



**Republic v M’ibua & 8 others (Criminal Case 3 of 2019)
[2024] KEHC 824 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 824 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE 3 OF 2019
LW GITARI, J
FEBRUARY 1, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

**GERALD NJERU M’IBUA 1ST ACCUSED
JULIUS MBURU KINANGA 2ND ACCUSED
JOHN NTHIGA KIREMA 3RD ACCUSED
SISIRIA KATORA ROCHIANGA 4TH ACCUSED
LEAH MUTHONI NGIGI 5TH ACCUSED
JULIUS NJERU KIMENYE 6TH ACCUSED
JORNARD NJAGI KIBIUBI 7TH ACCUSED
GEDIEL MUNYUA MUNUGU 8TH ACCUSED
TOM KINYUA NJOKA 9TH ACCUSED**

JUDGMENT

BACKGROUND

1. The accused persons herein face the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 30th April, 2019 at Kamaindi area location within Igambang’ombe sub-county within Tharaka Nithi County, the accused persons jointly with others not before court unlawfully murdered one Japhet Majau Mukengu.
2. All the accused denied committing the offence and the matter proceeded to full trial with the prosecution calling a total of nine (9) witnesses in support of its case against the accused. At the close



of the prosecution's case. This court ruled that the accused had a case to answer and they were put to their defence. The accused persons testified in their defence with the 3rd Accused calling three other witnesses in support of his case, and the 4th, 5th, and 7th Accused each calling one witness each in support of their individual cases. In the end, a total fifteen (15) witnesses testified in support of the defence case. Hereunder is a summary of their respective cases.

Brief Facts:

This is a sad case which was sparked off by goats that strayed into the shamba of a neighbor who is one of the accused and were detained pending the resolution of that simple dispute by the local administration. The deceased in this case was at the time of this incident the chief of Kamaindi Location within Igamba Ngombe Sub-County, Tharaka Nithi County. The key witness Josephat Gikware Mukengu (PW1) was at his home on 30/4/2019 when at about 1.00 p.m. he notice goats of Julius Mburu Kinanga (2nd accused) had strayed on his farm and wee grazing on his crops. PW1 drove them to his home and called the assistant chief one Veronica Kanini Mutugi to whom he reported the matter. She in turn told PW1 to call the chief and report the matter to him. The chief who is the deceased in this matter told the (PW1) to make arrangements with his wife who was also the area manager and return the goats to the owner. PW2 did as directed and told his wife (PW4) to return the goats to the home of second accused. No sooner had she returned the goats, she saw the accused person who were armed with pangas, sticks, arrows and other weapons heading to the home of the (PW1). Soon the accused went to the home of the PW1 baying for his blood but lucky he had locked himself inside the house. It was at that very time that the chief arrived at the home of the PW1 and started negotiating with the accused. All of a sudden, the 2nd and 6th accused started asking the rest what they were waiting for. All the accused attacked the deceased with the crude weapons without any warning or provocation. The 7th accused picked a stone and hit the deceased on the forehead. The deceased was thrown into panicked and asked him whether it was a fight ("kwani imekuwa ni vita.") All the other accused started cutting the deceased using pangas and hitting him with sticks. The deceased was overcome and collapsed as the accused continued attacking him. The accused then poured petrol on the deceased which they had carried in a jerrycan and set the body ablaze. It is the 9th accused who removed a match box from his pocket and after dousing the deceased with petrol he set him ablaze when he was still alive. The matter was reported to the police. The nine accused person who wee known to the PW1, PW2 and PW4 and were all involved in a committing the offence were arrested and charged with the offence of murder. The accused are all related by blood from extended family. All the accused persons pleaded not guilty. The case proceeded to full hearing with the accused represented by Mr. Mutuma Gichuru and Associates for 1st, 3rd and 4th and 5th Accused persons and Mr. Ashasa for 2nd, 6th, 7th and 9th accused. The prosecution was ably conducted by Ms Jane Maari.

The Prosecution's Case

3. PW1 was Josphat Gikwa Mukengu, a resident of Kamaindi location and the older brother of the deceased. He stated that he knew all the accused as they were his neighbours. He recalled that on the material day between 1.00 p.m. and 2.00 p.m., he was in his farm where his home is. He saw four goats enter his farm and started destroying his crops. The goats belonged to the 2nd Accused. PW1 stated that he went and removed the goats from the farm and took them home. He then called the assistant chief and asked him to go to PW1's home so that they could return the goats. The assistant chief told him that she was not available. PW1 then decided to call the chief who is the deceased herein. The deceased advised PW1 to call the area manager to go and pick the goats and return them to the owner. The area manager is PW1's wife. PW1's wife was not at home but later returned and PW1 informed her about



- what the chief had said. PW1's wife then took the goats and returned them to the 2nd Accused. At the 2nd Accused's home, she met the 2nd Accused's wife who is the area manager's sister.
4. It was PW1's testimony that while the goats were at his home, he heard the 2nd Accused and his wife screaming and asking why he had taken their goats. That people started gathering at the home of the 2nd Accused and after PW1's wife returned home, PW1 could still hear noises from the home of the 2nd Accused. PW1's wife told him to go inside the house as the people who were at the home of the 2nd Accused were armed with dangerous weapons. PW1 refused to go inside the house but his wife held him and forced him to go inside the house. He went inside the house and locked himself. His wife remained outside. Soon afterwards, the chief appeared and PW1's wife advised him not to go near the people who were at the fence as they were armed with pangas and sticks.
 5. The deceased chief told the people not to enter PW1's compound as that would be unlawful. The 6th Accused then shouted loudly saying "Why are you delaying him?" PW1 stated that it is then that the 7th Accused hit the deceased chief with a stone. The chief turned and asked them if they wanted a fight. The 6th Accused then cut the chief on his back with a panga. The chief started to run away but the 5th Accused prevented him from running away and they started hitting the chief on his face using sticks. At that point, the 2nd Accused shouted, "Cut him on the leg, he is very strong." PW1 stated that the 1st, 2nd and 8th Accused then cut the chief on the leg using pangas and that the 7th Accused cut the deceased on the hand also using a panga while the 3rd and 6th Accused cut the deceased on the face next to the eyes. According to PW1, the accused persons then competed on where to cut the deceased and PW1's wife also got cut by the 1st Accused on the face and the middle of the head. All along, PW1 was watching the incident from the window and when he saw that his wife was in danger, he went to open the door but realized that the house had been locked from outside. PW1 then went through the rear door and started heading to his son's house. Njeru saw PW1 and raised an alarm that PW1 was running away. PW1 continued running and did not stop. The 7th Accused chased after PW1 while attacking her with stones. PW1 reached his son's house and the 7th Accused then decided to go back. PW1 informed his son Mwiti that the people had killed the chief. Mwiti told his father to stay in the house as he went to the scene. Mwiti then returned and informed PW1 that the people had even lynched the chief. PW1 told Mwiti that the people could come and surround them. PW1 then went and crossed Thuci river and decided to go to report the matter to the police. He met the D.C. Igambang'ombe and other officers. PW1 led them to the scene and showed them where he was when he witnessed the subject offence unfolding. PW1 then recorded his statement the following day.
 6. PW2 was David Mutegi Njeru, also a resident of Kamaindi location. He stated that he is a unit elder and that he knew the deceased as he was his area chief. That he also knew all the accused persons as they came from the same location. He recalled that on the material day at around 3.00 p.m., he was at his home having arrived from grazing. He received a phone call from the deceased chief who asked him to meet him at the chief's office as there was work that he needed them to do. The chief asked PW2 to meet him at 5.00 p.m. but PW2 got late and arrived at the office at about 5.30 p.m. The chief was not there. PW2 proceeded to small town called Barrier where he met a person who told him that the chief had gone in the direction of his home. PW2 decided to follow the chief. After walking for about one kilometer from the chief's office, he came to a junction where there is a path to Thuci river. He heard people singing abusive songs in Tharaka language which he understood. According to PW2, the songs that the people sang are usually sang during circumcision and it was usual that if you hear the songs being sang, you know that the people were going somewhere or were up to something. PW2 stated that the songs were coming from the home of the 2nd Accused. He saw people coming towards where he was and identified the accused persons herein. That the people had pangas and others had sticks and that they were heading to PW1's home. PW2 saw the accused entering PW1's home and he followed



- them. He saw the deceased at PW1's compound and heard him tell the accused that they had no right to enter another person's home while armed. He then heard the 6th Accused asking the others what they were waiting for in respect to the deceased.
7. PW2 corroborated PW1's testimony that at that point, the 7th Accused picked a stone and hit the deceased on the head. The chief started bleeding and he asked them "Kwani ilikuwa vita?" in Kiswahili. The 7th Accused then cut the chief on his back near his shoulders. The 3rd Accused also cut the deceased on the back. The chief tried to run but he met the 4th and 5th Accused who started hitting him with sticks until the chief fell down. The 2nd Accused told the rest to cut the chief's legs as he was very strong and so that he could not run away. The 1st Accused cut the deceased on one leg and the 2nd Accused cut the deceased on the other leg. The 9th Accused cut the deceased on the right hand. The accused persons then surrounded the deceased. The 6th Accused cut the deceased across his mouth while the 2nd Accused cut him across the forehead. The rest of the accused persons joined in and started cutting the chief. Members of the public were attracted by the noises and started to gather at the fence. The 9th Accused who had a jerry can then started pouring some liquid quickly on the deceased. He removed something from his pocket and immediately started a fire. The others started walking away one by one. PW2 got scared and he decided to call the assistant chief. He then called his brother Elias Muriuki Njeru. He then went home and informed his family what had transpired. They then decided to go to the house of PW2's uncle's house in fear for their lives and they stayed there for four days. PW2 subsequently recorded his statement.
 8. PW3 was John Mwindu Karangu, a church leader and a resident of Kamaindi location. He stated that he knew the deceased as he was area chief and also knew the accused persons. He recalled that on the material day, he left his home at 3.00 p.m. and went to church for a meeting. The meeting ended at 5.30 p.m. when PW3 decided to take two bursary forms that he had to the area chief. He did not find the chief at his office and was informed that the chief had gone home. PW3 decided to go to the chief's home. On reaching a junction, he heard noises coming from the home of PW1 which was in the direction of where he was heading. He followed a path to the house and saw the chief talking to a group of about twelve (12) people. PW3 could not hear what they were talking about but heard the chief telling the people that they should not go to somebody's home without the person's permission. PW3 identified the people that the chief was talking to as the accused persons herein. PW3 corroborated the testimonies of PW1 and PW2 in respect to the how the accused attacked the chief, killed him and 9th Accused the set the deceased ablaze. At that point, the PW3 left the scene in fear. He later on recorded his statement.
 9. PW4 was Rosylyn Nguru Ngware, PW1's wife and the area manager. She stated that she knew the deceased herein as he was a brother to his husband and the area chief. She also knew the accused persons as they are her neighbours. She recalled that on the material day she had left home and returned at around 2.00 p.m. She found four goats belonging to the 2nd Accused had been locked up in her compound by her husband who had found them in their farm. She corroborated PW1's testimony that the area chief had asked PW1 to call her as the area manager and ask her to return the goats to their owner, the 2nd Accused. That PW4 took the goats to the home of the 2nd Accused where he met the 2nd Accused's wife, who is PW4's sister, and her child. That there was no issue when PW4 returned the goats and that after she gave them back, she started returning home. On her way back, she met David, a child of the 2nd Accused and two people who PW4 did not know. PW4 reached home and as she was standing outside in her compound she saw people going to the home of the 2nd Accused. She stated that the people were more than ten (10) and all the accused persons herein were among them. That the people were talking and some of them had pangas, bows, arrows, and clubs.



10. It was PW4's testimony that the aforementioned David was carrying a sack that had something inside. PW4 corroborated the testimonies of PW1, PW2 and PW3 in respect of how each of the accused was armed and how they left the 2nd Accused's home and came to PW4's compound. She stated that she told her husband that there was a problem then pushed him inside the house. That the accused persons were hauling insults at PW4 and her husband stating that they would kill someone. The chief arrived at the scene and told the people not to enter PW4's compound and instead, to stand outside the compound and resolve the matter. PW4 corroborated the testimonies of PW1, PW2, and PW3 on how the accused persons then descended on the chief, cut him severally, and killed him. When PW4 asked them if they wanted to kill the chief, the 1st Accused attacked her and cut her on the head and hand. That one Catherine Kanagaria, who was not before court, hit PW4 on the back and fell down. She then stood and ran away to the home of one Veronica Karimi Mutugi, the assistant chief. They then proceeded to the scene at around 7.00 p.m. where they found the D.C. and policemen. At the scene was the body of the deceased chief which had been burnt. PW4 gave them a blanket to carry the deceased's body and she went to hospital the following day where she was stitched. On cross examination, she stated that her son Mwiti accompanied the police to arrest the suspects and both Mwiti and the OCS were killed. That David Ikaba also met his death.
11. PW5 was Anne Wanjira Mukengu, the daughter of PW1 and PW4. She stated that she knew the deceased as he was her uncle and the area chief. That the accused are their neighbours. She recalled that on the material day, she was at home with his father at about 1.00 p.m. She prepared lunch and they ate. It was PW5's testimony that her father then spotted four goats in their farm and went to drive them out. That he came back home with them and locked them in the goat pen. PW5 corroborated PW1's testimony that he called the assistant chief and that her mother (PW4) then came and returned the goats to the owner. That after PW5's returned home, PW5 heard commotion outside the house of the 2nd Accused. That the deceased then came and the commotion at the 2nd Accused's home intensified. PW5 corroborated the testimonies of PW1, PW2, PW3, and PW4 that the group of people who were at the 2nd Accused's house then approached their home armed with pangas and sticks. That they attacked the chief by cutting him repeatedly. PW5 realized that there was danger and tried to run away and that is when the 7th Accused kicked her on her legs but she managed to run away to the house of her brother called Mwiti. That she returned at home at 6.00 a.m. and found that the deceased had been burnt and that her mother had been injured on the face.
12. PW6 was James Njoka Mukengu, a resident at Kamaindi, a brother to the deceased. He stated that he knew the accused persons as they are his neighbours. He recalled that on the material day, he had taken his child to school and spent the day there. That he left the school and passed by the deceased's office at around 5.30 p.m. where he found him with other people talking about bursaries. The deceased asked him to give him a lift. On the way, he passed by the home of PW1 who is their brother. They found PW4 at the home who told him that things were not good. PW4 explained to him about how PW1 had locked the goats he found in their farm and that she had returned the goats to the owner but people had gathered there and were causing commotion. PW6 then corroborated the testimonies of PW1, PW2, PW3, PW4, and PW5 on how the people approached the home of PW1 and when the deceased tried to stop them from entering the compound, they attacked him, killed him, and burnt his body. PW6 recorded his statement the following day.
13. PW7 was Dr. Moses Njue Gachoki, who performed the postmortem examination on the body of the deceased on 15th May, 2019. He noted lacerations and burn marks all over the body. One laceration was from the front to parietal region measuring eight (8) centimeters. There was a deep laceration on the back of the head measuring five (5) centimeters. The deceased's skull bone skull was fractured exposing his brain. According to PW7, there was evidence that the deceased's brain was under



increased pressure due to collection of blood. On examining the deceased's respiratory system, it was PW7's testimony that there was no soot which in his opinion was an indication that the deceased was burnt after he died. PW7 produced the postmortem report and pathologist report as P. Exhibit 2 and 3 respectively.

14. PW8 was Eliud Muchiri Manjao, a son of the deceased. He stated that he knew the accused persons as they were his neighbour at Kamaindi Location where he was born. He recalled that on the material day, he was at home at around 6.00 p.m. when he heard noises coming from the home of his uncle (PW1). He then heard screams made by a woman. He went to their gate and looked from a distance to find out what the noises were about. He saw people approaching the home of PW1 but could not identify them and neither could tell if they were armed as they were at a distance. The people were moving in a hurry. PW8 tried to call his father but could not reach him. He then called PW1 but he also did not pick up his call. After a few minutes, he saw a dark smoke in the air coming from the compound of PW1. PW8's mother then received a call from a woman called Miriam informing her that PW1's wife (PW4) had passed by her home and she was bleeding from her head and that PW4 had told her that she had left the deceased having been seriously injured. PW8 and her mother decided to go to the compound of PW1 to find out what had transpired and that is where they came to find out that the deceased had been killed and his body burnt.
15. PW9 was P.C. Joseph Ole Napaso. He gave evidence on behalf of the investigating officer in this case, Chief Inspector Stanslus Mwangi Kibiru, who is now deceased. PW9 stated that he knew his handwriting and signature having had worked with from late 2018 to early 2020. According to the statement by the late Chief Inspector Stanslus Mwangi, he received a call from the D.C.I.O. Madam Betty on the material day at around 8.00 p.m. informing him of a murder incident. He proceeded to the scene in the company of some D.C.I. officers and officers from Chuka Police Station under OCS Kinyua Ngure (now deceased). At Kamaindi location, they met the D.C.C. who led them to the home of PW1 where they found the burnt body of the deceased. They called the scenes of crime officers from Embu and as they were waiting for them, they interviewed the brother of the deceased who told them that he knew the perpetrators of the offence and could lead them to their homes. The investigation was led to the homes of the suspects and he arrested four people on that night. The scene of crime officers arrived at the scene and the deceased's body was removed and taken to Chuka mortuary. The other suspects were later arrested on diverse dates and their statements were recorded. The statements of the witnesses were also recorded. PW9 produced as exhibits photographs taken by the scenes of crime officer and the certificate of the photographs as P. Exhibits 4(i) to (ix) and P. Exhibit 5 respectively. He also produced a sketch plan of the scene as P. Exhibit 6. The P3 form issued to PW4, the mental examination reports of the accused persons and the statement of the investigating officer were also produced in evidence as P. Exhibit 1, 7, and 8 respectively. PW9 told the court that the OCS and other officers received information from an informer of the whereabouts of David Ikaba, the son of the 2nd Accused. They proceeded to where the said suspect was where the wife of the suspect raised an alarm that they had been attacked by robbers. The incident became chaotic and unfortunately, the OCS, the informer and the suspect lost their lives in the incident.
16. This marked the close of the prosecution's case and the accused persons were put on their defence.

The Defence Case

17. DW1 was Gerald Njeru M'Ibua, the 1st Accused herein. It was his testimony that on the material day he woke up and went to his maize farm to graze his cows and goats. That he returned in the evening at around 8.00 p.m., ate food with his wife and then slept. That at 2.00 a.m. policemen came with the son of PW1 and arrested him and took him to Chuka Police Station. He maintained that he was arrested



- over a land dispute he had with PW1 and did not know anything about the murder of the deceased. On cross examination, he stated that he never heard screams or noises in connection with the murder of the deceased. That the evidence of PW1, PW2 and PW4 stating that the he was at the scene of the crime were pure lies and that he had been framed because of a land dispute.
18. DW2 was Julius Mburu Kinanga, the 2nd Accused herein. It was his testimony that on the material day, he went to graze his goats at 9.00 a.m. That he later returned the goats to the pen and locked them up and proceeded to take a shower as it was hot. That when he returned, he found PW1 had opened the goat pen and went with the goats. That PW1 led the goats to his home and his son Mwiti assisted him in locking up the goats. That DW2 then telephoned the sub-chief and reported the incident but she informed him that she was in Chuka. DW2 stated that he then decided to go to the road to get people who would assist him in going to pick his goats. That he did not see anyone until 5.00 p.m. when his son David came with three other people. That DW2 then called the Deputy County Commissioner (D.C.C.) to report the matter and the D.C.C. told him to call the area chief. He stated that since he did not have the telephone number of the area chief, he called the D.C.C. again who informed him that she had called the area chief who had sent the area manager to return the goats. That DW2, his son David, and the three men that David had come with proceeded to PW1's house. That PW1 was sitting outside the house and when he saw them, he entered inside the house. Further, that they found the area chief at the home of PW1. Dw2 stated that his co-accused were not at the home of PW1. That the young men who were in the company of David then released the goats and told DW2 to take them home which he did leaving his son and the men at the compound of PW1. According to DW2, he woke the following day as usual and went to visit his brother. That on that day he was arrested at 11.00 a.m. while at his brother's house and told that his son David had killed the deceased.
 19. DW3 was John Kithiga Kirema, the 3rd Accused person herein. HE stated that he is an employee of the Teachers' Service Commission and that he lives in Nairobi but his rural home is in Kamaindi. That on the material day, he was in his house in Dandora Phase 5 in Nairobi. That he woke up and went to his office in Upperhill where he arrived some minutes to 8.00 a.m. That he logged in the office using a biometric machine to show that he had reported for duty. That he worked as usual until 5.00 p.m. when he left for town and later to a place called Headquarters where he met some of his friends. That he then went home and arrived some minutes to 9.00 p.m. That he then slept and that during the night of 30th April, 2019 and 1st May, 2019, his wife (the 5th Accused) called him through a mobile phone informing him that there were men who had come to their house claiming to be policemen. That DW3 asked the 5th Accused to be cautious and suddenly, the phone got disconnected. That on the same night, DW3's wife called him telling that she was at Chuka Police Station. That DW3 went to work on 2nd May, 2019 to request for leave. That while at work policemen from Capital Hill Police Station came and informed him that the D.C.I.O. Chuka required him to record a statement at Chuka Police Station in connection with the death of the deceased. That DW3 was then arrested at his office and taken to Chuka Police Station and subsequently charge with the subject offence. He maintained that he was never in Kamaindi on 29th or 30th April, 2019 and stated that his arrest was underpinned by a land dispute he had with PW1. He produced in evidence biometric print outs from his office to show that he was at work from 22nd April, 2019 to 8th June, 2019.
 20. DW4 was Cecilia Gatura Ruianga, the 4th Accused herein and the wife to the 1st Accused. it was her testimony that on the material day, she woke up at 8.00 a.m. and went to plant. That she left the farm at 11.00 a.m. and went to Igambang'ombe location to get a cow and a plow from the brother to his husband. That she found him using them and that it was not until 3.00 p.m. when his brother-in-law gave them to her and she proceeded home. That she arrived home at 5.00 p.m. and gave the cows to husband to go and graze them. That his husband returned at 8.30 p.m. and put the cows in the pen. That hey then had dinner and went to sleep only for them to be woken up by policemen led by PW1



- and his son at around 2.00 a.m. It DW4's testimony that they were then arrested and taken to Chuka Police Station where they were informed that they were suspects in the murder of the deceased.
21. DW5 was Leah Muthoni Ngigi, the 5th Accused person herein. it was testimony that on the material day, her child JK was to re-open school and took her to the school in Embu and returned home at around 8.00 p.m. That she was at home with her employee alone and husband was not at home. That between 12.00 midnight and 1.00 a.m., while she was sleeping, policemen came to her house, asked her where her husband was, searched the house and then escorted her to Chuka Police Station where she was informed that she was being arrested in connection to the death of the deceased chief.
 22. DW6 was Julius Njeru Kimenye, the 6th Accused herein. it was his testimony that on the material day, he went to graze and returned at 7.30 p.m. That he was later arrested on 15th May, 2019 and taken to the D.D.C.'s office where he allegedly came to learn that PW1 had given out his name as one of the people who had been involved in the murder of the deceased. As for the defence of DW3. I have considered the defence that he left the office in Nairobi at 4.30 pm. In my view it was possible for him to be at the scene at the time the offence was committed. He was known to the witnesses and there was no possibility of mistaken identity. I reject the defence.
 23. DW7 was Jonath Njagi Kibibiubi, the 7th Accused herein. it was his testimony that on the material day at about 5.00 p.m., he returned home from doing casual jobs. That on reaching Barrier at about 6.00 p.m., he went to a hotel of one Mutugi where he stayed for some time. That at about 7.00 p.m. he was still at the hotel when he heard the brother to the deceased saying that he did not know whether the deceased was still alive where he had left him. That DW7 was surprised and left the hotel. He arrived at his home where his stays with his two children at 8.00 p.m. and slept. He maintained that he was implicated and that he never heard any noises on the material day and that he was not involved in the murder of the deceased.
 24. DW8 was Jediel Munyua Munugu, the 8th Accused herein. It was his testimony that on the material day in the morning, he went to graze his cow in the farm of one Casto Mutua. That he then proceeded home at 6.00 p.m. and slept. That he never heard of the murder of the deceased or saw anything on his way home. He stated that he was arrested on 15th May, 2019 over that incident and taken to Chuka Police Station. He maintained that that his arrest was over the land dispute he had with PW1.
 25. DW9 was Tom Kinyua Njoka, the 9th Accused herein. It was his testimony that on the material day, his wife had a court case in Chuka Law Courts Court No. 1, the same being Criminal Case No. 7099 of 2018. That they came to court and later went home where they met one James Njoka near the gate of their home. That they had bought a duck to celebrate as they had won the case and that as they were eating, one Naomi went and told them that there were people looking for the perpetrators who killed the chief. That he asked his children to keep quiet and then saw four men hurriedly walking by who went and crossed the river and boarded motor cycles. That after seeing that, he decided to go to his mother's hotel which is at a place called Barrier so to avoid any trouble that could arise. He stated that on his way there, he met a corporal of police who asked him if he had heard that the chief had been killed. That he replied in the affirmative and added that he had a debt of the chief of Kshs. 500/= which he allegedly gave to the corporal of police. That the corporal informed him that his name had been given by the chief's brother as one of the people who were involved in the murder of the deceased. PW9 stated that he then proceeded to his mother's place and told her of the incident and his mother advised him to go back home in case the police were looking for him. That he then returned home and slept. According to him, he later took himself to the police after Gikware approached him and told him that he had been told to look for witnesses outside the family and that he would be arrested if he did not become a witness in the case. That he was arrested because he refused to assist Gikware and



- the investigating officer to find evidence in support of the case and that Gikware kept calling him and visiting him while he was in prison trying to convince him to become a prosecution witness in this case.
26. DW10 was Longinus Dibobo Oduya, a security officer at the Teachers' Service Commission (TSC). He stated that he was at the time of his testimony based at Bomet County but was previously working at the headquarters of TSC in Nairobi. It was his evidence that the advocate for the 3rd Accused had requested him for biometric login data in respect of the 3rd Accused person starting from 22nd April, 2019 to 3rd May, 2019. DW10 testified that in the material day, the 3rd Accused logged in at 7.40 a.m. and left at 16.50 p.m. That from their record, the 3rd Accused was on duty on the material day.
 27. DW11 was Dickson Gitonga Kabete. He stated that he was a businessman operating a bar and restaurant in Nairobi called Headquarters Retreat in Dandora. DW11 stated that he knew the 3rd Accused and that on the material day, the 3rd Accused was taking a drink at his bar at about 7.30 p.m. and left at about 8.30 p.m. It was further his testimony that on 1st May, 2019, the 3rd Accused went back to see him at around 9.30 a.m. That the 3rd Accused looked disturbed and that he told him that his wife had been arrested back at home in connection with the murder of a chief and an OCS. DW11 stated that he was later surprised to hear that the 3rd Accused was also arrested in connection with the murder of the chief.
 28. DW12 was Sonia Murugi Kirema, the daughter of the 3rd Accused. She stated that she lives with her father in Dandora and that on the material day, she was at home as she had completed her college studies. That his father came back home from work at about 9.00 p.m., ate supper then went to bed. That while they were sleeping, she heard his father's phone ringing which woke her up. That his father received the phone call and then told her that her mother had been arrested. It was her testimony that his father then told her that he would send her to Chuka to go see her mother. That she arrived in Chuka the following day at 10.00 a.m. to follow up on the arrest of her mother but the police officers at the station denied her access to her to her mother. She then returned home and the next, she got information that his father had also been arrested.
 29. DW13 was Elijah Nthiga, a nephew to the 4th Accused person herein. It was his testimony that on the material day, he was ploughing his farm and then went back home. That he met his aunt, the 4th Accused, who requested him for his cows to go and plough. That they had lunch and stayed up to 3.00 p.m. when he gave the 4th Accused two cows and then she left and proceeded to Kamaindi which was about five (5) kilometers away. On cross examination, DW13 stated that it was possible that the 4th Accused arrived at her home at 5.00 p.m.
 30. DW14 was June Karimi, a daughter of the 5th Accused person herein. She recalled that on the material day, she left home with her mother as she was going back to school that day. That they boarded a direct vehicle from their home at Kamaindi to Embu. That they arrived at 1.00 p.m. and did some shopping. That at 3.00 p.m., they parted ways with her mother and she boarded a vehicle to take her to school. It was her testimony that it takes three hours from Kamaindi to Embu when one boards an express vehicle. She further stated that the 3rd Accused was not with them at Kamaindi on 30th April, 2019 and 1st May, 2019.
 31. DW15 was Joseck Nyaga, a farmer. He stated that he knew the 7th Accused person herein as he is his neighbour. He stated that on the material day, he woke up in the morning at 6.00 a.m. and went to work at a shamba, which is about eight (8) kilometers away. That he reached there at 8.00 a.m. and worked together with the 7th Accused up to 5.00 p.m. That they passed through the Thuci River and took a bath and then walked up to Barrier where they watched a video in a hotel as they were taking tea. According to him, he parted with the 7th Accused at 8.00 p.m. and DW15 went home. He stated that



he heard of the murder of the chief the following day and was surprised to hear that the 7th Accused was involved.

32. That marked the close of the defence case and the parties opted to put in their final submissions.

The Submissions

33. It was the prosecution's submissions is that it proved the death of the deceased to the required standards. Further, that there was enough proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons. The prosecution stated that it has clearly demonstrated that the accused persons grouped themselves while armed with pangas, bows and arrows, and rungu and went to PW1's home to attack him. That before they accomplished their mission, they met the deceased chief, who was PW1's brother and when the chief tried to calm them down, they all attacked him, poured petrol on him and burnt him alive. Finally, the prosecution submitted that the motive behind the murder of the deceased was due to a land conflict between the family of the deceased and the accused persons. The prosecution thus submitted that the evidence tendered by the accused in their defence did not dispel the prosecution's case as mounted in any respect. It therefore urged this court that the case against the accused persons was proved beyond a reasonable doubt and as such proceed to convict the accused persons of the offence charged and sentence them accordingly.
34. On the other hand, it was submitted on behalf of the accused persons that the testimonies of PW1, PW4, and PW5 were marred with contradictions and inconsistencies that cast a shadow of doubt to the prosecution's case as they are substantially at variance and yet they describe the events of the same incident. Further, that investigations done were shoddy as the defences of alibi brought out at the very earliest point by the accused persons were not investigated and/or given attention to establish whether the accused persons were proper candidates for prosecution. It was submitted that the defence remained uncontroverted and proved that none of the accused persons were present at the scene of the crime when the deceased's murder was committed. It was thus their submission that the prosecution had failed miserably in proving its case beyond reasonable doubt.

Issue for Determination

35. I have considered the evidence on record and I have deduced the main issues for determination by this Court are:
- a. Whether the prosecution's case has been proved to the required standard of beyond any reasonable doubt to warrant the conviction of the accused persons;

Analysis

36. For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:
- a. the death of the deceased and the cause of that death;
 - b. that the accused persons committed the unlawful act which caused the death of the deceased and
 - c. that the accused persons had the malice aforethought.
- [See: Anthony Ndegwa Ngari v Republic [2014] eKLR]



Section 203 of the Penal Code provides:-

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

The prosecution bears the burden to establish the circumstances under Section 206 of the Penal Code on what constitutes malice afore-thought. Both actus reus and mensrea must be established.

a. The fact and cause of death of the deceased

37. From the evidence on record, it is clear that on 30th April, 2014, the deceased was severely cut and he died as a result of the injuries. This was well established by the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW9 all which I have summarized above. There is no doubt that the deceased died.
38. As for the cause of his death Doctor Moses Njue Gachoka (PW7) who conducted the postmortem examination on the deceased's body testified the body was in pugilistic posture, burned body with 200% burns, laceration on parietal occipital 8x3 ociput 5x3 cm exposing the brain through an open fracture on the skull on the right temporal occipital area. The head had numerous complex fractures exposing the brain, sub-dural haematoma and brain laceration. He formed the opinion that the cause of his death was due to head injury from blunt force and that the burning was not a cause of the deceased's death. He produced the postmortem form as exhibit 2. In view of the evidence on record, it is clear that the fact and cause of the deceased's death was therefore proved beyond any reasonable doubt.

b. Identification of the accused persons as the perpetrators of the deceased's murder

39. It is the prosecution's case that the deceased was at the time of his death a chief at Kamaindi Location Igamba Ngombe Sub-County Tharaka Nithi County. It lined up witnesses to prove that case against the accused.
40. PW1 stated that he saw all the accused persons herein at the scene of the crime. PW1 stated he saw the goats belonging to the 2nd Accused in his (PW1's) farm at about 2.30 p.m. and he decided to lock them in his compound in a goat pen. That the area manager (PW4), who is PW1's wife, went home between 3.00 p.m. and 4.00 p.m. and returned the goats. People started to gather at the home of the 2nd Accused and they proceeded to the home of PW1 while armed and with the intention of attacking him. The deceased chief then came at the about 6.00 p.m. and tried to calm down the tensions that were building up but within 20 minutes, he was attacked and killed. The owner of the goats DW2 testified that he went to the road to look for people to assist him to get his goats. It is therefore not far fetched for PW1 & 2 to testify that a group of people went to his home. It is also a fact all the accused are related and their presence at the home DW2 as stated by PW1 is plausible.
41. PW1 gave a detailed account of how each of the accused persons contributed to the deceased's death. He stated that the 7th Accused picked a stone and hit the deceased on the head. That the 6th accused cut the deceased on the back with a panga and the 5th Accused prevented the deceased from running away by hitting him with a stick. The 1st, 2nd and 8th Accused persons then started cutting the deceased on his legs with pangas. The 3rd and 6th Accused then joined in and cut the deceased on his face. PW1 was watching from a safe distance inside the house where PW4 locked him upon sensing danger on seeing the accused heading to their home.



42. PW2, PW3, PW4 and PW5 who were also at the scene of the crime corroborated PW1's testimony as to how the accused persons attacked the deceased chief while armed, killed him and then set his body on fire. It was PW2 testimony that the 4th Accused was among those who hit the deceased with a stick and that it was the 9th Accused, who was carrying a jerrican of petrol, that set the deceased's body on fire. In my view, all the accused were positively identified as the perpetrators of the deceased's murder. To this end the prosecution proved beyond any reasonable doubt that the accused persons jointly committed the unlawful acts which caused the death of the deceased. The accused persons were well known to the prosecution witnesses. This is a fact which is not in dispute. There was no possibility of mistaken identity. The offence was committed in broad daylight. It was therefore easy for witnesses to recognize the accused person. There were independent witnesses who identified the accused. This is a case which they relied on direct evidence from witnesses who knew accused persons. It is trite that facts are proved by direct evidence of witnesses who saw what happened or circumstantial evidence. In law direct evidence is considered the best evidence to prove a case. Eye witnesses account is given high status in court. It is critical in both civil and criminal trials. Direct evidence is evidence that if believed directly, proves a fact in issue. Direct evidence is that one does not have to make inferences or presumptions as to prove. It is a piece of evidence in trials both civil and criminal of the testimony of witnesses or eye witness account.
43. The chain of evidence as adduced by witnesses starting with Josephat Gikware Mukengu as the goats were returned by his wife to the home of DW2 direct by the deceased and PW4 coming from the home of DW2 direct evidence was adduced by PW1 saw it all. The chief arrived and tried to calm the accused but 2nd and 6th accused asked the rest what they were waiting for, by so doing opened the door for the deceased to eternity as they set on him cutting him severally hitting with sticks and setting his body on fire. This attack was witnessed by David Mutegei (PW2) who was an independent witness. He told the court that he identified all the nine accused persons when they were stopped by the deceased just outside PW1's home. He saw the accused and heard what they said PW3 corroborated the testimony of PW1 & 2. He was able to identify all the accused who he knew him. The defence branded the witness as a gun for hire as well as PW2. These are mere allegations. The prosecution has not based their case on the testimony of PW2 & 3. They are not the only eye witness. They cannot be termed by the defence as the only eye witnesses as submitted by the defence. There is PW1 and PW4. The contentions by the defence is just another line of defence because they could not fit in the defence by the accused that the issue arose out of land disputes. The PW2 & 3 testified that they feared. This was not far fetched as there was general fear by the public after the chief was killed. I had chance to see PW2 & 3 and even as they gave evidence they appeared uneasy and in fear. It is not unusual for person to witness a traumatizing event and it remains imprinted in their minds for the rest of their lives. So, the fact that a witness can remember how a perpetrator of a crime was dressed months later can not be a reason to discredit their testimony. Having had that opportunity to see them when they testified, I had no reason to doubt their credibility.
44. Lucyline Nkuru Gikware (PW4) she identified 1, 2, 6 & 8 accused. It is her testimony that 6th accused cut her on the head with a panga. PW5 also testified that she identified all the accused. It was her testimony that 7th accused charged at her and hit her with a 'rungu' (stick). The defence has challenged the evidence of PW1, 4 & 5 on the basis that they are relatives that is father, mother and child. It is noted that the chief was killed inside their home compound. There is nothing wrong for parents and their children to be found at home. The witnesses were present and saw they can't be rejected. The three are competent witnesses. Section 125 (1) of the Evidence Act deals with competency of witnesses generally.



It provides:-

- “(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.”

PW1, 4 & 5 are competent witnesses. They adduced direct evidence which was corroborated by evidence of 2&3.

The defence has challenged their testimony on the basis of contradictions and inconsistencies. It is trite that not all contradictions and inconsistencies will lead to the evidence of a witness being rejected. The courts ignores minor contradictions if they are not such that they show that the witness was not telling the truth. In the case of *Erick Onyango Ondeng –v- Republic* (2014) eKLR the Court of Appeal held as follows with regard to inconsistencies;

“No do we think much turns on the alleged contradictions on the time of the commission of the offence. The trial court after hearing all the evidence accepted that the offence was committed at about 7.00 pm in accordance with the evidence of PW2 as noted by the Uganda Court of Appeal, in *Tuehangane Alfred –v- Uganda Cr*, Appeal No. 139/2001 (2003) UGCA 6, It is not every contradiction that warrants rejection of evidence. As the court put it:

With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

The alleged contradictions on the testimony of PW1, 4 and 5 is not correct. That PW4 identified 1, 6, 8 & 2 who are relatives is not a reason to doubt her testimony. She knew all the accused who the defence submits are related. She could have said she identified all of them. I find that her testimony is credible. This incident was not sudden and not expected. The infractions in their testimony is understandable such minor inconsistencies are excusable and are ignored.

The various allegations made by the accused that there were land disputes and other cases in court could have also influence the accused to commit this offence. There is evidence that the deceased was killed within the compound of PW1 and the accused were in that compound as testified by witnesses. The defence tendered is a mere denied. I also note that the accused brought evidence which was obtained when the matter was in the court. In this regard I refer to Exhibit D7 by John Nthiga Kirema again dated 16/8/2021. The PW1 said he was not involved in the case. It was not indicated who signed as no name is given or who certified it as a true copy. It is a document made after the death of deceased mere fabrications. It is therefore a suspect document which could only have been made to mislead court. It is of no probative value. When PW1 was cross-examined he testified that he had no land dispute with the 3rd accused. He testified that the land he bought from the 1st accused had no dispute.

45. The defence of DW1 shows that he was at home. He was arrested the same night and a son of PW1 said he was one of them. He confirmed that 5th accused was arrested that same night. He denied involvement in the murder. He was known to PW1 and was identified as one of those who killed the deceased. The dispute he had with PW1 in his own words was over twenty years ago and was resolved. His defence is a mere denial. He was arrested for participating in the commission of this offence.



DW2- Julius Mburu said admitted that his goats were detained in the home of PW1. He then went to the road and mobilized people to go for the goats. That his son went with three people at about 5.30 pm to go for the goats. DW2 admitted that his son and himself went to the home of PW1 and met the chief there. Though he said he took the goats left. He was identified by witnesses attacking the chief. He raised matters which were not put to the prosecution witnesses. This shows that the defence was not truthful. PW1 had no reason to frame him. DW3 John Nthiga Kirema raised a defence of alibi. He said he was arrested on 2/5/2019 but on 30/4/2019 he was in Nairobi. He said he had a land dispute with PW1. He produced a receipt issued on 11/9/2021 when this case was still in court. According to him the dispute was resolved in 2011. If the dispute was resolved PW1 had no reason to frame. He said he had no grudge with PW3 and PW2. DW3 was not truthful. He relied on a receipt which he admitted that the case was filed in court when this case murder was pending in court it shows he was manufacturing evidence. He stated that he had a case with Gikware (PW1) it then turned out that the dispute was with deceased. I am minded that he had no burden to prove his alibi defence. I find that his defence was not credible. He was placed at the scene of the murder by PW1, 2, 3. I had no reason to doubt these witnesses who saw the 3rd accused in broad day light. They could not mistake him for another person. It was possible that he left his place of work and was at Kamaindi at the time when the offence was committed. I reject the defence. The speed at which he was arrested shows he had been identified as one of the attackers who murdered the chief. As for DW4, DW5, DW6 DW7 and DW8 & DW9, I have equally considered their defence. I find that they were placed at the scene by the prosecution witnesses whose testimonies were well corroborated. DW7 produced a newspaper cutting is unreliable. This court has heard the testimonies of witnesses and cannot rely on the cutting. DW7 denied the contents of the newspaper cutting DW8 had recorded a statement with police and said he was aware the chief was killed and to sleep with his son. He was identified by witness who know him well and he had no grudge with any of them. The DW9 I considered the way he described his movement showed somebody who was on the run. He was identified by witness as the one who set the deceased alight after dousing him with petrol. I reject his defence. He was place at the scene of the murder. I reject his allegation that PW1 went to ask him to be a witness. PW1 denied. I believe him there were sufficient witnesses.

I find that the defence tendered by the defence witnesses is not convincing.

c. Whether the accused persons had malice aforethought

46. Pursuant to the provision in Section 206 of the Penal Code , the offence of murder is complete when, “malice aforethought” is established if evidence proves any one or 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 of 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 a 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.”



47. In the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack. The burden is on the prosecution to prove the charge beyond any reasonable doubts. Section 107(1) of the Evidence Act provides:-

“ 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.”

48. The evidence tendered by the prosecution in this case show that the accused persons herein jointly attacked and killed the deceased herein using sticks, pangas, and bows and arrows. From my assessment of the evidence the circumstances of this case fall within the scope of the doctrine on common intention as defined under Section 21 of the Penal Code which provides that:

“When two or more persons from 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.”

49. Considering the facts and circumstances of this case, I hold the view that the alibi defence raised by the 3rd, 4th, 5th and 7th Accused persons is not convincing in view of the evidence tendered by the prosecution. I am not convicted by the defence of 3rd accused. It is ruled out by direct evidence of witnesses who were credible that he was at the scene and took part in the killing. I am satisfied enough that the defence by the accused persons was dislodged in line with the principles in the case of Republic Versus Cheya case 1973 EA where the Court held that

“The existence of common intention being the sole test of total responsibility it must be proved that the common intention was and that the common Act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under the section. It is only when a court can with some judicial certitude hold that a particular accused must have pre-conceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can be applied.”

A piece of Evidence tendered by PW4 Rosylyn Nguru is that the accused told her that if the PW1 is the one who went to return the goats he would not have gone back alive. The accused then armed themselves and went to home of PW1 and vented their anger on the chief. They had intention to kill (PW1) thought they ended up killing the chief.

Section 20(1) and 21 of the Penal Code Provides:

“20. (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; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”

“21. 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.”

Section 10 of the Evidence Act provides:

SUBPARA “(10)

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

- 50. According to PW2, after the deceased was set ablaze, the accused started walking away from the scene while making noises which according to PW2, were made when one is happy and that they were singing war songs. This is a clear indication that they were thirsty for blood and would not let anyone or anything stand in their way. Malice afore is demonstrate by the brutal manner in which they inflicted fatal injuries and burnt his dead body. The motive was to kill due to alleged land disputes.
- 51. In the end, it is my view that all the nine (9) persons had malice aforethought of committing an offence and with a common intention of causing the death of PW1 or doing grievous harm to him which sadly resulted in the death of the deceased, who happened to come to the scene at the nick of time.

Conclusion

- 52. The upshot of the foregoing, is that the prosecution proved its case against the accused persons beyond any reasonable doubt. I find the accused persons guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. I convict them under Section 322 (2) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF FEBRUARY 2024.

L.W.GITARI

JUDGE

