



**Republic v Mwenja & 5 others (Criminal Case 4 of 2018)  
[2023] KEHC 20818 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 20818 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL CASE 4 OF 2018**

**LW GITARI, J**

**APRIL 13, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NKONYE MAKEMBO MWENJA ..... 1<sup>ST</sup> ACCUSED**

**EDWARD NYAGA MURIITHI ..... 2<sup>ND</sup> ACCUSED**

**HARON KIMATHI MUBIRU ALIAS KILONZO ..... 3<sup>RD</sup> ACCUSED**

**PATRICK MUTHUI KAIBIRU ..... 4<sup>TH</sup> ACCUSED**

**JOSEPH MURIUNGI KAMWARA ..... 5<sup>TH</sup> ACCUSED**

**JOVANAH NCUGU ..... 6<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* (Cap 63 of the Laws of Kenya). It was alleged that on 9<sup>th</sup> October 2017 at Kamatindi village, Mauthini sub-location of Kanjoro location, Tharaka North sub-county within Tharaka-Nithi County, the accused persons unlawfully murdered one Nyaga Makembo (the “deceased”).
2. The accused persons were all assessed and found to be mentally fit to stand trial. They all pleaded not guilty to the offence and the matter proceeded to full trial with the prosecution calling a total of 9 (nine) witnesses. On the other hand, all the accused persons testified in defence of the case against each of them respectively. Below is a summary of the respective cases by the parties.



## The Prosecution's Case

PW1 was James Mutwiri Kaibiru, a neighbour to the deceased in Kanjoro location. He recalled that on the material day between midnight and 1.00 a.m., he was heading to his home having come from the home of his aunt, one Karimi. As he was passing by the deceased's home, he saw light emanating from around 4 – 5 torches around the granary structure that the deceased lived in. According to him, most people in that area stay in such structures.

3. PW1 stated that he got surprised after seeing the lights as the deceased used to live alone and it was unordinary for someone to be awake at such an hour. PW1 went to find out what was happening. He moved closer to the deceased's granary and saw a crowd of people. According to PW1, he recognized the voices of Jovanah Ncugu (6<sup>th</sup> Accused person herein), Muriungu (the 5<sup>th</sup> Accused person herein) and Kilonzo (who he stated was the 4<sup>th</sup> Accused Person herein but the record shows that he is the 3<sup>rd</sup> Accused Person).
4. He stated that he heard the 6<sup>th</sup> Accused person asking what was inside the granary and the 2<sup>nd</sup> Accused told her that there were sacks. That the 2<sup>nd</sup> Accused person offered to remove the sacks for the 6<sup>th</sup> Accused to view the place. PW1 further stated that he saw 2<sup>nd</sup> Accused removing the sacks from the granary and giving them to the 3<sup>rd</sup> accused person who in turn handed them to the 6<sup>th</sup> Accused person. That he could see them clearly as there was light from torches they had.
5. It was PW1's testimony that there were other people standing near the granary including a woman and 3 other person who PW1 could not recognize as they were standing beyond the range of the light from the torches. He identified the sacks presented before court as the sacks that were removed from the said granary on the material day. According to him (PW1), he thought that there was an incident of theft going on only to be shocked when he heard the 6<sup>th</sup> Accused person ask "Umemaliza kabisa?"
6. PW1 stated that the 6<sup>th</sup> Accused person then stated "*Ulikuwa umesema wewe ni ndume ya wanaume. Umekutana na dume wa kike. Mpaka uamki tena.*" It was PW1's testimony that at that point, he got scared for his life, retreated slowly, and went to his house, leaving the accused persons at the scene. That the following day, PW1 received information that the deceased was murdered and 3 days after the material night, he went to his neighbour's house, one John Mutura, and told him what he had witnessed on the material night. That he also reported to the area chief on the same day.

In cross-examination PW1 stated that the 1<sup>st</sup> accused and the deceased had a land dispute, that 1-6 accused are from the dame family. He testified that he did not see the 1<sup>st</sup> accused.

7. PW2 was John Murithi Muiru. He knew the deceased as he was his immediate neighbour and also knows all the accused persons by name. He recalled that on 6<sup>th</sup> October 2017 at 1 p.m., the deceased called him together with other people to go witness the resolution of a land dispute at the office of the area assistant chief. That the assistant chief sent the area manager and committee member to represent him in the meeting. That the meeting started but the 6<sup>th</sup> Accused, her son, and the 6<sup>th</sup> Accused raised objections to the meeting being held in the absence of the sub chief. That the meeting got disrupted as one Musyimi beat John Mutura (PW4) on the head before him and Murimi Nkonye (1<sup>st</sup> Accused's son) chased John Mutura away. That PW4 then ran away. That Musyimi and Murimi Nkonye then went back to where they had assembled for the meeting and they chased the deceased towards his home as the 6<sup>th</sup> Accused encouraged them to follow the deceased. That the deceased, Tuathi, and the area manager then took off and were pursued to the granary. According to PW2, Mutura (PW4) made a report to the police who came and took Murimi Nkonye and Musyimi to the police station.



8. It was further PW2's testimony that on the material night at around 1 a.m. he was sleeping when he heard his dog barking. He went to find out what was happening and saw people with spot lights. That the people moved from the deceased's home, approached his home, then went to the home of the 1<sup>st</sup> Accused which is next to PW2's home. It was PW2's testimony that he could hear the people talking but could not make out what they were saying. That he saw a person who also had a spot light going to the home of the 4<sup>th</sup> Accused. PW2 stated that he went back to his home and the following day, one Gitonga went to PW2's home and told him that the deceased had been killed.
9. PW3 was Julia Karimi Nyaga, the widow of the deceased. It was her testimony that on the material day, the deceased left their home and went to his farm. That the said farm has a house where one could stay. That the deceased did not return home on that day and on 10<sup>th</sup> October, 2017 at around 11 a.m., she went to the farm. She saw one Murithi who asked her to go to his house. That she was reluctant at first but finally decided to go. They boarded a motor bike and on the way, they met Gitonga who informed her that the deceased had been killed. They then proceeded to the scene where they found the deceased lying on the ground dead outside the house he was staying in.
10. PW4 was John Mutura Gaichu. He stated that he knew the deceased as his immediate neighbour in his home at Kamasabi. That he also knows all the accused persons. That on the material day, he passed the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons on his way. That he was apprehensive as they had threatened him on 6<sup>th</sup> October, 2017 over a land dispute between the deceased and the 1<sup>st</sup> Accused. That the 2<sup>nd</sup>, 4<sup>th</sup>, and Mucheni are the ones who chased him away with arrows and machetes and he had to go to sleep in a different location. On 10<sup>th</sup> October, 2017, he was called by John Murithi (PW2) who informed him that the deceased had been killed.
11. PW4's testimony was that on 28<sup>th</sup> October, 2017, he found the 6<sup>th</sup> Accused grazing her cows on his farm. That on inquiring why she was doing so, the 6<sup>th</sup> Accused told him that the plot was not his. That if he ploughed the farm, "*Nyaga Makemubu naye atalima.*" According to PW4, the 1<sup>st</sup> Accused also passed by his home later the same evening and told him, "*Wewe Mutura mjinga sana. Wewe kaa hapo tu utajionea mwenyewe ukilima, Nyaga Makembo atalima pia.*" That on 29<sup>th</sup> October, 2017, he went and reported the incident to the police station. On cross examination, PW4 testified that there had been a dispute between him and the 1<sup>st</sup> Accused but the same had been resolved by the chief.
12. PW5 was Josphat Nkonde Muceke. It was his testimony that on the material day at around 6 p.m., he went with the deceased to the shops and bought sugar while the deceased bought tea. That on their way back, he heard people talking in a homestead and went there thinking they would find alcohol. That they reached the homestead and found that the alcohol was finished. They then went on their home. That when they reached the junction that separated their homes, they both went their separate ways and the following morning at around 8 a.m., an elder by the name Olimpio went to PW5's stating that he had gone to wake the deceased but he was not waking up. PW5 states that he accompanied the said Olimpio to the deceased's home where they found the lying on his back facing up with blood and foam oozing from his mouth. That the two then went to a lady called Kamunda and found her with her son Muriithi. They told them that the deceased was dead. That the said Murithi then took his motor bike and returned shortly with his wife.
13. PW5 recalled that on the previous day (8<sup>th</sup> October, 2017), the 1<sup>st</sup> Accused found him and the deceased drinking under a tree in the deceased's home. That one Mwathi was also with them. According to PW5, the 1<sup>st</sup> Accused stated that he was going to get his land and that the accused was going to know who he (the 1<sup>st</sup> Accused) was. On cross-examination, PW5 denied knowing PW1 stating that he did not know of any neighbour by the name James Mutwiri Kaibiru.



14. PW6 was Moses Kimathi Nyaga Gaicho, the deceased's son. It was his testimony that he knows all the deceased's persons as they are his neighbours. That he received information about his father's death on 10<sup>th</sup> October, 2017 and that some maize, green grams, and other things had been stolen when the deceased was killed and that on 12<sup>th</sup> October, 2017 at around 8 p.m., he received a phone call informing him that 3 sacks of green grams belonging to the deceased had been found. On 13<sup>th</sup> October, 2017, he went to the home of one Rwanda and found one Makunyi. That the said Makunyi accompanied by one Mwathi Mubiro took PW6 to the scene where the aforementioned sacks were found.
15. On reaching Nkonde Mucheke's home, which was a few metres from the home where the deceased was killed and found 3 bags of green grams each containing 25-30 kilograms. That PW6 checked inside the bags and found an old 1 kg tin which he identified as belonging to the deceased. That he identified the tin as it had the initials "JT" which according to him meant Japhet. It was his testimony that the sacks were hidden in a heap of sticks. PW6 then carried away the bags and called one Inspector Kyalo of Makutano Police Station who instructed him to take the bags to the police station and record his statement.
16. PW7 was Peter Mauki, another son of the deceased. He stated that he knows the accused persons as they are their neighbours since childhood. That they had all lived peacefully until June 2017 when a land dispute arose. According to him, the deceased had leased some land to one Gikathi Gaichu but the 1<sup>st</sup> and 2<sup>nd</sup> Accused started claiming that the leased land was theirs. That a meeting was to be held on 6<sup>th</sup> October, 2017 to attempt to resolve the dispute but the 1<sup>st</sup>, 2<sup>nd</sup>, and 6<sup>th</sup> accused persons together with one Musyimi and Murimi chased away the members of the committee as well as the deceased. That the deceased reported the incident at Makutano Police Station and Murimi and Musyimi were arrested the same day and charged at Marimanti Law Courts for vandalizing the property of Mutura (PW4). PW7 later received information on 10<sup>th</sup> October, 2017 that his father had been killed. He proceeded to the scene from Maua and found his father's body still at the scene. The police later came and took away the body. PW7 witnessed the postmortem examination that was conducted at Meru Level 5 Mortuary. He identified the body and according to him, there was a stab wound below the deceased's jaw. On cross-examination, he stated that it is the deceased who informed him of the meeting that was scheduled for 6<sup>th</sup> October, 2017 as well as the events of that day.
17. PW8 was Charles Kyalo Mayeke, an inspector of police in charge of Mukomothima Police Post. He recalled receiving a phone call on 10<sup>th</sup> October, 2017 from the OCS Makutano, CIP Wairagu. He was informed of the subject incident and instructed to visit the scene. We went to the scene accompanied by two policemen. They found the deceased's body lying a few metres from a semi-permanent granary which was grass thatched. It was his testimony that the deceased's body was facing up and there was a blood stained blanket (P. Exhibit 3), a blood stained stone (P. Exhibit 4), two bottles of pesticides and two 2 litres jerry cans at the scene. He interrogated the neighbours who were at the scene, took some photographs, and took the deceased's body to the mortuary.
18. PW8 then recorded the statements of the witnesses and the accused persons herein. That it is on 3<sup>rd</sup> November, 2017 that he managed to arrest the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons who had gone into hiding. That he recovered from the 5<sup>th</sup> Accused a sword (P. Exhibit 2), pangas, a knife (P. Exhibit 5), stone of bhang, 40 rolls of bhang and rolling paper. Further, that on 13<sup>th</sup> October, 2017, it is the village elder who recovered 3 sacks of green grams of 40 kilograms each. Finally, that investigation established that there had been a land dispute involving the deceased and the 1<sup>st</sup> Accused herein. On cross-examination, PW8 stated that there were signs of struggle at the scene of the crime as the deceased's shoes were found at a distance from the body.



19. PW9 was Dr. Denis Mugambi. He produced the postmortem report of the deceased (P. Exhibit 6) which was filled on 12<sup>th</sup> October, 2017 by his colleague, one Dr. Michael Ongasi. He stated that he was conversant with his colleagues' handwriting and signature. He testified that the body of the deceased had a cut wound on the lower mudible measuring 4x6 centimetres, the lung was punctured and there was blood in the chest cavity. There was fracture of 2,3 and 4 ribs on the right side. There was shrinking of the spleen due to blood loss. He formed the opinion that the cause of death was due to massive blood loss from the raptured liver due to massive force – blunt trauma to the chest.

### **Defence Case**

20. The 1<sup>st</sup> Accused testified as DW1. He denied killing the deceased stating that on the material day, he went to look after his cows and then returned home and slept. That on 10<sup>th</sup> October, 2017, he responded to summons by the sub-chief but the sub-chief never went to his office. That he decided to go back home and it is on his way that he received the news that the deceased had died. The 1<sup>st</sup> Accused further denied that he went to the home of the deceased on the material day or even see him. That he never had a grudge or land dispute with the deceased as they were in-laws. That the only land dispute that he had was with one Iguna Kamwana. On cross examination, the 1<sup>st</sup> Accused also denied that there was a meeting on 6<sup>th</sup> October, 2017. That the area chief wanted to evict him from his land.
21. The 6<sup>th</sup> Accused testified as DW2. She is the wife to the 1<sup>st</sup> Accused. She also denied killing the deceased stating that on the material day, she woke up, removed charcoal and started burning it in their farm compound which they had received threats of eviction. That she worked until 4 p.m. and went to sleep at 10 p.m. it was her testimony that she never left the house on the material night. That further, she never saw the dead body of the deceased but only came to learn about it when she was arrested and charged.
22. The 2<sup>nd</sup> Accused testified as DW3. He denied the charge of murder of the deceased stating that he was at home on the material day in the evening. That he was repairing a goat pen with his wife, one Charity Kathera. He denied that PW1 saw him on the material night stating that he was being implicated by PW1 because he had married to that family and PW1's father, Igura Kamwara, had a land dispute with the family. That he did not know when the deceased died and only came to learn about it from the charge sheet. He that he heard about the deceased's death on 10<sup>th</sup> in the evening and denied that he had fled from the area. He further stated that none of the items that were produced as exhibits were recovered from him. He denied having a grudge with either PW1 or PW2 stating that he was only charged because he is married to the family of the 1<sup>st</sup> Accused and all his in-laws were charged.
23. The 3<sup>rd</sup> Accused testified as DW4. He is the biological son to the 1<sup>st</sup> Accused and DW2. He denied the charge herein stating that he lives in Mitunguu which is about 60 kilometres from the scene and that he had stayed for 3 years without visiting Kanjora. That he stays with the 5<sup>th</sup> Accused at Mitunguu and PW1's evidence is a fabrication. According to him, PW1's father had a land dispute with the 1<sup>st</sup> Accused and they implicated the family of the 1<sup>st</sup> Accused so that they could put them to jail and utilize the disputed land. Further, it was his testimony that the 1<sup>st</sup> Accused never had a land dispute with the deceased. He stated that he was at a quarry in Mitunguu on the material day and thus maintained that he was framed.
24. The 4<sup>th</sup> Accused testified as DW5. He stated that he lives with his grandfather (the 1<sup>st</sup> Accused herein) and the 6<sup>th</sup> Accused. That he was at home with the 1<sup>st</sup> and 6<sup>th</sup> Accused on the material day. That the 1<sup>st</sup> Accused went to heard goats while the 6<sup>th</sup> Accused was digging out charcoal she had burned. He stated that him he was ploughing the farm and that in the evening, the 1<sup>st</sup> Accused came, and they all had



supper and then slept. That the following morning, he heard of the passing of the deceased but did not know the cause. The 4<sup>th</sup> Accused stated that he was not aware of any dispute between the deceased and the 1<sup>st</sup> Accused. He further stated that on 6<sup>th</sup> October, 2017, there was to be a meeting involving Mutura (PW4) and the 1<sup>st</sup> Accused over a land dispute and the assistant chief was meant to come for that meeting but failed to. That Mutura then insisted that the dispute should be resolved by fixing the boundary and then a commotion erupted between Mutura, and the last born son of the 1<sup>st</sup> Accused as Murimi and Musyimi. It was his testimony that those involved never fought but Mutura called the police and Murimi and Musyimi were arrested.

25. The 5<sup>th</sup> Accused then testified as DW6. He is a son –in-law to the 1<sup>st</sup> Accused as he is married to the daughter of the 1<sup>st</sup> Accused. He stated that he lives near the home of the 1<sup>st</sup> Accused. That on the material day, he was at Mitunguu and not Mautini. That he last visited Mautini in 2013 and has never had an interest in the land of the 1<sup>st</sup> Accused. It was his testimony that on the material day, he was with the 3<sup>rd</sup> Accused in his house. That they stayed up until 8 p.m. and then slept. That he only came to know of the murder of the deceased when he was arrested.

### **The Submissions**

26. It was submitted by Mr. Mutahi, the learned counsel for the 1<sup>st</sup> and 6<sup>th</sup> Accused persons that the prosecution had failed to prove their case against all the accused persons to the required standard of beyond any reasonable doubt. That the evidence of PW1 is not that of an eye witness. That the identification of voices by PW1 was not sufficient. Further, that no other witness called by the prosecution was at the scene and therefore no credible evidence as to who could have murdered the deceased. According to Mr. Mutahi, there were very many factors that could have led to the death of the deceased as he used to sell illicit brew at night. Mr. Mutahi thus urged this Court to accept the explanation given by the accused persons and acquit the 1<sup>st</sup> and 6<sup>th</sup> Accused.
27. On his part, Mr. Kijaru, learned counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons opted to rely on the evidence by the accused persons.
28. On the other hand, it was submitted by Ms. Maari, the learned counsel for the State, that the prosecution had established its case and proved beyond any reasonable doubt. That the evidence of PW1, PW2, and PW7 place the accused persons at the scene and point to them going to the home of the deceased while armed. That meeting to resolve a land dispute did not materialize on 6<sup>th</sup> October, 2017 and the deceased was murdered 3 days later. According to Ms. Maari, the evidence shows that the murder of the deceased was related to the land dispute. That as such, the accused person should be convicted of the charge.

### **Issues for determination**

29. This Court is called upon to decide whether the accused persons herein are guilty of the offence of murder. Section 203 of the *Penal Code* (Chapter 63 of the Laws of Kenya) defines the offence of murder and requires proof of the following elements for the offence be established:
- a. death of the deceased,
  - b. cause of death of the deceased,
  - c. an unlawful act or omission on the part of the accused resulting in the death of the deceased,
  - d. malice aforethought on the part of the accused.



30. From a reading of Section 203 of the *Penal Code* the following are the main issues that arise for determination by this Court:
- a. Whether there is proof of the fact and cause of death of the deceased; and if so,
  - b. Whether the accused persons caused the death of the deceased; and if so,
  - c. Whether the acts of the accused persons, resulting in the deceased's death, qualify as murder (intentional killing)

## **Analysis**

### **a. Proof of fact and cause of death of the deceased**

31. On the fact of death, the testimonies of PW3, PW7 and PW8 prove that the deceased did die as they all witnessed the lifeless body of the deceased. PW3 and PW8 visited the scene where the deceased's body was found while PW7 witnessed the post-mortem examination being done on the deceased's body.
32. On the cause of the death of the deceased, PW9 confirmed that on examination of the deceased's body, Dr. Michael Ongasi, who was the examining doctor formed the opinion that the cause of the deceased's death was due to massive loss of blood from the ruptured liver due to massive force caused by a blunt trauma to the chest.

### **b. Proof that the accused persons committed the unlawful act that led to death of the deceased**

33. In this case, PW2 stated he went outside his house on the material night and saw people with spot lights. That the unidentified persons moved from the deceased's home, approached his home, then went to the home of the 1<sup>st</sup> Accused which is next to PW2's home. That the people were talking but he however could not make out what the people were saying. On the strength of PW2's testimony, doubt was cast on the recognition and identification of who the people he saw were. This leaves the evidence of PW1 who was the star prosecution witness and the only witness who alleged to have identified and recognized the accused persons at the scene.
34. I have considered the holding in the case of *Kiragu v. Republic* [1985] eKLR, where the court expressed itself as follows on the issue of considering the evidence of a single eyewitness:
- “It is trite law that subject to certain well known exceptions a fact may be proved by the testimony of a single witness however in exercise of its duty this Court has to satisfy itself that in all the circumstances of the case, it is safe to act upon it.”
35. The same position was taken in the case of *Abdala bin Wendo and another v R* [1953] 20 EACA166 the court stated that:

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of single witness, can safely be accepted as free from the possibility of error.”



36. In this case, it was PW1's testimony that he recognized the voices of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused. He however never saw any of them killing the deceased. He only alleges to have seen the 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Accused persons collaborating to remove sacks with loads from the deceased's granary and came to learn of the deceased's death the following day. The subject incident was stated to have happened between midnight and 1.00 a.m. according to the testimonies of PW1 and PW2.
37. Before considering the voice identification, this court must again be careful to ensure that the evidence tendered is safe and free from error. In *Simon Kiptumarap Choge & 3 others v. Republic* [1985]eKLR, the Court of Appeal set out the conditions for voice identification when it stated as follows:
- “In relation to the identification by voice, care would obviously be necessary to ensure:
- (a) that it was the accused person's voice
  - (b) that the witness was familiar with it and recognised it and
  - (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”
38. Similarly, in *Karani vs. Republic*,(1985)KLR 290, the Court of Appeal addressed itself as follows:
- “Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, than the complainant was familiar with the voice and that he recognized it and there were conditions in existence favouring safe identification.”
39. Considering that the incident took place sometime after midnight, the source of light at the material time is important to identify. PW1 stated that he did not see the deceased in the granary as it was dark but not very dark. It was also PW1's evidence that he could see the accused persons clearly as there was light coming from the torches that the accused persons had carried. PW2 testimonies corroborated PW1's that the source of light was from torches.
40. On whether PW1's recognition of voices of the people at the scene was free from error, it is notable that first, all the accused persons herein are related as they come for the same family. Secondly, the testimonies of PW6 and PW7, sons of the deceased, confirmed that the deceased was a neighbour to the 1<sup>st</sup> and 6<sup>th</sup> Accused persons. Thirdly, PW1, PW2 and PW5 confirmed that they also knew the deceased as their neighbour and that they also knew the accused persons as they all lived in the same village. Finally, PW1 gave the exact words that he heard the 6<sup>th</sup> Accused uttering. Given this background, it is believable that PW1 could have recognized the voices of some of the people he saw outside the deceased's granary on the material night considering that he was at a distance of around 9 – 10 metres from them.
41. However, PW1's evidence did not place the 1<sup>st</sup> and 4<sup>th</sup> Accused persons at the scene of the crime. Save for PW1 stating that he recognized the voice of the 5<sup>th</sup> Accused at the scene, neither the evidence of PW1 nor that of PW2 provided details on what the 5<sup>th</sup> Accused did at the crime scene. PW1 also did not state anything that the 5<sup>th</sup> Accused said at the scene. In their defence, the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons maintained the defence of alibi. That they were together on the material night in their homes in Mitunguu which is not close to the crime scene. The 5<sup>th</sup> Accused stated that he was being implicated in this matter because he is the son-in-law to the 1<sup>st</sup> Accused. Their defence of alibi was however not raised at the earliest opportunity and neither was it substantiated by any evidence. In my view, the same was an afterthought.



42. Section 21 of the *Penal Code* provides that:

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

43. Section 21 of the *Penal Code* therefore recognizes the act being complained must be executed in furtherance of common intention. The doctrine of common was observed in the cases of *Rex v Kyeyane Mikaeri & Others* [1941] 8 EACA 84 and *Rex v Tabulayenka s/o Kirya & 3 others* [1943] 10 EACA 51, where the courts stated that:

“Where a mob sets upon a suspected thief and beat him to death, every person following the mob would be deemed to have formed a common intention with the rest to kill the thief, and would be liable for murder. it was stated that it is not necessary that there should have been any concerted agreement between the arrested persons prior to the attack on the so called thief.”

44. None of the witnesses, including PW1, saw how the deceased met his death. The prosecution relied fully on circumstantial evidence. This brings the issue of the justifiability of relying on circumstantial evidence. The test to be met with here was laid out in the Court of Appeal case of *Sawe vs Republic* [2003] KLR 364, where it was stated that:-

“In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.”

45. The standard of proof in criminal cases being one that is beyond any reasonable doubt, it is my view that the prosecution proved that the accused persons formed a common intention to kill the deceased and their collective acts and omissions on the material day did lead to the death of the deceased.

### **c. On whether there was malice aforethought**

46. It is trite that “malice aforethought”, is the criminal mind for has to be established for a conviction for the offence of murder to be sustained. Pursuant to Section 206 of the Penal Code the evidence tendered by the prosecution should prove any one or more of the following circumstances for malice aforethought to be established:

- “(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



47. PW9 who testified on behalf of Dr. Michael Ongasi, the examining doctor, noted from the post-mortem report that there was a cut wound on the deceased's lower mandible measuring 4 x 6 centimetres. That his lung was punctured and there was blood in the chest cavity. Further, that there was fractures of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> ribs on the right side. According to PW3 who visited the scene the morning after the material night, the neck of the deceased had been slaughtered and some plant chemicals sprayed on him. Their evidence were corroborated by the testimony of PW8 who stated that that the deceased's body had foam oozing from the mouth which was blood stained. That the body also had a strong smell of pesticide which still smelled on P. Exhibit 3, the blanket which was recovered at the scene. From the said injuries, and the evidence of PW5 that he had been with the deceased earlier that night, it is clear that the deceased must have died a painful death. Malice aforethought demonstrated by the nature of the injuries which prove that the intention was to cause the unlawful death of the deceased
48. PW2 and PW4 stated there was a land dispute between the 1<sup>st</sup> Accused and deceased in this case. PW3 corroborated PW1 and PW2's testimonies that there had been a land case between the deceased and the 1<sup>st</sup> Accused. That a meeting was to be held at the farm on 6<sup>th</sup> October, 2017 before the elders but the same did not take place. That she later recovered green grams in the farm of one Nkonde. They were in a 1 kg gram tin which she apparently recognized as hers. In my view, the items stolen from the granary were taken to cover up the unlawful killing of the deceased.

### **Conclusion**

49. The standard of proof in criminal cases being one that is beyond any reasonable doubt, it is my view that the prosecution did prove its case against the accused persons. I therefore find the accused persons guilty as charged and I convict them

### **Sentence**

I have considered the mitigation. This offence is no doubt serious. The deceased died a painful and cruel death in the hands of the accused for no good reason. A sentence to discourage the offence is called for.

I have also noted the mitigation that they are from the same family and have been in remand for a very long time. Taking all these into account I will consider a custodial sentence and save the accused the mandatory death sentence. I sentence each accused to serve eighteen (18) years imprisonment. The sentence be reduced by the period spent in remand that is from 5/1/2018 to date. Right of Appeal in 14 days explained.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF APRIL 2023.**

**L.W GITARI**

**JUDGE**

**13/4/2023**

The Judgment has been read out in open court in presence of Mr. Mutani for 1<sup>st</sup> & 6<sup>th</sup> Accused

Mr. Kijaru for 2<sup>nd</sup> & 5<sup>th</sup> accused – Absent

**L.W. GITARI**

**JUDGE**

**13/4/2023**

