



REPUBLIC OF KENYA



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**Republic v Nchebere & 2 others (Criminal Case 8 of 2016)  
[2023] KEHC 3214 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3214 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 8 OF 2016  
EM MURIITHI, J  
APRIL 12, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SAMUEL KINYUA NCHEBERE ..... 1<sup>ST</sup> ACCUSED**

**DANIEL KAREITHI NCHEBERE ..... 2<sup>ND</sup> ACCUSED**

**DICKENS MUNGATHIA KARIGI ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. Samuel Kinyua Nchebere, Daniel Kareithi Nchebere and Dickens Mungathia Karigi (“the accused”) were arraigned before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 3/1/2016 at Mulika Shopping Centre in Tigania East Sub-County within Meru County, jointly with others not before court, murdered Simon Mungathia Kagwima.
2. The accused denied the charge and the prosecution called 7 witnesses to prove its case.

**Evidence**

3. PW1 Sammy Kirimi Remmy testified that –

“On 3/1/2016 at 8:00 am I woke up at home in Westlands, Meru Kunati market. I went to work at cess point at Mlango area. I worked there upto 6:00 pm when I closed the office. I went to Mikinduri and went to a barber shop belonging to my cousin, Kilowest kinyozi. As I was going there I found a flash back message on my phone. It was from Simon Mungathia. I called him at about 6:30pm. He asked me where I was. I informed him that I was at Mikinduri on my way to Mulika. He told me to wait for him to accompany me to Mulika to



go and treat my two boys who had been circumcised. The boys were aged 18 and 20 years. At the time Simon Mungathia was a doctor. I waited for him and he came after a short while. We took a boda boda from one Kinoti and paid Kshs. 300/= to take us to Mulika Market. We went to a pool table place operated by one Mutembei. We stayed there up to 7:00pm when we left to go to my home. At about 8:30 pm after we had taken supper I gave Mungathia Kshs 3000 to buy food for the boys. He was to give the money to the boy's mother one Kangai. Mungathia left and I remained with my wife Purity Kananu. On the following day on 4/1/2016 at 8:30 pm in the morning I left home on my way to the main stage at Mulika. I called Simon to enquire about the state of the circumcised boys but his phone did not go through. At 9:00 am I saw many people at the stage going in different directions. I asked from one "Cobra" what had happened and he told me that there was a dead person at road side trench, I went to scene . I saw that it was the Doctor Simon Mungathia who I had been with in previous night. There was blood on the head and there was blood on his clothes and he was dead. There was one other person called Muriuki who knew him and I asked him to accompany me with "Cobra" to report at Mulika Police Station. I gave CID officers the number of the deceased so that it could help in their investigations. On 5/1/2016 at 6:00pm. I received a call from Pastor Mutethia Jeremano who told me that there was a possibility the people who killed Simon were Kareithi, Kinyua and Dicken. I knew all three name. They are the 3 before the court as accused. I knew them before, the 1<sup>st</sup> accused is Kinyua. He used to sell Miraa at the market Mulika. The 2<sup>nd</sup> accused is Kareithi. He is a brother to Kinyua the 1<sup>st</sup> accused. The 3<sup>rd</sup> accused is Dickens and he too is a Miraa businessman. I later recorded statement at the Flying Squad Police."

4. On cross examination, he stated that:

"When I gave the deceased Ksh.2200, I did not know where he went to. While we were with him, I never met the accused persons. The only evidence is what I was given by the two persons."

5. PW2 Patrick Kairethia Ntarandu testified that:

"On 3/1/2016 at 11:30 pm in the night I had come from work as mechanic which I closed at 7:00pm. I got home at 7:00 pm. I went to shop and bought foodstuff. At 11:30pm, Kinyua came to Kareithi whom I stayed within the plot. I was then in the house. I heard the noises from the back of the house. The noise I heard belonged to Kinyua calling Kareithi. He was using Kimeru language. They spoke while outside the house for about 5-10 minutes. I did not hear what they said because I was inside the house. I heard Kinyua asking Kareithi to give him a panga. After asking for the panga. He stayed for a while and then Kareithi asked his wife to lock door so that he could follow his brother to see where he had gone with the panga. At this time, my employer had bought a motor bike and he had had an accident and broken his shoulder. As he had a shop in the front side of the plot I decided to go and check on the door as I thought someone may come in to the shop. On the following day 4/1/2016 at 9:00 am I heard had a doctor by the name Simon had been killed. I stayed with Kareithi in the same plot. I knew Kinyua as a Miraa seller at the market. I had known him for 10-11 months. Kinyua is the accused No. 1 dressed in white shirt and red Jacket (points). I knew Kareithi for a longer time. It is about the same time as with Kinyua, 11 months. I recorded my statement at the police station.



6. On cross examination, he stated that:

“I lived with Kareithi in the same plot. My house was the 3<sup>rd</sup> from Kareithi house. The distance is from the witness box to the door of the court (4 meters). The houses are brick construction. One could hear people talking in the other houses but not get what they were saying. A person could hear the conversation but not what they were saying. I heard Kinyua talking. I was inside my house. I heard his voice. I heard the voice was Kinyua’s. I went out of the house. I had a torch. I saw him calling Kareithi as I had a torch. [You have changed your evidence from which you said in Chief? What is truth?] I went out when I was going to the garage. I was not long thereafter. I heard Kinyua ask for a panga. [Did you see Kareithi give Kinyua a panga?] No I did not see Kareithi give a panga to Kinyua. When I heard Kareithi say that he had given Kinyua a panga, I was inside my house. I didn’t see Kareithi leaving his house. [You have changed from saying that you heard him say that he would follow to see where Kinyua had gone?] I was inside the house when I heard Kareithi say he would follow. I saw Kareithi leave the house. I saw Kareithi leave the house. I saw Kinyua leaving but I did not see him carrying anything. After sometime. I also saw Kareithi leaving. [Why did you not say so in examination and in the statement?] That is what I recorded in the statement. When Kinyua came to ask for a panga, the house of Kareithi had only Kareithi and his wife. Kinyua joined him to make 3 and Kinyua’s wife was outside the house. I did not hear him talk about anything else other than asking for the panga. I went outside of my house. I did not meet any of the accused. I did not see the 3<sup>rd</sup> accused anywhere that night. I only heard Kinyua’s voice as he came and went. What he said I did not hear.”

7. PW3 Lenny Muriuki Njoka testified that:

“In 2016, I was living at Mulika market in Mikinduri area. I work as a businessman. At Mikinduri, I had a business of shops and hotel. The Hotel was called Morning Star Hotel at Mulika Market Centre. On 2/1/2016 at 11:30pm in the night, I was at the hotel. I was with a few customers and I locked at 11:00pm and went to my home outside the hotel. It is around 500 metres from my hotel. As I went home, I met 2 people on the road I did not speak to them. I did not want to meet with them and I went side to avoid a direct confrontation. I stayed on the other side of the road. I was walking. The 2 people were persons I could not identify. I went aside and did not get to see them well. When I got home, I knocked and the door was opened my wife Joan Kanja. She asked me whether I had heard the fighting which was going on area of the bar. I said I had not heard as my Hotel was far from the Bar called Mombasa Raha. After she told me about the matter. I felt that something was wrong and I decided to go and find out what was going on. I went out to my hotel on arrival, I saw 3 people from a far about 150-200 metres. They were outside my hotel. I could not identify them. After seeing them outside my hotel, I felt that something is either going to happen or was happening. I decided to go and hide in a partly completed building to see what would happen. As I hid in the building. I heard as if people were running. I saw 2 people running. I did not want to wait to see what was happening. I went to a corridor where I could see clearly what was happening. At the point I saw at the market stall-beds outside my hotel 4 people, 2 of whom were sitting aside, 2 were standing. I could not identify them. I did not go close. I saw like there was a commotion like a fight was going on. I stayed there for almost 1 hour. Later, I retreated in the hotel and stayed upto 1:00 pm in the night. When it appeared quiet after peeping through the hotel window curtains I left and went back home to sleep. On the following day 3/1/2016 at 10:00am on Sunday, I woke up and went to my



hotel. I met a friend of mine called Mati and he told me that there was a fight and one person nicknamed Daktari had been killed and that it was a fight between one person called Kinyua and the Daktari. My friend who told me this is one Mati. Kinyua was known to me. He is the 1<sup>st</sup> accused (points at the accused). I knew Kinyua as a Miraa trader. I was his customer for about 4 years. I had met him – Kinyua - after leaving Mati on the road between my hotel and the market. I said hello to Kinyua and we talked. He told me that he had met with people and they had fought. He had a deep cut on the head. I can't remember on which side of the head as it was a long time. I told him to go for treatment. He said he would not go because he had been told that if he went he would be asked for a police form P.3 and he did not want anything to do with police. He told me that he was fighting with Daktari and 2 other people. Daktari is now deceased. I do not know the correct name of Daktari. I only know him a veterinary for cattle and we called him Daktari. I went to the hotel. It's about 2:00 pm. I called the major police officer at Mulika Police Station. I informed him of what I had heard on the matter and I later recorded a statement with the police officers who were investigating the matter. We recorded at Mulika Police station.”

8. On cross examination, he stated that:

“On 2/1/2016, I worked in my hotel and went home. I did not meet the accused. The person I met I could not identify. I had seen the deceased at about 8:00pm but I did not see him when was going home. I met Kinyua on 3/1/2016 the 2<sup>nd</sup> day. I did not meet the other 2 accused. Kinyua is the one who told me that he had fought with the deceased. Mate had also told me that Kinyua had fought with Daktari. I did not see the event I was told by Mate.”

9. PW4 Baariu Julius Kagwima, a teacher testified that:

“On 11/1/2016, I with another police officer from Mulika Police Station called Siko went to Meru Level 5 hospital and we went to the mortuary. I identified the body of deceased who was my brother. He is Simon Mungathia Kagwima. I went to identify the body because even before this date in January 2016 on a date I can't recall my brother Josphat Kaimenyi Kagwiria had called me in the morning and told me that my brother had been killed by some people with whom he used to sell miraa and one of them was called Kinyua. I did not know Kinyua at the time. My brother told me to go to Meru Hospital to confirm whether it was true or false. I then went to hospital and identified the body. This was before the date which I went with the police. I was asked by my family to go with the police and I had gone there and identified my brother earlier. Post mortem was conducted. The body had injuries on the head with dents all one. I later recorded my statement. The doctor said the cause of death was fracture and skull with internal bleeding.”

10. On cross examination, he said “I did not see Kinyua kill the deceased. It was my brother who told me.”

11. PW5 Dr. Kinoti Yvonne, a medical officer at Meru Level 5 Hospital produced the post mortem report on behalf of Dr. Kagosi Trevor. The body was fairly persevered but rigor mortise had set in. The time of death was approximately more than 1 week. There were multiple penetrating injuries to the head including on the right eye-brow, right side of the lower lips, forehead, right cheek and left occipital scalp, and blood was oozing from the right ear. There were also multiple penetrating injuries, lower right incisor, and canine were lost, fracture of right mandible, fracture of right maxilla, bloody right, and linear biparietal. There was hematoma epidural of the brain above in Dura intracerebral hematoma in blood in brain matter. The cause of death was severe head injury with biparietal skull fracture and intracranial bleeding.



12. PW6 Ann Gacheri John testified that:

“On 3/1/2016, I was at my home in the house at Mulika. It was the night of 3/1/2016. I was asleep. My house was near the road. I heard a motor bike come between 1100 -1200 midnight, I peeped out through the wide and saw 3 people. It came and stopped outside my door. It is near the road and I have let out part of it. I thought it was my husband who had come whom we had separated but would come occasionally. I therefor decided to see whether it was him. I saw that it was not him and I went to sleep. At the time I did not know who it was who had come. After sometime I heard someone shaking my door and a torch light shone on the door. I did not speak as I wondered what the person wanted. I then heard people come chasing after each other one of them was asking for his phone and the other replied that he did not have the phone. The motorbike had already gone back before my door was being shaken. The person who was asking for the phone I recognized his voice as Kinyua. He is the accused (points at the 1<sup>st</sup> accused). I then heard a struggle. I heard one person say, “leo utajua sisi ni wanaume.” [You will know that we are men] It was Kareithi who said this. Kareithi is the one in the middle [2<sup>nd</sup> accused points] The person who was being beaten screamed. Kinyua asked him “unapiga nduru usaidiwe na nani.” [You are screaming so that who can help you?]. I heard the person who was being beaten name 3 people asking them why they wanted to kill him. He named Kinyua, Kariithi and Dicken. After that it fell silent, I heard a loud noise as if something had been dropped to the ground. It then fell silent and I did not hear any noises thereafter. At this time, I had woken up and sat up in the bed as I feared. In the morning, a lady came and knocked on my door and asked me why I was still sleeping and there was a body of a dead person by my door. I came out and found there was a body of a man whose clothing had been removed living him with only an underwear and vest. He had stab injuries on the face and head. It also appeared that he had been hit on the forehead with a hearing object. Near him was a stone. I called my brother, Martin Murimi and I told him what happened. He told me to report to the police. I did not call the police because the police had already come. I went to nearby chemist to call my brother as I had no phone. When going back home. I found the police had already arrived. The police took the body. On the following day 5/1/2016, while at my shop at Mulika Market Mr. Kareithi (2<sup>nd</sup> Accused) came and started insulting me and threatening me that they would kill me or take me to Njuri. Njuri is the men elders’ council. When one is taken to Njuri one may be killed. It was Kariithi who said he would take me to Njuri. I went to report the threats. While I was preparing to go and report, a pastor known as Jeremano told me not to go and report the matter. Pastor Jeremano was my pastor and he belonged to Church (East Africa Pentecostal Church) at Mulika. I learnt that he was also pastor for the deceased. I did not know the deceased. I recognized the attackers who were beatings the deceased as Kinyua, Kareithi and Dickens (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused) before the court. It was at night. I was able to recognize them by their voices as I had lived with them since 2004. Kinyua and Kareithi had also rented a parcel of land to me. I used to leave with Dickens as a co-tenant in the same premises. When I got married I used to worship at Kenya Assemblies of God (KAG) and Kinyua and Kareithi were worshippers at the church along with my husband. I later left KAG and went to EA Pentecostal Church. I did not record those matters of the church at the police station. I only told of what happened in the night of 3/1/2016. I did not tell about the Church.”



13. On cross examination, she stated that:

“The road where I heard the motor-bike is a distance of only 2 metres from my house. I peeped from the window when the motor bike came. I did not see the people. I only recognized them by their voices. I knew Kareithi since 2004. Kareithi used to call me in the night at the place where I was before I came to place where the matter happened. I know Kinyua well. I even used to repair clothes of his children. When I had lived with the 2, I could recognize their voices. [What did you identify in their voices?] It was how he pronounce his words. [How does Kinyua speak so that you may know it is him?] I had lived with them for long. I heard someone ask for the phone. It is the person who was being asked for the phone who said “Kinyua sina simu” [Kinyua I do not have the phone]. I did not hear Dicken talk. I only heard the person who was being beaten name Dickson. At this time, I was near the window to listen carefully. When I heard people talk I was at the window. I only heard the voices of the person who being beaten and noise of Kinyua and Kareithi. There were one other noises. I listened for all of them until I heard that they head left. At the time the motor bike came, the people on the bike did not speak. I recorded my statement identify the accused on 5/1/2016. The incident happened on 3/4/January, 2016. It was about a day after the incident. What in the voices could make you identifying Kareithi’s voice? I identified him because the following day he came to threaten me. Is there any incident that could make you not forget his voice? Kareithi used to came and call me in the night at the earlier place of residence. Kinyua was my customer and friend of my husband. When I recorded my statement Kareithi and Kinyua, may have been arrested. I do not know for sure.

14. On re-examination, she stated that:

“The voices of Kariuki and Kinyua I know them for long. The incident took 45 minutes to 1 hour since the motor bike came. The whole incident of calling for the police and the struggles took 30 minutes. Kariithi uses insults like one about going to Njuri. From what did you identify Kareithi’s voice? Kariithi used to say “mimi ni mwanaume” when he was annoyed. When they were arrested, I went to the shamba and found out the maize had been harvested. I later went to the police.”

15. PW 7 NO. 82171 CPL Joseph Gatemu, who previously worked at Flying Squad at Mikinduri Meru, testified that:

“On 4.1.2016 we received a report of the death of Simon Mungathia whose report was made at Mulika Police station. On the following day on 5/1/2016 together with in charge of Flying Squad Unit in Meru C.I. Mangor with PC Makhoha and Cpl Ogandi we went to the Mulika area at Mulika Police station to investigate the matter of death on the night of 3/1/2016. It was said that Simon Mungathia had been killed and discovered on the following day on 4/1/2016 at a road side within the Mulika shopping Centre near an unfinished construction. He had injuries on the head and right eye. We investigated the matter and made a sketch map indicating that at the Mulika shopping centre. There are 2 streets one passing by the market and the other behind the market. In the one behind the market is where the deceased was found. On one side there were living houses and on the other side there is a maize plantation without any buildings. One Kirimi had been arrested by the officer at Mulika Police Station as he had been the last person to be seen with the deceased. We interrogated him. He said the deceased had been at his bar known as Mombasa Raha and he parted with the deceased at about 8:00pm in the evening, when the deceased



said he had gone to taken care of his 2 boys who had been circumcised. Kirimi (PW1) told us that on that day while at the bar Mombasa Raha, Kinyua the 1<sup>st</sup> accused had come into the Bar together with his (Kinyua's) wife and they had quarreled with the deceased about Miraa matters. We recorded a statement from Kagendo Agnes who is an attendant at Bar who confirmed the same. We also recorded a statement from Kinyua's wife, Magdaline Mwenda. I recorded other testimony of Patrick Kariari Therangi (PW2) and his wife, Emma Kathure, who are neighbours of the 1<sup>st</sup> accused (Kinyua) who said that on the night, the 1<sup>st</sup> accused had gone home together with his brother and asked for a panga. The 1<sup>st</sup> accused had been injured on the head. We visited the house of accused and we found at Kinyua's house, all his clothes had been washed including a white vest which had blood stains. At Kareithi house, there were no clothing except those he was wearing at the time of arrest. The neighbours said his wife had left him on the night of 3/1/2016 because of the incident. I went to the scene. Members of the public came to the scene. We found a club which had broken which the people said the 1<sup>st</sup> accused used to carry with him all the time at the market. I also find a neighbor Ann Gacheri who told me that the same night of 3/1/16 at about 12:00 midnight while sleeping she had heard a commotion outside the house and she had peeped from her widow and saw 4 people struggling. She said she had heard the voice of the deceased mentioning the names of the 1, 2, and 3 accused, Kinyua, Kareithi and Dickens, as the one who were beating. I recorded the statement of Ann Gacheri. I arrested the 3 accused the same day on 6/1/2016. I arrested them at Mulika shopping Centre. I did not know him. They were pointed out to me by the owner of the Bar, Mombasa Raha Bar. I interrogated them when I arrested them. They gave contradicting statements. The 1<sup>st</sup> accused (Kinyua) said he had beaten by 3 people while coming from Mombasa Raha; the 2<sup>nd</sup> accused Kareithi said Kinyua had told him that he was beaten while selling miraa to people at the market. After getting the statement and visiting the places of residence we could not recover the panga which the 1<sup>st</sup> accused is said to have called for. After arresting him and interrogating them I preferred the charges. After the postmortem, it was detected that the cause of death was injury from a sharp object consistent with the panga that the 1<sup>st</sup> accused had called for."

16. On cross examination, he stated that:

"At the scene, the body [referring to the sketch map] was 7 meters – 10 metres from Ann Gacheri's house. From my evidence on the statements, it was Ann Gacheri who stated the names of the suspect. I also relied on the evidence of the bar attendants. I asked Gacheri whether she identified the voices of the suspects. She said she had worked with the accused for a long time. Bloodstained vest. The vest had been stained. We did not subject it to blood DNA. The club alleged to have been used by Kinyua is not before the court. Kinyua said the club was his when I showed him the club. We did not recover anything from the 2<sup>nd</sup> and 3<sup>rd</sup> accused's house. I arrested the 1<sup>st</sup> accused at Mulika market. The 2<sup>nd</sup> accused had gone into hiding and we made an ambush. We arrested the 3<sup>rd</sup> accused at the market. 1<sup>st</sup> accused said he had been at Mombasa Raha. The 2<sup>nd</sup> accused said he was at home and he was called by 1<sup>st</sup> accused. The 3<sup>rd</sup> accused was at the market. The 1<sup>st</sup> accused had reported that they had been beaten. The 1<sup>st</sup> accused had injuries and I even took him to hospital. He said he was beaten at the market."

## The Defence

17. When put on their defence the accused presented the following evidence.



18. DW 1 Samuel Kinyua Ncebere testified that he had been attacked by four persons, three of whom he identified, in the evening of 3/1/2016 while on the way home from a bar called Tapers Club and denied that the deceased Simon Mungathia was the person he was fighting with, as follows:

“I come from Mulika Market. Before I was arrested I was a businessman selling Miraa at Mulika Market.

Simon Mungathia Kagwima is known to me but I am not the one who killed.

On 3/1/2016 it was a Sunday that morning, I received a call by a lady called Naomi Mukokinya. She told me that there was miraa she had picked and could not bring to the market and she asked me to go and take it. I left my home at Mulika market where I lived. I took a motor cycle to Kangethia. It was about 7:00am in the morning. I went to Kangethia. I found the lady selling the miraa. She counted the miraa as I emptied into my bag and I took it to my Mulika Market stall where I used to sell miraa. I sold the miraa until 3:00pm. I put the miraa that remained in a bag and went out selling the miraa around the hotels. Bars and shops. I did this until 7:30 pm. At 7:30 pm I went to a bar called Tapers Club. I started taking beer until about 10:00pm. There were many other people. At about 10:00pm, I was found there by Ntarangwi, Mitheu and Martin together with another person whom I did not know. I stayed at the club upto about 10:20 pm. The lights went out. I left after the four people had left. I went home which was nearby. I started walking towards home. On my way home at the stage before I went into my home, I found the 4 people who we were with at the Bar waiting for me. I recognized Martin, Mitheu and Ntarangwi. I did not identify the other person. They attacked me. Martin hit me saying why I had chased away the people they had sent to the shamba. They then hit me with a panga on the head Ntarangwi hit with a panga and he hit me on the head as he hit me with it. Suddenly I saw light from a torch from a distant. Ntaragwi and the other stopped beating me. I rose from where I sat and held on to Martin by his shirt and asked him why they had attacked me. He said that they were beating me because I had refused to allow people to get into their shamba and I had to refund the cost of the money they had used to send the people there.

While still holding Martin by the shirt, Ntarangwi took some money from my pocket. It was 1620 and he said it was not enough to pay for their costs. After about 2 minutes, the person who had a torch arrived. He was a person known to me. He was Mwendia when Mwendia came he came and separated us with Martin. He asked us what the problem was. They said that they wanted me to pay for the 3 days that their people had been chased among from the shamba. The person with the torch is called Mwendia. He told them that they should take me to police station, rather than beating me and it was a small problem which could be resolved. The people left me and went. They refused to take me to hospital saying I was the one who chased away their people from the shamba.

Mwendia and I went to my house at Njoka Investment. I told my wife Mwendwa Magdaline about what had happened. We went to the police station about 10:40 pm. It was at Mulika Police Station. It was Mwendia, my wife Mwendwa and I who went to the police station.

I reported about the matter of my attack by 4 people one of whom had left three beating me and they had taken my money. I recorded the matter in the O.B. The O.B was for robbery. It was on 3/1/2016 at 11:00 pm in the night. When we finished reporting, we went back home. This was sometime after 11:00pm.

I never left home after this. It was raining. I could have gone to hospital if it had not been raining. I lived with Magdaline Mwendwa.



I never met the deceased that night. On that night I did not see the accused Kareithi and Dickens. I did not even see them in the morning.

On 4/1/2016, I woke up so that I go to hospital. On arrival at the stage to take a motor cycle, I was told that there was a body at Mate road of a person who had been killed. I went to see the person. I stopped going to hospital first. It was about 150 metres from my house. It was at Mulika market. At the scene there were many people as it was in the morning of a market day. I saw the body but I could not identify it as the body lay on the stomach and his head had dropped. I was with Muriuki, Gacheri and other people at the boda boda market.

It was Ann Gacheri and Muriuki and another. Ann Gacheri testified (PW6). When the body was taken by police officers we left and I went to hospital at Kibulini for treatment.

I went home after treatment.

I got to be arrested on 6/1/2016 on Wednesday. I had gone to pick miraa from the shamba, I was arrested at Mulika Market. I was arrested by Flying Squad officers at about 11:30am. Kareithi and Dickens had been arrested. I found them in police vehicle when I was arrested. Kareithi, 2<sup>nd</sup> accused is my brother. Dickens used to loan me money from where he worked as cereals operator. I would pay it back with some interest. He was a businessman friend. I was taken to Mikinduri Police Station. The police officer said he wanted me to tell them whom I was fighting with on Sunday night.

Simon Mungathia is not the person we were fighting with that night.

Ann Gacheri said she saw us fighting and beating the deceased. She lied. Gacheri had given me 20,000/= to me to get a land. She had been thrown out from the shamba and stopped from planting in the shamba. She had sought to have the money she paid to me refunded. We had a grudge because of the money she paid to me.

I knew Mungathia as he was a friend of Remmy Kirimi. We had no grudge with Mungathia. It was Mwendia who took me to police station to report the matter. I shall call him as a witness.

19. On cross-examination, the 1<sup>st</sup> Accused said:

“I lived at Mulika Market. It was a rental place. It belonged to a Mzee called Kongo. It had 6 rooms 4 had goods; one belonged to me and other to another young man.

I knew Ann Gacheri. I knew her as a clothes maker. My children used to get their clothes sewn at her place before we disagreed. She had lived at Mulika for 3 years. I had known her for about 3 years. I knew Gacheri very well.

Gacheri lived at about 200 metres from where I lived. I knew where she stayed as it was on this way to my shamba where I used to pick miraa. I used to see her with her children.

The shamba which I leased to Ann is at a place called Kendee. It was 2 acres. The land was not mine. I worked as a manager for the shamba,

The shamba belonged to another man called Mitindii. He had given me permission to lease. It was a clean land. It was huge land. There were disputes on the land. The land belonged to a group land by Mzee Mwitini. I do not know whether he could come to testify on his own will as they were threatened. He may come by order of the court.



On 3/1/2016, I went to Tapas bar until 10:00 pm. It is not far from my house. It is about 20 metres.

Outside the bar, I was attacked by 3 people, the 4 person left. He did not beat me.

I went to report at Mulika Police Station.

I do not recall the OB number. I lost the paper when I was arrested. But the report is there.

Why did you not call for OB record. I told Judge Gikonyo that I had reported and Judge told me the police officers should follow up. I waited for the outcome of the case from the police officers. No other person has been able to follow on the matter. My brother is in the custody and there is no other person except my old parents.

Magdaline Mwendwa was my second wife. She left after one year and left one child with my mother. I do not know where she is.

I got OB report I did not get P3 as I was told to go to hospital. When I went for P3 I was arrested on that date before I got the P3 from the police.

Police do not give P3. The usually give OB report.

Do you have any treatment notes?

I had the papers but the Flying Squad came from the direction from my house. When I was arrested many people took all my valuables and took them home.

20. DW 2 Daniel Kareithi Ncebere the 2<sup>nd</sup> accused testified raising an alibi that he was at the material time at home with his wife as follows:

“I come from Mulika. I am a casual worker.

Simon Mungathia Kagwima.

I do not know the deceased.

On 3/1/2016, I woke up and went to church. I work from my house at Mulika. It was about 7:00am in the morning.

I left home and went to Church as I was a Sunday school teacher. It was at KAG Church. When I went to Church, I stayed home upto 9:00 am.

I was left at the church for the 2<sup>nd</sup> church service. We started at 10:00 am and I left church at 1:00pm. I left for the church at 1:00pm and I went home at Mulika.

I stayed home from 1:30 pm upto 3:00pm, I was in the house at home, looking after my goats.

I left for the Mulika Market from 3:00pm. I went to the Mulika Market in the market I had gone to buy medicine as I was unwell, I left the market at 6:00 pm in the evening and I went back to my house. I arrived at the house at about 6:20pm. I never left home again. I was unwell. I was with my wife Pamela Kendi at home. I never left home until 4/1/2016.

On 4/1/2016, I wanted to go and transport hardcore from Mulika Market. I had got the job for transport by Kinyua. When I went to transport, I heard that somebody had been killed. I had from Kalue and others that someone had been killed. We decided to go and see. We went with Kagithia, Muriuki and we met with a police vehicle taking the body.



On 6/1/2016, I went to proceed with the transporting of hardcore, I had gone to Mulika Market to buy miraa. While at the market place for miraa, I was arrested by 2 officers and they came and told me that they wanted to speak to me. They took me aside and asked me where Kinyua accused 1 was. I told them I had just came from work and I did not know where he was. They took me to a vehicle. In the vehicle I was alone. After about 15 minutes, I saw them come with Dicken the 3<sup>rd</sup> accused also another arrest.

Kinyua came to the vehicle to see why I had been arrested and he was also arrested. We were taken to Mulika Police Station.

We stayed for about 10 minutes and we were taken to Mikinduri Police Station.

The officers told me that we had been arrested because there were people who had fought. I did not know the deceased. The 1<sup>st</sup> accused is my brother. We do not stay together.

I lived at Kiguuru village and the 1<sup>st</sup> accused at Mulika Market. It is about 500 metres apart. The 3<sup>rd</sup> accused is known to me but is not related to me.

I was not with the 3<sup>rd</sup> accused and 1<sup>st</sup> accused. On 3/1/2016, I did not kill Simon Mungathia.

21. On cross-examination, he said:

“I lived at Kiguru village Mulika. I lived with at a house with a wife Pamela Kendi.

On 3/1/2016, I went to church at 7:00 am in the morning. I was not unwell. I have a witness, my wife and parents know that I went to church. I have not been able to keep contact with my wife after I was arrested.

I went to buy tablets for headache, I was having headache. From the time I was in church I do not know what was ailing me. I went back to the house at 6:00 PM. I did not leave the house as I was unwell. The people who were near my house can testify that I never left. I have neighbours at Kiguuru village who know me. If the court summons them they may come to testify that I was in the house and never left.

Ann Gacheri. I know Ann Gacheri. Gacheri used to come to church with me at KAG church. It is at Kiongo Kiamuthangeni.

I knew Ann Gacheri from about 3 years. Her husband was a friend of mine. I knew Gacheri for about 3 years. I knew her very well.

22. DW 3 Dickens Mungathia Karigi the 3<sup>rd</sup> accused testified that:

“I come from Mulika market. I work as store man. I used to buy and sell cereals at Mulika market.

Simon Mungathia Kagwima is not known to me.

On 3//1/2016, I woke up in the morning from my house at Mulika Market. It was 7:00am. I was with my wife Beatrice Kanyua and our child. We washed up and went to St. Xaviers Catholic Church Nchorimba. I was with my wife and child. We went to Church at about 7:00 am. We were at the church from 9:00 am – 1:00pm. After church, I went to my wife’s saloon and took my phone which I had left charging. I then left and went to KK Muthangene Friend. This was about 2:00pm, we went away from the game about 6:30pm and went to Mulika Market. I went to a hotel called Mutethia Market and we ate miraa there



until 8:00pm in the evening. I went to my house about 8:00 pm. I never left the house when I went in I was with my wife and child.

On 4/1/2016, it had rained there is a cousin who had come to give a key. It was Patrick Mutethia. He brought me a key to a store. He came and found me asleep. He is the one who told me that somebody had been killed at Mate road near the Police Station. I went to see the body. We went with him and we met with a police vehicle had already taken the body.

We went to open the store and proceeded with our work.

I was arrested when I had gone from the store and had gone to buy miraa. I was arrested by 3 officers. They enquired of my name whether I was Dickens and said that they wanted me to help them with something and we started walking with them. When I refused, he held me by my hand and handcuffed me and took me to Mulika Police Station. We stayed at the Police Station and then taken to Mikinduri Police Station. At the vehicle I heard that Kinyua had run away. I told him I did not know where Kinyua was.

Kinyua 1<sup>st</sup> accused used to sell miraa to me. Our houses are at different areas of Mulika about 250 metres. I knew Daniel 2<sup>nd</sup> accused as brother of Kinyua.

On 3/1/2016, I did not meet the 1<sup>st</sup> and 2<sup>nd</sup> accused. I do not know the deceased.

It is not true that we killed Simon Mungathia on 3/1/2016. I wish to call my wife Rachel Kanyua [as a witness].

23. On cross-examination, he said:

I know 1<sup>st</sup> accused Kinyua. He used to sell miraa to me. He used to sell miraa at Mulika market.

I know the 2<sup>nd</sup> accused as Kinyua's brother. We have been brought up together. On 3/1/2016, the 1<sup>st</sup> accused lived at a rental place near the stage, the area is called Mulika Market.

The 2<sup>nd</sup> accused herein is Kiguuru. I knew both very well. We were all brought up together. Kinyua was my friend. He used to sell me miraa. He could also come for some soft loans to buy miraa.

I did not see him on 3/1/2016. On 4/1/2016. I went to the place and I did not find him and when I asked him where he was he told me he had met with thugs and he had been cut on the head. He told me he had reported the matter. I went to Mutethia Hotel at 6:00pm. I was with many people at the hotel, I went home at 8:00pm. I found my wife had slept. She gave me food and water went to bed. I ate and went to bed and slept.

Ann Gacheri. I knew Gacheri as I was renting out a cereals store, Gacheri had also rented out the building at the back for residence. She stayed at the same building in 2 rooms.

I also knew her as a friend. As she went to work she would leave me with a house keys so that when the children came from school they would take the keys.

I had leased the part of the plot as cereals stores and Gacheri leased 2 rooms at the back. There were 4 rooms. It belonged to an old man whose name I can't recall.

The 1<sup>st</sup> accused lived at the stage in Mulika. It was not at the same place. It was a little far off.



24. DW 4, Gervasio Ntongai Mwenda, testified for the 1<sup>st</sup> accused Samuel Kinyua and said that:

“I am known by name Mwenda. I come from Mulika. I work as Butchery Operator. I make soup and ugali and for sale. I work at Mulika.

I know Samuel Kinyua, He is the one who has called me as his witness.

On 3/1/2016 at about 10:00pm while at my work place preparing to go home, as I was going home before I got to the stage I heard people quarrelling. I lit a torch and I saw there were 4 people. I recognized Kinyua, Martin, Ntarangwi and Mitheu.

I heard Martin who was holding Kinyua by his shirt and (Kinyua) was bleeding, telling Kinyua that he must give him back his money as he was the one who used to chase away his workers when he sent them to the shamba.

I talked to them and advised them if there was any wrong done they should go to report at the Police or the Chief.

When I spoke with them they stopped and I went along with Kinyua and as he had rented out near the market with the wife of Kinyua when Kinyua and when we went to make the report at Police station Mulika.

When we went to the police station we were with Kinyua and his wife. We left the Police Station at 11:00pm. I went and left Kinyua with his wife and I went on my way. I saw Kinyua get into his home with his wife.

The next day. I went out to look for food stuff to sell at my butchery and I came at about 10:00 am I was told that Kinyua had been arrested.

I did not get to know why he was arrested.

I also did not know the deceased herein. I did not see the other 2 accused when I met Kinyua in the previous night. I was with Kinyua for the time I saw him being beaten and we went to police and later his home.

25. On cross-examination, he said that:

“I did not see Martin beat Kinyua. I only found him when Kinyua was bleeding and Martin was holding him by the shirt. I do not know who beat Kinyua.

I did not record statement at Police. I went with Kinyua to the Police Station and I left him at home.

I cant know what could have happened after I left him at his home.

I left Kinyua at his home I was with him for a short time.

26. DW 5, Beatrice Kanyua testified for the 3<sup>rd</sup> accused and said:

“I come from Mulika. I work at a Saloon at Mulika.

Dickens Mungathia 3<sup>rd</sup> accused is my husband. I know he has been charged with murder under Simon Mungathia.

I do not know Simon Mungathia .



On 3/1/2016 from 6:00pm. It was a Sunday. We woke up in the morning and went to church at 9:00 am. We left about 1:00 pm. We were with my husband. When we left church I went to open my Saloon and my husband went to watch soccer at KK Muthangene Primary School.

When he left the soccer place at about 5:00 pm he came to my Saloon at 6:00pm and I had a customer. He told me that he would wait at Mutethia Hotel nearby to wait for me. I went by the hotel about 7:00pm on my way home. I peeped inside the hotel and I saw that he was at the hotel. I went home and made supper. At about 8:00pm my husband came and knocked and I opened for him and served him with food. He served and started eating. After eating we slept and he never left home until morning.

On Wednesday 6/1/2016 while at my Saloon, a person with whom I work at my saloon came and told me that Dickens had been arrested. When I asked why he had been arrested she was not able to tell me.

I went to the Police Station Mulika and I found Dickens in vehicle. We went with 2 police officers and Dickens to my place and they searched everywhere. They did not recover anything from my place.

The police said Dickens was helping police with investigations. The police went with Dickens to Mikinduri Police station. He has been in custody since then.

I also know the 1<sup>st</sup> accused Kinyua. Kinyua used to come and borrow money to buy miraa. On the 3/1/2016. I did not see Kinyua or the other accused person.

27. On cross-examination, she said that:

“I have not recorded any statement. The incident happened in January 2016 six years ago. [How you can remember everything that happened 6 years ago?]

I can remember the events that happened 6 years ago. But I cannot remember everything.

3<sup>rd</sup> accused came at 8:00pm at home. I do not know what could have happened before 8:00 pm, from 6:00pm to 8:00pm, I was not with Dickens but was at the hotel which is near my house. I could even hear him laughing at the hotel.

Another person who knew him could also know it was him if he heard him laughing?

I knew him because he is my husband. I could recognize his laughter. A person who knew him could identify Dickens even without seeing him?

I do not know about any other person. I know him because he is my husband.

I do not know the deceased.”

28. Counsel for the Accused and the DPP chose to rely on the evidence before the court without making any submissions, and judgment was reserved.

### **Analysis and Determination**

29. This being a murder case, the prosecution must prove beyond reasonable doubt; the fact and cause of death, that the death was as a result of an unlawful act or omission on the part of the accused and that there was malice aforethought. See Antony Ndegwa Ngari v. R [2014] eKLR].



## Determination

### Fact and Cause of Death of the Deceased

30. There is no doubt the prosecution has been able to prove the fact and cause of death to the required standard. The fact and cause of death being severe head injury with biparietal skull fracture and intracranial bleeding were consistent with multiple head injuries reported by the deceased's brother PW4 who identified the body and examining Doctor's report produced by PW5.

### Alibi defences, Identification and Corroboration

31. Several principles of judicial decision-making in criminal law cases arise for consideration in this case: (a) the evaluation of the entire evidence before the trial court; (b) the proof of falsity of the defence; (c) separate examination of responsibility of each of several co-accused persons; and (d) corroboration and water-tight evidence in cases of identification to justify a conviction.
32. The case is based on identification of the accused persons and due caution in acting on that kind of evidence is taken. See *The Turnbull Guidelines in R v. Turnbull (1977) Q.B. 224*. Although, the evidence of recognition is more reliable than that of mere physical identification, the court must warn itself of the dangers of convicting on identification evidence of a single witness without corroboration, as pointed out by the court in *Turnbull*:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution....”

33. The need for caution is similarly underscored in the East African cases of *Abdala bin Wendo & Another v. R (1953) 20 EACA 166* and *Roria v R (1967) EA 583*, in words 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 a single witness, can safely be accepted as free from the possibility of error.”

*Abdala bin Wendo*, *ibid* at p.168.



34. On identification by recognition, see *Anjanoni & Others v. R* (1976-1980) KLR 1566 where the Court of Appeal said:

“Being night time the conditions for identification ... in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger, because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Geteya v. The Republic* (unreported).”

35. As regards voice identification, Archibold *Criminal Pleading, Evidence and Practice*, 2017 ed. By P.J. Richardson at para 4-467 notes in the case of trial by jury:

“In a case of purported voice identification, the jury should be directed in accordance with the directions for visual identifications, suitably adapted, i.e. the risk of mistake, the reasons why a witness may be mistaken, the fact that an honest witness may be mistaken and the strengths and weaknesses of the identification must all be spelt out: *R v. Hersey* [1998] Crim. L.R. 281, CA.”

In our court setting without a jury, the judge will warn himself of these dangers as appropriate.

### **Evidence as a whole**

36. The court is required to consider the whole of the evidence presented in a trial by the prosecution and the defence, not separately, but as one whole. See *Okethi Okale & Others v. R* (1965) EA 555 and *Karanja v. R* (1983) KLR 501. The court is required to have these defences in mind while considering the evidence of the prosecution, so as to see whether the offence is proved, or a reasonable doubt is raised, on the evidence. See *Ssentale v. Uganda* (1968) EA 365. On the reverse, there can be no valid conviction based merely on suspicion, no matter how strong. (see *Sawe v. R* [2003] KLR 364.)

37. There is no question that the three accused persons raised alibi defences in the true acceptance of the word in criminal law as in that:

“The word “alibi” is a Latin adverb, meaning “elsewhere” or “at another place”. Thus if an accused person alleged that he was not present at a place at the time an offence was committed, and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi.”

38. It is the duty of the prosecution to prove the falsity of the alibi defences, as an accused who raises an alibi does not assume any responsibility to prove its truth. See *Wang’ombe v. R* (1976-80) KLR 1683, *Karanja v. R* (1983) KLR 501 and *Kiarie v. R* (1984).

39. Late disclosure of an alibi diminishes the weight given to the defence as against the evidence of the Prosecution. In *Karanja v. R* (supra) the Court of Appeal said:

“[W]e agree with the observations by the Court of Appeal for Eastern Africa in *R v. Ahmed Bin Abdul Hafid* (1934) 1EACA 76, and with those of the former Court of Criminal Appeal in *R v. Little Boy*, (1934) 2KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and



so that I can be tested by those responsible for the investigation and prevent any suggestion of afterthought.”

### **Cases against the individual Accused persons**

40. Finally, as held the Court of Appeal in *Munyole v. R* (1985) KLR 662:

“In a joint trial involving more than one accused person, the evidence against each accused must be considered separately and the case against each accused must be such as to prove the guilt of that particular accused beyond reasonable doubt. It is also a misdirection to deal separately with one part of the evidence and omit to relate it to the whole.”

The cases against the three accused are dealt with below.

41. The issue for determination is whether the said death was caused by an unlawful act of omission or commission on the part of the accused, and whether they was malice aforethought as to make the killing an offence of murder as charged.

### **Identity of the assailants**

42. In general, the Prosecution case relies on identification of the attackers by voice recognition. The identifying witness PW6 had no difficulty placing the accused at the scene of the murder. She stated that she was at her house, which is near the road, 2 meters according to her, on the material day when she saw 3 people aboard a motor cycle. She then heard someone shaking her door and a torch shone on it. She then heard people chasing after each other. One of them was asking for his phone and the other replied that they did not have the phone. She identified the attackers saying:

“The person who was asking for the phone I recognized his voice as Kinyua. He is the accused (points at the 1<sup>st</sup> accused). I then heard a struggle. I heard one person say “leo utajua sisi ni wanaume.” [You will know that we are men] It was Kareithi who said this. Kareithi is the one in the middle [2<sup>nd</sup> accused points] The person who was being beaten screamed. Kinyua asked him “unapiga nduru usaidiwe na nanai.” [You are screaming so that who can help you]. I heard the person who was being beaten name 3 people asking them why they wanted to kill him. He named Kinyua, Kareithi and Dicken. After that it fell silent, I heard a loud noise as if something had been dropped to the ground. It then fell silent and I did not hear any noises thereafter. At this time, I had woken up and sat up in the bed as I feared. In the morning, a lady came and knocked on my door and asked me why I was still sleeping and there was a body of a dead person by my door. I came out and found there was a body of a man whose clothing had been removed leaving him with only an underwear and vest. He had stab injuries on the face and head. It also appeared that he had been hit on the forehead with a hearing object, near him was a stone...On the following day 5/1/2016, while at my shop at Mulika Market Mr. Kareithi (2<sup>nd</sup> Accused) came and started insulting me and threatening me that they would kill me or take me to Njuri...I did not know the deceased. I recognized the attackers who were beatings the accused as Kinyua, Kareithi and Dickens (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused) before the court it was at night. I was able to recognize them by their voices as I had lived there since 2004. Kinyua and Kariithi had also rented a parcel of land to me. I used to leave with Dickens as a co-tenant in the same premises. When I got married I used to worship at Kenya Assemblies of God (KAG) and Kinyua and Kareithi were worshippers at the church only with my husband. I latter left KAG and went to EA Pentecostal Church.”



43. On cross-examination, the witness explained the circumstances and basis of her recognition of the 1<sup>st</sup> and 2<sup>nd</sup> accused:

“The road where I heard the motor-bike is a distance of only 2 metres from my house. I peeped from the widow when the motor bike came. I did not see the people. I only recognized them by their voices. I knew Kareithi since 2004. Kareithi used to call me in the night at the place where I was before I came to place where the matter happened. I know Kinyua well I even used to repair clothes of his children. When I had lived with the 2 I could recognize their voices. What did you identify in their voices? It was how he pronounce his words. How does Kinyua speak so that you may know it is him? I had lived with them for long. I heard someone ask for the phone. It is the person who was being asked for the phone who said “Kinyua sina simu” [Kinyua I do not have the phone]. I did not here Dicken talk. I only heard the person who was being beaten named Dickson. At this time I was near the window to listen carefully. When I heard people talk I was at the window. I only heard the voices of the person who being beaten and noise of Kinyua and Kareithi. There were one other noises. I listened for all of them until I heard that they head left. What in the voices could make you identifying Kareithi’s voice? I identified him because the following day he came to threaten me. Is there any incident that could make you not forget his voice? Kareithi used to come and call me in the night at the earlier place of residence. Kinyua was my customer and friend of my husband.”

44. On re-examination, she stated that:

“The voices of Kariuki and Kinyua I know them for long. The incident took 45 minutes to 1 hour since the motor bike came. The whole incident of calling for the police and the struggles took 30 minutes. Kareithi uses insults like one about going to Njuri. From what did you identify Kareithi’s voice? Kareithi used to say “mimi ni mwanaume” when he was annoyed.”

45. Even though the witness on cross-examination was not able to describe what in the voice of the accused 1 and 2 made her know it was them, the Court accepts having lived with the accused persons, a fact admitted by the accused, for a long period and having interacted at close quarters as a tenant, friend and neighbour, respectively, she was in a position to tell their voices, even without having seen them. Not insignificantly, the identifying witness said the 2<sup>nd</sup> accused had on the following day gone to her “insulting me and threatening me that they would kill me or take me to Njuri”. And the short distance of the scene from her house at 2meters according to her was conducive for the voice identification.

46. When PW7 visited the scene, he confirmed that the body of the deceased was 7-10 metres from PW6’s house.

47. PW3 testified that he learnt about the fight between the deceased and the 1<sup>st</sup> accused from his friend Mati. He went on to state that the 1<sup>st</sup> accused confessed to him that he had fought with the deceased on 2/1/2016. He stated that:

“...I had met him Kinyua after leaving Mati on the road between my hotel and the market. I said hello to Kinyua and we talked. He told me that he had met with people and they had fought. He had a deep cut on the head. I can’t remember on which side of the head as it was a long time. I told him to go for treatment. He said he would not go because he had been told that if he went he would be asked for a police form P.3 and he did not want anything



to do with police. He told me that he was fighting with Daktari and 2 other people. Daktari is now deceased.”

48. This purported confession was, however, not processed in accordance with the law and the Court must disregard it. In addition, PW3’s testimony as to what his friend Mati told him was hearsay of what he had been told by Mati who did not testify.

49. PW1 testified that he was informed by Pastor Mutethia Jeremano that there was a possibility the people who killed Simon were Kareithi, Kinyua and Dicken. He stated that he knew the said persons very well: “I knew all three name. They are the 3 before the court as accused. I knew them before. The 1<sup>st</sup> accused is Kinyua. He used to sell Miraa at the market Mulika. The 2<sup>nd</sup> accused is Kareithi. He is a brother to Kinyua the 1<sup>st</sup> accused. The 3<sup>rd</sup> accused is Dickens and he too has a Miraa businessman.”

Pastor Jeremano did not testify and this hearsay evidence as to the people who killed Simon is worthless.

50. PW2 testified that he knew the 1<sup>st</sup> and 2<sup>nd</sup> accused well as follows:

“I stayed with Kareithi in the same plot. I knew Kinyua as a Miraa seller at the market. I had known him for 10-11 months. Kinyua is the accused No. 1 dressed in white shirt and red Jacket (points). I knew Kareithi for a longer time. It is about the same time as with Kinyua, 11 months.”

51. The Court has warned itself of the dangers of convicting on identification evidence of a single witness and in accordance with *Abdala bin Wendo & Another v. R (1953) 20 EACA 166* and *Roria v R (1967) EA 583* and *R v. Turnbull (supra)* sought corroboration of the recognition evidence of PW6. PW6 was able to recognize the voices of the 1<sup>st</sup> and 2<sup>nd</sup> accused because she knew them prior to the incident. She heard the deceased say the name of the 3<sup>rd</sup> accused as he was being assaulted. However, there is no other evidence of the 3<sup>rd</sup> accused’s involvement.

52. From the evidence before the court, the incident leading to the death of the deceased took place on the night of 3/1/2016 at Mulika market, a shopping centre described by Investigation Officer PW7 as “There are 2 streets one passing by the market and the other behind the market. In the one behind the market is where the deceased was found. On one side there were living houses and on the other side there is a maize plantation without any buildings.” PW3 said that his house was 500 metres from his hotel where on return after closing up at 11.00pm he witnessed fighting involving four people he did not identify. It is apparent that after parting with the PW1 at about 8.30pm, the deceased got into fight with the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused and possibly the 3<sup>rd</sup> accused which was described as a “a commotion like a fight” by PW3, or a fight as described by PW7 in his testimony relating the statements of witnesses, in the course of which the 1<sup>st</sup> accused was injured. At about 11.30pm the 1<sup>st</sup> accused sought for a panga from his brother the 2<sup>nd</sup> accused who gives him a panga and follows him “to see where he had gone with the panga” as testified by the PW2. The two together with the 3<sup>rd</sup> accused as testified by PW6 are later, sometime after “about 1100 - 1200 midnight”, placed at the scene beating the deceased and demanding the 1<sup>st</sup> accused’s phone and the 2<sup>nd</sup> accused pledging to make the deceased realize that they were men; and after some beating culminating a loud noise such as made when “something has been dropped to the ground” there is silence and when the identifying witness PW6 wakes up the following morning she is alerted of a dead body outside her door no doubt belonging to the person who was being beaten the previous night and who in the course of the beating named his attackers as the accused persons, but only two of whom had spoken were identified PW6 as the 1<sup>st</sup> and 2<sup>nd</sup> accused. Based on the evidence of PW6 and PW2, the 1<sup>st</sup> accused was injured in a fight with the deceased and not in an attack by persons named as Martin, Ntarangwi and Mitheu, in his defence, as discussed below.



The respective cases against the Accused

Accused 1 Samuel Kinyua Nchebere

53. The evidence to be considered here is the prosecution evidence and the Accused 1 Samuel Kinyua Nchebere DW1 defence together with the testimony of DW4.
54. The prosecution witness PW6 whose house was adjacent to the road where the body of the deceased was found on 4/1/2016 stated that she heard and recognized the voice of the 1<sup>st</sup> Accused as he demanded for his phone from the person who named the accused together with his co-accused as the attackers the previous night. PW2 who was a neighbour at the 2<sup>nd</sup> Accused's rental plot for 10-11 months, and who knew the 1<sup>st</sup> accused and 2<sup>nd</sup> accused for the same period, testified that he had heard the 1<sup>st</sup> accused come and ask for a panga from his brother the 2<sup>nd</sup> accused on the night of the attack on the deceased.
55. PW3 who had witnessed 'a commotion like a fight' outside his hotel after lock-up at 11.00pm in the night, was on the following day informed by a friend of his called Mati and the 1<sup>st</sup> accused himself that it was fight between the 1<sup>st</sup> accused and one Daktari, the deceased herein. The informer Mati was not called as a witness and the prosecution did not record any confession in terms of section 25A of the [Evidence Act](#), and the court is therefore, not able to act on this piece of hearsay evidence given by PW3.
56. The 1<sup>st</sup> accused raised an alibi defence indicating that he was injured in an attack by 4 persons with whom he had drinking at a bar earlier in the evening, and it had nothing to do with the deceased. DW4 who worked at a butchery at Mulika market supported the 1<sup>st</sup> accused's alibi saying that he had at 10.00pm on 3/1/2016 while on his way home after work come upon a group of 4 people who were quarrelling being the 1<sup>st</sup> accused, Martin, Ntarangwi and Mitheu, when one of them, Martin, was holding the 1<sup>st</sup> accused who was bleeding, by his shirt and demanding a refund of some money as he was the one who had chased away his workers from the Shamba. The witness did not say that he had seen the said Martin beat the 1<sup>st</sup> Accused, and he testified that he could tell who had beaten him.
57. PW6 said she knew the three accused person very well for 3 years having interacted with them closely as customer, tenant and neighbour at rental residence. All the accused persons confirmed that they had known the witness PW6 as a friend and neighbour who made clothes for the 1<sup>st</sup> accused's children; as a church fellow member and wife of the 2<sup>nd</sup> accused's friend; and with whom the 3<sup>rd</sup> accused stayed together in the same rental commercial and residential building.
58. The Court rejects the 1<sup>st</sup> accused's defence as the PW6 evidence of recognition which the finds corroborated by the evidence of PW2 that the 1<sup>st</sup> accused had gone for a panga from his brother's house which he got and went back with the brother following to see where he had gone with the panga, only for the two and one other (3<sup>rd</sup> accused) to be placed at the scene by their conversations with the deceased by the voice recognition of the two.

***Accused 2 Daniel Kareithi Nchebere***

59. The relevant evidence here is the testimony of the Prosecution witnesses and defence evidence of the Accused 2 Daniel Kareithi Nchebere DW2.
60. PW2 the 2<sup>nd</sup> accused's neighbour who heard the 1<sup>st</sup> accused come and ask for a panga subsequently saw the 2<sup>nd</sup> accused leave his house after saying that he would follow to see what the 1<sup>st</sup> accused wanted to do with the panga. The 2<sup>nd</sup> accused was later heard at the scene of crime when PW6 heard his voice telling the deceased in Kiswahili language "leo utajua sisi ni wanaume", that the deceased would know



the attackers were men! In his defence, the accused said that he was with his wife at home on the night of 3/1/2016 after he came from Mulika market at 6.20pm and never left home

61. The Court finds the identification evidence of PW6 which places the 2<sup>nd</sup> accused at the scene of the attack as one of the attackers is corroborated by the evidence of the 2<sup>nd</sup> accused's neighbour PW2 who saw him leave his house after he heard him tell his wife that he would follow the 1<sup>st</sup> accused "to see where he had gone with the panga." There is further support of the identification evidence in the fact that the 2<sup>nd</sup> accused had on the following day on 5/1/2016 gone to the identifying witness and threatened to kill her if she told on the events of the previous night.
62. The court must reject the alibi that the accused was at home with his wife in view of the two consistent testimonies of PW6 and PW2 which place the accused at the scene.
63. The Court accepts that her voice recognition in the circumstances of the close relationship between the identifying witness Ann Gacheri PW6 and the accused person in this case is safe from possibility of error in respect of the two 1<sup>st</sup> and 2<sup>nd</sup> accused persons who she heard speak at the scene.

### **Accused 3 Dickens Mungathia Karigi**

64. The evidence to be considered as regards the 3<sup>rd</sup> Accused Dickens Mungathia is the prosecution evidence and his alibi defence as DW3, supported by the testimony of his wife DW5. The Prosecution evidence is merely that the deceased mentioned the 3<sup>rd</sup> accused as one of the attackers. The identifying witness PW6 did not hear the 3<sup>rd</sup> accused speak at the scene and there was, therefore, no voice recognition of the 3<sup>rd</sup> accused at the scene. It is not safe to convict the 3<sup>rd</sup> accused on the evidence before the court.

SUBDIVISION -Malice aforethought

PARA 65.

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

- " 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - (c) an intent to commit a felony;
  - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

PARA 66.

The body of the deceased had multiple penetrating injuries to the head including on the right eye-bow, right side of the lower lips forehead right cheek and left occipital scalp, and blood was oozing from the right ear with fractures of the right mandible and right maxilla. The deceased died from severe head injury with biparietal



skull fracture and intracranial bleeding. In beating the deceased while armed with a panga, the accused knew that their actions would probably cause death or grievous harm to him. The fact of non-recovery of the Panga or production of a club which PW7 had testified had been used to beat the deceased does not detract from the recognition evidence of PW6 of the accused as the attackers.

PARA 67.

The Court finds that the prosecution has proved malice aforethought on the part of the 1<sup>st</sup> and 2<sup>nd</sup> accused on account of the nature of the injuries inflicted on the deceased. From the totality of the evidence on record, this court finds that the prosecution proved beyond reasonable doubt that the two 1<sup>st</sup> and 2<sup>nd</sup> accused are the persons who in fact caused the death of the deceased. The 3<sup>rd</sup> accused's involvement was not proved to the required standard.

## **ORDERS**

68. Accordingly, for the reasons set out, the Court finds the 1<sup>st</sup> SAMUEL KINYUA NCHEBERE and 2<sup>nd</sup> accused DANIEL KAREITHI NCHEBERE guilty of the offence of murder contrary to section 203 as read with 204 of the Penal Code, and convicts them.
69. The 3<sup>rd</sup> Accused DICKENS MUNGATHIA KARIGI is acquitted of the offence of murder contrary to section 203 as read with 204 of the Penal Code.
70. As the 3<sup>rd</sup> Accused has been out on bond pending trial, there shall be an order for the release of the bond security to the depositor.
71. Order accordingly.

**DATED AND DELIVERED ON THIS 12<sup>TH</sup> DAY OF APRIL, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Masila, Principal Prosecution Counsel for the DPP.

Mr. Igweta Advocate for the Accused.

