



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 86 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

DORIS MWARE IKIAO.....1ST ACCUSED

JANET KANYUA IKIAO.....2ND ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of offence were that:-

‘On the 24th day of November 2015 at Nthunguri Village in Ntombo Sub-Location in Kimachia Location within Tigania West Sub-County within Meru County jointly murdered Solomon Liria.’

2. The 2nd accused is the mother to the 1st accused. Both accused persons pleaded not guilty and the matter went for trial. The Court will reproduce the evidence of the parties.

Prosecution’s Case

3. Prosecution Counsel for the State, at first was Mr. Musyoka and thereafter it was Ms Muriithi, later Mr. Maina and finally Mr. Namiti. Ms. Muriithi gave an opening statement, that on 24th November 2015, at about 11.00 a.m, the deceased was at his shamba farming when the 2 accused persons accosted him, armed with pangas. That soon after, the deceased’s wife, Jennifer Karimi came to his rescue and the accused also attacked her. At that time, the accused were also injured. That the deceased died from the injuries while undergoing treatment and the widow recovered.

4. The Prosecution indicated that they would be calling 8 witnesses relying on both direct and circumstantial evidence. The proceedings were interpreted in Kimeru, the language the accused persons understood.

PW1

5. PW1 was Jennifer Karimi, who gave sworn testimony. She stated that she hails from Nthongori and she is a farmer. That she recalls on 24th November 2015 at about 11.00am, she was at home preparing to go to Hospital when she heard her husband Solomon Liria scream that **he is dying**. That at the time, he was behind his house and was cutting grass for the cows. That she came out to see what was happening and when she reached there, she found five (5) people cutting her husband. That she knew the people who were children of the 2nd accused together with the 1st accused. That the two accused persons were present. She said that she found Kanyua (2nd accused), Doris (1st accused), Gitonga, Kanyiru and Mwirigi, the husband to the 1st accused. That the 1st accused, 2nd accused and Gitonga were cutting her husband with pangas. That she screamed and people came. That after she told them to stop cutting her husband, they also attacked her and that those who cut her were the 1st accused and Kanyiri. That she got injured on the right hand, left finger, right shoulder and at the back of her head. That she was taken to hospital by her son’s wife at Miathene Hospital and they were transferred to Meru Level 5. That her husband was taken to Kiirua Hospital but he died before reaching the hospital. That she went to Njiru Police Station where a P3 form was filled on her behalf. That she does not know where the weapons they were using were taken. That she is not related to the accused and they only invaded their land and occupied 0.80 acres of their land.

6. She was cross-examined by Mr. Thangicia, Counsel for the accused persons. In cross-examination, she said that she could not recall the period of time that she was admitted since she was cut on her head and that sometimes she forgets things. That she made a statement on 9th March 2016 after she left hospital and she was taken by children and that she told the police officer her story as they recorded it. That the deceased had woken up and gone to cut grass and that the distance between the house and where her husband was cutting grass was about 6

meters and that it was behind her house and she could hear what was going on. That she heard the deceased scream '*I am dying.*' That she was not told by the doctor that she could have memory lapse. She refuted Counsel's claim that she said in her statement that she saw only two women. She said that she had said 5. When her statement was read out to her where she had indicated that she had seen the 1st and 2nd accused persons, she stated that was true but that there were others. That she told the police that she found them fighting the deceased and that she now states that she saw them cutting the deceased. That there was another woman on the side, by the name of Kanenu who witnessed the incident. That so many people came after she screamed and that she was cut and lost consciousness and that the people came after she had been cut. That she saw Pastor Mutwira and many others including Sarah. That she only came out after the deceased screamed and she found that they had already cut him. That the land was 2 acres and the attackers were using 0.80 acres and that she does not know why they entered the land. That when they invaded the land, she had already been married there. That she did not see anyone else bleeding because they also attacked her immediately they saw her. That she did not have any weapon. That it is not true that it was the deceased who started cutting the 1st accused and that she found her husband on the ground and they were cutting him.

PW2

7. PW2 was Sarah Kambu. She gave sworn testimony. That she lives in Ntombo and she is a business lady. That she recalls on 24th November 2015 at about 10.00am, she was called by a lady called Tata. That she was in the farm and the said lady told her that her (PW2's) husband, Bernard Mutwa had informed her that her (PW2's) parents namely Solomon Liria and Jennifer Karimi had been attacked. That she rushed home and found that her father had been cut on the head and on one of the hands while in the farm. That she did not establish his status. That her mother had been cut on the head and that a finger and one hand was nearly severed. That she was also lying in the farm, a distance from his father. That she found many people from whom she sought help to take the 2 to hospital and they took them to Miathene Hospital and on reaching there, she found the 2 accused who did not have injuries. That she asked her mother what had happened and she told her that they had been cut by Doris Mwari, Kanyua, Gitonga, Mwirigi and Kanenu. That they then went to Meru Level 5 accompanied by Mwirigi and Gitonga and that these two run away when they heard that her father had passed on. That while at Meru Level 5, Doris (1st accused) said that if she had a knife, she would stab her mother and finish her. That her mother was admitted for 2 months in hospital. That Doris, (1st accused) accompanied them because the doctor said so. That she knows Doris Mwari (1st accused) who is a neighbour with whom they had a land dispute with together with her mother, Janet Kanyua (2nd accused).

8. During cross-examination, she stated that she made a statement at the police on 25th November 2015. That she did not witness the two being assaulted. When Counsel for accused read out her statement to her, she said that she does not recall having indicated that Mwari and Kanyua were at the hospital with cut wounds. That she recorded that the Miathene Hospital referred her father, her mother, Mwari and Kanyua to Meru Level 5 Hospital. She denied that she saw Mwari and Kanyua with injuries and she said that she never saw them admitted. That PW1 was lying about 10 meters from the scene and that she never saw the accused at the scene.

PW3

9. PW3 was Johana Mutuera who gave sworn testimony. He said that he lives in Ntombo Sub Location, Tigania West, and that he is a Pastor at Baptist Church, Ntombo. That he recalls that on 24th November 2015, at about 1pm, he heard screams while coming from getting grass for his cows and that the screams were from a woman stating that she had been cut. That he dropped his grass at home and proceeded to where the screams were coming from where he found a man lying down with an injury on the head and he was bleeding. That some distance from where the man was, he saw the woman was screaming. She had a head injury with blood all over her body. That someone took her to hospital. That he called the assistance chief of the area and informed him of the incident and they then took the man to hospital, at Miathene Level 4. That upon arriving at the hospital, he saw Janet Kanyura and Doris Mwari and the other woman who was screaming was also there. That he saw Kanyua and Mwari with injuries on their hands and that the 4 were put in an ambulance and taken to Meru Hospital. That at about 4 p.m, the police came to the scene and he was there when they came and that they took photographs and asked them to go and make their statements and that he made his statement on 25th November 2015 at Njiru Police Station. That on 24th November 2015, at about 2pm, on arriving home, he heard that the man had died and that he only saw the blood in the ground. That he came to learn that the pangas that had been used were locked in the house of Doris. That he was informed by Ruth, the sister of Doris (1st accused) and that he called the police and informed them as such. That the police came and Ruth's daughter, by the name Joy opened Doris' house and recovered 3 pangas, one long and two short, all with blood stains. When the pangas in Court were placed before him, he identified them as follows: -

- PMFI1 was a long sword which he identified as the one used by the deceased, Solomon and it appeared as a slasher.
- PMFI2, PMFI3 and PMFI4 he identified as the short ones that were recovered from the house which the police went with.

10. During cross-examination, he said that he did not witness the people cutting each other and at the scene, he did not see the accused. That the police came at about 4 p.m on the same day and he accompanied them when they came to recover the pangas. That they came later on a day he could not recall, about a week later after they had made their statements. That his wife told him that she had heard that the pangas were in the house of Doris. That he accompanied the police, neighbours like Nyeera, Lewa and others whose names he cannot recall and that Joy, the daughter of Ruth was also present as she is the one who opened the door for them. That they arrived at the house ahead of her. That he did not know whether there was a warrant to search the house and that Doris was not there as she was already in custody. That he did not enter the house and it is the police who entered and came out with the pangas for which 3 had blood stains and one did not have a blood stain. That looking at the pangas in Court, he cannot tell if they have blood stains but that he can see dried blood stains on 2 of those pangas. That he found the accused in the ambulance with injuries in their hands but he did not accompany them to Meru General. That he could not tell whether the accused were admitted or not as they all never came home. That the accused are neighbours although they have different homes. That the incident occurred on a 0.2 acre excised from the land of the accused and given to the deceased during the adjudication process and that is where he found the deceased and that at that time, there was a house belonging to the brother of the accused on that 0.20 acre but it is now no longer there. That from the scene to the house of the deceased is about 30 meters. That there were beans and maize on the farm at the time; That the distance between where the deceased was lying and his house was about 30 meters and PW1 was about 35 meters from her house. That the homestead of the deceased is not fenced but the disputed portion is fenced separate from that of the deceased and that it was fenced by the deceased before 2015. That the family of Janet was never satisfied when the adjudication officers curved off 0.20 acres from her land and gave it to the deceased.

PW4

11. PW4 was Benjamin Githinji. He gave a sworn statement. He said that he hails from Thogoria and that he is a farmer. He said that he recalls on 24th November 2015, at about 4 p.m, he received a call from Mikinduri, from one Polline Karauki who informed her that they were in hospital and asked him to go to the home of the deceased as the deceased and his wife had been cut. That he proceeded to the homestead of the deceased and when he arrived there, he found blood on the ground in the farm and that he took care of the homestead and later got information that Solomon had died. That there was no one within the compound.

12. On cross examination, he said that he made his statement on the following day. He said that the police had informed him that Solomon had died as a result of injuries inflicted on him by Mwirigi, Gitonga and Kaniri. That Polline Karauki is his wife and the deceased was his father. That the distance between the house of the deceased and where the blood was on the ground was approximately about 20 meters. That there was no tree that had been cut at the scene but he saw a fence had been cut.

PW5

13. PW5 was Bernard Mworja John. He gave sworn testimony. He said that his home is in Kivulini but he was working in Kagaene and that he is a Pastor with First Baptist Church. That on 24th November 2015, he was at his farm, in Ntoombo Sub Location at about 11.00 am where he had labourers planting trees and that while there, he heard screams and when he was going to check, he met a lady whose name he could not recall who told him that people were fighting in the farm of Solomon Liria. That he rushed there and saw someone on the ground and he recognized that it was Solomon Liria who was lying on his back and he had an injury on the right side of his head which had opened up. That Solomon was unable to talk. That Pastor Johanna came and joined him and that he saw the wife of the deceased at a distance crying and that she had blood all over. That he called some youth and together they carried the deceased to Miathene District Hospital and they reported the matter to a police post next to the hospital. That the deceased was received and put in an ambulance while he and others went to the police. That he did not see any weapons at the scene and that he saw a crowd standing at a distance and that the deceased was lying at the middle of his land.

14. On cross examination, his statement was read out to him where he is said to have stated that he met Doris Mwari and her mother Kanyua admitted at Miathene Hospital nursing wounds. He refuted his statement and said that he never saw the two, but he heard that they were in the ambulance and that he was not told that they were involved in the incident. He said that all of them were referred to Meru Level 5 Hospital although he can't recall who in particular gave him that information. That from the scene, he was accompanied by Kithinji, Sarah and other youths to Miathene Hospital. That Solomon was living on his land and that the 2 accused persons are his neighbours. That he did not know why there was a fight and that he did not find any trees which had been cut at the scene. That the deceased was his uncle.

15. During re-examination, he said that he had given his statement without oath but that what he was telling the Court now was the truth. That when he arrived at the scene, there was no one close to Solomon and that Pastor and other youths came to help him.

PW6

16. PW6 was Dr. Njeri Nderitu who gave a sworn statement. She said that she works at the Meru Teaching and Referral Hospital and that she graduated from Wenzhu Medical University, China with an MBChB. She had a post mortem report filled by Dr. Carol Kilacho who no longer works at Meru Referral Hospital as she went to Eldoret. That she worked with Dr. Carol for about 3 years and she is familiar with her handwriting and signature and she would like to testify on it. (The Court allowed her to proceed). She stated that the report relates to the body of Solomon Liria (deceased) and the post mortem was performed at Meru Teaching and Referral Hospital on 3rd December 2015. That the body was identified by Rose Kananu, Benjamin Githinji and PC Kipyegon No. 101944. That the body was naked, of an African male of 67 years and of good nutrition with height 170cm. That post mortem changes there was Regan Mortis- well preserved under formalin. That externally, there were multiple deep cut wounds on the scalp 5 in number. That there was one deep longitudinal cut on the left palaetal scalp area around 10cm in length with a skull fracture. That there was brain haematoma. That there was a vertical cut on the same site measuring 4cm. That there was one deep cut on the vertex (back) of the head about 5cm. That there was also a skull fracture with brain extruding haematoma. That there was another deep cut on the left palaetal scalp area next to the first one with a skull fracture measuring 5cm long. That there was another deep cut on the right occipital area (back of the head) with a skull fracture measuring 8cm. That there was another cut wound on the left extensa surface of the forearm measuring 3cm. That internally, the only system affected was the head with multiple skull fractures with brain extension from the fracture site and intracerebral haematoma on the left palaetal lobe. That there were no other injuries detected. That Dr. Kilachi opined that the cause of death was a severe traumatic head injury. That the death certificate was No. 0107702. That Dr. Kilachi signed the report and had it stamped by the hospital stamp.

17. On cross-examination, she said that she did not produced the death certificate as it is the relatives who are issued with it. That from the report the brain had to be opened up surgically to confirm the fracture and this does not have to be indicated. That this is the only way to confirm internal injuries that is usually not indicated. That there were no other fractures except the head. That the date is indicated as 3rd December 2015 and is given at the beginning of the report. That she joined Meru Teaching and Referral Hospital in 2015 and Dr. Kilachi went for further studies in 2018.

18. In re-examination, she said that there is a date on the report and that to ascertain internal injuries, they have to surgically open up the body and in this case, the head was opened up.

PW7

19. PW7 was CPL David Muriula Njue (No. 77552). He stated that he is based at Dandora Police Station, Nairobi and that he worked in Meru on 24th November 2015, stationed at Njiru Police Station. That on that day, a report was made at the station by one Samuel, that his parent had been attacked by known persons. That the report was booked in the O.B. That he stated that the attack was serious. That he informed CIP Makau who decided that they visit the scene and that before leaving to the scene, they were informed that a similar report had

been made to Miathene Police Station where it was recorded that two parties were accusing each other. That they went to the scene at Thunguri Village where they were informed that the victims had been taken to Miathene Hospital where they went to and found that the hospital had received 4 victims whom they had referred to Meru Level 5. That they went to Miathene Police Post and confirmed that there were 2 reports, one made at 11.30hrs by Janet Kanyua and Doris Mwari accusing Solomon Liria and his wife. That the perpetrators had serious injuries. That another report was made at 12.00hrs by Solomon Liria (deceased) and Jennifer Kaari, his wife accusing Janet Kanyua and Doris Mwari of attacking them. That the report indicated that they had serious injuries. That they went back to the office and that on 25th November 2015, himself and the OCS left to Meru Level 5 Hospital to visit the victims of the incident. That they found 3 of them admitted in serious condition being Doris Mwari, Janet Kanyua and Jennifer Kaari. That on inquiry, they were informed that Solomon had succumbed to his injuries while being transferred from Miathene to Meru. That they interviewed the victims and got a brief of what happened. That on 26th November 2015, they received information from members of the public that some pangas had been kept in the house of Doris Mwari next to the scene. That he accompanied Inspector Wafula to re-visit the scene and were shown the house by Johanna Mutwira among other persons. That they broke the door and found 4 pangas which had blood stains. That they recovered them and made an inventory of the same which was witnessed by Johanna Mutwira and they kept them at the police station. That one of the pangas was positively identified to have belonged to the deceased person, the long one (c-line) as he had been seen carrying it in his farm. That on 26th November 2015, in the evening, Doris Mwari and Janet Kanyua were discharged from hospital and that they then effected their arrest and placed them in custody. That the two were interviewed on the crime and their version was that they fought. That an autopsy was conducted on the body of the deceased on 3rd December 2015 and the cause of death was established. That the body was identified to the pathologist by a son of the deceased and that he then preferred the charges against the accused. That on 7th January 2016, Jennifer Karimi was discharged from hospital. That the cause of the conflict was established to be that the deceased went to cut trees which the accused alleged to be theirs; That on several occasions, there had been a dispute on the land parcel where the deceased lived and that he established that the deceased had previously made reports at Njiru Police Station whereby they were referred to the local administration for settlement. That the pangas he recovered from the house of Doris Mwari are in Court and the long one belonged to the deceased and produced as P Exhibit 1 and the other 3 were short pangas and produced as Prosecution Exhibit 2, 3 & 4 respectively. He produced an inventory he did which was witnessed by Johanna Mutwira.

20. On cross examination, he stated that he did not have consent or warrants to break into Doris' house and that the pangas he recovered were not subjected to any forensic examination. That Johanna, among others identified P Exhibit 1. That he does not know whether Johanna is related to the victims or the accused and that he did not establish whether he was an employee of any of the parties. That he went there on 26th November 2015 and established in his investigation diary that all these parties fought each other with pangas and that the fight was over ownership of trees. That he charged them with murder because they committed one. That the statements were recorded by more than one officer and that he recorded the statements of Jennifer Karimi, Benard Mworira and his own statement. That he has the list of witnesses. When he was questioned about the statement of Sarah Kaniru who stated that a conflict had arose between Solomon and her sister in law Doris Mwari and that she saw Solomon cut Doris with a panga between the fingers of one of her hands and her forehead arm near the ear, on her thighs and fingers and that she tried to convince Doris to run away but she kept fighting with Solomon, he said that he established that it was the accused who was cut.

21. Upon re-examination, he stated that in her statement, Sarah stated that she decided to scream for help. Doris was armed with a panga which she used to cut Solomon as well and she saw the deceased fall down and that she saw the deceased fall down, and as the deceased was on the ground, Doris persistently hacked him. That the dispute was on trees and it is the deceased who was cutting trees.

22. That was the close of the prosecution's case. By a Ruling delivered on 31st October 2019, both accused persons were placed on their defence.

Defence Case

23. Mr. Thangicia gave an opening statement. He states that their case is that the accused acted in self-defence. They were attacked in their own land and home. That they were first attacked and injured. That the 2nd accused is the mother of the 1st accused. That the deceased and his wife wanted to evict them from their land. That there were orders restraining either party from interfering with the developments in that property.

DW1

24. DW1 was the 1st accused, Doris Mwari Ikiao. She gave sworn testimony. She said that she hails from Nthogoi village and that she understands the case she faces of murder. That the 2nd accused is her mother. That the deceased was a neighbour at home and he was married to Karimi Jennifer. That their lands border each other. That she recalls that the incident in question happened at their home. That on the material day, on 24th November 2015, she woke up and went to hospital in the morning but the doctor was not there and she went back home. That when she reached home at about 11.00am, she found that the deceased and his wife had attacked and injured her mother, the 2nd accused. That they had cut the 2nd accused's fingers on both hands. That she asked them what was going on and they attacked her and cut her forehead, on her right hand thumb (she showed a stitched thumb), that her left thumb was severed (she showed a severed left hand thumb with only 4 fingers remaining), on her left ear, which is also stitched. That they also cut her on her right leg on the knee and near the ankle. That they had pangas and the deceased had a C-line and the wife had a short panga. The deceased had P Exhibit 1. That she run behind the wife, PW1 and the deceased cut his wife while trying to reach her. That she hit the deceased and when he fell down, she took his C-line and cut him with it. That she cannot tell how many times she cut him. That there were no people around and at the scene, they were only 4 of them being herself, her mother, PW1 and the deceased. That she took the 3 pangas and put them in her house so that the police could come and recover them. That she left with her mother to Miathane Police Station and they were given P3 forms and went to Miathane General Hospital. That while they were at the hospital, the deceased and the wife were brought to the hospital. That the 4 of them were put in an ambulance and brought to Meru Level 5 Hospital and she was stitched. That she was admitted for 3 days and on the 3rd day, together with her mother, they were picked by police officers from Nchiru police station. That they stayed in the cells for 2 weeks before they were brought to Court. That she does not have the medical records because when she was arrested, she was not given any discharge papers by the hospital. That she did not kill the deceased and it was a fight. That it was in their land. That she was defending herself and that she did not plan to kill the deceased. That in the disputed land, there are trees that belong to her mother and that when the dispute arose, Mworira came

and surveyed a portion of their land giving the deceased. That they reported to the area chief and they removed him from their portion and the chief directed that no one should interfere with the trees. That on that day, the deceased and his wife were cutting trees and when her mother asked them about it, they attacked her and that is the time she arrived.

25. On cross examination, she said that on the material day, she saw 3 pangas and she saw that 4 pangas were produced. That they were 4 of them and she did not have a panga. That she was from hospital and had not even gone to their house. That she did not see any other person and she could not see others who were in their farms. That's he knows Sarah Kaneru went to the hospital, Miathene on that day and that she was not at the scene and that she never testified. That she knows Johanna Mutwera is a neighbour and his home is about 150 m from their home and that she never saw him on that day and she does not know if he saw her. That she admits that she cut the deceased with his panga and that they were fighting. That he sustained injuries during the fight and that it is not only her who assaulted him because he had cut her severally all over her body. That she was treated at Miathene when the ambulance came she was on drip and that she was also treated at Meru Level 5. That she did not know the medical records would be required.

26. On re-examination, she said that she was cut 8 times and that is when she reacted and that if she did not react, she would be dead now. That if she was given time, she could follow up on the medical records. That she had no grudge with the deceased. That there was no one present except the 4 of them and that there is a road between their land and that of PW3.

DW2

27. DW2 was the 2nd accused, Janet Kanyua Ikiao. She gave sworn testimony and said that she hails from Nthongori, Maithene and that the 1st accused is her daughter. That she is old but has her ID which shows how old she is. That she is 75 years and she has 8 children. That she knew the deceased and he originally came from Maiga, Meru. That before he died, he was her neighbour and his home was about 50m from hers. That she knows the charge facing her. That it was alleged that she fought with the deceased and on that day, she was alone at her home. That she heard him cutting her trees outside her house. That she was at the time cutting grass for her cow and she brought the feder to her cow and went to see who was cutting her trees. That when she reached there, she found it was Solomon cutting her trees and she asked him why he was cutting them and yet the government had ordered that no one should cut them. That the deceased shouted at her and "It is you, the devil I was looking for." That he then said to the effect that since she did not have anyone to protect her, he would kill her. That he then charged at her and he was holding his C-line. That she moved backwards and on stepping 3 steps backwards, he cut her on her left small finger (she showed Court her left hand chopped). That he again cut her on right hand (right thumb and 3 other fingers stitched). That both limbs are deformed and she cannot do anything with them. That as at the time, Doris had not reached where she was. That Solomon was with his wife PW1 at the time. That when Doris came, she told her that they had attacked her. That the deceased attacked her and chopped off one of her fingers. That the deceased attacked the 1st accused because she asked why they had attacked her and they cut her on both hands, the head and leg. That she cannot tell who between the two cut her. That her and the 1st accused have never planned to kill the deceased. That the incident occurred outside her own house and a government officer had directed that the trees should not be cut. That she did not cut the deceased and after he cut her, she also cut him.

DW3

28. DW3 was Geoffrey Muthomi Muriithi, a clinician at Miathene Subcounty Hospital. He produced 2 P3 forms, one for the 1st accused and the other for the 2nd accused.

29. He said that he had the P3 form dated 24th November 2015 for Doris Mwari. He said that there was a history that she had been assaulted by people known to her on 24th

November 2015 and that on examination she had a cut wound on her right ear and on the right hand palm; and that on the left hand, her thumb was amputated; and there was swelling on the right leg knee with a cut wound. He said that at the time of making the P3 form, the injuries were 5 years. He said that a sharp object had been used to inflict the injury. He said that she was treated with antibiotics and refashioning of the right hand thumb which had been amputated and that the degree of injury was grievous harm. He said that he completed the P3 form on 5th October 2020 and that the P3 form related to OB No. 7/24/11/205 at Miathane Polcie Station. He produced this a Defence Exhibit No. 1.

30. He said that there are treatment summary notes from Meru Teaching and Referral Hospital and that the date of admission was shown as 24th November 2015 and a discharge of 26th November 2015 and that it has injuries related to this. He produced this as Defence Exhibit No. 2.

31. He said that the other P3 form was for Janet Kanyua aged 75 years. The form is dated 24th November 2015. He said that Janet had come to the hospital and on examination, her right hand had multiple cut wounds on the fingers and her left hand had multiple cut wound; that the injuries had taken 5 years by the time he filled the P3 form and that she was treated with antibiotics suturing. He said that the degree on injuries was harm. He said that filled the P3 form on 5th October 2020 and it related to OB No. 7/24/11/205. He produced this as Defence Exhibit No. 3.

32. He said that there are treatment summary notes from Meru Teaching and Referral Hospital where she was seen and admitted for 1 day. He produced this as Defence Exhibit No. 4.

Prosecution's Submissions

33. In their submissions, the Prosecution restated the evidence tendered during hearing. Concerning the Defence of provocation and self defence that was fronted by the accused persons, the Prosecution submits that the two accused persons testified before Court that they had cut the deceased as well as PW1 and that these actions were not warranted and not justified at all because the deceased lost his life and PW1 was

seriously injured and had to spend a whole month in hospital. Relying on the case of **Anthony Ndegwa Ngari v Republic (2014) eKLR** they submit that there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction and they are: -

- a) The death of the deceased and the cause of death.
- b) That the accused committed the unlawful act which caused the death of the deceased; and
- c) That the accused had malice aforethought.

34. They submit that the Prosecution proved death through the evidence of PW1 who testified that the deceased was pronounced dead upon arrival at Meru Level 5 Hospital and that PW6, the doctor, confirmed that the cause of death was severe traumatic head injury. That the second element was also proven as PW1 witnessed the accused persons attack the deceased with pangas and when she went to help him, they also attacked her. That the prosecution also proved malice aforethought under Section 206 (b) of the Penal Code as the accused persons inflicted injuries with the use of pangas and the same did cause grievous harm leading to his death. That the post mortem indicated that the deceased had multiple cuts on his scalp with a total of 5 deep cuts. That the accused persons knew without doubt that the kind of injuries they inflicted upon the deceased were grievous and that it was very hard for a person to survive from the injuries which the deceased had sustained. That there was no provocation at all by the deceased. They rely on the case of **Republic v Daniel Okello Rapuch (2017) eKLR**, where the provisions of Section 208 (1) of the Penal Code were the subject of interpretation. They rely further on the case of **Peter Kingori Mwangi & 2 Others v Republic (2014) eKLR** where the Court stated that provocation to exist the following two conditions must be established: -

- a) The subjective condition that the accused was actually provoked so as to lose his self-control; and
- b) The objective condition that a reasonable man would have been so provoked.

That none of these conditions existed. They submit that from the evidence on record, the parcel of land which was in dispute belonged to the deceased and this shows that the accused persons attacked the deceased without having the matter settled amicably before a court of law. They also rely on the case of **Elphas Fwambok v Republic (2009) eKLR**. They submit that even after the accused persons stopped attacking the deceased, they did not see reason and they only went to the police and made a report of having been attacked and hid the fact that they had also injured the deceased and PW1. That if they had seen reason once they cooled down, they would have looked for help and rushed the deceased and PW1 to hospital. Relying on the other case of **Lucy Mueni Mutava v Republic (2019) eKLR** and the other case of **Victor Nthiga Kiruthi & Another v R (2017) eKLR**, they submit that the defence of self-defense is not available to both accused persons since they used excessive force in the circumstances of the case. That the nature of injuries inflicted upon the deceased negates the defences of provocation and self-defense and that the force used was not proportional to the apparent imminent danger and harm.

Defence Submissions

35. In their submissions, the defence first restated their evidence. They submit that all 4 parties sustained life threatening injuries. They submit that there was no ballistic evidence linking the pangas which were produced in Court to the accused persons. That only PW1 is purported to have witnessed the incident. They submit that the elements of the offence of murder have not been established and that no single witness testified of any malice aforethought. That majority of the Prosecution Witnesses are relatives of the deceased who gave hearsay evidence. They submit that the deceased is the one who attacked the 2nd accused, an elderly woman of 75 years of age who can be termed as being defenseless who was at the mercy of the deceased and that the deceased and PW1 were determined to kill the 1st accused. That the attack on the 2nd accused, an elderly and mother is a wild provocation to any child and that the only reasonable action at that point is self-defense to preserve your life and the life of your mother and/or daughter. That there was a serious fight among the four, it being that there were 4 pangas recovered.

Determination

36. For the Prosecution to secure a conviction on the charge of murder, they have to prove 4 ingredients: -

- a) Proof of fact of death.**
- b) The cause of the death of the deceased.**
- c) Proof that the death of deceased was a direct consequence of the unlawful act or omission of the accused i.e *actus reus*.**
- d) Proof that the said unlawful acts or omission was committed with malice aforethought i.e *mens rea*.**

Proof of fact of death.

37. It is not in dispute that the deceased succumbed while on the way to the hospital. PW6, the doctor, indicated that a death certificate was signed to this effect following the conduct of the post mortem.

The cause of the death of the deceased.

38. The post mortem report confirmed that the cause of death was severe traumatic head injury. There were 5 external deep cut wounds and upon opening the head, it was confirmed that the head had been damaged severely with multiple skull fracture. The report confirmed that the

deceased had brain hematoma. This was the cause of death.

Proof that the death of deceased was a direct consequence of the unlawful act or omission of the accused i.e actus reus.

39. As per the evidence on record, the deceased died of the injuries inflicted on him by the accused persons with pangas on his head. In fact, the accused persons admit to having cut the deceased. The 1st accused is on record as not knowing the number of time she hacked the deceased. The 2nd accused also admitted that she cut the deceased although for her, it is not clear the extent to which she cut him.

40. PW1 was an eye witness and the widow to the deceased and this Court has no doubt that her identification of the deceased as well as of the 2 accused persons is credible. Her evidence was consistent, that while she was still in their house, she heard her husband, who was at the shamba scream that he was dying and when she went to check, at the shamba, which was behind the house, she found the 1st and 2nd accused cutting him with a panga and they also turned and attacked her. Counsel for the accused raised a question as to the exact number of people who were seen at the crime scene by PW1. PW1 clarified that they were 5. In any event, the 2 accused persons in this suit were present and the case concerns them.

41. Further, PW2, the daughter to the deceased and PW1 testified that she went to the crime scene and saw her parents lying on the ground with cuts. The nature of the cuts she identified were similar to those identified by PW1. Although she admits that she did not witness the cutting as she came to the scene after this had already happened and that it is her mother who told her who had cut them, she testified that she was with Doris (1st accused) at the hospital and that Doris made remarks that if she had a knife, she would stab PW1 and finish her. She also testified that Mwirigi and Gitonga, who were also at the hospital (and were among the 5 people PW1 had identified to have been behind the attack) run away when they heard that her father had passed on. Her evidence corroborated that of PW1.

42. PW3 also testified that he saw the deceased and PW1 on the scene of crime, having been cut on the head. He also accompanied the police to the house of Doris after being told by Ruth, Doris' sister that the pangas were in the 1st accused person's house. He saw the pangas which were recovered from the 1st accused person's house. This Court does not agree with the submissions made by the Defence that the absence of a ballistic report linking the pangas to the accused is enough to overlook the overwhelming evidence on record that implicated them. The Prosecution's evidence with respect to the date and approximate time when the incident occurred, the nature of injuries sustained and the weapons used to inflict the harm are all consistent. Indeed, the death of the deceased was a direct consequence of the actions of the accused persons and in this case, the 1st accused person who was the last to harm the deceased.

43. The accused persons have attempted to claim that they were also injured and that their injuries were as a result of attacks by the deceased and PW1. They claim that they were acting in self-defense and that they had been provoked. The Court will consider their respective defences of self-defense and provocation as hereunder.

Provocation

44. Section 207 and 208 of the Penal Code, Cap 63 provides for the defence of provocation as follows: -

207. Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

208. Provocation defined

(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

Self-Defense

45. Authorities have held that self-defense will only to be admitted if done within the bounds of reasonable force. This issue was dealt with by the Court of Appeal in the case of *Lucy Mueni Mutava v Republic, Criminal Appeal No. 52 of 2013 [2019] eKLR* where A. Visram, W.

Karanja, JJA. and M. K . Koome JA (as she then was) held as follows when addressing the defence of self-defence: -

“...the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed, in our view, was way excessive and negated any defence of self defence, if any, in light of the surrounding circumstances. See Racho Kuno Hameso vs. R [2014] eKLR.

Our position is further fortified by the case of Victor Nthiga Kiruthu & another vs. R [2017] eKLR wherein this Court while discussing self defence stated:

“The principles that have emerged from these and other authorities are as follows:-

(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.

15. All in all, we, like the trial court are satisfied that the appellant’s actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of malice aforethought on her part as defined under Section 206 of the Penal Code...”

46. With the above background, definitions and parameters within which the two defences of provocation and self-defence rightfully lie, the Court will now analyze whether the circumstance surrounding the 2 accused persons acts and omissions support their defences.

2nd Accused

47. With respect to the defense of provocation, the 2nd accused claims that the deceased was cutting her trees and that when she questioned, the deceased attacked her. Other than her oral evidence tendered in chief, there was however no proof of this fact. Concerning the cutting down of the trees, all the Prosecution Witnesses, during cross examination said that they did not see any trees that had been cut. Although PW7, the Investigating Officer says that he established that the dispute was on trees, he did not testify as to having seen any of the said cut trees. He in fact came to the scene much later and was therefore not an eye witness. This Court finds that if indeed the dispute had been on trees, the supposed cut trees ought to have been produced in evidence. In the absence of proof of the act of cutting trees, this Court is not able to proceed and determine whether there was any provocation on this act.

48. Nonetheless, even if it were true that the said trees were being cut, this Court does not find that the act of cutting trees is one that amounts to an act of provocation within the meaning of Section 208 of the Penal Code. The reasonable thing to do, upon finding that one’s trees were being cut is to report the matter to authorities and in this case the Chief who is said to have previously given the direction that no trees should be cut. This Court therefore dismisses her defence of provocation with respect to the alleged act of cutting trees.

49. Concerning the 2nd Accused person’s defence of self defence, this Court observes that the attacks occurred in the deceased person’s shamba. This Court further finds that the 2nd Accused had gone to the said shamba with her panga(s) as she could not have had time to go back and fetch the panga(s) in the circumstances. This points to the fact that she went armed with her said weapon, the panga(s). These findings do not aid her defence in claiming that it was the deceased who was the aggressor. However, this Court is also mindful of the fact that there was no eye witness who was present when the attack commenced for the very first time. Even PW1, the eye witness is on record that she only went to the scene when she heard her now late husband scream that he was dying. Although she testifies that she saw the Accused persons attack him, she did not witness how the attack started.

50. This Court considers that if at all the deceased is the one who started the attack, the 2nd Accused person may indeed have been acting in reaction to this act. Concerning the nature of injuries she inflicted on the deceased, it is not clear from the evidence to what extent she inflicted harm on the deceased. In her evidence, she simply indicates that she only cut the deceased after he had cut her. Save for the fact that the weapon used was a panga, it is not clear in what manner she inflicted harm. In view of this apparent doubt, this Court will admit her defence of self-defence.

1st Accused

51. With respect to the defense of provocation, the 1st Accused person claims that she was provoked when she saw that the deceased and

PW1 had attacked her mother, DW2. Indeed, an attack on a parent if the attack is such one of great magnitude so as to cause a reasonable person to lose self-control, may cause provocation. Furthermore, if a person is first attacked by another, the aggressor, as is claimed by the 1st Accused person that she was first attacked by the deceased, this would be considered as a ground to act in self-defense. In other words, the defence of self-defense is available to a person who was on the receiving end, as opposed to the one who commenced the attack.

52. This notwithstanding, the law demands that the acts done out of provocation and self-defense must be comparable to the kind of attacks that were done by the supposed aggressor. To this end, this Court observes that the nature of injuries inflicted upon the deceased, being head injuries and the type of weapons used by the 1st Accused, being panga(s) in the supposed self-defense spell the use of excessive force.

53. Contrasting the injuries sustained by the 1st Accused person to those sustained by the deceased, the former sustained injuries on her arms more specifically on the fingers while the latter lost his life. The Court is convinced that the nature of injuries so sustained by the 1st Accused on her arms were not grave as compared to the ones sustained by the deceased and PW1. The deceased suffered multiple skull fractures and brain hematoma. PW5, Bernard Mworja John testified that when he went to the scene, he saw the deceased on the ground bleeding and his head had opened up. PW7 testified that in the evening of 26th November 2015, merely two days after the incident occurred, Doris and Janet, the accused persons, were discharged from hospital. This is to be contrasted with the evidence of PW2, the daughter to PW1 and the deceased who testified that PW1 stayed in hospital for 2 months. According to PW7, PW1 was discharged from hospital on 7th January 2016. This is a period of one and a half months later after she was admitted on 24th November 2015. If anything, it appears that the accused persons' injuries were a natural consequence of the nature of weapons they were using to inflict harm on the deceased as opposed to those of the deceased and PW1 who suffered much more serious injuries, one of which led to a death. This Court finds that the report made by the accused persons at the police stations was stage managed to feign themselves as victims.

54. Going by the finding of the Court in the aforementioned case of *Lucy Mueni Mutava v Republic Criminal Appeal No. 52 of 2013 [2019] eKLR*, the Court finds that the injuries inflicted on the deceased by the 1st Accused were way excessive and this negates any defence of self-defense. Additionally, this negates the defense of provocation since the attack on the 1st Accused person's mother, which is claimed to have been the cause of provocation is not an assault, the kind of which the 1st Accused committed against the deceased. In other words, the attack on the 2nd Accused by the deceased, does not compare with the attack that the 1st Accused unleashed on the deceased. The 1st Accused testified that she cannot recall how many times she hacked the deceased.

55. This Court therefore dismisses the 1st Accused persons' defence of self-defense as well as that of provocation.

Proof that the said unlawful acts or omission was committed with malice aforethought i.e mens rea.

56. Malice aforethought, otherwise known as *mens rea* is an active ingredient of the offence of murder. Malice aforethought 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;

57. It is clear that the accused persons had a boundary dispute with the deceased and his wife. According to the Prosecution evidence, there existed a boundary dispute between the accused persons and the deceased's family. PW1 stated that the accused persons had invaded their land and occupied some 0.80 acres thereof. PW2, a daughter to PW1 and the deceased stated as much, that their family had a land dispute with the accused. According to the evidence of PW3, the incident occurred on a 0.20 acre excised from the land of the accused and given to the deceased during adjudication process on which there was a house belonging to the brother of the deceased. The allocation of this 0.20 acres of land to the deceased apparently upset the 2nd Accused. PW4 indicated that at the scene of the crime, there was a fence which had been cut.

58. The 2nd Accused said that the dispute was on trees which the chief had ordered should not be cut. This was however not supported by evidence. In their submissions, the defence submit that there was a land dispute in issue.

59. Clearly, there are various perspectives to the dispute in question. Nonetheless, it is clear that a land and/or boundary dispute existed between the accused persons and the deceased's family. It is not for this Court to determine who was the rightful owner of whatever portions of the land. This Court is only concerned with whether the relationship between the accused persons and the accused that could lead to the conclusion that the accused persons, more so the 1st Accused person possessed the necessary *mens rea* for the offence of murder that she is charged with. It is evident that the accused persons had a vendetta flowing from their perceived claim over the land the deceased occupied.

60. As can be gleaned from the provisions of Section 206 of the Penal Code *mens rea* need not be confined to the relationship of the parties prior to the incident, but it can also be inferred from the circumstances surrounding the attack that lead to the death. In the case of *Republic V. Tumbere S/O Ochen (1945) 12 EACA 63*, which case was cited by the Court of Appeal in the other case of *Sammy Mulai v Republic Criminal Appeal No. 130 of 2015, [2020] eKLR*, by W. Ouko, H. Okwengu and F. Sichale JJA., the Court identified five things to be looked for in order to infer malice aforethought in a given situation. These include:

a) the nature of the weapon used;

b) the manner in which it was used;

c) the part of the body targeted;

d) the nature of the injuries inflicted either a single stab-wound or multiple injuries;

e) and the conduct of the accused before, during and after the incident.

61. It is not in dispute that the pangas were obtained from the 1st Accused person's house. During hearing, she stated that she took the pangas and kept them in her house so that the police could come and recover them. This Court does not believe that a supposed victim of a criminal offence would have the time to take pangas and store the same in her house for the benefit of the police. If indeed she wanted the police to know about them, she would have gone with the pangas to the police station where it is confirmed she went to record her statement i.e. Miathene Police Post, shortly after the incident occurred. This Court finds that the 1st Accused person hid the pangas in her house so as to conceal material evidence. Pangas are undoubtedly dangerous weapons which if used to inflict harm on another would most likely lead to death, otherwise loss of body parts.

62. On the part of the body targeted and the manner in which the pangas were used, the nature of injuries inflicted clearly depict that the 1st Accused person deliberately cut the deceased on the head. The head is such a distinct and sensitive part of the body such that one who injures another on this part of the body will definitely know the grievous nature of the injuries likely to be inflicted on him. DW6, the Doctor confirmed that the post mortem revealed 5 deep cuts on the head. There were multiple skull fractures as well. The 1st Accused person is on record herself as not knowing the number of times she hacked the deceased. This reveals that the 1st Accused person inflicted the harm knowing very well that dire consequences (death) would result from the attack. This Court finds that the 1st Accused person indeed possessed the requisite *mens rea*, for the offence of murder.

63. Further, PW2 testified that at the hospital, DW1 had said to her that if she had a knife, she would stab PW1 and finish her. This statement speaks a lot on the general attitude of the 1st Accused person even after the attack thereby affirming a positive finding that the 1st Accused possessed the necessary malice aforethought.

Conclusion

64. The deceased died of severe traumatic head injury. He died on the same day the attack happened. It is evident that the manner in which the deceased was injured was brutally savage. This deadly attack over an ordinary boundary dispute was not at all warranted or called for by any stretch of the principle of provocation or self defence on the part of the 1st accused.

65. However as there was no eye-witness as to how the incident started, the 2nd Accused and the deceased are the only two persons who know how the attack commenced. Despite the fact that the killing happened on the deceased person's shamba, no one else can tell as to who between the two was the aggressor. PW1 and even the 1st Accused could not testify as to how the attack started since they both admit to coming to the scene much later after the attack had already started. This Court is mindful that any such doubt on the matter is to be construed in favour of the Defence. The doubt as to who was the aggressor between the deceased and the 2nd Accused, while dismissing the 2nd Accused person's defence of provocation, the Court accepts that the 2nd Accused may have been acting out of self-defence, in reaction to an alleged attack by the deceased, who evidence shows had a panga which he was using to cut grass for his cows, and the doubt must be given to the benefit of the 2nd Accused. The evidence tendered does not indicate that the force used by the 2nd Accused while so defending herself was excessive, and the Court finds a reasonable doubt has been raised in relation to her defence of self-defence.

66. The 1st Accused person is, on the evidence, shown as using a panga to hack the deceased person, to her own admission, on uncountable times to the extent that she doesn't remember how many times. This Court finds that the attack on her mother, which she offered as an act of provocation, could not justify her reaction by the vicious attack that she meted on the deceased on such vulnerable part of the body as the head, to a point where the head was split open. This Court finds that the nature of her attack were so severe and excessive, and that these are not the acts as contemplated in the defence of provocation in Section 208 of the Penal Code, and neither are they acts in self-defence, provided for under section 17 of the Penal Code, as the killing obviously exceeded the reasonable degree of force required to ward off the alleged attack by the deceased on herself.

67. The Court finds that a weighing of the evidence adduced by the Prosecution and the Defence as a whole establishes all the elements of the offence of murder beyond reasonable doubt, and the charge of murder contrary to section 203 as read with section 204 of the Penal Code has been proven, as against the 1st Accused person but not against the 2nd Accused.

ORDERS

68. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The 1st Accused person DORIS MWARE IKIAO is hereby found guilty for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and this Court convicts her accordingly.

ii) The 2nd Accused person JANET KANYUA IKIAO is hereby acquitted.

69. The sentencing proceedings for the Accused No. 1 shall be had on **28th June 2021**.

Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. B. Nandwa Prosecution Counsel for the DPP.

M/S Thangicia M. David & Co. Advocates for the 1st and 2nd Accused.