



**Republic v Ireri & 2 others (Criminal Case E015 of 2020)  
[2024] KEHC 8856 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8856 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E015 OF 2020  
LM NJUGUNA, J  
JULY 18, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NICHOLAS NJERU IRERI ..... 1<sup>ST</sup> ACCUSED**

**PETERSON NJUE NGUKU ..... 2<sup>ND</sup> ACCUSED**

**JAMES MURITHI KITHAKA ALIAS TOSHA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons were charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are that on 29<sup>th</sup> November 2020 at Gacavari village, Mutuobare location in Mbeere South sub-county within Embu County, the accused persons jointly murdered Margaret Igoki Karangi. Upon arraignment, they pleaded not guilty and a plea of not guilty was entered for each of them before the matter proceeded to full hearing.
2. PW1, Kilangi Lawrence Njiru, son of the deceased, stated that on the day of the incident, he was at home with his mother, his 2 sisters and his younger brother when they heard something hitting the roof of their house. When they went to check they saw the 3<sup>rd</sup> accused having entered the house and they rushed to his sisters' room where they locked themselves up. That when his sister opened the door, the 3<sup>rd</sup> accused cut her on the left hand with a panga and then hit her on the head with a rungu. This forced them to leave the room and that is when he saw the 1<sup>st</sup> and 2<sup>nd</sup> accused persons who started beating the deceased with rungus on her head and on the back. That he ran outside the compound and hid behind a stone, and left the deceased being beaten by all the accused persons.
3. That the accused persons started burning the house where he, the mother and the other siblings were sleeping. He heard Griffin Nyaga saying "tuuwe huyu mama" ("let us kill this woman"). He stated that they also torched his elder brother's house. That when he saw they were about to kill his mother, he ran



- to his aunt's house and told her what had happened. That when he ran outside the house, his younger brother who was 6 years old followed him but he couldn't keep up his pace but his 2 sisters followed her to her aunt's place the same night. His aunt told him to go and inform his grandmother of the sad news and he passed through Simon Kariuki's place who accompanied him to his grandmother's house. That his grandmother told him to stay at her place for the night but his uncle advised him against it as the gang that had attacked their home was looking for him and so his uncle took him to his house to spend the night.
4. He stated that he woke up early the following morning and went back home and on his way, he met one Rose Wamatuuri in the company of his younger brother who said that he had spent the night in a thicket. That he asked Rose Wamatuuri to take his brother to his aunt's place and when he arrived at his home, he found his mother lying outside the house half naked. He ran back to his grandmother's home but did not find her. That he returned home and found his father, his uncle and some police officers who recorded his statement. He stated that he identified the accused persons as the people who attacked his mother because he knew them. That he did not see the 2<sup>nd</sup> accused person but he heard his voice when he was asking the others to leave the deceased alone.
  5. That his 2 brothers' houses were torched that night but they were not in the houses and the attackers were asking for their whereabouts. On cross-examination, he stated that he was not aware of any previous reports of a shop having been broken into. That Griffin Nyaga was one of the people who attacked them and he told the police as much. That he left their house at around 10PM that night and he returned at 7AM the following morning, by which time his mother was already dead. That he also heard the 1<sup>st</sup> accused person's saying that there was another house that they should go and burn. That their house is well lit with solar light. He stated that there were many people who attacked them that night but he saw 5 people and the 2<sup>nd</sup> accused was pleading with the others to stop beating the deceased. That they were eating supper when the 3<sup>rd</sup> accused entered the house through the door since it was not locked. That before that day, the 3<sup>rd</sup> accused person had gone to their home to look for his brother and he was armed with a spear.
  6. He stated that after the death of his mother, he heard about sexual offence charges against his brother, John Kimathi Kirangi, in Siakago Court. That the 3<sup>rd</sup> accused cut his sister with a panga on the left hand and he hit him on the stomach and they were screaming although none of the neighbors rescued them since they are far. That he took about 30 minutes to reach his aunt's house and 20 minutes to reach his grandmother's house. He stated that he did not see who lit the fires that burned the houses and that he had never heard any complaints against his brothers who were not at home that day. That the accused persons continued beating them even after they had been told that his brothers were not at home.
  7. PW2 was Susan Wanja Kiragi, PW1's sister who stated that she was at home with her mother, her sister and 2 brothers and at supper time they called their father. That while they were talking on the phone, they heard noises outside and someone knocking on the roof of the house. That she went to close the door and she heard someone saying "wako huko ndani, tokeni" ("they are inside, come out") and her mother told her to open the door. That the 3<sup>rd</sup> accused entered the house and told them to get out and they went to her room where he followed them and cut her on her left hand. That as she tried to leave, he hit her with a rungu on her forehead and hit PW1 with a rungu on his stomach.
  8. That the accused persons held their mother by the collar of her blouse, dragged her out of the house and started beating her with rungu. That she (Pw2) ran to her aunt's place and arrived at the same time with her sister and they found PW1 already there. That PW1 was sent to their grandmother's house to inform her of the incident and she accompanied PW1 back to their aunt's house from where they called the area chief. That her grandmother went to their home together with the area chief and their



- aunt. That the body of the deceased was found near the chicken coop and the houses in the homestead had been torched. That she recorded her statement with the police.
9. She identified the accused persons in court as the attackers. On cross-examination, she stated that she left her home at around 10PM and her mother was being beaten at the time. That there was another person called Griffin in their compound that night but he was not in court. That there were about 20 people who were at their home to attack them that night and there was light in the house that enabled them to see the attackers. That there was a case involving the 3<sup>rd</sup> accused person and her family but she did not know the nature of the case. That their father was not at home at the material time and so he did not know what was happening. That she saw the 3 accused persons that night and that the 2<sup>nd</sup> accused hit her mother with a panga.
  10. PW3 was EWK, sister of PW1 and PW2, a minor. After conducting voir dire, the court took sworn evidence wherein she stated that on the fateful night, she was at home with her mother, PW1, PW2 and her younger brother and they were having dinner when something knocked the roof of the house. That PW2 went to close the door but the 3<sup>rd</sup> accused person told her to open the door and she did. They ran to hide in the bedroom where he followed them and cut PW2 on her hand. That the 1<sup>st</sup> and 3<sup>rd</sup> accused persons took the deceased outside and the 3 accused persons started beating her up.
  11. That she ran to a neighbor's house, a Mr. Mutwiri, where she found her brother and that she saw the accused persons starting the fires on the houses using petrol. That she does not know why the neighbor did not help them when they were attacked. That she, and PW1 proceeded to their aunt's house from where their uncle picked them to go and record their statements. She stated that she saw the 1<sup>st</sup> and 3<sup>rd</sup> accused persons assaulting her mother and that the 2<sup>nd</sup> accused person was holding a stick.
  12. On cross-examination, she stated that there were 5 people near the door and there were a total of 40 people at their home. That she left when her mother was being beaten and when she returned the following day at 7AM, her mother was already dead. She stated that the 2<sup>nd</sup> accused person did not hit the deceased. That when she ran outside, she saw 5 people outside the door and that some of them were not among the accused persons in this case.
  13. PW4 was Nyaga Donald Kamaria, the subchief, who stated that on the morning of 30<sup>th</sup> September 2020, he switched on his phone and found that one Celina Kabura had tried reaching him the previous night. That he called her back and she informed him that the family of the deceased had been attacked the previous night and the children had been displaced and they couldn't account for their mother. That he requested to meet the children and he met PW2 and her grandmother who narrated the occurrence to him and they named the accused persons, being people he knew. That he informed the chief about the incident and they went to Mutuobare Police Post then proceeded to the scene. That at the scene, he found a burned family house with holes on the roof which remained intact.
  14. That the body of the deceased lay a few meters from the house and he reported the incident to the police. That PW2 told him that the accused persons had gone to the home to look for her brothers and when they did not find them, they directed their anger at the deceased and burned the houses. On cross-examination, he stated that he was not present when the 1<sup>st</sup> accused was arrested but he was arrested at his home the day after the incident. That he was also not present when the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were arrested. That the family narrated to him that the mob had gone to the homestead to look for the 2 sons of the deceased who were known habitual thieves in the area but they did not find them. That some other people were mentioned as being part of the mob but they were not arrested because they are at large.



15. PW5 was Samuel Kirangi Ndiore, husband of the deceased, who stated that he was at his place of work when he received a phone call informing him of the incident. That he sought permission from work and when he arrived at his home, he found his houses had been torched and the body of his wife was lying outside the house. That the deceased had her eyes gorged out and had also suffered injuries on her ears and the ribs. That he called the assistant chief and then recorded his statement with the police. He stated that he identified the body of the deceased at Embu Level 5 Hospital for purposes of postmortem. That on the night of the incident, he was not at home.
16. PW6 was Simon Mate Nyaga who stated that he met the deceased's mother-in-law and sister-in-law who requested him to accompany them to the deceased's homestead where they found the deceased lying outside the house and she seemed dead. That on the day of the incident, he was asleep with his family at around 1AM when he heard the roof of his house being hit with something and people were calling out to him to get outside. That he got outside and found the 1<sup>st</sup> and 3<sup>rd</sup> accused persons and another one called Griffin Nyaga, who were armed with pangas and rungas. They alleged that his son had stolen from the shop belonging to the 1<sup>st</sup> accused.
17. That he called his son and they ascertained that he was not one of the thieves they were looking for. That they let him off with a warning to teach his son better manners and they left. On cross-examination, he stated that he does not know who killed the deceased but the 1<sup>st</sup> accused was among the people who went to his home that night. That he did not see the 2<sup>nd</sup> accused that night at his home but some of the people who visited his home stood in the darkness. That the 1<sup>st</sup> accused was not armed but the 3<sup>rd</sup> accused had a panga.
18. PW7 was Dr. Godfrey Njuki Njiru who conducted postmortem on the body of the deceased. He stated that the body of the deceased had multiple cut wounds on the head and scalp, the largest being on the left side of the head, measuring approximately 5cm. That there were multiple stab wounds on the face and blunt force trauma on the chest. He opined that the cause of death was cardio-pulmonary arrest due to lack of blood from external bleeding which had resulted from cut and stab wounds which were consistent with assault. He produced the postmortem report and burial permit as evidence.
19. PW8 was P.C. Daniel Kiragu who stated that he visited the crime scene and took photographs which he produced as evidence together with a certificate of photographic evidence. On cross-examination, he stated that he did not see any source of light in the compound outside the house but there was solar lighting inside the house. That at the scene, there was a blood-stained stick but it was not collected for purposes of fingerprint analysis.
20. PW9 was P.C. Okoth Amos Omollo who stated that on 27<sup>th</sup> November 2020 at around 2PM he was at the police station with his 2 colleagues when PW2 went to the police post in the company of her father and her grandmother. They informed them that they had seen the 3<sup>rd</sup> accused person who had cut PW2 with a panga. That they went and arrested the 3<sup>rd</sup> accused person in connection with an assault case. On cross-examination, he stated that the 3<sup>rd</sup> accused did not resist arrest and that he had never committed an offence before the one he was arrested for.
21. PW10, P.C. Boniface Mwaura, the investigating officer, stated that the Chief Inspector in charge of Kiritiri called to inform him that there was a murder incident and he proceeded to the scene. That he found the body of the deceased half naked, lying next to a partially demolished and torched mud house. That there was also another torched house in the same compound. Upon inquiry from the community, they were informed that the home had been invaded by about 40 people who were looking for the sons of the deceased but they did not find them. That the mob turned their rage onto the deceased and they beat her to death. That he recorded statements from the witnesses and the crime scene was



- processed by scenes of crime personnel and the body of the deceased was removed to Embu Level 5 Hospital mortuary.
22. That on 01<sup>st</sup> October 2020, a raid was conducted and the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were arrested and detained at Kiritiri Police Station. He stated that the accused persons were escorted to Meru Level 5 Hospital for mental assessment. That on 06<sup>th</sup> October 2020, a postmortem was conducted on the body of the deceased and the accused persons, together with others, were charged with the offence. On cross-examination, he stated that he recovered a blood stained piece of wood and a metal bar at the scene but the same were not subjected to forensic examination. That the witnesses who mentioned the 1<sup>st</sup> accused stated that there was solar lighting and moonlight which enabled them to see him.
  23. That when he visited the scene, the solar lighting had been destroyed because the houses had been burned down. He stated that the 2<sup>nd</sup> accused person was only mentioned by PW1 and none of the other witnesses saw him at the scene where there were about 40 people. That the 2<sup>nd</sup> accused had indicated that he wanted to record a statement and he was named as being among the assailants. That he did not know about sexual offence charges involving the 3<sup>rd</sup> accused and PW2. Whereon it was alleged that the deceased's son had sexually assaulted the 3<sup>rd</sup> accused's daughter, a minor.
  24. PW11 was Sgt. Paul Sega, formerly of Mbeere South DCI office, stated that the incident was reported and his office took up the investigations. That the accused persons were named by witnesses and they were arrested. He stated that on 01<sup>st</sup> October 2020, they went to the home of the 1<sup>st</sup> accused but nobody was there but 10 men armed with arrows were found in the nearby bushes. That they fired shots in the air and they managed to arrest one Peter Ngondi Muthanje who was armed with a bow and 5 arrows and the 1<sup>st</sup> accused who was armed with a metal bar. That the 1<sup>st</sup> accused had reported a case of shop breaking and he had stated that he suspected the thieves to be the 2 sons of the deceased. That when he reported the incident, the 1<sup>st</sup> accused did not record any statement but he mobilized a team of people to go to the alleged thieves' home to retaliate. On cross-examination, he stated that when the 1<sup>st</sup> accused was arrested in possession of the metal bar, he was charged with the offence of preparing to commit a felony. That it is the witnesses who gave them the names of the accused persons whom they arrested.
  25. PW12 was Assistant Superintendent of Police Christopher Meme, formerly the OCS Kiritiri Police Station. He stated that on 02<sup>nd</sup> October 2020, PW10 went with the 2<sup>nd</sup> accused person to his office and asked him to take a confessionary statement. That the 2<sup>nd</sup> accused was informed of the rules and procedure for recording a confession and that he had a right to have a third party present. That the 2<sup>nd</sup> accused preferred to give his statement in Kiswahili and the same was translated to English. It was read out to him and he stated that it was accurate and that he understood and signed it. That he elected one Charity Nyaguthii to be his representative and the process lasted 2 hours.
  26. In his statement which was produced as an exhibit, the 2<sup>nd</sup> accused stated that he met a group of people on the road and when he asked what they were up to, they told him that their leader had asked them to accompany him to find some people who had stolen from his shop. That at first, he did not want to accompany them but the 1<sup>st</sup> accused insisted that he joins them. That they proceeded to the home of the deceased and surrounded it but he watched from afar. That the crowd demanded that the deceased opens the door and when she did, she hurriedly closed it and that is when they decided to demolish the house by taking off the iron sheets. That when the deceased saw that her house was being demolished, she went outside and himself and PW2 were trying to shield her from being beaten by the crowd and the crowd descended on her and he sustained injuries in the process.
  27. The 2<sup>nd</sup> accused stated that PW2 managed to slip away, and left the deceased being beaten mercilessly by the crowd, until she could not move. That the crowd demanded to know where the deceased's sons



were hiding the things they had stolen from the 1<sup>st</sup> accused's shop but she said that she did not know, except that she knew that 2 gallons of petrol were being hidden at Kanyangi. That the crowd set the houses on fire and then went to 3 other homesteads including that of PW6, whose son was allegedly one of the thieves who stole from the 1<sup>st</sup> accused's shop but they did not find the person they were looking for. That the crowd then reconvened at Kabera where the 1<sup>st</sup> accused gave them beer and the 2<sup>nd</sup> accused stated that he took milk and they parted ways at around 1AM. That the following day, the 2<sup>nd</sup> accused stated that he heard that the police had found the body of the deceased but he could not go to see what was happening because he had pain on his leg.

28. The 2<sup>nd</sup> accused went to Mutuobare Police Post to report the incidents of the previous night and while on the way, he met a police officer who escorted him to the police post where he recorded his confessional statement and his confession. On cross-examination, he stated that the 2<sup>nd</sup> accused person said that the crowd was made up of about 40 people. That the 2<sup>nd</sup> accused stated that he was forced to follow the crowd but he did not give details of who forced him and he also never ran away from the group. That the 2<sup>nd</sup> accused stated that he tried pleading with the crowd to stop beating PW2 to no avail. That the 2<sup>nd</sup> accused did not mention any other accused persons in his statement. He produced the mental assessment reports for the accused persons indicating that they were fit to stand trial.
29. After the close of the prosecution's case, the accused persons were placed on their defense.
30. DW1 was the 1<sup>st</sup> accused who stated that on the day of the incident, he went to harvest honey with his sons between 8a.m and 12p.m and then went to buy stock for his shop. That on 30<sup>th</sup> October 2020, he worked until 9PM and then went home where he ate dinner and while on his way to sleep in his shop, he was arrested by police in connection with the murder of the deceased. He denied involvement in the incident as he had no reason to kill the deceased. That he did not know the people who broke into his shop and that he reported the matter to the police although he did not know the thieves.
31. DW2, Dennis Mutugi Njeru, son of DW1 stated that he is a shopkeeper at DW1's shop. He stated that on the day of the incident, he had gone to harvest honey with his father and brother at around 8PM and they returned home at around 11PM the same night. That they slept until the following morning when his father went to the shop where he used to work. That he heard that his father had been arrested but he did not know why. He also stated that he did not know the deceased or how she met her death. On cross-examination, he stated that they harvested 3 buckets of honey from 5 beehives and they returned home at around 11PM.
32. DW3 was Eric Fundi Njeru, son of DW1 who stated that on the day of the incident, he had gone to harvest honey with DW1 and DW2 at around 8PM. That they harvested honey from 2 beehives after which they went back home at around 11PM and they slept until the following morning. That the following day, they spent the day at home and he later heard that his father had been arrested. He stated that he did not know the deceased and how she died. On cross-examination, he stated that there were 15-20 beehives and they harvested from 5 of them.
33. DW4 was the 2<sup>nd</sup> accused person who stated that on the day of the incident, he was at Kings and Queens Hospital in Siakago and when he was heading home, he met a group of people who stopped him at around 9PM at Kabaraka area. That the 1<sup>st</sup> accused was among them and he told him to accompany them to go and arrest thieves to which he obliged. That they went to the home of the deceased and as he tried to defend the PW2 from being beaten by the crowd, he was injured in the process. That the following day, he was not able to report the matter to police but on 31<sup>st</sup> September, he talked about the matter with a police officer he met at a café. That he was surprised when they arrested him in relation to the death of the deceased.



34. On cross-examination, he stated that he saw the deceased on the night of the incident. That the crowd consisted of more than 50 people and they demanded to see the 2 sons of the deceased and when she refused to open the door, the crowd broke the door and entered the house. That the crowd beat the deceased for 2 hours and then they all left together. On further cross-examination, he stated that he was forced to join the crowd but he could not run away because there were many people. That when they parted ways, he went back to Kabarak, took his motor cycle and went home and that he did not go to the police station because he was in shock. That he did not report to the police the following day because he was in pain and he did not know exactly who injured him.
35. DW5 was the 3<sup>rd</sup> accused person. He stated that on the day of the incident, he was at work the whole day and he returned home at around 7PM and slept until the following day. He denied the statement by PW2 that he faced assault charges and when he was shown the charge sheet and judgment, he stated that he was acquitted of the charge. He stated that he was arrested at Mutuabare stage but he did not know why he was arrested. On cross-examination, he stated that there is a case of defilement where the victim is his daughter while the accused is the son of the deceased. He denied any involvement in the death of the deceased.
36. DW6 was Elizabeth Njoki, wife of the 3<sup>rd</sup> accused person. She stated that on the day of the incident, her husband returned home at around 6PM and she prepared supper for him to eat before he went to sleep and he woke up at 5AM the following day. That he did not leave the house that night. On cross-examination, she stated that DW5 did not have another wife although it was put to her that she had a co-wife, a fact that came out in the assault proceedings against her husband.
37. After the close of the defence case, the 1<sup>st</sup> accused and the prosecution filed their submissions.
38. The prosecution, in its submissions, relied on the case of Anthony Ndegwa Ngari v Republic [2014] eKLR on the elements of the offence of murder. That the cause of death was as stated by PW7. It relied on Article 26 of *the Constitution* and the cases of Republic v Stephen Sila Wambua [2017] eKLR and Guzambizi Wesonga v Republic [1948] 15 EACA 63. It stated that the testimonies of PW1, PW2 and PW3 placed the accused persons at the scene, beating the deceased. Further reliance was placed on section 21 of the Penal Code which provides that the accused persons should be held liable individually if they colluded to commit the offence.
39. It relied on the cases of Njoroge v. Republic [1983] eKLR, Dickson Mwangi Munene & Another v Republic [2014] eKLR and Otieno Evans Oduor v Republic [2016] eKLR where the courts echoed section 21 of the Penal Code. On the issue of malice aforethought, it relied on section 206 of the Penal Code and the case of Joseph Kimani Njau v. Republic [2014] eKLR and stated that the nature of injuries inflicted on the deceased indicated that the accused persons intended to kill her. The prosecution urged the court to dismiss the defense because the alibi relied upon was raised too late in the case. On this argument, reliance was placed on the case of Republic VS G.N.K [2017] eKLR it urged the court to find the accused persons guilty as charged.
40. The 1<sup>st</sup> accused person submitted that he was not properly identified as a member of the 40-man gang that raided the home of the deceased. That despite the fact that PW1, PW2 and PW3 stated that they saw him at the scene, PW8 stated that he did not see any source of light at the home that would have enabled them to see him. That the clothes that he was wearing that night were not described to the police and that the testimony of PW10 shows that there was not enough light in the compound that night. That the metal bar that he was arrested with did not have anything to do with the murder of the deceased since it was found in a different location.



41. He submitted that the confession of the 2<sup>nd</sup> accused was suspect since he did not explain the circumstances leading to his being forced to join the criminal gang that night. That according to section 141 of the *evidence Act*, an accomplice should not be held as a competent witness and his testimony should be held as untrustworthy. He stated that his alibi evident checks out since DW2 and DW3 can account for his whereabouts on the night of the incident. He relied on the case of Republic v. GNK (2017) eKLR and urged the court to find him not guilty and acquit him of the charge.
42. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons did not file any submissions.
43. The issue for determination is whether the prosecution has proved the offence of murder beyond reasonable doubt against each of the accused persons.
44. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The accused persons herein are facing a charge of murder contrary to section 203 as read together with 204 of the Penal Code. It is the duty of the prosecution to prove beyond reasonable doubt, that the accused persons murdered the deceased. These provisions of the Penal Code provide the elements of the offence as follows:
- “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
204. Any person who is convicted of murder shall be sentenced to death.”
45. In the case of Republic v W.O.O. [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, being guided by the Court of Appeal in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR (supra), as follows:
- “ For the offence of murder to be proved, 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 committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”
46. On the first element of death and cause of death, PW7 produced a postmortem report. He observed that the body of the deceased was severely pale and it had multiple cut wounds on the scalp, the largest being on the left side of the head measuring 5cm. That there were stab wounds on the face and there was evidence of blunt trauma on the chest anterior. In the postmortem report, he formed the opinion that the cause of death was cardiopulmonary arrest secondary to external hemorrhage from cut wound from assault.
47. On the element of unlawful act which caused the death of the deceased, the prosecution is tasked with proving that the accused persons are linked to the death of the deceased. PW1, PW2 and PW3 stated that it was the accused persons and one Griffin Nyaga who beat the deceased with rungus that night. PW2 stated that the 3 accused persons held the deceased by her blouse, dragged her outside the house and beat her mercilessly. She stated that it is the 3<sup>rd</sup> accused person who cut her with a panga.
48. PW1 stated that the 3 accused persons hit his mother on the head and on the back. PW3 stated that she saw the 1<sup>st</sup> and 3<sup>rd</sup> accused persons through the moonlight holding her mother and they were beating her with rungus. In his evidence, PW6 stated that the accused persons went to his home looking for his son whom they accused of stealing from the shop of the 1<sup>st</sup> accused together with the deceased's sons. He stated that they were armed with rungus and pangas and that he did not know where they went to after they left him with a warning.



49. PW10 produced a confession recorded by the 2<sup>nd</sup> accused person who stated that the 1<sup>st</sup> accused person forced him to join the crowd of people that was headed towards the home of the deceased. The confession stated that on the night of the incident, the crowd visited 4 homes including that of PW6 and the purpose of the visits was to catch thieves who had stolen from the shop of the 1<sup>st</sup> accused. In his defense, the 2<sup>nd</sup> accused person reiterated the contents of his confession as recorded by PW12 but he did not explain how he was forced to follow the crowd that night, neither did he give sufficient reasons why he did not report the incident the following day. The testimonies of PW1, PW2, PW3, PW12 and the 2<sup>nd</sup> accused person place all the accused persons at the scene at the time of the incident.
50. At the same time, these testimonies show that indeed the accused persons were armed with pangas and rungas which were used to inflict fatal injuries on the deceased. In his testimony, DW1, the 1<sup>st</sup> accused raised the defense of alibi and called his 2 sons as witnesses. His alibi was that on the night of the incident, he was in the company of DW2 and DW3, his sons, and that they went to harvest honey some distance from their home. That afterwards, they returned home and he did not leave again until the following morning. As correctly submitted by the prosecution, the defense of alibi should be raised early enough in order to allow the prosecution to interrogate it since the burden of displacing it, if at all, lies with the prosecution.
51. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR the Court of Appeal while addressing alibi defence stated:
- “It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see *Karanja v R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”
52. Therefore, as regards, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons’ alibi, the same do not hold water. The alibi was raised too late in the day and in any event, the same cannot displace the strong evidence that was adduced by the prosecution witnesses including the eye witnesses who saw and identified them at the scene on the material night. As for the 2<sup>nd</sup> accused person, his confession as recorded by PW12 is persuasive and the same is held as credible to place him at the scene. Even though he stated that he tried to stop the crowd from beating PW2 who was shielding her mother, there is not enough evidence to prove this.
53. He stated that when he went home, he did not report the incident the following day because he was in a state of shock. That he reported the matter 2 days after the incident since he was also nursing an injury he sustained during the incident. PW12, on cross-examination stated that at the time when he was recording the 2<sup>nd</sup> accused person’s confession, he did not have any injuries on his body and that he was not deprived of food, water, sleep or medical attention. That being said, there is sufficient evidence proving that the accused persons were present at the scene and they inflicted fatal injuries to the deceased.



54. The last element to determine is whether the accused persons bore malice aforethought at the time of the offence. Malice aforethought is defined and well explained under section 206 of the Penal Code as follows:

“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.”

55. Malice aforethought may be inferred through the weapon used, the conduct of the accused persons before the offence, the part of the body that was injured, and so on. The court of appeal, in the case of *Daniel Muthee v. Republic CA No. 218 of 2005* (UR), stated thus while considering what constitutes malice aforethought:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

56. In the case of *Nzuki v Republic* [1993] KLR 171, the court stated that malice aforethought is a term of art and emphasized that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by



itself enough to convert a homicide into a crime of murder. (see Hyman v Director of Public Prosecutions, [1975] AC 55.)”

57. PW1, PW2 and PW3 stated that the accused persons were armed with rungas and pangas and they went to their home in search of their brothers whom they accused of the shop breaking and theft of the 1<sup>st</sup> accused person’s shop. PW11 stated that a case of shop breaking had been reported at Mutuobare Police Post and the suspects in the case were the 2 sons of the deceased. That when the 1<sup>st</sup> accused made this report, he did not record a statement but instead, he mobilized a crowd of young men to go and retaliate at the home of the deceased. It was the testimony of the prosecution witnesses that the accused persons asked for the sons of the deceased but when they learned that they were not at home, they attacked the deceased and burned down her house and that of her sons.
58. From the testimony of PW7, the deceased suffered injuries in the nature of cuts and stab wounds to the head and chest, which led to massive loss of blood which led to her death. From the series of events at the scene, to the cause of death as stated by PW7, it is evident that the accused persons intended to cause injuries to the deceased, from which she died. Moreover, PW1 stated that he heard the accused persons saying “tuuwe huyo mama” (“let us kill that woman”) as they were burning the houses down. Therefore, the accused persons bore malice aforethought.
59. In the end, the court finds that the prosecution has proved the offence of murder contrary to section 203 of the Penal Code against the accused persons beyond reasonable doubt. The accused persons are hereby convicted accordingly.
60. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the State\*\*

.....for the 1st Accused Person\*\*

**.....for the 2nd Accused Person**

**.....for the 3rd Accused Person**

JUDGMENT HCCR E015 OF 2020 Page 4

