



**Republic v Nduma & another (Criminal Case 16 of 2019)  
[2025] KEHC 10301 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL CASE 16 OF 2019  
EM MURIITHI, J  
JULY 17, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NJOKA WAMAITHA NDUMA ..... 1<sup>ST</sup> ACCUSED**

**SAMUEL MURIITHI NJOGU ..... 2<sup>ND</sup> ACCUSED**

**RULING**

**Introduction**

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*, with the particulars of the offence that they “in the night of 17th and 18<sup>th</sup> July 2019 at Matandaara village within Kirinyaga County, within Kirinyaga County unlawfully murdered Simon Mwangi Gachube.” The accused person pleaded not guilty to the charge and the matter proceeded to trial, the prosecution calling 11 witnesses to prove the charge.
2. After ten witnesses had testified, the 1<sup>st</sup> Accused on 2/10/2023 indicated that he wished to change his plea and following two adjournments (on 2/10/2023 and 12/10/2023) to allow for consultation with his counsel and upon the insistence of accused after the consequences of the plea had been explained by Counsel, the accused on 2/11/2023 changed his plea of not guilty to one of guilty, and he was consequently convicted for murder contrary to section 203 as read with 204 of the penal Code. After mitigation proceedings and filing of Probation Officer’s pre-sentence report and Prisons Report of a Capital Remand, the Court by a ruling delivered on 24/10/2024 sentenced the 1<sup>st</sup> Accused to imprisonment for 18 years commencing the date of arraignment for plea on 6<sup>th</sup> August 2019.
3. This ruling on case to answer is therefore on the question of the proof of the prosecution’s case against the 2<sup>nd</sup> accused who maintained his plea of not guilty.



4. The court has considered as required under section 306 of the *Criminal Procedure Code* whether there is the evidence that the accused person committed the offence. At this stage, the court is required to consider whether the prosecution evidence has established a prima facie case, which as held in *Ramanlal T. Bhatt v. R* (1957) EA 332, 335 is “one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”
5. The Court accepts the binding authority that it is under a duty, where it considers that there is not established a prima facie case, to acquit the accused. See *Murimi v. R* (1967) EA 542 and *Wachira v. R* (1975) EA 262. In such instance, the Court is required to give full reasons for the decision unlike where it finds that a prima facie case has been established as held in *Kibera Karimi v. R* (1979) KLR 36 (*Trevelyan & Todd JJ*), so as not to prejudice the fair trial of the case by giving the impression that the court has already made up its mind without hearing the defence. See also *Festo Wandera Mukando v. R* (1976 – 80) KLR 1626 and *Antony Njue Njeru v R, Nairobi C.A. Cr. Appeal No. 77 of 2006* and the Kenya Judiciary Criminal Procedure Benchbook, 2018 at 99-100.
6. Upon consideration of the prosecution evidence, the Court does not find, having regard to the ingredients of the offence of murder that the offence has been established against the 2<sup>nd</sup> accused, and the Court will, consequently, give full reasons.

### **The Evidence**

7. The Prosecution witnesses PW1-10 is set out in full as follows:

#### **PW- 1 Lawrence Kariuki Ethan o**

On 17.9.2019 there was a football which we were watching on TV with a friend of mine. It was at 11.00 pm. When the match was over, I went to escort him using my motor bike. I escorted him and returned.

When I was a few metres from home, there was a bar called Matandara bar. I saw Njoka and Muriithi. One was Njoka Maina, 1<sup>st</sup> accused in the dock and Muriithi Njogu the 2<sup>nd</sup> accused in the dock and two other people who are not before court.

I also saw the deceased Simon Mwangi Gachure. They were coming from the bar heading home. They were quarrelling and so I decided to find out. Mwangi was totally drunk and Njoki Wamaitha and Muriithi were carrying him. Wamwirua (a lady) and Karuku were also present. I asked them what was wrong.

They told me there was no problem, it is Mangi who was very drunk and decided to go and give him a place to sleep. Before I reached them, I heard Njoka the 1<sup>st</sup> accused demanding one thousand shillings from Mwangi. I asked them so that I could assist but when they said he was not sick but drunk, I left them and went home. They went to the home of Njoka.

I proceeded home. The next morning I heard that the body of Mwangi was spotted in a farm planted peas. Those who killed him did not realize the spilling blood. We followed the blood stains from where the body was to the home of Njoka which was about 200 metres away.

The body I saw it when it was in the farm. It had an injury on the head and blood was still oozing. The blood stains led us to the home of Njoka.

I saw bottles inside the house and there was an axe.



**Cross-Examination:**

When I met the two accused, there were two others who are not in court. Wamwirua and Karuku. They were all drunk. There were blood stains from where the body was which led to the house of Njoka Maitha.

In the morning we found Njoka Maitha in the house asleep. I could not tell whether deceased walked to the scene all was carried but blood was from the house to where the body was. It appeared he was killed in the house because even where he slept there were heavy blood stains. I only saw Njoka in the house that morning.

I would not know if they had a grudge before. They used to be friends. I don't agree he was killed by other people and taken to the house. That was not possible as the owner was in the house.

**Re-Examination: Nil.**

PW- 2 Joseph Kariuki On 17.7.2019 I was in my house when I heard screams. My plot is opposite the plot of Njoka, refers to 1<sup>st</sup> accused.

It was about 11.00 am. I woke up. I asked the 1<sup>st</sup> accused what was happening. He told me he was asking his son Kshs.1000/= because there was a time he had demolished a door. I slept.

The next day I met the son of Njoka and I asked him what was wrong. He told me to go and see how the door has been done. I went and saw the door was demolished.

There were many people. There were heavy blood stains in the house. I asked what was wrong. I was told Mwangi was killed and body dumped in the farm.

I followed blood stains upto where the body was. The head had cut wounds.

**Cross-Examination:**

The quarrel I heard was between 1<sup>st</sup> accused and I called him and asked him what was happening. He told me he had asked his son for money because he had demolished a door. I did not hear the voice of his son. The son of Njoka is called Brian. My house to that of Njoka was like from court to the road. I went and slept.

**Re-Examination:**

I heard 1<sup>st</sup> accused asking for Ksh.1000/= but I did not go to find out, it is accused who told me it was his son. I know 1<sup>st</sup> accused as Njuki but he is also known as Njoka.

**PW3 Hellen Njeri Wangechi:**

In July and August 2019 I was working in a bar.

On 17.7.2019 Njuki and Muriithi - Njuki is 1<sup>st</sup> accused in the dock and Muriithi, the 2<sup>nd</sup> accused in the dock, and one called Karuku came at about 10.00 pm when I was about to close they asked me to sell to them a beer called Jebel. I sold to them and they left. The owner of the bar came and collected the daily sales and the pump. I went home.

The next morning I was told there was a dead body. I did not go to view the body as I feared to look at the body. Later in the day I was told it was Mwangi.

**Cross-Examination:**

I went near the body and those near told me it was Mwangi.

I did not look at the body. I was told to go and record a statement.



Njuki, Muriithi and Karuki are the ones who came to the bar. Mwangi was not in that bar that day. The 1<sup>st</sup> accused and 2<sup>nd</sup> accused and other came after I had closed and they called me. I sold to them take away. The bar is near the road. I never heard any quarrels. I don't drink beer. I know Njoka. He is the 1<sup>st</sup> accused in the dock. In the area we call him Njuki.

**PW- 4 Stephen Ndungu Gitau**

I am the assistant chief of Mathangauta sub-location, Nyagati Location Mwea East.

I can remember on 18.7.2019 I was woken up at 6.00 am by the village in-charge of Matandara village. He telephoned me and told me there was somebody who was killed and the body dropped at Mathangauta Primary School.

I woke up and rushed to the scene using my motor bike. It took me about ten minutes. I confirmed that the report was true and I identified the body as that of Simon Mwangi Gachuhi. I looked at the body. It was heavily blood stained and he had cuts on the face.

The clothes were torn and blood stained when I looked around I saw blood stains on a foot path. I followed the blood stains. It was early in the morning and people had not used the path to disturb the stains. I followed the blood stains and they led me to a village which was about 200 metres away.

It led to the house of Njoka Wamaitha Nduma who is the 1<sup>st</sup> accused now in the dock identified. He is also known as Njuki in the village. I knew his name as I signed his identity card.

When I reached the house, the door was broken so I did not have the knock. I entered and I saw Njoka Wamaitha who was asleep on the floor. I checked inside and saw the house was heavily blood stained.

I woke him up. He was stark naked. I asked him why the house had blood stains. He told me he does not now anything. I held him.

We entered one room as the house had three rooms. I found a bed and it was heavily blood stained. There were clothes on a hanger and they were heavily bold stained. One was a T-shirt and the other a short. I asked him who was the owner of the clothes. He told me they were of his friend who sleeps in the house called Samuel Muriithi Njogu. I knew him. I asked him where he was and he told me they spent the night together but did not know where he had gone. I told him one Mwangi had been killed and blood stains led me to his house. I asked him whether he knew what happened. He told me he may have been killed by his friend who had disappeared.

A mob was building up so I decided to take him to the Police Station. I took him to Kimbimbi Police Post. I then called the OCS Wang'uru and reported. The Police took over investigations.

**CROSS-EXAMINATION:**

Njoka was asleep. He had no clothes on. He had no blood stains. There were clothes which were heavily blood stained.

1<sup>st</sup> accused told me they belonged to Muriithi. All the beddings, a mattress, blankets and bed sheets were blood stained. The 1<sup>st</sup> accused is the one who told me the clothes belonged to Muriithi and he had worn them that day. Njoka was in the house and the murder took place in the house.

He told me the two of them live in the house. The door of Njoka's house was broken.

The 1<sup>st</sup> accused told me the door was broken by his son three says ago. The deceased was not the son of Njoka.



**Cross-Examination:**

The bloodstained clothes I had never seen 1<sup>st</sup> accused or 2<sup>nd</sup> accused wearing them, it is 1<sup>st</sup> accused who told me they belong to 2<sup>nd</sup> accused.

**Re-Examination: Nil.**

PW- 5 Samuel Kinyua Gachoki the village-in-charge Matandara village.

On 18.7.2019 at about 6.45 am I received a call from area Nyumba Kumi chairman, David Waweru Gitari. He informed me that there was dead body near his home which appears like of Simon Mwangi. I telephoned the assistant chief and reported. He told me that we meet at the scene.

I proceeded there and I met the chief. We saw bloodstains which we followed and they led us to the home of Njoka. There were three houses, one belonged to Njoka, and the other was of his mother and the other of his son.

The house of Njoka Wamaitha had no door as it was demolished and was on the ground. We entered the house of Njoka with the chief. We saw blood stains in the house. The assistant chief asked him questions.

We then took Njoka to the Police. On the way back we met police from Wang'uru Police Station. We went to where the body was. The police continued their work.

**Cross-Examination:**

Njoka Wamaitha Nduma is the one we found in the house.

He was sleeping in the sitting. He was wearing a black trouser and black coat.

We went to another room which had a bed. Njoka had no blood stains.

His clothes were not bloodstained. In the bedroom there were clothes which were bloodstained, a short and a shirt. They were hanged somewhere.

The deceased was not living with Njoka. They were friends. They had no grudges. They were friends. They have never had a dispute.

I don't know if Njoka and Muriithi had reason to kill the deceased. From where the deceased was there were drops of bloodstains and it appeared he was carried to the scene. 1<sup>st</sup> accused had no blood stains.

He may not have carried the deceased. 1<sup>st</sup> accused, 2<sup>nd</sup> accused and the deceased were habitual drunkards. The 1<sup>st</sup> accused was sound asleep in the sitting on the floor.

**Re-Examination: Nil.**

PW-6 Peter Njogu Gachube I know the deceased Simon Mwangi Gachube.

On 26.7.2019 I attended a postmortem at Kibugi Funeral Home. I was informed that Mwangi died from massive bleeding and a broken skull. The rest I don't know. I came when body was discovered.

**Cross-Examination: Nil.**

PW-7 Elijah Njoroge Kamau

On 18.7.2019 I woke up in the morning. A man called Jack came to my house and told me there was a man called Mwangi who was killed at Matandara.

I went to the scene and found the body had been removed.

The brother of Mwangi requested me to accompany him to the mortuary.



I boarded his vehicle and we went to the mortuary. We then went to Wang'uru and reported.

**Cross-Examination:**

I found the body had been removed from the scene and placed in the police vehicle.

I saw the body was covered with blood and he had injuries.

**W- 8 Peter Njogu Gachube**

On 18.7.2019 I had taken my child to school at about 7.30 a.m. I met a neighbour who asked me if I had heard something. I told him no. I took the child to school.

I then carried a woman and we went to the scene.

We found members of the public and police. We found somebody who was murdered at the scene.

We carried the body. It was taken to the mortuary. We then went to Wang'uru.

**Cross-Examination:**

I only saw the body at the scene.

**Re-Examination; Nil.**

PW.9 David Gitari a Tuk Tuk operator at Mwea.

On 19.7.2019 in the morning section, I heard screams about 100 metres away. I went near there. I found a dead body of a man who I knew as Mwangi Gachobe.

The body had blood and had blood stained clothes. I did not see injuries. I called Samuel Kinyua, in charge of Matandara village. He came to the scene with sub-chief Mr. Ndungu and police officers. They followed the blood trail towards Matandara. I went to work.

I later recorded a statement at the Wang'uru Police Station on the 19.7.2019.

**Cross-Examination:**

The blood stains followed to the road – I did not follow.

During the night I never heard any noise.

That's all.

**Re-Examination; Nil.**

PW10 Dr. Karomo testified that

8. The evidence of PW11, which was based primarily of the statement of the other witnesses only implicated the accused in the fact of having shared a house with the 1<sup>st</sup> accused, having together on the material date and in some concerted action in the incident after 1<sup>st</sup> accused had hit the deceased appeared in the Re-examination with the Investigating Officer, saying:

“It was said that the accused used to live in the house of the 1<sup>st</sup> accused. It was said by the villagers that the shirt recovered from the house belonged to him. He used to wear it. We took the samples from the primary scene and secondary scene and exhibit memo form. There is no report from the Government chemist. I used to follow up on the report and the Government Chemist said they had misplaced the exhibits.”



## Submissions

9. Counsel for the Accused urged in Submissions dated 28/4/2025 that the prosecution had failed to establish a prima facie case against the 2<sup>nd</sup> accused as follows:

“2nd Accused's Person Written Submissions on a no Case to Answer

### Introduction

The accused person herein is charged with the offence of Murder Contrary to section 203 as read with Section 204 of the Penal Code Cap. 63 Laws of Kenya.

The particulars of the offence are that:

Njoka Wamaitha Nduma and Samuel Muriithi Njogu on the night of 17<sup>th</sup> and 18<sup>th</sup> July, 2019 at Matandara village within Kirinyaga County unlawfully murdered Simon Mwangi Gachube.

The accused person herein pleaded not guilty to the charges herein

### Facts

The prosecution in proving their case called a total of 11 witnesses.

The prosecution's case is primarily based on circumstantial evidence as there was no eye-witness who say the accused person commit the offence herein.

Your Lordship, among the 11 witnesses called by the Prosecution PW1 Lawrence Kariuki Ethan is the only witness who could have solved the puzzle as to who killed the deceased herein.

However, the evidence of PW1 fell short of its expectations since it did not complete the sequence of events as it left us hanging at the point he left the accused persons with the deceased near the 1st accused persons' house. From there no other witness linked the 2nd accused person with the act of killing the deceased herein.

Your Lordship, it is trite law that he who alleges must prove. This assertion is well amplified by the provisions of Sections 107, 108 and 109 of The Evidence Act Cap. 80 Laws of Kenya which provides as follows:

107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Your Lordship in the case of Republic V Gutu Sambaro Jilat [2021] eKLR the court set out the following as the issues for determination in a murder case –

- a) That the deceased is dead.
- b) That his death was due to an unlawful act by the accused
- c) That in killing the deceased accused had malice aforethought
- d) That it is beyond per adventure the deceased death was caused by the accused.

Your Lordship, none of the prosecution witnesses testified as to the mens rea of the accused person herein to murder the deceased. Your Lordship, in as stated earlier, the prosecution's case is primarily premised on circumstantial evidence. Your Lordship, following the evidence of PW1, a clear doubt is raised as to whether the 2nd accused person actually killed or participated in any way in killing the deceased person. It is therefore in our view that putting the accused person herein on his defence would only serve one purpose which is to seal the loopholes in the prosecution's case which in itself would be an illegality. In this regard we urge this court to be guided by the locus classicus case of Ramanlal Trambaklal Bhatt V R [1957] E.A. 332 at p. 334-335 which was cited with approval in the case of Anthony Njue Njeru V Republic [2006] eKLR which clearly explains the meaning of a prima facie case....

In addition to the foregoing we further urge this court to be guided by the decision of the Court of Appeal in the case of Anthony Njue Njeru V Republic [2006] eKLR (Supra) where the Court of Appeal held that an accused person should not be called to his defence in order to fill in the gaps of the prosecution's case....

### **Conclusion**

It is our humble submissions that the prosecution has not made out a prima facie case warranting the accused person herein to be put in his defence. The Prosecution's case is full of loop holes arid gaps which cannot be explained. That calling the accused person to his defence would only serve the sole purpose of trying to fill the gaps left by the prosecution. And in view of the holding in the case of Antony Njue Njeru (Supra) the Court ought not to call an accused to his defence in order to cure the deficiencies in the prosecution's case. With regard to the foregoing, there is no prima facie case established by the prosecution for the Court to call upon accused to state his defence under Section 306 (2) as read with Section 307 of the *Criminal Procedure Code* and we thus pray that the accused person herein be set at liberty.”

10. For the Prosecution, by Submissions of 30/4/2025 Counsel restated the facts upon which the 1<sup>st</sup> accused pleaded guilty by his Plea bargain, without contending, properly in this Court's view, that it had established a case against the 2<sup>nd</sup> accused:

“Submission on case to answer



Your Lordship The Accused is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

#### Particulars of Facts

On the night of 17<sup>th</sup> and 18<sup>th</sup> July 2019 at Matandara within Kirinyaga County Murdered Simon Mwangi Gachube.

#### Facts

On 1<sup>st</sup> July 2019 at about 2300 hrs, the accused went to a joint christened Matandara bar where he found the 1<sup>st</sup> Accused {Njoka Wamaitha Nduma} and the deceased {Simon Mwangi Gachube}. 1<sup>st</sup> Accused [Njoka Wamaitha Nduma] made a payment of Kshs 1000 for the drinks they consumed at the bar with both the 2<sup>nd</sup> accused {Samuel Muriithi Njogu} and the deceased {Simon Mwangi Gachube} before they left to where they were staying with the 2<sup>nd</sup> accused {Samuel Muriithi Njogu}. The deceased followed them and upon noticing the presence of the deceased, the accused was infuriated and upon questioning him why he had followed them, he picked an empty bottle of the [Vienna] and smashed him on the head rendering him to fall flat on the ground unconscious. He noticed the injuries he had occasioned to the Deceased {Simon Mwangi Gachube} who was by then remained unconscious and bleeding profusely from the injuries suffered on the head.

He requested the 2<sup>nd</sup> Accused {Samuel Muriithi Njogu} to assist him pull him outside from the house; which they did. They hauled him for about 100 metres from the house and left him alone still bleeding and unconscious. The 2<sup>nd</sup> Accused {Samuel Muriithi Njogu} left the scene immediately and disappeared into the night leaving the accused who then retired to his house and slept. Pw-4 {Stephen Ndun'gu Gitari} testified that being the area assistant Chief, he received information from a village elder {Samuel Kinyua Gachoki} on the 18<sup>th</sup> July 2019 of the deceased body that had been discovered near a shamba at Mathangauta Primary School. He proceeded to the scene and was able to identify the deceased {Simon Mwangi Gachube}. He had visible injuries on the head with a deep cut. His cloths were fully soaked in blood. He noticed blood drops that lead to the accused house about 100 metres. Upon entering the house, they noticed the beddings were also soaked in blood. Some hanged cloths also had blood stain with accused still in the house. He picked the accused and escorted him to Kimbimbi AP Camp for fear he would be lynched by members of the Public. The body was taken by the Police to Kibugi Funeral Home. Pw-10 {Dr. Karomo} who performed the Post Mortem formed the opinion that the cause of death was due to severe head injury caused by heavy blunt force trauma. Attached is the death certificate number 1224820.

The following prosecution had testified so far. Pw-1 {Lawrence Kariuki Ethan} Pw-2 Joseph Kariuki} Pw-3 {Hellen Njeri Wangechi} Pw-4 {Stephen Ndungu} Pw-5 {Samuel Kinyua Gachoki} Pw-6 {Peter jogu Gachube} Pw-7 {Elijah Njoroge Kamau} Pw-8 {Paul Kimani Kinyanjui} Pw-9 {Duvid Wawcr u Gitari} Pw-10 {Dr. Karomo}.”

#### The Issue

11. The issue for determination is whether the Prosecution has adduced evidence of commission of the offence by the 2<sup>nd</sup> accused in terms of section 306 of the [Criminal Procedure Code](#).



### **Ingredients of the offence of murder**

12. The Court is mindful of the ingredients of the offence of murder as observed in *R. v. Nyambura & 4 Others* (2001) KLR 355, especially the two requirements, apart from the proof of death, that it is the unlawful act of the accused that cause the death of the deceased and that in doing so he had malice aforethought, as defined in section 206 of the penal Code.

### **Contradictions in the prosecution evidence**

13. The Prosecution's opening on 10/2/2020 by Prosecution Counsel Achimosi indicated that prosecution case relied on the principle of last seen with as follows:

“Mr. Achimosi:

The two accused have been charged with murder. It is alleged that on the night of 17 & 18.7.2019 at Matandara village they unlawfully murdered Simon Mwangi. On the morning of 18.7.19 the body of the deceased was discovered in pea's planation.

Upon discovering of the body, traces of blood led the area assistant chief to the house of 1<sup>st</sup> accused where he spent the night, with 2<sup>nd</sup> accused. Upon entering blood was visible on the bed sheets and the floor of the house. There were also blood stains on a jeans trouser and a short which were recovered by the investigating officer of this case.

On the previous night the deceased was last seen in the company of 1<sup>st</sup> and 2<sup>nd</sup> accused and after drinking in a bar the accused were demanding menacingly demanding a debt of Ksh.1000/= from the deceased. The 1<sup>st</sup> witness intervened and the two said they wanted to give the deceased a place to sleep. The next thing was that the body was discovered in a farm. The body was taken to Kibugi Mortuary. A postmortem showed cause of death was head injury due to blunt force trauma with a heavy object.

I have lined up 2 witnesses.”

14. However, the evidence of PW1, the eye-witness motor bike rider, is contradicted by that of PW3 the bar operator as regards the presence of the deceased at the drinking place. PW1 states that “When I was a few metres from home, there was a bar called Matandara bar. I saw Njoka and Muriithi. One was Njoka Maina, 1<sup>st</sup> accused in the dock and Muriithi Njogu the 2<sup>nd</sup> accused in the dock and two other people who are not before court. I also saw the deceased Simon Mwangi Gachure. They were coming from the bar heading home” while PW3 states “Njuki, Muriithi and Karuki are the ones who came to the bar. Mwangi was not in that bar that day.”
15. In addition, apart from PW1 evidence that the 1<sup>st</sup> and 2<sup>nd</sup> accused had been together the previous evening drinking with the deceased, PW4, the assistant chief testified that he acted on a hearsay suggestion by the 1<sup>st</sup> accused that the 2<sup>nd</sup> accused may have been the attacker, as follows:

“We entered one room as the house had three rooms. I found a bed and it was heavily blood stained. There were clothes on a hanger and they were heavily bold stained. One was a T-shirt and the other a short. I asked him who was the owner of the clothes. He told me they were of his friend who sleeps in the house called Samuel Muriithi Njogu. I knew him. I asked him where he was and he told me they spent the night together but did not know where he had gone. I told him one Mwangi had been killed and blood stains led me to his house.



I asked him whether he knew what happened. He told me he may have been killed by his friend who had disappeared.”

16. There was no forensic evidence on the items recovered from the house and allegedly presented to the Government Chemist. The corroboration that such forensic evidence could offer the evidence of PW1 on the last seen with principle fails. The contradiction by PW3 of the PW1 as to presence of the deceased at the bar when she asserts that “”, damages the last seen with theory of the prosecution.

### **Principal Offenders**

17. The evidence does not show that the 2<sup>nd</sup> accused was a principal offender for doing any act which constitute the offence or aiding or abetting the commission of the offence or counselling or procuring the 1<sup>st</sup> accused to commit the offence. Section 20 of the Penal Code defines principal offenders as follows:

“20. Principal offenders

- (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
  - (a) every person who actually does the act or makes the omission which constitutes the offence;
  - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
  - (c) every person who aids or abets another person in committing the offence;
  - (d) any person who counsels or procures any other person to commit the offence, in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
- (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
- (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission”



## Common purpose

18. Section 21 of the [Criminal Procedure Code](#) provides for principal joint offenders as follows:

“ 21. Joint offenders in prosecution of common purpose

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

19. Following the plea of guilty through the Plea bargain by the 1<sup>st</sup> accused, and in view of the joint charge, the prosecution must show that the two accused persons acted with common purpose, within the meaning of section 21 of the [Penal Code](#), of killing or causing the deceased grievous harm in terms of the definition of malice aforethought in section 206 of the [Penal Code](#).

20. The facts which the 1<sup>st</sup> accused accepted are in the same terms as the submissions by the DPP. As evidence of a co-accused against the 2<sup>nd</sup> accused, which according to *Ndungu v. R* the court must take with caution, it is merely that the two accused were going home after a drinking session with the deceased and when the deceased followed the two as they left the drinking place, the 1<sup>st</sup> accused in anger hit the deceased on the head inflicting serious injury and the deceased fell unconscious. The 1<sup>st</sup> accused then enlisted the help of the 2<sup>nd</sup> accused to move the unconscious person 100 metres from their home, obviously with intention to enable the 1<sup>st</sup> accused escape detention and punishment for his offence.

21. Of the evidence of a co-accused, even if a confession, as against the accused must be treated with caution as held by the Court of Appeal in *M’Inanga v Republic* [1985] KLR 294 that –

“ 1. A confession by an accused person involving his co-accused, when unsupported by other testimony, is evidence of the weakest kind against such co-accused. It is accomplice evidence needing corroboration, the need for corroboration being the greater when the maker of the statement has sought to retract it.”

22. The evidence of the 1<sup>st</sup> Accused in his plea of guilty where he accepted the facts set out by the Prosecution implicating the 2<sup>nd</sup> accused in the dragging of the deceased from his house to place 100 metres is accomplice evidence which must be cautiously treated as evidence of the weakest quality against the 2<sup>nd</sup> accused in the absence of corroboration. Never mind that the 2<sup>nd</sup> accused was not granted opportunity to cross-examine the 1<sup>st</sup> accused on this evidence, as held in *Godhana v. R* [1991] KLR 417 that where –

“ The appellant was not given an opportunity to cross-examine his co-accused. It was a fatal misdirection to state that this error had not occasioned a miscarriage of justice.”

## Accessory after the fact

23. If the 2<sup>nd</sup> accused had knowledge that the 1<sup>st</sup> accused had killed his victim, he could have been an accessory after the fact to murder, as set out in section 222 of the [Penal Code](#) as follows:

“ 222. Accessory after the fact to murder



Any person who becomes an accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life.”

24. The offence of accessory after the fact is defined in section 396 of the penal Code as follows:

“ 396. Definition of accessories after the fact

- (1) A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.
- (2) A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; or by receiving or assisting in her husband’s presence and by his authority another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become an accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment.”

25. But the facts of this case, do not reveal that at the time of the 2<sup>nd</sup> accused’s involvement, the deceased had died. If the accused helped the 1<sup>st</sup> accused move the unconscious person, he could only have been an accessory after the fact to the offence of assault or grievous harm, not murder. As the deceased had not died at the time of the alleged moving, the 2<sup>nd</sup> accused’s participation in the event as an accessory after the fact to the felony of assault or grievous harm under respectively sections 251 and 234 of the [Penal Code](#).

26. The punishment for being an accessory after the fact to a felony, such as assault or grievous harm, is set out in section 397 of the [Penal Code](#) as follows:

“ 397. Punishment of accessories after the fact to felonies

Any person who becomes an accessory after the fact to a felony is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for three years.”

27. He could also be charged, if it could shown that he knew that the 1<sup>st</sup> accused intended to attack the deceased, with the misdemeanour of failure to prevent a felony under section 392 of the [Penal Code](#) as follows:

“ 392. Neglect to prevent felony

Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour”

28. The 2<sup>nd</sup> accused could not properly have been charged with murder given the ingredients of murder contrary to section 203 as read with 204 of the penal Code.



## **Verdict**

29. The Court must find that the prosecution has not established a case against the 2<sup>nd</sup> accused because there was no evidence of common intention with the 1<sup>st</sup> accused who hit the deceased and inflicted the fatal blow. His subsequent involvement in removal of the unconscious victim is at worst an offence of accessory after the fact to the offence of assault or grievous harm but not an accessory to murder, with which offence, in any event, he is not charged.

## **Orders**

30. Accordingly, in terms of section 306 (1) of the *Criminal Procedure Code*, upon finding that there is no evidence that the 2<sup>nd</sup> accused committed the offence of murder, the court records a finding of not guilty and the 2<sup>nd</sup> accused is consequently acquitted of murder c/s 203 as read with 204 of the *Penal Code*.

31. There shall, therefore, be an order for his release from custody unless he is otherwise lawfully held.

Order accordingly.

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JULY 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

Mr. Mamba for the DDP/Prosecution.

Mr. Ngigi for the Accused.

