



**Republic v Mogi & another (Criminal Case 63 of 2016)  
[2024] KEHC 5869 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5869 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 63 OF 2016  
EM MURIITHI, J  
MAY 23, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PAUL MICHUBU MOGI ..... 1<sup>ST</sup> ACCUSED**

**SIMON M’MWETI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Paul Michubu Mogi and Simon M’Mweti (“the accused”) were arraigned before this court for the offence of murder contrary to section 203 as read with section 204 of the Penal Code, with particulars that on 21/8/2026 at Riige location in Igembe South Sub-County within Meru County, they murdered Philip Kiramari.
2. The accused denied the charge and the prosecution called 8 witnesses to prove its case.

**Evidence**

3. PW1 Joel M’Muraga testified that, “I reside at Giika location Igembe South. I work as a farmer. On 21.8.2016 at 6.00 p.m in the evening, we had come from drinking beer at Tharaka. We were with M’Amweti the 2<sup>nd</sup> accused (pointing at the 2<sup>nd</sup> accused) and Joseph Kaberia, Mitheka and Michubu. Michubu is not before the court. We were with other people. We had come from drinking and we were going home. We found people fighting. Mweti and Kaberia and Michubu were beating Kiramari. The 2<sup>nd</sup> accused (Mweti) was beating Kiramari on his back using a rungu (club). Joseph Kaberia beat the said man on his back and he fell down. We were behind them as we came from drinking. It was along a road and they were ahead of us. It is the road from Tharaka towards our home at Igembe, Rigi area. While coming behind Mweti we were with Mithiga and we came and found Mweti and others beating the person. When we asked him why they were beating him, they chased us away as they had rungun.



We were chased by Mwet, Kaberia and Michubu. We went to the home of Kiramari. From the position where he was being beaten to Kiramari's home is about 200 metres. I am not sure. It would take about 30 minutes. When we got to Kiramari's home, we left a report with his mother and his children that Kiramari was being beaten. I had left for home and on the following day 22.8.2016 together with the family of Kiramari we went to the place where Kiramari had been beaten. It was at a place called Nukunu. At the scene, I saw the body of Kiramari in the water. The place is called Nukunu. We had been informed where to find Kiramari's body by his wife Kanja who had received a call. I do not know who had called her. When I went to the river, we were with the family of the deceased. I later recorded a statement at Maua police station. I know the 2<sup>nd</sup> accused Mwet. We were with him drinking. I knew him as a village mate. I knew him for about 10 years from 2000."

4. On cross examination by counsel for the 1<sup>st</sup> accused, he stated that, "I know the 1<sup>st</sup> accused. I saw him on 21.8.2016. We were with him at Tharaka. He hit the deceased. The Michubu I spoke about is the 1<sup>st</sup> accused. [Witness appears unaware of his testimony when asked why he had said Michubu is not before the court in his evidence in chief]."
5. On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, "We came from drinking at Tharaka. We were with Mithega. M'Mwet and Michubu were ahead of us. We followed them with Mithega. We found them beating the deceased. It was about 6.00 p.m. it was not dark. I was drunk but not too drunk. The rungu they used to beat the deceased were big. I do not know where the rungu and sticks went. I run to Kiramari's home and told them I have left the person being beaten. [I referred when I went to Mikunu]. The statement is correct. The other people we were with were Michubu, Simeon who had gone ahead and wife was behind. On the following day we were told Kiramari had not got home. I am the one who went to tell his wife that Kiramari was being beaten by Michubu, Mwet and Kaberia. On 22.8.2016, I got the report from his wife who was crying. She had received a phone call. From Tharaka the place where Kiramari was being beaten is far. From the place he was being beaten to the place we found his body is very near. I am 30 years. I have known 2<sup>nd</sup> accused for about 10 years. I was 20 years when I started getting on with the 2<sup>nd</sup> accused."
6. PW2 Joseph Mithika testified that, "I reside at Marega, Giike West. I work as a farmer. On 21.8.2015 at 6.00 p.m. We were coming from Giike towards Tigania East. There is a river between. We were with Simon M'Mwet, the 2<sup>nd</sup> accused (pointing to 2<sup>nd</sup> accused), Kaberia who is not before the court, Joel and Michubu. I see the Michubu person in court. He is the 1<sup>st</sup> accused. We were six. We were coming from Giike area towards Tigania area. We went up to Ngaeni. We went drinking beer – traditional beer. After drinking, Mwet, Michubu, Kaberia and another person went ahead. We were left with Joel and we followed them. We followed them and found them beating the person along the road. We found Michubu, Mwet and Kaberia and the deceased. The (3) were beating the deceased using a rungu. The deceased was called Philip Kiramari. I saw Michubu beat the deceased on the back using a rungu. I saw M'Mwet beat the deceased on his head. We asked them what they were doing. I am the one who asked them. They came towards me with a rungu and tried to hit me and we ran away with Joel. It was Michubu who came towards me with a rungu. Joel and I ran to the wife of Kiramari and we told her together with the children. The wife is called Kanja. We told her we had left her husband being beaten by three people. It was at night we went to the scene the next day. After telling the wife, I went home because it was dark. On the following day 22.8.2016 we went to the place where the deceased was. It was at the place where we left him being beaten the previous day. When we left him being beaten the previous night we went back the following day. We were with the family of the deceased, some neighbours. At the area, I saw the body of Philip Kiramari in the river Nukunu. The body was on the Tigania side. He was in the water but he had not been covered fully by water. I saw an injury on his



- neck on the back and shoulder. I later recorded a statement. We called the chief. The chief called the police. I recorded my statement at Maua.”
7. On cross examination by counsel for the 1<sup>st</sup> accused, he stated that, “On 21.8.2016, we had gone to drink Nainchu beer. We were all drunk. Joel and I left behind. We found the accused beating Kiramari with a rungu. I do not know where they got the rungu. It was about 6.20 p.m. it was not yet dark. I was a little drunk. I was not too drunk to report what happened that day.”
  8. On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, “The accused were using a rungu. [Statement states Kaberia took his walking stick]. They did not have walking stick. I am calling the walking stick a rungu. A walking stick is a rungu. I think the beating was the cause of death as he had not been ill before the beating.”
  9. PW3 Seberina Kanja testified that, “I reside at Rigii. I work as a farmer. On 21.8.2016 at 11.00 a.m in the morning my husband Philip Kiramari. It was on a Sunday. He told me to give him 10,000/= of the money I had sold ndengu (green grams) and he would give half of it to a friend who would come to design a house for us. He said that he was going to look for the timber so that they could plan the matter. It was at 11.00 a.m. I gave him the money. In the evening, I waited for him and he did not come. I slept. On the following day, 22.8.2015, on Monday, at about 10.00 a.m when he had not come, I went to the neighbours who had his telephone number so that I could call him. I went to my son and asked him to call his father. This was after I had tried to call him through a neighbour and failed. At about 3. 00 p.m I had gone to fetch water from the river at Nukunu river. While there, I heard woman who were coming from the shamba saying that there was a body in the river. I asked them what they were talking about. They remained silent. I was stranded. I went home and then went to a canteen. At the canteen I asked whether anyone had seen my husband. Those I asked said they had seen him the previous evening. When I found that nobody knows his whereabouts, I remembered what the women at river said and I went and called some youth and I explained to them what I had heard and I asked them to take me to the river to see whether the man was my husband. I was taken by many people as it was at 5.00 p.m and I was afraid. We went up to the river Nukunu where the body was. I saw it was my husband. I saw his clothes and he was floating on the water. They were my husband’s clothes. It was my husband Philip Kiramari. I went to the area manager Mr. Paul Kiundu and he said he would call the chief. We were advised to go and guard the body until the police came. I was with many people from the area including the youths that I had picked and the children. We guarded the body overnight and the police picked the body on Thursday around 1.00 p.m. It was police from Maua. The body was taken to Meru Mortuary. I later recorded my statement.”
  10. On cross examination by counsel for the 1<sup>st</sup> accused, she stated that, “I knew the 1<sup>st</sup> accused. On 22.8.2016 – I do not recall when it was. AAAA”
  11. On cross examination by counsel for the 2<sup>nd</sup> accused, she stated that, “On that date, one Simeon Mugambi came and told me that my husband was among (9) people. On Tuesday (2) people came to home and told me that they did not want the matter be covered up as they knew what happened. On that day that I gave money to my husband, on the Sunday, nobody came to my home to tell me about the matter.”
  12. PW4 Simeon Mugambi testified that, “I reside at Marega, Igembe South. I work as a farmer. On 21.8.2016 at 6.00 p.m. We were 10 people coming from Mariari on the border of Tharaka and Tigania. We had gone to Mariai. We were drunk. We had gone to look for beer. It wasn’t far from our home. We came from Rigi village Marega sub-location. We were with Michubu, M’Mweti, Karichu, Mitheka, Mkubu, Chalo, Jennifer, Kiramari (deceased) and Joel M’Murega and I. As we went home, they told me they would beat me. It was all the rest who were singing for me and that they would beat me. They



- did not say why they wanted to beat me. I ran to the bushes and disappeared. I ran away and I was followed by Chalo leaving the others singing. We went with Chalo up to my home. Chalo went home after taking me home. On 22.8.2016 at 7.00 p.m it was discovered that Kiramari had been killed. I heard that Kiramari had been found in the river. I was told by wife of Kiramari. It was the wife of Kiramari who informed me. After I got the information, I went to the scene. We were with many other people. It was at Nukunu. At the scene, I saw the Nukunu river and the body of the deceased was in the river. The body faced downward in the river. I told the people whom we were with the last evening - the people who wanted to beat me – police came from Maua picked the body and asked me to accompany them. I later recorded my statement with the police at Maua. The two accused persons were part of the 10 I was with. The 1<sup>st</sup> accused is Michubu, I knew him. We come from the same village. The 2<sup>nd</sup> accused is my clan mate. He is Simeon M’Mweti. He is known to me since our youth days. We used to visit each other. The accused are older than me. I do not know my age. [ID card of the witness shows date of birth as 1980].”
13. On cross examination by counsel for the 1<sup>st</sup> accused, he stated that, “On 21.8.2016, we were coming from drinking beer. We were all drunk. We were all drunk by the time we left. All the other nine wanted to beat me. Kiramari was not among them. Kiramari was like my father and he could not want to beat me. I ran away. I saw the deceased before I ran away. When I was running away I saw Kirimmari. He was okay at the time.”
  14. On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, “I ran away. Chalo followed me. We went up to my home. I do not know a person known as Kanunge. [Statement of the witness]. 2<sup>nd</sup> witness ran to the home of Kanunge who had employed him as a watchman. It is Kalunge’s not Kanunge. I recorded the statement because I passed by his farm where I worked before going home. I did not record anything else. On 22.8.2016 after finding the body at Nukunu river, the police came and took his body. We had spent the night at the place so that it was not taken. The body was taken on the following date. We had spent the night with the body at the scene. The persons wanted to beat me with sticks. They were singing loudly. I did not see them beat Kiramari.”
  15. PW5 Miramo Kimbo testified that, “I reside Ogoti area. I work as a farmer. On 20.8.2016 at 6.00 p.m I was at a place called Naliani. I was with Michubu, Paul, Simon Mwitwi, Karisi, Joel, Jennifer, Chalo and Karimari. We had gone to drink beer. It was at a place called Mzee Kinyua. After drinking, I went home. As I went home when we reached Kirigu’s place, I left the others and went home. I left Michubu, Mwitwi, Jennifer, Karisi, Simon and Chalo and Joel. Kiramari was also left with them. Michubu and Mwitwi are the accused, the 1<sup>st</sup> and 2<sup>nd</sup> accused (pointing at the accused). I knew Michubu as a neighbour. I have known him for a long time since I was born. I am 20 years. I was born on a date I cannot recall in the month of August. I have known Mwitwi also for a long time. He was from my area as a neighbour. I have also known him for the 20 years. I left them and went home. I left not that I was too drunk. On the following day 22.8.2016 about 6.00 p.m I got information that Kiramari had been found dead in the river. I was told by the deceased’s children, one Murungi that Kiramari had been found in Nukunu river. I later recorded my statement with police. We kept vigil at the river until the next day when the police from Maua police station came to pick the body. I knew Kiramari as a neighbour. We stayed together. We used to go and borrow fire from their place. I had known him since I was 10 years old.”
  16. On cross examination by counsel for the 1<sup>st</sup> accused, he stated that, “On 20.8.2016, I was (15) years old. You were going to drink beer at 15 years old? Yes. When I left Michubu and Mwitwi, I did not hear anything until the next day when I learnt Kiramari had died.”
  17. On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, “On 20.8.2016, I left Michubu and Mwitwi. I got to know of the death next day. It was true that I did not see what happened or caused the death of the deceased.”



18. PW6 Moses Mwenda testified that, “I reside at Ngutu, Mikinduri. I work as a miraa picker. On 22.8.2016 at 6.00 p.m, I received a call and was told Mzee Philip Kiramari had been found dead in Nkunuku river. I was telephoned by his son Murungi. Kiramari is my father-in-law. I am married to his daughter. I went to the river. I was with 2 other people. We slept there until the next day when the police came. The police came at 2.00 p.m. They took the body and took it to Meru hospital mortuary. I accompanied the body. On 29.8.2016, I went for the postmortem. I was with Mutei and the police officers. It was at Meru hospital.”
19. On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, “I did not see Kiramari being beaten. I only saw the body in the river.”
20. PW7 Dr. Kate Gacheri Murathi testified on behalf of Dr. Munyoki who conducted the postmortem on 29.8.2016. She stated that, “General observation: There was a kanga/lesso around his neck. Male African 55 years old, of normal nutrition and physique normal.

Post mortem changes: There was rigor mortis – stiff of neck. Exfoliation of the skin (peeling of skin).

External appearance: It was decomposed. Skull had no fractures. Serious neck fracture at the level of 4<sup>th</sup> and 5<sup>th</sup> cervical. Abdomen, thorax limbs had no injury. Internal appearance: Respiratory system, cardio-vascular system, digestive system, genito-urinary system of were normal.

Head: Skull had fractures but there were fractures of cervical 4<sup>th</sup> and 5<sup>th</sup>.

Nervous system: No brain hematoma. Cervical spine deformed with fractured c4 and 5.

Spinal cord: Cervical cord was injured.

Cause of death: Cervical spine injury secondary to trauma.

The kanga around the neck was probably to support the neck as the cervical spine was broken. Postmortem report P Exh No. (1).”

21. On cross examination by counsel for the 1<sup>st</sup> accused, she stated that, “Rigor mortis occurs about 72 (hours) if the body is not preserved. Exfoliation of the skin (could be the result of exclusive condition of being left on heat or water for long periods.

Fracture on the neck region: If there was hanging or strangling there would be marks on the neck. In this case, there were no marks. The injury may have been caused by blunt trauma hit by blunt object from behind or from a fall. With a fall there could be a head injury. So in this case it could have been blunt trauma with a lot of force.

Cervical spine deformation: Deformation means if the fracture exists there are not in line. Once broken, the head may be moving on one side. It is said to be deformed.”

22. On cross examination by counsel for the 2<sup>nd</sup> accused, she stated that, “Kanga/lesso may have been used to support the neck. The head was moving from one side to the other. Somebody may have tried to support the neck. There was no blood.

Blunt trauma: The blunt object could have been an object with force. It could be stick big and used with force. It is not a small cane. If small could be surrounded by swelling. There was no swelling. Could it have been a mob or deceased falling into a river? Ideally, neck is a sensitive system. There are blood vessels, with fracture at the neck, supply of blood to the



neck could have caused death as the tissue and the neck system bleeding. There is no open cut around the neck. With the fracture of the cervical bone, there no entry supply of blood and nerve injury. The neck was hit without any cut on the neck. Only a fracture of cervical bone. It was by blunt trauma.”

23. On re-examination, she stated that, “If one is hit very hard, one is not able to support his neck by less. At the cervical, the nerves downward are affected. The victim would only have been able to tie at the beginning but later nerves are affected also.”
24. PW8 P.C. Lucas Maitha currently at Voi Railway (SGR) Police Station testified that, “At the time of the incident in 2016, I was stationed at Maua police station in Igembe South Sub-County. I was with Benjamin Dickson Enalasiat and I was the crime standby of the day. Benjamin Dickson was the investigating officer. He is currently at Loyangalen police station, Maralal. I have come in court to stand in for Inspector Dickson as we were together in this investigation. On 23.8.2016 at around 8.30 p.m, we received a report that the deceased Philip Kiramari was found floating in river Nakuni. The report was from the area chief Mr. Mucheke and officers from AP post Riigi police post. I was with Inspector Dickson, an AP officer and the chief went to the scene. We found the body of the deceased inside the river. We examined the body and it had no physical injuries. The body was photographed, removed and taken to Meru Level (5) hospital mortuary. The accused Paul Michubu was mentioned by his friends PW1 and PW2 that the deceased went to take local brew at the area accompanied by Paul Michubu, Simon, Joseph, Muniyu, Jennifer, M’Mwiti, Joel and Joseph Kaberia. When the deceased was going back home accompanied by the accused, witnesses PW1 and PW2 said that they saw Paul Michubu and Simon beating the deceased. Investigations were done and accused arrested and later charged with the offence of murder. Postmortem done at Meru Level (5) and I was the police officer who attended the postmortem on 29.8.2016. Paul Michubu was arrested immediately after incident. The 2<sup>nd</sup> accused was arrested later. I do not know when the 2<sup>nd</sup> accused was arrested. PW1 and PW2 mentioned the two accused persons as they were the ones accompanying the deceased going back home. We charged the 1<sup>st</sup> and 2<sup>nd</sup> accused as they were the ones PW1 and PW2 saw beating the deceased. The case was reported on 23.8.2016 at 8.00 a.m in the morning. The area chief told us that he did not know the exact time but it could have been done on 22.8.2016 in the evening. The body was in the river. It was on the riverbank. There was little water in the river. The body was on the riverbank not inside the river.”
25. On cross examination by counsel for the 1<sup>st</sup> accused, he stated that, “Inspector Dickson was the investigating officer. I do not know when the 1<sup>st</sup> accused was arrested. From the statement of the investigating officer, 1<sup>st</sup> accused was arrested by members of the public. According to the investigating diary, 1<sup>st</sup> accused was arrested on 12.9.2016. [Witness is referred to the statement of the investigating officer. It was indicating the date of arrest as 12.8.2016].

I think it was 12.9.2016 at 13.45 hours according to the OB because it is referred in the OB when the report was made. The report is OB/17/23/8/2016. The report dated 23.8.2016 indicates 1<sup>st</sup> accused was brought in to the station. The accused date of arrest is 12.9.2016 at 13.45 hours. It was not on 23.8.2016. The 1<sup>st</sup> accused was arrested by members of the public. It is PW1 and PW2 who saw the accused beat the deceased. I did not visit the place of the drinking. I went to the scene where it was said the deceased was being assaulted. It was about – 150 meters from the place where the body was found. I did not investigate to know where the 1<sup>st</sup> accused lived. I did not investigate to know whether there was a family relationship or other relationship with the deceased. He was just a friend of the deceased. I do not know where the 1<sup>st</sup> accused was arrested. I was not there at the time. I had already transferred to Meru Central and later to Voi police station. The transfer happened within (2) months.”



26. On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, “I am No. 75707 P.C Lucas Maitha. I was a standby officer. I was the crime standby of the day. The body was retrieved on 23.8.2016 when the report was made. The investigating officer was Inspector Dickson.

Did you work with one Andrew Kituku? Yes, he was an Inspector of police. He was the Deputy O.C.S of Maua police station. There was Andrew Kituku DCIO. He was involved in the investigation as he was DCIO to whom we reported after concluding investigations. There were (2) eye witnesses. PW1 was Severina Kanja, she was the wife to the deceased.

Was Severina Kanja an eye witness? According to statement of Inspector Dickson investigating officer, Severina Kanja and D1 Joseph Mithika were the eye witnesses. I was with Inspector Dickson. I confirm that D2 Saverina Kanja was not an eye witness. She recorded a statement. Joseph Mithika (D1) was an eye witness.

What did Joseph Mithika witness? He saw the accused persons beating the deceased.

In Dickson’s statement indicates [There were 10 people. Why were the others not eye witnesses] The others did not record statements.

[Letter by DCIO, Andrew Kituku dated 26.9.2016 to ODPP recommends that 1<sup>st</sup> accused be charged]. In the letter Andrew states that there are (3) eye witnesses. We brought only (1) witness as eye witness. From the investigation, the (2) accused contributed to the death as they were beating the deceased.

Any exhibits? When we went to the scene, we there were no exhibits. We did not recover exhibits other than the photographs. I could not tell what was used to beat the deceased as no exhibits were recovered.”

27. On re-examination, he stated that, “The witness said that deceased was beaten by a walking stick. It was not easy to establish that as there was no stick or walking sticks at the scene. On report of the incident area chief were asked of the date and time.

How long did you take to go to the scene? At the scene there were members of the public. We went immediately after the report. Date of arrest. Date of report OB No. 17/23/8/2026 – report of the incident and departure to scene. Arrest is OB 57/12/9/2016 indicates the arrest of Paul Michubu. He was arrested on 12.9.2016, upon the report on 23.8.2016.

Court: Certified copy of the OB to be supplied.

PW1 and PW2 testified in court. PW1 is shown as Joel M’Murage. PW2 is Joseph Mithika. The wife of deceased Severina Kanja is PW3. The eye witnesses were Joseph Mithikla PW2 and Joel M’Murage PW1.”

### **The defences**

28. When put on their defence the accused both testified as DW1 and DW3, respectively, and the 2<sup>nd</sup> accused called a witness DW2.

29. DW1 Paul Michubu Mogi testified as follows:

I come from Riigi. I used to work as a farmer. The deceased was my friend. I heard the testimony of prosecution witnesses. I remember it was in August 2016. I had carried the head of cow and I was going to cook it at a place where we were drinking beer. We were with M’Mwiti, his wife Jennifer, Kumbuku, Kaberia, Simieon Njiru, the deceased came



at 3.00p.m. together with another called Mitheka. My friend was at the drinking place. I brought him a glass of soup and he then asked for beer what he said was not good. He said he will go to drink elsewhere. They went away with Mitheka. (Witnesses said you beat the deceased?)

The witness implicated me on the reason of a land dispute. The last time I saw the deceased was at 3.00p.m. When he left us at the drinking place. I did not beat the deceased. I saw him and then he left. We went later at 8.00p.m. to call him and they said we should leave them and they would continue with their drinking. They never came back to where we were drinking after that. The last time I saw him was at 8.00p.m. When we went to get him at Kanyua's place. It is not true that we beat the deceased."

30. There was no Cross – examination by Counsel for 1<sup>st</sup> accused.

31. On Cross – examination by counsel for the DPP he said:

"Land dispute. Any document to show land dispute? No. Any dispute with Joel Maraga? It is his father who has a suit with me. It is a court case. Joel Maraga (PW1) was with us when drinking at the place called Ngeneru. Joseph Mitheka? We do not have any family relationship with Joseph Mitheka (Pw2) Simon Mugambi? We are not same family. We are in the same clan. Simon Mugambi (Pw4) was with us when we were drinking.

Your relations with them was good?

Yes. We have no problem. They had come to stay with me and I made the meat from the cow's head. Did they tell the truth in court? They implicated me because of the land dispute. They had started asking on the disputed and land it is with Welfare Boundaries Officer to call them to start construction on the plot. There were many people at the place. It is trumped up charge. They were never got anyone arrested because of this matter. Is the court case in court? The dispute was being dealt with at Land's office. I got the title. I saw the deceased on that day. He was my friend. I saw him at 3.00p.m. and 8.00p.m. At 8.00p.m. I saw him at the drinking place and asked him to come so that we could go home. But he said they had not got satisfied. We left him there together with Mitheka. I did not ask their witness questions as to the land dispute. (It is an afterthought? It is false there was no dispute of land? I can bring documents on the land dispute."

32. On Re – examination by Mr. Wamache he said:

"I am facing murder charge. It is not about land dispute. The witnesses lied."

33. DW2 the 2<sup>nd</sup> accused's witness Jennifer Ciakirigi testified as follows:

"I come from Riigi. I work as a farmer. I know Jeremiah Kiramari. On the date of the incident I went and I found him where they were drinking up to 8.00p.m. They were drinking at Ngariciani at Karigi's place. We were many people at the place. I left him Kirimari talking with the seller of the beer. Karigu the lady. We left with Mwiti, Michubu, Simon, Charles and Mitheka and Joel Kaimba. At this time the accused Mwiti and Michubu. Mwiti is the 2<sup>nd</sup> accused and Michubu is the 1<sup>st</sup> Accused. The Prosecution witnesses were Mithika, Joel Mwiraga. When we left with the group, we parted at my gate at the road. I went with Mithika, Mwiti (2<sup>nd</sup> accused) to my home. Mithika was selling land to us. He is a neighbor Mwiti is my husband. On the following day, Monday we heard that a body had been found



in the river. I never saw anyone beating the deceased. We left the drinking place and got home at 3.00p.m. The others left with from the drinking place.

34. On Cross – examination by Wamache for 1<sup>st</sup> accused she said:

“I know the 1<sup>st</sup> accused. I know him as a neighbor. He was the guardian to the 2<sup>nd</sup> accused during his circumcision rites. When we left the drinking place, we were with Michubu. We parted ways at my place and they left. We left the deceased at Ngariani. We were not together.

35. On Cross – examination by DPP’s Mr. Masila she said:

“We did not live with Michubu. He is a villager, neighbor. The 2<sup>nd</sup> accused is my husband. We live in the same house. We were with the 2<sup>nd</sup> accused when we were drinking. We never parted at my gate. The deceased Kirimari was with us. We were drinking together. We were happy at the drinking place. The witnesses may have told lies. There is a brother of Kirimari who stole a chicken from my place. He was charged 10,000 for the chicken. That is why they bitter. He paid Kshs.10,000 for all the chicken that had been lost. The chicken belonged to me. It was Kirimari’s brother Boi who was charged with the theft and paid 10,000. Boi was not a witness in this case. He could be a witness if he wanted to be a witness.

36. On Re – examination by Mr. Ngentu she said: The chicken incident and the payment of 10,000 was in June, 2016. It was before this case.

37. DW3 the 2<sup>nd</sup> accused Simeon M’Mweti testified that:

“I come from Riigi. I am on Murder charge. I know Kirimari. We were used to be with him. He used to sell beer at my place. I ran a place where I sell beer. The place was at Riigi. He was my friend. On the date that he was killed, I was with Kirimari at 8.00p.m. It is at Ngeriani at a place belonging to Mama Karigu. We were drinking beer. We were with Michubu, Mithika, Joel, Jennifer, Karis (Kaberia) Simeon Mugambi, Charles Michubu, and Nkubitu. Those are the people we were drinking with at the place. There were other customers. We left at 8.00p.m. We left with the people I have mentioned. We left Kirimari at Karigu’s place. As we drunk we were peaceful and there was no problem. When we left the drinking place, we went up to my home and we parted ways. I went with Jennifer, Joel Mithika to my place. We left Kirimari at Karigu’s place. We did not see Kirimari being beaten by anyone. We were with the Prosecutions witnesses at the drinking place. Where did you leave him? Mithika came with me to my home, Joel went to his home, and others went to their respective homes. The prosecution witness did this because of the chicken dispute. Each witness was given 50,000 to testify. I was not involved in the killing of Kirimari. The witnesses died. My houses were burnt after the incident.

38. There was no Cross – examination by Mr. Wamache for 1<sup>st</sup> accused.

39. On Cross – examination by Mr. Masila for DPP he said:

“It was not the first time where we drunk together with the deceased. We had been drinking with the people previously until when incident happened. We were arrested for no fault. All the prosecution witness were present at the drinking place they are-

1. Joel Muraga (Pw1)
2. Joseph Mitheka (Pw2)



3. Severina Kanja (Pw3) was at her home.
4. Simeon Mugambi (Pw4) was present
5. Nkatha (Pw5) was with us.
6. Moses Mwenda (Pw6) was not with us.

The witnesses said that I was the one who killed Kirimari. They lied. We did not have a problem at the drinking place. We were happy together. We have no problem. They were given money. They were given money by one Mwirigi who is dead.

40. There was no Re – examination.

### **Submissions**

41. The prosecution urges that it has proved the three ingredients of the charge of murder beyond reasonable doubt.
42. The accused did not file any submissions.

### **Analysis and Determination**

43. This being a murder case, the prosecution must prove beyond reasonable doubt; the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused and that there was malice aforethought.

### ***Cause of death***

44. There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. It was established by PW7 Dr. Kate Gacheri Murathi with the aid of the Postmortem report PExh No. (1), that the cause of the death of the deceased was cervical spine injury secondary to trauma.

### ***Unlawful act of the accused***

45. The issue in contention is whether the said death was caused by an unlawful act of omission or commission on the part of the accused. The evidence of PW1 and PW2, the eye witnesses herein, is the crucial link between the accused and the commission of the offence.
46. The accused's defence was simply that they had been drinking with their friend the deceased and had left the deceased at a drinking place at 8.00pm on the night that he was killed and they had therefore been involved in any beating of the deceased leading to his death and the prosecution witnesses had lied against them for different reasons.
47. The Accused 1 (DW1) said that he had with the deceased, the accused, the prosecution witnesses been drinking beer peacefully and without any problem from 3.00pm to 8.00pm, at Mama Karigu's beer place and they had left his friend the deceased at the drinking place and they parted ways to go to their respective homes, and the deceased had been left with Mitheka (PW2) saying they had not been satisfied.
48. As regards Accused 2 (DW3), supported by his wife DW2, that they had left the deceased at the drinking place, Karigu's place and went to his home with his wife Jennifer DW2 and another Mithika while the others went to their respective homes. The accused said that the prosecution witnesses had been bribed with each being given 50,000/- to testify but he did not give a reason for the bribery. DW2 testified that they had at 8.00pm left the deceased talking to the beer seller, Karigu the lady and went



- away with the two accused and the others. She gave a different explanation as to the charges the brother of the deceased had stolen chicken from her place and when become bitter when charged with theft and forced to pay Ksh.10,000/-.
49. PW1 Joel M’Muranga testified that, “On 21.8.2016 at 6.00 p.m in the evening, we had come from drinking beer at Tharaka. We were with M’Amweti the 2<sup>nd</sup> accused (pointing at the 2<sup>nd</sup> accused) and Joseph Kaberia, Mitheka and Michubu. Michubu is not before the court. We were with other people. We had come from drinking and we were going home. We found people fighting. Mweti and Kaberia and Michubu were beating Kiramari. The 2<sup>nd</sup> accused (Mweti) was beating Kiramari on his back using a rungu (club). Joseph Kaberia beat the said man on his back and he fell down. We were behind them as we came from drinking. It was along a road and they were ahead of us. It is the road from Tharaka towards our home at Igembe, Rigi area. While coming behind Mweti we were with Mithiga and we came and found Mweti and others beating the person. When we asked him why they were beating him, they chased us away as they had rungu. We were chased by Mweti, Kaberia and Michubu. We went to the home of Kiramari. From the position where he was being beaten to Kiramari’s home is about 200 metres...It would take about 30 minutes. When we got to Kiramari’s home, we left a report with his mother and his children that Kiramari was being beaten.” On cross examination by counsel for the 1<sup>st</sup> accused, he confirmed that, “I know the 1<sup>st</sup> accused. I saw him on 21.8.2016. We were with him at Tharaka. He hit the deceased. The Michubu I spoke about is the 1<sup>st</sup> accused.” On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, “...We were with Mithiga M’Mweti and Michubu were ahead of us. We followed them with Mithiga. We found them beating the deceased. It was about 6.00 p.m. it was not dark. I was drunk but not too drunk. The rungu they used to beat the deceased were big.”
50. PW1’s evidence was corroborative of PW2 Joseph Mithika who testified that, “On 21.8.2015 at 6.00 p.m. We were coming from Giike towards Tigania East...We were with Simon M’Mweti the 2<sup>nd</sup> accused (pointing to 2<sup>nd</sup> accused), Kaberia who is not before the court, Joel and Michubu. I see the Michubu person in court. He is the 1<sup>st</sup> accused... We went drinking beer – traditional beer. After drinking, Mweti, Michubu, Kaberia and another person went ahead. We were left with Joel and we followed them. We followed him and found him beating the person along the road. We found Michubu, Mweti and Kaberia and the deceased. The (3) were beating the deceased using a rungu. The deceased was called Philip Kiramari. I saw Michubu beat the deceased on the back using a rungu. I saw M’Mweti beat the deceased on his head...Joel and I ran to the wife of Kiramari and we told her together with the children. The wife is called Kanja. We told her we had left her husband being beaten by three people.” On cross examination by counsel for the 1<sup>st</sup> accused, he stated that, “...We found the accused beating Kiramari with a rungu. I do not know where they got the rungu. It was about 6.20 p.m. it was not yet dark. I was a little drunk. I was not too drunk to report what happened that day.” On cross examination by counsel for the 2<sup>nd</sup> accused, he stated that, “The accused were using a rungu...I am calling the walking stick a rungu. A walking stick is a rungu.”
51. Although PW4 and PW5 were also with the deceased, the accused, PW1 and PW2 on the material day, PW4 was not present when the offence allegedly took place as he had already scampered to safety after being threatened to be beaten up. PW5 had equally left and gone home. The Accused’s defence that they had left the deceased drinking at Karigu’s place, with Mithika according to Accused 1 (DW1) and alone with the seller lady according to Accused 2 (DW3)’s wife DW2. The Court does not see a reason why the eye witnesses PW1 and PW2 would lie against the two accused persons who were their friends with whom they had been drinking peacefully from 3.00pm to 8.00pm according to the defence. The claims of grudges regarding land dispute as regards Accused 1, bitterness on the part of deceased’s brother who was not present and who did not testify for a penalty of 10,000/- in compensation for



theft of the Accused's 2's wife (DW2) or the outright alleged bribery of Ksh.50,000/- for each witness are not reasonable in the circumstances that the accused persons in their group of ten friends had been peacefully drinking together for long hours. It is inconceivable that the persons who bore grudges from various disputes would have gone out to drink together. The two eye witnesses saw the accused 1 and 2 and another named Kaberia beat the deceased using a runigus or big sticks according to the PW1 and PW2. When the two tried to intervene the three attackers chased them away.

52. This court is thus satisfied beyond any shred of doubt that, the accused were sufficiently linked to the commission of the offence by corroborated and consistent evidence.

### **Identity of the assailants**

53. The witnesses are friends and on that day were drinking buddies of the accused and there is no question of misidentification. PW1 affirmed on cross examination by counsel for the 2<sup>nd</sup> accused that, "...I have known 2<sup>nd</sup> accused for about 10 years. I was 20 years when I started getting on with the 2<sup>nd</sup> accused."
54. PW3 acknowledged that, "I knew the 1<sup>st</sup> accused."
55. PW4 testified that, "...The two accused persons were part of the 10 I was with. The 1<sup>st</sup> accused is Michubu, I knew him. We come from the same village. The 2<sup>nd</sup> accused is my clan mate. He is Simeon M'Mweti. He is known to me since our youth days. We used to visit each other."
56. PW5 testified that, "Michubu and Mwiti are the accused, the 1<sup>st</sup> and 2<sup>nd</sup> accused (pointing at the accused: I knew Michubu as a neighbour. I have known him for a long time since I was born. I am 20 years. I was born on a date I cannot recall in the month of August. I have known Mwiti also for a long time. He was from my area as a neighbour. I have also known him for the 20 years."
57. Whereas the offence herein took place at around 6.00 p.m and it is admitted that the deceased, the accused, PW1, PW2, PW4 and PW5 were coming from a drinking spree, the witnesses were categorical that their drunkenness did not either hinder their ability to witness the offence take place or the identify the accused as the perpetrators thereof.
58. The accused persons both admitted to have been drinking with the deceased and the witnesses but alleged to have left the deceased at a drinking joint at 8.00pm when he declined to go home saying he had not been satisfied. This is technically an alibi, as the accused were saying that they were at the material time not at the scene of the incident leading to the killing having left the deceased and gone to their respective homes. The two accused explained the charges against them as trumped up on account of a land dispute with one of the witnesses' father in respect to the 1<sup>st</sup> accused and bribery of witnesses as alleged by the 2<sup>nd</sup> accused. These accused do not have any duty to prove their defence of alibi or the allegations of trumped up charges, but when weighed against the prosecutions evidence of witnesses who are friends of the accused who had been with the deceased and the accused on the material day, the court finds the accused's defences unbelievable and accepts the eye witness testimony of the two identifying witnesses which is materially supported by other prosecution witnesses. Both accused testified to their good relations with the witnesses and the explanations for their alleged lying to the court cannot be reasonable.
59. From the totality of the evidence on record, this court finds that the prosecution proved beyond reasonable doubt that the accused are the persons who unlawfully caused the death of the deceased.



## **Malice aforethought**

60. Malice afterthought is defined under Section 206 of the Penal Code as follows:

- “206. Malice aforethought shall be deemed to be established by evidence proving 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.”

61. The body of the deceased had serious neck fracture at the level of 4<sup>th</sup> and 5<sup>th</sup> cervical, the skull had no fractures but there were fractures of cervical 4<sup>th</sup> and 5<sup>th</sup>, the cervical spine was deformed with fractured c4 and 5 and the cervical cord was injured. PW7 opined that the injury may have been caused by blunt trauma by being hit with a blunt object from behind or from a fall. She ruled out a fall because the deceased had no head injury. PW7’s finding that the deceased was hit by a blunt object from behind, resonates well with the evidence led by P1 and PW2, the eye witnesses. The accused, unprovoked, pummeled the deceased with rungus, fully aware that their actions would probably cause death or grievous harm to him. The accused’s alibi defence was clearly an afterthought and the explanation for the trumped-up charge on allegations of land dispute and bribery of witnesses could not upset the consistent evidence of the two eye witnesses with whom the deceased, the accused and other had been drinking peacefully throughout the day before the violent incident at the end.

62. However, although it was established on the evidence the fact that the accused had in a group of ten persons spent the day drinking alcohol and were drunk in the testimony of the prosecution witnesses as well as the defence, intoxication was not put forth as a defence and it was not shown that the circumstances of the intoxication was such as to deprive them the capacity to form the specific intention required for malice aforethought under section 206 of the Criminal Procedure Code, as required for the defence of intoxication under Section 13 of the Penal Code, as follows:

“13. Intoxication

- (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
  - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or



- (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply. (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. (5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

63. Therefore, the court finds that the prosecution has proved malice aforethought on the part of the two accused persons.

64. The fact of their being drunk may, however, be taken into account when considering the appropriate length of sentence.

### **ORDERS**

65. Accordingly, the Court finds, pursuant to section 322 of the Criminal Procedure Code, that the two accused persons are guilty of the offence of murder contrary to section 203 as read with 204 of the Penal Code, and convict them.

66. Mitigation and Sentencing proceedings pursuant to section 323 of the Criminal Procedure Code shall be had on a date to be fixed in consultation with Counsel.

67. Mention for directions as to Sentencing proceedings on 20/6/2024.

*Order accordingly.*

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

Mr. Masila for DPP.

Mr. Ngentu for 1<sup>st</sup> Accused.

Mr. Wamache for 2<sup>nd</sup> Accused.

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