



**Republic v Ndathi & 5 others (Criminal Case 23 of 2019)
[2024] KEHC 8839 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 23 OF 2019
LM NJUGUNA, J
JULY 18, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

**JOSEPH KARIUKI NDATHI 1ST ACCUSED
KENNEDY NTHIGA MUGOIYOH 2ND ACCUSED
NICHOLAS NJERU NJUE 3RD ACCUSED
ALFRED NYAGA ITUMU 4TH ACCUSED
DESDERIO IRERI MUGO 5TH ACCUSED
FREDRICK NJUKI NYAGA 6TH 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 14th December 2017 at Mutira area, Magacha village in Mbeere North sub-county, within Embu County, murdered Adriano Mugendi Njeru. 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, Patrick Njiru Njeru, brother of the deceased, stated that the accused persons are all known to him. That on the day of the incident, he was in the company of the deceased and they had planned to go to Siakago to pluck Miraa. That on the way, at Magacha village, they met 6 people, whom he identified as the accused persons, who started beating them up. That the accused persons were armed with sticks, arrows, a whip and tree branches. That the accused persons beat up the deceased all over his body and that nobody came to save them even though they screamed. That the 2nd accused took him



- and the deceased to Siakago Hospital at around 9AM and then escorted them to Siakago Police Station where they recorded statements. That the deceased died at 1PM and the police recovered the weapons.
3. On cross-examination, he stated that he and the deceased had been sentenced to community service after they were caught stealing Miraa. That the day after the incident, he was taken to Siakago Police Station and then Siakago Court and charged with stealing miraa. That after the incident, they were taken to hospital and were treated and discharged. He stated that he pleaded guilty of the offence of stealing miraa. That it is the 1st accused who stopped them first and demanded to see the miraa that he was carrying and besides the 6 accused persons, there were no other people along that road.
 4. He stated that the 2nd accused person had never accused him of stealing miraa and that he is the one who took him and the deceased to hospital through the chief's office. That he and the deceased were accused of stealing the 1st accused person's miraa and when they went to the chief, they agreed to pay for the miraa. That his father witnessed them being beaten but the 2nd accused did not stop the other from beating him as alleged although he is the one who took them to hospital in his motor vehicle.
 5. That the 2nd accused was not among the people who stopped him on the road to inquire about the miraa but he came to the scene later and participated in beating them. It was his testimony that him and the deceased were stopped by 3 people who called the others to join them. That the deceased died at the police station and he had injuries on his head, stomach and back. That more people joined in beating them up and some of them were women. That the people who stopped them first checked the miraa they were carrying before they started beating them up.
 6. PW2 was Cecilia Wanjiru Kathee who stated that she was on her way to Magacha shopping center to buy milk when she found the deceased and PW1 being beaten by the accused persons. That she tried to intervene but the accused persons threatened to beat her up and she left. She stated that the 2nd accused person had a whip while the others had tree branches, sticks and arrows and they beat the deceased on his head and back. That she did not know why the deceased and PW1 were being beaten. That she does not know if the accused persons have other names but the 3rd accused is also known as Wachira. On cross-examination, she stated that the sticks had been cut from freshly cut tree branches and that they were not in court, neither was the whip. She stated that the sticks that were in court were much smaller than the ones she saw some of the accused persons using at the scene.
 7. On further cross-examination, she stated that the 2nd accused was holding a whip although she did not mention this to the police. That she met the father of the deceased and PW1 heading at the scene when she was on her way back home. That there were passers-by pleading with the accused persons to stop beating the deceased and PW1. She stated that she did not see any injuries by arrows on the body of the deceased. That she was at the scene for about 10 minutes and she couldn't recognize the passers-by apart from one Peter Ireri who is a teacher by profession.
 8. PW3 was Peter Ireri Nderi who stated that on the day of the incident at around 6:30AM, he was at home preparing to go to the shamba when he heard noises of people saying "wacha tuhome hii kijana" ("let us burn this boy"). That he went to the scene where 2 people were being beaten by the accused persons. He heard one of the accused persons saying that they should call the teacher on the phone. The teacher was the 2nd accused person, who arrived at the scene with his car, removed a tyre and put it on the neck of the deceased.
 9. That among the people who were at the scene was Mama Vero who called the parents of the deceased and PW1. That the father of the deceased and PW1 arrived at the scene and he took his sons to hospital with the help of the 2nd accused person in his vehicle. On cross-examination, he stated that he did not know the character of the deceased and PW1 and that he did not know whether they had been accused



- of theft before that incident. That the 2nd accused person removed a tyre from his car and put it on the neck of the deceased and then beat the deceased and PW1 with a whip.
10. That even though he did not say in his initial statement that the 2nd accused put the tyre around the neck of the deceased, that is what happened. He couldn't tell which part of the body the 2nd accused hit the deceased and PW1. He denied that the father of the deceased and PW1 also beat them when he arrived at the scene. He however stated that the tyre was placed around the neck of the deceased but it was not lit.
 11. PW4, Francis Nyaga Ngungi stated that on the day of the incident at around 7:30AM, he was on his way to work when he saw the accused persons beating the deceased and PW1 with long sticks all over their bodies. That he was at the scene with PW2 and one Fredrick Njuki Njiru. On cross-examination, he stated that his testimony was not coached by one Taracisio Kawe, a political activist, even though he discussed about the case with him. That he does not know where the accused persons got the sticks which they used to beat the deceased and PW1 but he stated that the sticks were not in court.
 12. He stated that the deceased and PW1 were known to him since they went to the same primary school. That when their father arrived at the scene, he did not beat them up but he was visibly annoyed. That they had been previously charged with the offence of theft and PW1 was imprisoned. That the father of the deceased and PW1 pleaded with the accused persons to take the young men to the chief instead of beating them but they refused until much later.
 13. He stated that he did not see anyone with arrows but he saw them on the ground at the scene. That the sticks used to beat the deceased and PW1 were not small and they were thick. That the activist namely Taracisio Kawe helped them to follow up when the case was in Siakago Law Courts where it was taking too long but he did not coach them on the evidence to give in Court. That it is the 2nd accused person who took the 2 brothers to the chief.
 14. PW5, Nikasio Ileri Njeru, the chief of Kiang'ombe location stated that on the material day Paul Nguyo went to his home to inform him that there were people at his office seeking his assistance. That when he went to his office, he found 2 young men sitting down in a leaning position and they had physical injuries and swelling on their faces. Upon inquiry, the people who were there unanimously informed him that the 2 young men had been stealing miraa from people's farms including those of the 1st, 3rd and 4th accused persons.
 15. He advised them to make a formal complaint at the police station and he accompanied them to Siakago Police Station where they arrived at around 12PM using the 2nd accused person's vehicle. The report was booked and the deceased and PW1 proceeded to hospital. On cross-examination, he stated that when he arrived at his office, he found about 10 people including the 2 brothers, who had been brought using the 2nd accused person's vehicle. That after the 2 young men had been taken to hospital, he was informed by the OCS that one of them had died.
 16. He stated that he knew the deceased and PW1 and that according to him they were not habitual thieves. That some of the people who went to his office on that day were not among those that he could see in court. He stated that the deceased and PW1 were walking on their own and they did not have blood stains on their clothes. That he did not recognize all the people who were at his office that day as he was mostly concerned about the 2 boys who had been beaten. That he knew the 4th accused person was living in Nairobi with a relative but he did not know what he did for a living. That he did not see the 4th accused person participating in the incident. He stated that he did not know whether the deceased and PW1 had been charged with the offence of theft of miraa



17. On further cross-examination, he stated that the 5th accused person was not in his office and that the people who were in his office were the ones who assisted in taking the deceased and PW1 to hospital. He could not tell whether there was further assault on the deceased and PW1 at the police station. He stated that Taracisio Kawe is known to him and they work together when he is running programs in his area. Regarding the theft charges against the deceased and PW1, he stated that the probation officer in that case consulted with him before he prepared the report in which he stated that he knew that PW1 was a habitual thief. That none of the people who went to his office had a weapon.
18. PW6 was Njeru Mbugi, father of the deceased and PW1. He stated that he found 6 people beating his 2 sons using sticks of different sizes cut from tree branches on suspicion of theft of miraa. That the 3rd accused person had a whip and they were beating the young men all over their bodies and their faces were swollen. That he pleaded with the accused persons to take his sons to the chief or the police instead of beating them. That they went to the chief's office in the 2nd accused person's car and his sons were carried in the boot of the vehicle while him and the 1st accused sat at the front. That the chief told them that the case was beyond him and he advised them to take the boys to the hospital which they did but they first reported the matter to the police.
19. He stated that they arrived at the chief's office at around 8.00 a.m and at the police station at around 10:30 a.m. That the deceased died while at the police station and it is the police who took him to hospital. That on the 21/12/2017 he identified the body of the deceased to the pathologist who carried out the postmortem. On cross-examination, he stated that the 1st, 2nd, 5th and 6th accused persons had sticks, the 3rd accused had a whip, the 4th accused had arrows and sticks. That by the time he arrived at the scene, the accused persons had already cut the sticks they used to beat the boys. That he recorded his statement but the police did not write down everything he said.
20. He denied knowledge of his sons having been charged with theft even when the names captured in the probation officer's report were read to him, he insisted that the person who was charged was not his son. He stated that they went to the chief's office at around 8:30 a.m, to the police station at around 10:30a.m, to the hospital where they stayed for about 30 minutes and then back to the police station around 11:30 a.m and thereafter the deceased died about 1 hour later. It was his evidence that his sons walked themselves to the hospital where they were treated before they went to the police station where they were held in a cell at around 11.00 a.m.
21. On further cross-examination, he stated that he did not know where the 4th accused person lived and that he saw him at the scene with sticks and arrows although none of the brothers had injuries from arrows. That the deceased died in police cells but it is not the police who beat him although he could not see what was happening in the cells. He stated that when they went to the police station the first time, they were not given a P3 form and one of his sons complained of a headache while on the way to hospital.
22. He stated that he was not drunk on that day and that he took his sons back to the police station after they were treated. It was his evidence that he could not see what was happening in the cells when his two sons were placed there. That the deceased was almost 18 years old and he had never been admitted in hospital before. That after the incident, the whip was taken by the 4th accused person and the sticks were left at the scene.
23. PW7, Fredrick Njuki Njiru stated that at around 5:30AM on the day of the incident, he was on his way to work when he saw some 3 people flashing their lights at him and they warned that if he went any further, they would shoot arrows at him. He identified the 4th accused person who was holding a bow and arrows and the 1st accused person who was armed with a panga and a jembe handle. The 5th accused



- person had an arrow which he had placed on the ground. That they accosted him and demanded that he opens his bag which he used to carry miraa in, as they were claiming that the miraa belonged to them.
24. He told them that he was a miraa dealer and the 5th accused confirmed that it was indeed true, and they let him go. He stated that he proceeded to the market where he sold his miraa and on his way back, he heard that 2 people had been attacked. That he found the 2nd accused beating PW1 and was asking him why he had not stopped his habit of stealing even after he had been warned. That the 1st, 3rd and 6th accused persons were also there and they listened to the conversation he was having with the 2nd accused before they left. That he went to look for the deceased's and PW1's brother but he found their cousin Francis Nyaga whom he informed of the incident before he proceeded home.
 25. That later on, the deceased's mother requested him to take her to Siakago Police Station and while there she received the sad news of the death of the deceased herein, and she started crying. He stated that when he found the 2 people being beaten, the deceased was worse off than PW1 and all the accused persons were present with the weapons on the ground. On cross-examination, he stated that when he arrived at the scene, he saw the 2nd accused person beating PW1 and not the deceased. That he did not see the 3rd accused person holding any weapon and that he does not know who beat the 2 people up. That the 4th accused person had bows and arrows but he did not use them on the deceased. That the 3 people that had stopped him early that morning were not armed by the time he returned from the market. That he didn't know whether the 5th accused person participated in beating the deceased and that he did not see the 6th accused person with any weapon.
 26. PW8 was Dr. Sheila Shavulimo, a psychiatrist at Embu Level 5 Hospital. She produced mental assessment reports authored by her colleagues Dr. Thuo and Dr. Gordon Ambayo who opined that all the accused persons were mentally fit to plead.
 27. PW9 was Dr. Godfrey Njuki Njiru who produced the postmortem report following examination of the body of the deceased. He observed that the body of the deceased had multiple bruises on the trunk and the limbs. There was massive subdural hematoma on the left side and there was a blood clot on the left side of the head at the vertex. He concluded that the deceased had died of severe injuries consistent with mob injustice. On cross-examination, he stated that the bruises on the body could not have caused the death of he deceased.
 28. PW10 was CPL Geoffrey Sikodia, formerly of Siakago Police Station and he was the investigating officer in the matter. He stated that on the day of the incident, the 1st and 3rd accused persons together with the area chief and one Evans Mbugi took the deceased and PW1 to the police station at around 1pm The 1st and 3rd accused persons alleged that the deceased and PW1 had stolen miraa from their farms. The deceased and PW1 were badly injured and they had bruises all over their bodies. They were referred to Siakago Level 4 Hospital where they were treated and then returned for booking.
 29. That after 2 hours, the condition of the deceased deteriorated and the OCS and some other police officers took him back to hospital but he died while receiving treatment. That the body of the deceased was taken to the Siakago Level 4 Hospital Mortuary and statements were taken from family members who blamed the accused persons for the death of the deceased. He stated that initially, they had received a report of mob injustice incident and they also recorded statements from the family members of the deceased in that regard. That he opened an inquest file and forwarded the same to the DCI who recommended that the accused persons be charged with the offence. That he visited the scene but no weapons were recovered.
 30. He stated that the deceased's clothes were dusty, he had bruises all over his body and his face was swollen. That when the deceased was received at the police station, all the usual procedures were



- followed in the circumstances. On cross-examination, he stated that when the deceased was returned from hospital, he was held in the police cells for about 2 hours before he was taken back to hospital. That PW1 was thereafter charged with the offence of theft. That he opened an inquest file because he heard that the deceased was subjected to mob injustice and the cause of death seemed unclear but he did not know if the matter was taken to court as an inquest.
31. He explained that an inquest is recommended when a person dies in police custody or under unclear circumstances. That when he recorded the statements of PW1 and PW6, they did not say that the deceased died in police cells. He stated that the deceased died in hospital while he was being resuscitated after some medication was administered to him. On further cross-examination, he stated that the investigation diary does not indicate whether the 5th accused person was involved but one witness stated that he kicked the deceased. He stated that when the deceased was brought at the police station, he was placed in the adult cells because his age had not yet been ascertained. That while in the cells, the deceased seemed okay and he was talking with his brother. He stated that the deceased was accompanied to the hospital by a police officer even though the OB does not state as much.
 32. PW11, Sgt. Awadh Issa Mohammed stated that his office received an inquest and he was instructed to arrest the accused persons following recommendation by the ODPP for them to be charged. That he arrested the 1st, 2nd, 3rd and 4th accused persons and he escorted them for mental assessment and they were all found fit to plead. That the inquest recommended that the accused persons be charged with the offence of murder. That he arrested the accused persons with the help of the witnesses and it was the chief who called the 4 accused persons he arrested to the police station. That he also arrested Cyrus Ileri who is a witness but he was not named a witness in the case. He reiterated that he did not participate in the arrest of the 5th accused person.
 33. At the end of the prosecution's case, the court found that the accused persons had a case to answer and they were placed on their defense.
 34. DW1 was the 2nd accused person who stated that on the day of the incident, he was in the company of Evans Njeru Mbugi and they were driving to the market at around 8AM to buy farm inputs. That after about 5KM drive, they found a crowd of people and they saw the deceased and PW1 sitting on the road and were covered with dust. The crowd alleged that the 2 young men had been caught stealing miraa the previous night and next to them was a nylon bag and a plastic basin full of miraa.
 35. He recognized the two young men as the sons of his cousin Njeru Mbugi (PW6). That he was keen to help them and so they pleaded with the boda boda operators who had accosted the young men and hopefully sort out the issue with the owner of the miraa. That when the owner of the miraa arrived, he recognized him as someone he knew and they went to the chief's office, taking the young men and a few other people with them. He stated that when they reached the chief's office, he was not there and they sent somebody to call him but before the Chief arrived, he excused himself because he had people waiting for him at his farm.
 36. It was his testimony that while he was at home, someone on a bodaboda went to inform him that the chief was requesting to see him. He went and the chief asked him to take the people he had brought to his office to Siakago Police Station, which he did and returned home. He stated that he did not take part in beating the deceased. On cross-examination, he stated that he only helped to take the deceased and PW1 to the chief's office. That the complainant was within the crowd and that he did not know how the complainant identified the miraa as his.
 37. That he is also a miraa farmer but the deceased and PW1 had never stolen his miraa because they were not thieves. He stated that he could not tell how long the deceased and PW1 had been there but when



- he saw them, they had been beaten and their lips were swollen. That he did not see the 1st and 4th accused persons assaulting the young men. That he only saw the 3rd accused person when the chief sent him to call him back to his office. He could not recall seeing the 5th and 6th accused persons at the scene which was along a busy road.
38. DW2 was the 3rd accused person who stated that on the material day, he returned home from selling miraa at Kamumu and he slept. That one Fredrick Njuki went to his house at around 7AM and informed him that some 2 people had been arrested for stealing miraa and they had been taken to the chief. That he went back to sleep until 9:30a.m and thereafter, he went to the chief's place where the chief sent him to call the 2nd accused person before they went to the police station.
 39. DW3 was the 4th accused person who stated that on the day of the incident, he had travelled from Nairobi to represent his cousin at a circumcision ceremony in Kigwa Mbuti. That at the ceremony, he met one David Kariuki, his former schoolmate, who gave him a lift to Siakago on his motorcycle since his cousin had delayed to send him fare. That while there, he visited the 1st accused person who told him that he had seen some light in his shamba and so they took some arrows and went to check. He stated that when they went to check, the people who were in the shamba ran away but he identified them.
 40. That the 1st accused person called some people who were on the other side of the river and informed them of the theft and he told them he knew who the thieves were. That the 1st accused person promised to organize his transport back to Ishiara and they returned to the house. That later, some people told the 1st accused that the people who had stolen his miraa had been arrested and that they were habitual thieves. He stated that there was a crowd of people beating the deceased and PW1 at the scene and when they arrived, the people stopped beating them. That a motor vehicle stopped some distance from the scene and the 1st accused asked the owner to take the deceased and PW1 to the chief's office and they all boarded the 2nd accused's motor vehicle and went to the chief who referred them to Siakago Police Station.
 41. That they boarded the 2nd accused person's motor vehicle again to the police station and he alighted near the station and boarded a vehicle to Nairobi. That he later received a phone call from a police officer telling him that he was one of the suspects of the incident where the deceased was beaten and there was an inquest. That the inquest file was closed and they were charged with murder.
 42. DW4 was the 5th accused who stated that on the day of the incident, he was on his way to work when he found a crowd of people, mostly boda boda operators at Magacha and they were beating some people for allegedly stealing miraa. That he did not stay there even for one minute and he went on his way. He stated that later on he was arrested in connection with the incident but he was not involved. That he was merely a passer-by and he did not see any plastic bucket or bag with miraa at the scene. That he was fairly new in that area and he was not a witness in the inquest proceedings.
 43. DW5 was Evans Ngari whose testimony is in support of the testimony of the 2nd accused (DW1). He stated that the 2nd accused asked him to accompany him to go to buy pesticides which he should carry for him as he goes to school. That on the way, they found a crowd and he saw the 4th accused holding arrows and 1st accused person was stepping on the stomach of a young man. That the 2 young men who were being beaten are his nephews and they were in bad shape. That when he went near the scene, they stopped beating them up and their father also arrived at the scene.
 44. That the 6th accused said that he knew the owner of the miraa that was allegedly stolen by his nephews and it was the first accused in this case. That they took the young men and went to the chief's office in the 2nd accused's car and in the company of the 1st and 6th accused persons. That later on, the chief sent the 3rd accused person to call the 2nd accused. That the following day, he was informed that the deceased



- had died. He stated that the 2nd accused person did not take part in beating the deceased. That besides the 1st and 6th accused persons, he did not see any other person beating the deceased.
45. The defense case was closed and the court directed the parties file their written submissions. Only the 1st and 3rd accused persons complied with the directions on filing of submissions.
46. The 3rd accused person submitted that the onus is on the prosecution to prove malice aforethought as provided for under section 206 of the Penal Code. Reliance was placed on the cases of Republic v. Ali Kajoto [2021] eKLR, AHM v Republic (Criminal Appeal no. E043 of 2021) 2022 KEHC 12773 (KLR) and Philip Nzaka Watu v Republic [2016] eKLR. He stated that the prosecution's evidence was marred with gross inconsistencies that cannot be ignored. He urged the court to subject the evidence to the standard of proof and find that he is not guilty. Further reliance was placed on the case of Republic v Wilson Learpora [2007] eKLR.
47. The 1st accused person submitted that the prosecution did not prove that he participated in inflicting the fatal injuries to the deceased. That even though he is said to have been holding arrows, none of the fatal wounds were caused by arrows, according to the postmortem report. That his mere presence at the scene does not in itself infer guilt on him. He referred to the cases of Republic v Kingori wa Gakuha & Another [1946] 13 EACA 81, Abubakar Musa Yakuba v Republic, CA 85 of 2000, Rex v Tebere S/O Ochen [1945] 12 EACA 63 and Pius Arap Maina v. Republic [2013] eKLR.
48. It is now upon this court to determine whether the prosecution has proved the offence of murder beyond reasonable doubt against each of the accused persons.
49. 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 the 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. Section 203 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.”
50. 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, 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.”
51. On the first element of death and cause of death, PW9 produced a postmortem report. He observed that the deceased suffered multiple bruises on the trunk and the limbs. That there was massive subdural hematoma on the left side and there was blood clot on the left side of the head at the vertex. He concluded that the deceased had died of severe injuries consistent with mob injustice.
52. On the element of unlawful act which caused the death of the deceased, the prosecution has the legal burden of proving that the accused persons are linked to the death of the deceased. PW1-PW7 all stated that they saw all the 6 accused persons at the scene and they presented different perspectives as



- follows: PW1 stated that he was in the company of the deceased that day and they were stopped by the 1st accused person and 2 others. That the other accused persons were called to the scene later and they beat them with sticks. That the 2nd accused person is the one who took them to the chief's office and later to the police station in his car. PW2 stated that she tried to stop the accused persons from beating the deceased and PW1 but they threatened to beat her too. She stated that the 2nd accused person was armed with a whip.
53. PW3 on his part stated that the 2nd accused person removed a tyre from his car and put it around the neck of the deceased but he did not light it. On cross-examination, he stated that in his initial statement to the police, he did not state this but he said that the court should believe it as part of his testimony. That the 2nd accused is the one who took the deceased and PW1 to the chief's office and then to the police station. PW4 stated that he saw arrows on the ground at the scene and that the 2nd accused person took the deceased and PW1 to the chief's office. PW5 stated the same thing and further that the 1st, 3rd and 4th accused persons had complained of theft of miraa from their farms. That the 4th and 5th accused persons were not present at his office when the matter was reported. PW6 stated that the 3rd accused person was armed with a whip while the 1st, 2nd, 5th and 6th accused persons had sticks. According to him, the 4th accused person had arrows and sticks. PW7 stated that the 1st and 4th accused persons stopped him while on his way to the market earlier that day and they were armed with a bow, arrows, a panga and a jembe handle. That the 2nd accused person only beat PW1 but did not beat the deceased with a stick. That the 6th accused person was not armed.
54. In their defenses, the 2nd accused stated that he was with DW5 when they found a crowd of people beating the deceased and PW1. That he only played the role of taking the deceased and PW1 to the chief's office and later to the police station. He stated that he did not participate in beating the deceased. The 3rd accused stated that he was sleeping in his house when PW7 told him about the crowd that was assaulting the deceased and PW1 and he caught up with the incident at the chief's office.
55. The 4th accused stated that he was with the 1st accused at his home when they saw light at the farm and when they went out with some arrows and a bow, the people who were in the farm ran away. That later, the 1st accused was informed that the thieves had been caught and they went to the scene and on arrival the crowd that was beating PW1 and the accused stopped beating them and they were taken to the chief's office by the 2nd accused person. That he was dropped off just before Siakago Police Station where the case had been referred and he returned to Nairobi. The 5th accused stated that he was merely a passer-by and did not spend any time at the scene where the 2 boys were being beaten.
56. From the evidence on record, there was indeed a crowd and the prosecution witnesses placed the accused persons at the scene armed with different weapons. The defense testimonies also show that the accused persons were indeed at the scene. I wish to note at this point that PW10 stated that none of the murder weapons were recovered at the scene. Some of the witnesses stated that the sticks that were presented in court as murder weapons are not the ones that were actually used. The pertinent question is, what was each of the accused person's participation in the unlawful act? The 1st accused is the owner of the allegedly stolen miraa and he is said to have been armed with a stick which according to PW1, he used to beat the deceased.
57. The 2nd accused is said to have been armed with a whip according to PW2. PW3 stated that the 2nd accused placed a tyre around the neck of the deceased but this account is a departure from his initial statement to the police. I find this account to be unbelievable since the witness contradicts himself and, in any event, this evidence is not corroborated. PW7 stated that the 2nd accused person had a stick with which he beat PW1 and that he did not beat the deceased. In all the testimonies, the witnesses stated that it is the 2nd accused person who took the deceased and PW1 away from the crime scene to



the chief's office and later to the police station. It is my considered view, in light of the testimony of PW7 that the 2nd accused person did not participate in inflicting injuries to the deceased.

58. The 3rd accused person is said to have been armed with a whip according to PW6. PW1 stated that he also beat the deceased and himself. The postmortem report disclosed that the cause of death was injuries consistent with mob injustice. The case against the 3rd accused person was proved beyond reasonable doubt.
59. PW6 and PW7 stated that the 4th accused person was armed with a bow and arrows but none of them were used to inflict injuries on the deceased. This is corroborated by the testimony of PW9 in his findings on the cause of death. In his defense, the 4th accused person stated that he was indeed with the 1st accused person at his shamba where there was movement consistent with miraa theft and that he accompanied him to the shamba with some arrows and a bow. That he was still in the company of the 1st accused person when he was called to the scene of the crime, where PW7 stated that he saw the 4th accused person with a bow and arrows and sticks. PW5 stated that the 4th accused person was not at his office when the matter was reported and, in his defense, he stated that he was finding his way back to Nairobi.
60. The postmortem report stated that the deceased suffered bruises on his trunk and limbs and that the cause of death was severe injuries consistent with mob injustice but did not disclose any injuries by arrows. Several prosecution witnesses stated that the clothes of the deceased did not have blood on them but they were just dusty and that the deceased did not have any injuries by arrows. Considering the evidence available, the 4th accused person was indeed at the crime scene but he did not participate in inflicting the fatal injuries on the deceased.
61. PW6 stated that the 1st, 5th and 6th accused persons were armed with sticks. It was the 5th accused person's defense that he was a passer-by on the road where the scene of crime was and that he did not stop at the scene but he saw the young men being beaten. PW7 stated that the 5th accused person had an arrow and it was on the ground next to him. PW5 stated that the 5th accused person was not at his office when the matter was reported. I do not think that the evidence against the 5th accused person meets the required standard given the inconsistent testimonies.
62. As for the 1st accused person, there is sufficient evidence to show that he was at the scene and participated in beating the deceased. PW1, PW6 and PW7 stated that he was armed with a stick which he used to beat the deceased. PW5 stated that the 1st accused person was the complainant of the miraa theft allegations and that they went to his office to report the incident. DW5 stated that he saw the 1st accused stepping on the deceased's stomach. I find that 1st accused person participated in inflicting the fatal injuries to the deceased.
63. PW7 stated that the 6th accused person was not armed with any weapon. However, PW1 and PW6 stated that he was armed with a stick and he was among the people beating the deceased and himself. It is therefore my view that, the 6th accused person participated in inflicting fatal injuries on the deceased.
64. Having associated the 1st, 3rd and 6th accused persons with the death of the deceased, it is now important to ascertain whether they 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.”

65. 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.”

66. 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.)”

67. PW1 stated that the 1st, 3rd and 6th accused persons beat him and the deceased randomly all over their bodies. PW5 and PW10 stated that the deceased was beaten all over his body and even though he was



not bleeding visibly, he seemed to be in bad shape. DW5 stated that the 1st accused was stepping on the deceased's stomach. From the evidence, they were armed with sticks and a whip, which were used to inflict injuries on the deceased. PW9 testified on the cause of death and the injuries that led to the said death, which testimony has been repeated hereinbefore. The injuries were internal and from the description of the prosecution witnesses of how the same were inflicted, the 1st, 3rd and 6th accused persons intended to cause grievous harm on the deceased given that he had been accused of stealing the 1st accused person's miraa.

68. The court has considered the evidence in its totality as well as the relevant laws and hereby finds as follows:

- a. The case against the 2nd, 4th and 5th accused persons was not proved beyond reasonable doubt and they are hereby accordingly acquitted of the offence of murder contrary to section 203 of the Penal Code; and
- b. The prosecution has proved the case against the 1st, 3rd and 6th accused persons beyond reasonable doubt. They are hereby convicted of the offence of murder contrary to section 203 of the Penal Code

69. It is so ordered.

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

L. NJUGUNA

JUDGE

.....for the State
.....for 1st Accused Person
.....for 2nd Accused Person
.....for 3rd Accused Person
.....for 4th Accused Person
.....for 5th Accused Person
.....for 6th Accused Person

