that recognition may be more reliable than identification of a stranger, but even when a witness is purporting to recognize someone who he knows, I must remind myself that mistakes in recognition of close relatives and friends are sometimes made. See **Anjononi vs Republic [1980] KLR 59**.

In this case, I have kept in mind the fact that identification/recognition may be proved by the testimony of a single witness. But in accepting and acting on such evidence, I must treat such evidence with greatest care and circumspection knowing that conditions favouring positive identification/recognition were difficult as it was at night. I also must warn myself which I hereby do, of the dangers of relying on the evidence of a single identifying witness and the danger inherent in such evidence.

Taking all the foregoing into account, I am convinced that PW4 was in a position to see the accused sufficiently as to be able to recognize them at the scene. They all talked to him and told him why they wanted to deal with the deceased. There is no possibility of the accused being victims of mistaken identity and or recognition. They were positively recognized by this witness. I have no reason to doubt his testimony. He appears also to be a man of the cloth. In those circumstances, I doubt that he would falsely

frame the accused with the case. PW4's recognition of the 1<sup>st</sup> accused is boosted further by the evidence of PW5. Reacting to the noise from the nearby road, he went to the scene and encountered the 1<sup>st</sup> accused who boasted to him that the man who had bewitched the children was down there and when he looked, it was the deceased.

As already stated, nobody saw the accused kill the deceased. Instead the State appears to be relying on circumstantial evidence as well to link the accused to the death of the deceased. It is trite law that for a court to rely on circumstantial evidence in order to find a conviction, the inculpatory facts must be incompatible with the accused's innocence and must not seek any explanation other than the guilt of the accused. Again such evidence must be watertight. In the case of **Republic vs Kipkering Arap Koskei & Another r(1949), 16 EACA 135**. It was held *inter alia*-

***“...in order to justify the inference of a guilt 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...”***

What then is the circumstantial evidence herein? There was the belief in the village that the deceased was a witch and that he had bewitched several children in the village. Two of those children belonged to the 1<sup>st</sup> accused. The villagers had demonstrated and appealed to the local Administration for intervention to no avail. Accordingly the villagers with the accused in tow decided to take the law into their hands. They got hold of the deceased and frog-marched him to where a final solution for his alleged sorcery was to be meted out. On the way, they came across the house of PW4. When he opened, the deceased saw an opportunity to dash for his dear life. He effectively wriggled himself from the crowd and dashed into the house of the PW4. PW4 then closed the door and tried to plead with the irate crowd to spare the deceased. Among the crowd were the accused. Indeed it is the 2<sup>nd</sup> accused who first complained to PW4 that he should not have opened the door for the deceased. The 2<sup>nd</sup> accused then threatened to burn the house. Immediately the 1<sup>st</sup> accused weighed in with the information that the deceased who had entered the house was a witch who had killed 2 of his children whom they were taking to the mortuary. At this juncture the 3<sup>rd</sup> accused entered the fray and engaged PW4 in a discussion as to why people wanted to burn his house. This discussion in my view was calculated to divert the attention of PW4 from what was going on since PW4 soon thereafter heard people breaking or forcing open his bedroom window. In that state, the 3<sup>rd</sup> accused rushed and entered the house through the window and opened the main door for the crowd. The crowd which had gathered outside then surged, overwhelmed PW4 who was holding onto the door so that they could not enter. Once inside the house the crowd picked the deceased and left with him. The next time the deceased seen was his dead body lying was along the road with injuries that could only have been inflicted by people. The deceased was seized from PW4's house at about 9.45 pm by a crowd of people among whom were the accused. They were all baying for the deceased's blood on account of his sorcery. A while later he is found dead with fatal injuries inflicted on the head. Prior to this PW5 had seen the 1<sup>st</sup> accused at the scene where the deceased met his death. Surely can it be said that the inculpatory facts are inconsistent with the accuseds guilt? I do not think so.

It should also be appreciated that prior to this, the 1<sup>st</sup> accused and his wife had on 10<sup>th</sup> March, 2011 at around 9 pm stormed the deceased's house and confronted his wife (PW3). Her evidence was that on that day and time, she heard people shouting outside and stoning her house. They threatened to set it ablaze unless she opened. She lit the lamp and opened the door, then sat on down a chair. The 1<sup>st</sup> accused immediately entered the house accompanied by his stepfather, **Nzioki Mutwii**. They proceeded to accuse her husband of bewitching their children. She was ordered out of the house and she came face to face with the 1<sup>st</sup> accused's wife who held her and ordered her to follow her. They ended up at the pastor's house. On the way however, the 1<sup>st</sup> accused assaulted her with a stick. The pastor managed to calm the 1<sup>st</sup> accused and his wife and persuaded them to go home. They did so; but PW3 spent the night at the pastor's house. That night their home was damaged. The following morning, PW3 reported the damage to the local Chief and sought the assessment of the damage. The Chief advised PW3 and the deceased to seek the intervention of the District Commissioner's office so that the 1<sup>st</sup> accused could explain his actions. When called the 1<sup>st</sup> accused insisted he wanted a sorcerer to go to their house and remove the

charms. The deceased agreed. However, this was not to be as soon thereafter he was murdered.

The cumulative effect of all the foregoing is that there is a common threat. The entire village believed that the deceased was a sorcerer who had bewitched their children. The village was charged and wanted the deceased dealt with. Apparently, they did not like the way the issue was being handled by the local Administration. They chose therefore to take the law into their hands. They attacked the deceased. Fortunately or unfortunately the accused was spotted among the crowd baying for the deceased's blood just before he was killed.

Obviously there was common intention by the crowd to punish the deceased. It therefore matters not what role each accused played, whether big or small. For the record the 2<sup>nd</sup> accused opened the door for the crowd and disappeared. However, it is that act of opening the door that led to the seizure of the deceased by the crowd that eventually led to his death. He is therefore as guilty as those who actually assaulted the deceased to death. Both the 2<sup>nd</sup> and 3<sup>rd</sup> accused were at the scene and left with the deceased. Indeed PW5 confirmed that on 12<sup>th</sup> March, 2011 at about 10pm whilst in his house he heard noise coming from the road. He proceeded there and was confronted by the 1<sup>st</sup> accused who told him that the man who he had bewitched the children was lying down there. On checking where the 1<sup>st</sup> accused had pointed he saw the deceased lying on the ground seriously injured. The evidence of this witness clearly punctures this accused's *alibi* defence. He was clearly at the scene of crime. I have not seen any reason why this witness would falsely testify against the accused. Nor has the 1<sup>st</sup> accused sought to impugn this evidence on account of any misunderstanding between them. This witness also testified as to there being bright and clear moonlight that night that enabled him to see and recognize the 1<sup>st</sup> accused. This evidence too tends to support the evidence of PW4 who also talked of there being moonlight that night.

The witness however, did not see the 2<sup>nd</sup> and 3<sup>rd</sup> accused at the scene. I have already addressed the 3<sup>rd</sup> accused's culpability elsewhere in this judgment. How about 1<sup>st</sup> and 2<sup>nd</sup> accused? They are equally to blame for the death of the deceased. They were among the crowd that threatened to burn the house of PW4 unless PW4 released the deceased to them. Indeed they were among the crowd that forcefully seized the deceased from PW4's custody. In view of this unchallenged testimony, the two accused's *alibi* defence cannot possibly hold water.

From the analysis of the evidence on record I have come to the inevitable conclusion that the deceased was murdered. He was so murdered by the crowd, among them the accused on suspicion of being a witch.

Nonetheless I am aware of the Court of Appeal decision which is to the effect that where a community or person believes so much in witchcraft and acts on that belief with the consequence that he kills a person, such belief takes such an act from the realm of murder. It is deemed to be provocation. In those circumstances the trial court should convict such person perhaps for the lesser offence of manslaughter. The rationale being that such obtaining circumstances do provide clear provoking circumstances, such as to negate any element of malice aforethought. It follows therefore that a conviction on a charge of murder would be unsustainable in the light of the obvious provocation which completely took away any mental element that the accused might have had against the deceased. This is what the Court of Appeal said in the case of **Patrick Tuva Mwanengu vs Republic [2007] eKLR**. The court observed that in 1983, the Court of Appeal was faced with the scenario where two Pokot tribesmen genuinely believed that the deceased had occult powers and used them to harm their children. They got hold of him, beat him up and threw him into Lake Baringo where he drowned. They pleaded guilty to manslaughter and were sentenced to long terms of imprisonment because it was on the borderline between murder and manslaughter. One of them appealed. The Court of Appeal consisting of **Madan/Kneller JJA** and **Chesoni Ag. JA** in rejecting the pleas for justifiable homicide stated -

***“It is a question of facts whether an accused in all the circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation when he killed someone and the plea is that the victim performed an act of witchcraft against him or another person under his immediate care in his presence so that he was angered to such an extent as to be deprived of his power of self-control and induced to assault the person doing the act of witchcraft. R. v Fabiano Kinene s/o***

***Mukye and Others (1941) 8 EACA 96. Here, the appellant had no such act performed in his presence so he was fortunate that his plea was not rejected.***

Seven years later, the Court of Appeal (Nyarangi/Masime/Gicheru, JJA) decided **Chivatsi & Another v. R. (supra)** where the facts relating to witchcraft were that:

***“...the deceased threatened to kill by witchcraft as many people as he deemed necessary and remain alone in the village. At the time the deceased made the threat to kill everybody (including the appellants), a brother of Dzombo had died after taking poison. It was said that the deceased had bewitched him. The other appellant believed that his mother had died as a result of being bewitched by the deceased. ”***

The Court posed the issue for decision as follows: -

***“The crux of this appeal turns on the issue as to whether the trial judge erred in holding that witchcraft as a provocative act can only avail an accused person where the victim was performing in the actual presence of the accused some act which the accused genuinely believed was an act of witchcraft against him and he was thereby angered to such an extent as to be deprived of the power of self-control. For that proposition of law, the trial judge relied on the decisions in Eria Galikuwa v Rex (1951) 18 EACA 175 and Rex v Fabiano Kinene & Others, (1941) 8 EACA 96.”*** The cases of Galikuwa and Fabian Kinene mentioned therein had earlier been re-examined by the Court of Appeal in Yovan v Uganda [1970] EA 405 where it was held that those cases did not lay down a general rule and that they ought to be interpreted with reference to the facts of each case. A threat to kill taken together with other existing circumstances could amount to legal provocation. The Court then made this profound statement which has since guided the courts on the issue posed at the beginning of this judgment –

***There are communities in Kenya where the sort of threat which the deceased administered at the appellants would be treated as twiddle-twaddle, as arrant nonsense. Not so, however, in the community to which the appellants belong. It is not the business of this or any other court to moralize. It is yet a fact that belief in witchcraft is widespread in the community of the appellants. We take that community as we find them, having regard to the law.***

***In our judgment, there is no room for doubt that the threat to kill, which was made by the deceased in the presence of the appellants, angered the appellants to such an extent that each was deprived of his power of self-control and induced both to jointly and fatally injure the deceased.***

***In our view this is a case where a threat to kill taken together with the existing circumstances of the deaths of close relatives of the appellants amounts to legal provocation.***

***Upon this other circumstance, turning on witchcraft, the appellants could be found guilty of manslaughter only.”*** Emphasis added.

This is the situation in this case. However, I need to emphasize that the application of the principle has to be governed by the facts and circumstances of each case.

Guided by this authority, I am inclined to and do reduce the charge facing the accused from murder to manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict them accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY 2012.**

**ASIKE – MAKHANDIA  
JUDGE**

