



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 64 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

PHILIP KAVILI MUTHENGI alias MWITL.....1ST ACCUSED

MERCY KIANJIA KINYUA.....2ND ACCUSED

LYDIA KAIMENYI KINYUA.....3RD ACCUSED

JUDGMENT

1. The accused persons were charged jointly 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 6th day of September 2015 at Lower Kiringa Sub-Location in Imenti South District within Meru County jointly murdered Henry Mbae Ng’anya.’

2. All the accused persons pleaded not guilty and the matter proceeded to trial.

Prosecution’s Case

3. In her opening statement, Prosecution Counsel for the State Ms. Murithi stated that on 6th September 2015, the deceased was seen at a joint taking illicit brew with his friends. That on the following day, his body was found lying at Iraru bridge and it was discovered that the deceased was with the accused persons when he came out of the drinking den. That they trailed him home. That the deceased was found dead on 7th September 2015 and the accused persons were the ones last seen with him.

4. The Prosecution indicated that they would be calling 10 witnesses and that they would be relying on circumstantial evidence. The evidence adduced is reproduced hereunder.

PW1

5. PW1, John Mutema testified as follows: -

“I am the above named from Kanyakine. I am a farmer. I recall 6th September, 2015 was a Sunday. I attended church at Kanyakine. I had planned to go to Nairobi. I had planned with Henry Mbae my employee for 24 years. He was my farm worker. When I came from church, I did not find him. I left money with my wife to give it to him to go and pay his other fellow workers. I left and went to Nairobi. When I reached Makutano, I received a call from Mbae who told me he had received the money from my wife and he was going to the farm to pay the workers. I reached Nairobi at 6:00 p.m and went to sleep. The following day at 6:00 a.m, I was called by my wife, Alice Mwari. She informed me that Mbae’s wife had come to my home as he had not slept in his house. I told her to look for him. I again received another call and was informed that his body had been found under Iraru bridge. The call came from my brother’s farm worker. The brother to the deceased went and confirmed the body to be his. I decided to come back home from Nairobi the same day. On arrival, I went to the scene but found that the body had been recovered by the police. I do not know the accused. He had a relationship with people across the river. He used to drink on Saturdays and Sundays.”

Cross-examination

"I knew the deceased for long. I do not know the accused. I can't tell whether they are the ones who killed the deceased. I was told that the body was in the water. I cannot tell what clothing he had. I saw the body on the day of burial. I do not know if it had any injuries."

PW2

6. PW2, Felix Kiambi testified as follows: -

"I am the above named. I live in Lower Kiriga location. I am a farmer. I recall on 7th September, 2015 at about 7:00 a.m, I was at my home with my mother Catherine Kairigo, Alice Kiende, the wife to the deceased, Festus Murithi and Jacob Mwitii. I received a call from Alice Mutema. She told me to go to River Iraru at the bridge to see if it was my brother Henry Mbae who was there. I took a motor bike and went there. On reaching the scene, I saw that it was my brother's body that was lying beside the river. The body had injuries. There was some soil on the back of the head and the skull had a cut. The body was lying on its stomach. It is only the head that had blood. There was no weapon anywhere around there. I called the sub-chief Rosaline. I informed her to get the police as the body was that of my brother. I waited until the police came and recovered the body. They moved it to Meru General Hospital Mortuary. I accompanied the body there. I later went and made my statement to Nkubu Police Station. I later attended the post mortem of the body."

Cross-examination

"From the deceased's home to my home is about 50 metres. It is the same farm. His wife was at my house. She did not tell me that the deceased had not returned home. I cannot tell whether it was unusual for him to come home in the evening. When I arrived at the scene, I met people who I do not know as it is far from my home. The distance from my home to the scene is far. I estimate it to be about 4 kilometres. I saw the injuries to the body. There was an injury on the head. There was no blood on the ground as the body was in the water. I do not know the accused. My brother was wearing a yellow sweater and a black trouser jean. He had sport shoes."

PW3

7. PW3, John Kinyua testified as follows: -

"I am the above named. I hail from Ithitwe village. I am a farmer. I recall on 6th September, 2015 which was a Sunday. I was at home. I went to a place to drink alcohol at about 10:00 a.m. It is then that I met Mbae (the deceased). The place we went to take alcohol is the home of Lydia Kinyua. She is in court today. She is the 3rd accused. I left for my home. The following day, Mutugi, a son of Zablon came and told me and Salesio that there was a body on the river. When I went there, I realized it was Mbae. Salesio called PW1 who was the employer of the deceased. I went back to my work. On Tuesday, the police came and picked me to go and make my statement. On the day I was with Mbae, he was wearing a white T-shirt and a black trouser. The shirt in court is the one he was wearing. (PMFI 1) I can't recall the trouser he was wearing. I did not stay long at the drinking den as I had cows to look after."

Cross-examination

"The distance between my home and the drinking den is some distance. It is about 7 kilometres. There were many people at the drinking den. There was no commotion at the drinking den. I saw the body of the deceased. It had an injury at the back of the head. The body was lying stomach downwards. I did not see any weapon at the scene. There was a stone under his body. He was wearing a white T-shirt. I say it was a shirt not a T-shirt. He also had a black trouser. I know the 1st accused. He is known as James Mwitii. I do not if there was any grudge between him and the 1st accused. The 1st accused was not at the drinking den. The 2nd accused is the wife of Felix Kinyua. I do not know if she had any grudge with the deceased. I do not know if they are the ones who killed the deceased."

PW4

8. PW4, Salesio Muriuki testified as follows: -

"I am the above named. I hail from Abogeta. I am a farmer. On 6th September, 2015 at about 12:30 p.m, I was in the Mworoga area. I was with Kinyua. I was unwell. Kinyua had taken me to Mworoga dispensary. We waited for it to be opened. We went to the home of a lady called Mercy to take some local brew. At that home we found Mbae. We spoke to him. He was with other people. I cannot recall their names. Mercy is the lady at the middle. After taking 2 cups, I left Mbae and Kinyua together with the others drinking. I went home. I left Mbae at the drinking den. He was reasonably drunk. The following day, I heard that there was a body on the river. I went to Iraru River. On reaching there we found the body of Mbae lying on the ground. The body was lying downwards. The body had an injury on the forehead. I did not see any other injury. There was some blood on a stone next to the body. He was wearing white sport shoes. I had known the deceased for about one month. He was a friend and was working for Mutema (PW1). On identifying the body, I called his employer Mutema and informed him about the incident. I went back to my house."

Cross-examination

“I went to Mercy's home at about 12:00 noon. I cannot recall anyone I met at the drinking den save for Mercy and Kinyua. I left at about 1:00 p.m after my wife came for me. I did not see Mercy (2nd accused) quarrel with the deceased. I knew of Mbae's death the following day in the morning. I can't remember the name of the person who informed me about the death of Mbae. Between my home and the scene, it is about a kilometre. There are some homesteads between my house and the scene. The injury was on the head. There was no blood trail at the scene. (Statement read to the witness) I stated that I believed he was murdered where he was drinking the previous day and brought to the scene. I was sick at the time. I know the 1st accused. He is called Mwiti. I do not know how he related with the deceased. I know the 2nd accused. She is called Mercy. I do not know how they related with the deceased. The 3rd accused was not there when we were drinking at the drinking den. From Mwiti's home to Mbae's is a distance of about 3 kilometres. I did not see the 1st accused on that day. I cannot tell whether there was any reason for the accused to kill the deceased.”

Re-examination

“The people I recall seeing at Mercy's place are Mbae and Kinyua. I left Mbae drinking. I left Mercy at the drinking den. Next, I saw Mbae dead. I have no grudge with any of the accused.”

PW5

9. PW5, Geoffrey Muriungi testified as follows: -

“I am the above named. I hail from Maraa. I am a farmer. I recall on 6th September 2015, at about 3:00 p.m, I left my home headed to Moroga Market. I arrived at about 3:30 p.m. I was with my wife Doreen Kagoji and her sister Stella Kawira. When we reached the market, we met my wife's cousin by the name Mbae. He was in a kiosk buying some things. He told me to take him to a drinking den where he had been drinking. We went to the home of Mercy. I know her. She is the 2nd accused in court. When we arrived at the den, we found Mbaabu, Kinyua, Salesio, Mercy Kabau and Katakaa. They were taking illicit brew. Mbae bought me one cup of the brew but my wife called me. I told my wife to wait for me as I call Mbae. He declined to come with me. I again went with Stella to pick Mbae but he once again declined. This was about 4:00 p.m. We left him with Mbaabu, Salesio, Mercy Kabau and Kinyua. The 2nd accused was also there. The following morning, I heard that the body of Mbae had been found at River Iraru. I went there but could not see the body well.”

Cross-examination

“I made my statement on 10th September 2015. On 6th September 2015, I met Mbae at about 3:00 p.m. I cannot recall what he was wearing. From my home to Moroga is about 2 kilometres. I would take about 30 minutes. We went with Mbae to the den. I left after he had taken 2 cups. I left at about 4:20 p.m. At the den, there was Salesio, Mercy Kabau, Kinyua, Katakaa. The 1st and 3rd accused were not there. Mbae refused to accompany us and insisted that he was waiting for someone to pick him with a motor cycle. The motor cyclist was Murangiri. I found many people at the scene. Murangiri did not carry Mbae on that day. He carried other customers to some other destinations, Mitunguu. I know all the accused but I did not see the 1st and 3rd accused on that day.”

Re-examination

“I accompanied Mbae to the 2nd accused's home. I left him there. The next time I saw him he was dead.”

PW6

10. PW6, James Mputhia testified as follows: -

“I am the above named. I live in Ithitwe. I am a farmer and Area Manager. On 7th September, 2019 at about 6:30 a.m, I received a call from the Assistant Chief, Rosaline Mayiene. She told me that I go to River Iraru and see who had been killed. When I went there, I found a body of Mbae. He was new to me. The body was lying on the bank of the river. His legs were on the water. The body was lying downwards. I saw only one injury on the head. I confirmed to the Assistant Chief the incident. I did not see any murder weapon. There was no blood splatted at the scene. There was little blood from the wound to the water. He was wearing a black/blue jumper. After that, the Assistant Chief came with the police. They recovered the body and went away. The following day, the Assistant Chief came at about 7:00 a.m and informed me I wait for her. She later came with the police. We went to Moraga. On crossing River Iraru we found Mwiti (Points at 1st accused). The police arrested him and we went to his house. The police carried out a search. They recovered a panga. It had blood stains (PMFI 2). It was recovered from under the bed. Then they recovered a motor cycle which was blue in colour. I can't tell the make. I did not examine it well. It was recovered from Mwiti's house. His compound had 3 houses and a goat kennel. We did not search around. Those present were me, the Assistant Chief and other people I did not know. I knew Mwiti before the incident. I did not know his family. I know the other 2 accused. The police also recovered some timber from Mwiti's house. It had blood stains. It was cut from his house because it had blood stains. The police went with the items they had recovered.”

Cross-examination

“I received the report from Rosaline, the Assistant Chief. Shadrack called me after the Assistant Chief had informed me about

the incident. I saw the body which had an injury. I cannot recall stating that the body had been hit with a stone in my statement. I recall I went to the police and made a statement. I signed it. He was wearing a jumper, a yellow t-shirt and a black trouser. He had white shoes. The panga that was recovered from Mwiti's house was blood stained. There was no blood where the body lay. We did not recover any clothes from Mwiti's house."

Re-examination

"Shadrack called me after the Assistant Chief Rosaline had called me."

PW7

11. PW7, Dr. Winnie Mutunga testified as follows: -

"I am the above named, a Medical Doctor at Meru Referral Hospital. I have been there for 3 years. I am a holder of MBCHB from University of Nairobi 2014. I have had the opportunity to work with Doctor Bett for 1 ½ years. Currently, he is in Moi University pursuing his Masters. I am conversant with his handwriting and signature. I have a post mortem report which he prepared. This is a post mortem report filled on 11th September, 2015. It is in respect of the body of Henry Mbae. The post mortem was done at Meru Level 5 Mortuary. On examination, with no clothing, it was of a male African in his 30's, nitrification was good and of average physique. The body was well preserved. Externally there was a cut wound on the left side of the head measuring 8cm x 7cm. There was a visible fractured skull 8cm deep. The neck was lax so probably broken. Internally on the head there was a cut skull fracture with a subdural haematoma below the covering of the brain. Spinal column there was a broken cervical at C3 and C2. The opinion was that the cause of death was Cardio Pulmonary arrest secondary to head injury and broke neck. Secondary cut wound and strangulation. The death certificate Number was 547691. A blood sample was taken. It was signed by Dr. Bett and stamped by the hospital stamp. I wish to produce it as P. Exhibit 3."

Cross-examination

"Dr. Bett went to Moi in 2017. I joined Meru Hospital in April, 2015. There were no strangulation marks noted on the body. I would state that the immediate cause of death would have been strangulation."

PW8

12. PW8 was No. 63752 CPL. Simon Toroitich who testified as follows: -

"I am the above named, currently attached at Tharene Police Post. I recall on 7th September, 2015 at 11:00 a.m, I received a call from OCS Nkubu Police Station reporting of a drowning at Iraru River within Lower Kiringa Sub-location. He sent a vehicle with which I and PC Mutiso went to the scene. On the way we met the Assistant Chief of Lower Kiringa Madam Rosaline Kathure who led us to the scene. We found the body at River Iraru under the bridge. On viewing the body, it had a deep cut on the head. It was lying on the river which had very little water flowing. The body was on the banks of the river. There was a crowd of people and the relatives. The body was lying on its back with a deep cut on the head. We found a phone in his pocket and a wallet with Ksh 2,000/=. Besides the body, there was a bag full of groceries. I informed the OCS who asked me to remove the body to the mortuary. We took it to Meru Level 5 Mortuary. The case was taken over by the DCI who took over the investigations. That is all."

Cross-examination

"When I visited the scene, I was told by the OCS that the body had drowned. I visited the scene at 11.00 a.m. At the scene, I found the body of the deceased besides the banks of River Irura. The cut was on the head. There was no blood on the scene. The water was so little to carry the body. I only saw the head injury and no others. The body had a jacket and a shirt. I cannot recall the colour. He had a trouser which I think was grey but cannot remember. We recovered a phone on his body. It was an Itel phone, black in colour. I was with the Area Assistant Chief Lower Kirigna and a police officer."

PW9

13. PW9, Elizabeth Waithera Oyiengo testified as follows: -

"I am the above named. I am a Government Analyst since 1993. I am currently based at the Government Chemist Nairobi. I hold BSC in Chemistry from University of Nairobi. I also hold a Masters in Science in Applied Analytical Chemistry from Kenyatta University. As regards this case, on 25th September, 2018 at the Laboratory of Government Chemist Nairobi the following were received by No. 91741 Cpl. Everline Akoth Mbua of DCI Nkubu. They were accompanied by an exhibit memo.

- Item labelled A - a blue jeans pair of trousers and a blue stripped shirt. They were in a khaki paper. They were indicated as of accused.*
- Item B - 1 was a blood swap indicated to be from motor cycle battery cover Registration No. KMCE 776U.*

- *Item B - 2 Another blood swap from the same motor cycle and indicated from the mud guard of the same cycle.*
- *Item B - 3 was a rubber strip in a khaki paper indicated to be from the same motor cycle.*
- *Item C was a piece of wood in a khaki paper indicated to be from accused Lydia Kaimenyi's house.*
- *Item D - 1 was a blue T-shirt in a khaki paper indicated as from accused Lydia Kaimenyi.*
- *Item D - 2 was a left leg safari boot shoe in a khaki paper indicated as of accused Lydia Kaimenyi.*
- *Item D - 3 was a panga rubbed in a newspaper.*
- *Item E - was blood sample in blood bottle indicated as of deceased Henry Mbae Ng'ang'a.*
- *Item F - was a blood sample in a blood stainer indicated to be of Lydia Kaimenyi.*
- *Item G Blood sample indicated as of accused Philip Kaviri Muthengi.*

It was desired to examine the items and determine the present and origin of any blood stains. The Shirt (item A) and piece of wood (item C) were moderately stained with human blood. The trouser (Item A) and the T-shirt (item D-1), rubber strip (B-3) shoe (Item D-2) and Panga (D-3) were lightly stained with human blood. The blood swaps (B1 and B2) were also stained with human blood. On doing the DNA Analysis, the outcome is at page 3 and 4 of the report in form of a table.

- a) The conclusion was the DNA profile generated from the blood stains from panga, the rubber strip matched the DNA profile generated from (item G) indicated Philip Kavili Muthengi. It was a perfect match.*
- b) The DNA profile generated from blood stains on the trouser matched the DNA profile generated from the blood stains on the T shirt and it was of an unknown male origin.*
- c) The DNA profile generated from the blood swap (B-2) matched the DNA profile generated from the blood stains on the piece of wood (C) and it was of another unknown male origin.*
- d) The blood sample (E) indicated as of deceased and the blood stains on the Shirt (A) and blood swap (B1) and the blood stain on the shoe did not generate a DNA profile.*

I compiled the results and signed it on 9th May, 2018 which I produce as P. Exhibit 4. The conclusion in (d) means that the elements of DNA may have degenerated.”

Cross-examination

“I see Item (D3) panga and Item (E) They were subjected to analysis. There was no profile for the deceased’s blood. The degeneration of DNA agents arises because of decomposition or mortuary preservative reagents which inhibit the generation of DNA profile.”

PW10

14. PW10 was No. 83572 PC David Nga'ng'a who testified as follows: -

“I am the above named. I am currently attached at Igembe North performing investigation duties. Formerly I was in Imenti South. I am one of the investigating officers in this case. On 7th September, 2015 a report of murder was reported at Tharene Police Post. It was referred to DCI, Imenti South and I together with other officers took over the case. We commenced investigations. We were briefed by the area chief Mrs. Rosemary that there was a dumped body at Iraru River underneath a bridge. We proceeded to the scene and the body had already been removed by officers from Tharene Police Post. There was a wooden plait with blood stains and traces of motor cycle tyre prints headed to the scene. With the help of area submanagers and the public we gathered information that the body was of Henry Mbae. We further gathered that on 6th September, 2015, the deceased was in the company of other friends refreshing themselves with traditional liquor at the homestead of one Mercy Kinyua. While there, commotion ensued between the revelers and the seller Kinyua Mercy. The fight was joined by her daughter Lydia Kinyua. During the commotion some revelers left including the deceased. Further investigation revealed that the deceased, together with Mercy and Lydia headed to another joint belonging to Philip Kavili. During the night, another commotion arose whereby Mercy, Lydia and Philip were injured. The following day 9th September, 2015 we went to the village and while passing by the home of Philip with our vehicle, we saw him suspiciously peeping from his compound. When he saw the police, he returned quickly to his compound. The officer followed him. When we reached there, we saw blood stains on the wall of his house. We asked him to open his house. On entering, underneath his bed we recovered a blood-stained panga on the clothes hanging line, there was a dark blue T-shirt and blue jeans which had blood stains. Philip was wearing safari boots. They also had blood stains. We recovered the three items. Outside his house was a corridor. Packed on the corridor was a motor cycle make Skygo blue in colour Registration No. KMCE 776U. It had blood stains. The stains were at the mudguard, the exhaust and on the rubber strips where the rider sits. We connected the motor cycle to the scene at Iraru River. This is because of the tyre prints at

the scene and blood stains. The distance between his house and the scene was about 150 metres. We recorded statements from witnesses. The recovered exhibits were secured. The deceased's post mortem was conducted and the body had a deep cut on the forehead. Doctor Bett conducted the post mortem. While at Mr. Kavili's compound we arrested him. The others were arrested later. I did not know them before this case. They are 1st accused Philip, Mercy 2nd accused, 3rd Accused as Lydia. Then latter two are neighbours to the 1st accused. I have the items that were recovered.

- This is the blood-stained shirt P. exhibit 1(a)
- Blue jeans - P. Exhibit 1(b)
- Panga P. Exhibits 2
- Timber wood P. Exhibit 5
- Left Safari Boot - P. Exhibit 6

All the above have visible blood stains. The motor cycle was recovered at the 1st accused and was photographed by the scene of crime officers. I have the rubber strips that had blood stains (P. Exhibit 7) The scene was photographed. The house had blood stains, motor cycles the parts, the bridge, scene, tyre prints and where the body was lying. I produce them as Exhibit. It is Evans Mose who took the photographs (18). He issued a certificate on 22nd October, 2015. Certificate - P. Exhibit 8. Photos - P. Exhibit 9 (a) to (r). An exhibit memo was prepared and set to government chemist for analysis. The results were produced later. Exhibit memo dated 24th September, 2015 - P. Exhibit 10.”

Cross-examination

“The murder occurred on the night of 6th September, 2015. The scene was first visited by officers from Tharene Police Post. I visited the scene on 7th September, 2015. The body had been removed to the mortuary. There were blood stains at the scene. The officer Cpl. Rotich visited the scene first and he told me so. It was a continuation of the investigation. He is the one who commenced the investigation. I was accompanied by Cpl. Kipro, Area Chief and members of the public. The deceased had been drinking at Mercy's place. He was with his friends, Salesio Muriungi and Kennedy Mutembei. The latter is deceased. I do not know how the fight started. According to statements, the fight started between accused 3 and escalated to the mother, 2nd accused. The body was found beneath the bridge and water was flowing nearby. At the scene, it was obvious the body was dumped there. The deceased was killed elsewhere and dumped there having been ferried there by a motor cycle. The distance between the house of the 1st accused and 2nd accused is between 150-200 metres. The distance between 1st accused house and the bridge where the body was found was 150 metres. In the statement, I had indicated the latter distance to be 500 metres. I stand by my testimony that is 150 metres. Between Mercy's home and the bridge, there are other homesteads. I was not interested with the other neighbours. I do not know if the neighbours did not hear the fight at Mercy's homestead. I could not force the neighbours to record statements. There is no one who saw the 3 accused kill the deceased. I recovered the things I have produced. There was blood all over Philip's homestead. I recovered nothing from the 2nd and 3rd accused. The three were injured and I took them to hospital. In the statement under injury, they confirmed that they were injured. The deceased had a deep cut on the left forehead. I attended the post mortem. The jeans had blood stains. I see P. Exhibit 4 (Chemist Report) The conclusion 1. The panga and shoes were collected from the 1st accused. 1st accused also had injuries, also the 2nd and 3rd accused and the deceased. They were mentioned by the witnesses.”

Defence Case

DW1

15. DW1 testified as follows: -

“I am Philip Kavili Muthengi. I am also known as Mwit. I come from Igoji Mwereni, Igoji Ward, Mwereni Location, Mworoge Sub-location. I am a farmer. I know why I am in Court. I have been charged with murder on 6th September, 2015. I recall that in July, 2015, Lydia's husband (Lydia is the 3rd accused) came to my home at night. He was accompanied by one Kinyua. They woke me up and told me that their motor cycle had broken down. They told me to repair the motor cycle for him and he would pick it up the following day. They did not come for the motor cycle and it was with me from the month of July and August, 2015. On the date when the deceased died, on 6th September, 2015, Lydia came to pick the motor cycle. Lydia hails from our village but she is married in another village. Her husband was known to me as he had a shop in our village. When Lydia came for the motor cycle, my son Lawrence Munene refused with the motor cycle. Lydia and Lawrence fought over the motor cycle. Lydia cut Munene with a panga on the left arm. My wife Angela Kageni and my son Denis Mutinda were present. Denis is a minor age born in 2007. Mutinda was sent to call me and when I arrived, I found Lydia holding the steering of his bike pushing it, while Munene held the bike at the back. I interfered and took the panga from Lydia. I did not see Munene cut Lydia. There was blood on motor cycle and on the wall of the house. The panga also had blood. When I snatched the panga from Lydia, she left. It was in the evening and the following day, an old man called Mbae M'Arimi alias Sulvana told us that he had found a dead person on the bridge. We went to see the body while with many people. The bridge is called Iraru Bridge on Iraru River. From my home to Iraru River is about ½ kilometre. We went together with many people. I did not know the person who had died. I did not know him before. At the time I saw him, he was still alive and he was stretching out his leg. He had blood on his head, I could not tell whether he had been cut on the head. There were stones beside his body. The kind of stones found in a river. When the police came, they took money, mobile phone and sugar the person was carrying. The sugar had been tied to the person's belt. If he had

jumped from the bridge, the sugar could have spilt. It will appear he had been killed elsewhere. I had not seen the deceased before during the day. After I saw the body, I went home. The police came and took the body on the following day. A young man called Koome came to me and said that he had met with the police who had come the previous day at the bridge and they were coming to Mworoge to arrest people. We decided to go and see what the police were doing at the bridge. When we reached the people there were 7 in number. We went to police. The police were with nyumba kumi members who knew me. The nyumba kumi members told the police that I was Kabiri. When I stopped, the police asked me whether I was Kabiri and I answered them appropriately. The police told me that there was a member who knew him. They said they have been told that there had been noises at my home the previous night. I told them what Lydia had done at the home. They told me to go with him to my home to see where the accident happened. We went with them and they found blood in the house and they arrested me. I also gave them the panga which I had snatched from Lydia. The police choose one panga which had blood in it from the place where there were many pangas. I did not know Rosaline. I got to know on the date of arrest. There was no one at my home apart from Lydia and Munene. The police took a piece of timber and the panga from my home. The clothes produced in court were not from my home. Government analyst and PW9 testified and produced exhibit No. 10 showing that blood from the deceased and blood from my home did not match. There was no match on the items recovered from the home. I know the 2nd accused. She is my neighbour. She was not at my place that date. Why then charge me for killing? I can't tell the reason for the charge against me.”

Cross-examination

“It is a long time. I may have forgotten the date. It was in the evening between 7:00 p.m. – 8:00 p.m. There was blood on the wall of my house on the outside. There was blood on the motor bike and mud guard. I got a slight injury on my hand, the left hand between the thumb and the first finger. I was cut when I was trying to get the panga from Lydia. Lawrence was cut on his arm. He went to hospital. I have nothing to show that he went to hospital. The police came to my home on a Tuesday. It was two days after. The fight was on Sunday. The body was recovered on Monday and the police came to my home on Tuesday. Police recovered a panga. The panga was under the bed where we keep pangas after any work from the shamba. There were many pangas. It is true the bed belonged to me. I had not hidden the panga. We keep pangas under the bed to keep the children safe. I just kept it with our other pangas. The piece of log was recovered at the scene at the bridge. I know the 3rd accused Lydia is a village neighbour, but married at a far off village. It is my son who refused to give the bike to Lydia. My son said that he had met with Lydia's husband who asked him not to allow Lydia to take the bike.

DW2

16. DW2 testified as follows: -

“I am Lawrence Munene. I am a farmer at Mworige Sub-location, Meru County. I reside at the same place. The 1st accused is my father. The 2nd accused is my aunt and the 3rd accused is my cousin. I know they have been charged with murder. I do not know the deceased. On 7th September, 2015, I was at home. It was in the evening after coming from church. I went to buy pork and as I was coming home, I found Lydia taking a motor bike. Her husband had told us that if we gave her the bike, we could pay for it. When I found her taking the bike, I stopped her and we struggled. Lydia had a panga and she cut me on the left arm. When she cut me, I injured my arm. An injury by the bike also got blood stains as we struggled. As this was happening there was my father and my brother Dennis. I was able to get the bike. When Lydia saw that she had cut me she went away making noise. I did not know the deceased Henry Mbae.”

Cross-examination

“There was no one at home except Lydia, my father and my brother. I later got to hear that somebody had died but I did not know him. Lydia came to our home on 6th September 2015, on a Sunday evening at about 7:00 p.m. I knew Lydia very well. She is my cousin. Her husband is a friend of mine that is why he left the bike with me. Lydia is a farmer. The 2nd accused, my aunt, is also a farmer. She has been selling beer but today she has not sold beer. It was traditional beer. She came when she was drunk that day.”

Re-examination

“My confrontation with Lydia my cousin was on 6th September 2015. We heard of Henry was discovered on Monday the 7th September 2015.”

DW3

17. DW3 testified as follows: -

“I am Mercy Kianja Kingira. I come from Igoji, East Ward, I work as a farmer. I have never done anything else apart from farming. On 6th September 2015, at 3:00 p.m, I was at my home. There came 10 people from Lower Kiringa, Abogeta. I heard them calling me as my home is alongside a road. When I answered, they came in and they found there were other people. I was selling beer at my place and also the chief also knew that I was selling and I was living with an old mother and I have a disabled child who I care for. I sold beer to them and later they left. When they left, I was left outside my home. On the following day on 7th September, 2015, at around 9:00 a.m, I heard people crying from the Lower Zone on the river. They were saying that someone had been found in the river. I did not know the person. I had seen him among many people but I did not bother to find out who he was. He did not come from our village. I went to the river and saw the body but I did not identify him. I also did not get to the place where the body was because the bridge was about 90 feet down. On 9th September, 2015, I was called by the sub-

chief Irature Sub location and I took a boda boda to his home. When I got there, he found me on the boda boda and said we should go to the police post at Kathithine. He did not tell me why he was arresting me. When people came to my home they stayed from 3:00 p.m. to 3:30 p.m. for 30 minutes. I knew the 1st accused. He is my neighbour in the roadside. His home is a metre far from my place. The 3rd accused is my daughter. On that date, 6th September 2015, I did not meet the 1st accused or the 3rd accused. I got to the police station at Nkubu and that is when I got to know that they were investigating whether the deceased was drunk. I told the police that I had sold beer to the people and they left. On 6th September 2015, there was my brother and daughter, Joy Murungi, who lives in my house. There was also Joy's grandmother. On that day there was no fight at my house. I had no reason to kill the deceased. There were many people and I did not know him.

Cross-examination

“On 6th September, 2015 at 3:00 p.m, I was selling beer. Some people came. They were: -

- i) Mbae
- ii) Salesio
- iii) Kangira
- iv) Mary Gacheri
- v) Muriungi
- vi) Stella Kaimuri
- vii) Kaigongi
- viii) Kimathi
- ix) Gatakaa
- x) Late Kennedy Mutembei
- xi) Ngui

I know Mbae when he came there that day. I got to know his name when I was called to the police station. The people stayed at my place drinking from 3:00 p.m. to 3:30p.m. I have a witness. Henry did not stay he until the evening.”

DW4

18. DW4 testified as follows: -

“I am Lorse Kinya. I reside at Mutunguru. I am a businesswoman. I know the 2nd accused, Mercy. She is my auntie. The 1st accused is my neighbour and the 3rd accused is my cousin. On 6th September, 2015 I left home and went to visit my auntie the 2nd accused Mercy. Her home is at Mworoge. At my auntie's place, I found auntie selling traditional liquor. I stayed with auntie. The deceased came along with other people and they stayed for about 30 minutes and after the beer got finished, they left. I had not seen the deceased before the date. I did not know of person coming with at my auntie's house. She lived with her husband; her children are all married. I left my auntie's place the following date. There was no fight during the time that I was at my auntie's place.”

Cross-examination

“On 6th September, 2015 I was at my auntie's place. I did not know the people who came. They were many. The deceased Mbae was coming there. I did not know the deceased. I got to know his name afterwards when he died. I was told by my auntie. My auntie did not know him. They drunk for 30 minutes and left after the beer got finished. I stayed at my auntie's until the following day.”

DW5

19. DW5 testified as follows: -

“I am Lydia Kaimenyi Kanyira. I reside at Maara Sub-location, Kanyakine. I work as a farmer. On 6th September, 2015 we left church with my husband and afterwards decided to go for our motorbike from Mwiti. Mwiti is accused No. 1. We took a boda boda to Mworoga. When we arrived at about 4:00 p.m, we went to drink up to 5:00 p.m. We went to drink at a neighbour's house. The neighbour is Gatui. We drunk up to 5:00 p.m. I told my husband that we should get another motor bike for carrying our own

motor bike which had broken down. When I was looking for a motor bike my husband had been drunk. We went to Mwiti's home from Gatui's home. When we got to Mwiti's home my husband refused to get to his home and I went inside on my own. When I got at Mwiti's house I found the wife in the kitchen washing dishes. I told her that I wanted to take my motor bike. When Munene heard us from his house, he came violently as he was also drunk. He said that the motor bike should not be taken as the owner, my husband had said that bike should not be given out. His mother told him that if the motor bike belonged to Lydia's husband, he should not refuse me from taking the bike. When I tried to take the bike which was particularly well, Munene slapped me. There was a panga near his door to his house of Mwiti's wife. We struggled over the panga. I was cut on the left palm. Munene was cut on his left arm. Munene's father came and said that he did not want noise in his home. I left her home and left. The deceased Mbae, I did not know him. At Gatui's home Mbae was not there. I heard of Mbae's death the day later when I was called by Sub-chief Rogando of Lower Kiringa she told me that I should go to Nkubu Police Station to help Mwiti. Kabiri show that he did not participate in any killing and that it was just traces between me and the son Munene. I did not have any reason to hurt Mbae. I got to know he was called Mbae from CID offices at the Police Station. On the 6th September 2015, at Mwiti Kabiru's house, there was only Munene, Mwiti's wife, myself and Mutinda, Mwiti's son in class 8 and Mwiti himself. There was no other person. When we struggled over the panga, Munene snipped his blood against the wall of their house and my motor bike got splashes of blood.

Cross-examination

“My husband had wanted to sell the motor bike. I had right to go for the bike as it was bought on loan. I found the panga at Mwiti's home. I took it at his home. I had a slight cut on the palm. I did not go to report. I do not know whether Munene reported the matter.”

Defence Submissions

20. The defence filed submissions on 27th September 2021. They reiterate the evidence of the Prosecution witnesses. They urge that the testimony of PW3 and PW5 contradicts that of PW9. That PW3 and PW5 testified that at the chang'aa den, they met the deceased and Mercy and two other guys who were unknown to him and on the other hand, PW9 stated that at the chang'aa den, there were many revelers including the deceased. That PW3 testified that all along, there was no form of quarrel or fight but PW9 testified that a quarrel arose at Mercy's place. That the witness further contradicted his evidence that the distance from Mercy's place to the bridge is about 7 km away, but PW2 estimated the distance to be about 4 km and the Investigating Officer claimed that it was a distance of 500 metres.

21. They urge that for one to rely on the doctrine of last seen, the events must simultaneously follow each other in a manner that automatically points to the guilt of the accused. They urge that none of the witnesses saw the accused persons committing the act. They urge that no murder weapon was recovered and that the suspected panga that was recovered was subjected to tests and the results showed that the DNA profile in the panga did not match that of the deceased.

22. They urge that the evidence of the Assistant Chief was that during the material night, the deceased was seen at the 1st accused person's house and that is when a fight ensued. They urge that the accused person has neighbours and that if indeed a commotion happened, the neighbours would have reacted to the same and thus should have been called as witnesses.

23. They urge that according to the Assistant Chief, the 2nd and 3rd accused persons were only charged because the deceased had been drinking illicit brew at their home. That it was further her evidence that Mercy had been involved in a fight but this contradicts the evidence of all other witnesses who had been partaking with the deceased. They further urge that the witness testified that a suspect by the name Ngoi was arrested with a blood stained shirt but was later released under very unclear circumstances. That the Investigations Officer avoids mentioning this 4th person.

24. They urge that PW9, the Government Chemist, testified that the blood sample from the panga, rubber strip and blood swab perfectly matched the DNA of the 1st accused. They urge that while the Investigating Officer claims that they found a panga that might have been used to commit the killing, the DNA results prove otherwise. They urge that the blood swabs on items B1 and B2 which the Investigating Officer claim might have been used to ferry the bodies to the scene were matched to an unknown male origin. They urge that sample E were which was collected from the deceased, blood stains collected on the shirt marked A and blood stain on the shoe did not generate any DNA profile.

25. They urge that the 1st accused testified as to how the 3rd accused, on the material night came to pick their motor bike and a fight ensued in which the 3rd accused cut the 1st accused's son's hand, as he had refused to release the motor bike to her. That the 1st accused did not know the deceased and he first saw him when he went to Iraru bridge to view the body like all other people and that he could thus not have had any motive to kill the deceased. That the 1st accused called his son as a witness who corroborated his evidence. That this evidence was further corroborated by the 2nd accused who confirmed that a fight ensued between her and the 1st accused's son.

26. They urge that the 3rd accused testified that on the material date, she was at home when the deceased came to drink some local brew in the company of other men and that she did not know the deceased as she had never seen him before. They urge that the 3rd accused testified that the deceased came to her home and left and that she called an alibi. That she further confirmed that no form of fight or quarrel arose at their home that day. They urge that the accused were arrested on a suspicion that a fight arose in the accused persons' home.

27. They urge that the Prosecution has a duty to prove their case beyond reasonable doubt and that this was not done. They urge that the element of malice aforethought was not proven. They cite **Sawe vs Republic** (2003) KLR 364 and **Abanga alias Onyango vs Republic** (1990) UR for when circumstantial evidence will sustain a conviction. They urge that suspicion cannot be used to sustain a conviction. They urge that the Prosecution's case has left a lot of unanswered questions and that the chain of events is not enough to warrant a conviction. They urge that the Prosecution witnesses relied on hearsay evidence which is inadmissible.

Determination

28. 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.

29. It is not in dispute that the deceased's body was found lying at River Irura. The deceased's dead body was positively identified by a number of witnesses including, PW2, his brother. PW7 produced a death certificate number 547691 with respect to the deceased's death.

The cause of the death of the deceased.

30. PW7, Dr. Winnie Mutunga produced a post mortem report with respect to the deceased. She confirmed that the deceased suffered a skull fracture and subdural haematoma. The report indicates the cause of death as **'Cardio Pulmonary arrest secondary to head injury and broke neck. Secondary cut wound and strangulation.'** All the witnesses who saw the deceased's body confirmed that it had a head injury.

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

31. This Court observes that there was no eye witness who saw how the killing happened. The Prosecution relied on circumstantial evidence and the assertion that the accused persons were the ones last seen with the deceased.

32. The leading decision on circumstantial evidence is **Rex vs Kipkering Arap Koske & 2 Others** (1949) EACA 135 where the Court held as follows:

"In order to justify a conviction on circumstantial evidence for the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

33. The factors to be considered when considering circumstantial evidence were further discussed by the Court of Appeal in **Joan Chebichii Sawe v Republic**, Criminal Appeal No. 2 of 2002 [2003] eKLR where **Kwach, Lakha & O'Kubasu JJ A** held as follows: -

"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on."

34. The Court will hereunder analyze the Prosecution's case with respect to each of the accused persons to determine whether the inculpatory facts, if any, are incompatible with the innocence of the accused and incapable of any other explanation. Before going to each of the accused person's evidence, this Court will analyze the Prosecution's case generally.

Inconsistencies

35. To begin with, the Court has observed some inconsistencies with respect to the Prosecution witnesses. The Court observes that the Prosecution witnesses who testified to have been with the deceased at the drinking den gave inconsistent timings as to when they were all together drinking. PW3 testified to have gone to the drinking den at 10:00 a.m but that he didn't stay long as he had cows to look after. He doesn't mention whether he had gone with anyone else. According to PW4, however, he went to the drinking den together with PW3. PW4 testified that he left the den at 1:00 p.m, after his wife came for him. However, PW5, who testified to have gone to the den with the deceased past 3:30 p.m confirmed that upon arrival at the den, they found PW3 and PW4. The Court considers that if PW4 had really left at 1:00 p.m as he stated, there was no way PW5, who arrived at the den past 3:30 p.m could have met him. This reveals that the Prosecution's case is contradictory and either of the witnesses did not tell the truth.

36. Another consistency is on the issue of whether or not there was a commotion at the drinking den. The Court considers that while PW3 who was at the drinking den testified that there was no commotion, PW10, the Investigating Officer testified that there was a fight, first at the drinking den, the home of the 2nd and 3rd accused persons and then at the home of the 1st accused. The above confirms that the Prosecution's evidence, to the extent of the inconsistencies is unreliable.

Hearsay Evidence

37. The Court has also observed that the Prosecution's Evidence was largely based on hearsay. The Investigating Officer who testified that there was a fight indicated that he got this information from other witnesses. He testified as follows: -

“...We further gathered that on 6th September, 2015, the deceased was in the company of other friends refreshing themselves with traditional liquor at the homestead of one Mercy Kinyua. While there, commotion ensued between the revelers and the seller Kinyua Mercy. The fight was joined by her daughter Lydia Kinyua. During the commotion some revelers left including the deceased. Further investigation revealed that the deceased, together with Mercy and Lydia headed to another joint belonging to Philip Kavili. During the night, another commotion arose whereby Mercy and Lydia and Philip were injured...”

“...The deceased had been drinking at Mercy's place. He was with his friends, Salesio Muriungi and Kennedy Mutembei. The latter is deceased. I do not know how the fight started. According to statements, the fight started between accused 3 and escalated to the mother, 2nd accused...They were mentioned by the witnesses.”

38. The above information, supposedly revealing that there were fights in which the accused persons and the deceased were involved in, on the material day, was said to have been information obtained from other ‘witnesses.’ The Investigating Officer testified that they ‘gathered information.’ This Court considers that the Prosecution had a duty to call these ‘other witnesses’ who revealed this information. In their absence, the evidence adduced by the Investigating Officer to this extent is merely hearsay evidence.

39. This Court is alive to the fact that there are instances when hearsay evidence will be admissible, but finds that the present circumstances do not fall among those exceptions contemplated in Section 33 of the Evidence Act. The Court will, therefore, not accept that there was evidence of a fight that ensued at the accused persons home on the material day, in the presence of the deceased.

40. The Court will hereunder analyze the culpability of each of the accused persons.

2nd Accused

41. PW5 testified that together with the deceased, they went to a drinking den to have illicit brew but that he left the deceased at the den. PW3 and PW4 who both testified to have gone to the drinking den on the material date, confirmed having seen the deceased at the den but that they similarly left him there. The Court has already discussed the inconsistencies with respect to the timings when the witnesses went to the drinking den.

42. The Court also considers that the witnesses testified that the drinking den was at the home of the 3rd accused. PW4 and PW5 testified that the drinking was at the home of the 2nd accused. This Court has, however, taken note of the fact that the 2nd accused is the mother of the 3rd accused and this explains why some witnesses referred to the den being at the home of the 2nd accused while others referred to the den being at the home of the 3rd accused.

43. From the evidence, it is clear that on the date of his demise, the deceased had some interaction with the 2nd accused person who is confirmed to have been at her home selling illicit brew on the material date. None of the witnesses however testified to have seen the deceased and the 2nd accused alone after everyone else had left. In fact, the evidence of PW5 and the 2nd accused herself reveal that there were more people at the den, some of whom have not been called as witnesses in the case. The witnesses who testified merely claim to have left the deceased at the drinking den but none of them testified that the 2nd accused was the only one left with the deceased at the den.

44. In their submissions, the accused persons urge that the Prosecution relied on hearsay evidence. The Court has already found that the Prosecution’s evidence on the question of whether or not there was a fight at the home of the 2nd and 3rd accused where the deceased was drinking on the material night was marred with inconsistencies and was also based on hearsay evidence, which is inadmissible. The Prosecution witnesses who met the deceased at the drinking den, prior to his death did not testify to witnessing a fight. PW10 who testified to have gathered information that there was a fight did not reveal the source of this information. It is also true that the Investigating Officer was not at the drinking den on the material night. This Court, therefore, agrees with the defence that the evidence adduced to the effect that there was a fight was hearsay evidence, which this Court finds inadmissible.

45. In her defence, the 2nd accused called DW4, her niece who testified to have gone to her home on the material day and that she witnessed the deceased come, take the illicit brew and leave.

46. The Court considers that there is no evidence linking the 2nd accused with the killing. The medical DNA evidence did not implicate the 2nd accused in any way to the killing. Further, as no witness confirmed that the 2nd accused was the last person to be seen with the accused, the Court considers that the deceased might have left the den and gone elsewhere where his assailant met and killed him.

47. This Court does not, therefore, find that the Prosecution linked the 2nd accused to the act of the killing.

1st and 3rd Accuseds

48. The Court will consider the linkage of the killing to the 1st and 3rd accused persons together. The Court has considered that PW5 testified that he did not see the 1st and 3rd accused persons at the drinking den where the deceased was on the material date.

49. The linkage of PW1 to the death of the deceased was first introduced by the evidence of PW6, the Area Manager. She testified to have been informed of the murder incident by the Assistant Chief and that they both attended to the case. She testified that while conducting investigations, they crossed River Iraru and found the 1st accused who was arrested by the police and upon conducting a search at his home, they recovered a panga with blood stains from under the bed; a motor cycle which was blue in colour; and timbre with blood stains.

50. The other witness who linked the deceased's death to the 1st accused was PW10 who testified as follows: -

“...The following day 9th September 2015, we went to the village and while passing by the home of Philip with our vehicle, we saw him suspiciously peeping from his compound. When he saw the police, he returned quickly to his compound. The officer followed him. When we reached there, we saw blood stains on the wall of his house. We asked him to open his house...”

51. The above shows that the basis of the police going to the 1st accused person's house was suspicion. The Court has taken note of the fact that upon conducting a search at the 1st accused person's house, they saw blood stains on the wall of his house, they recovered a blood-stained panga underneath his bed, they recovered a dark blue T-shirt and blue jeans which had blood stains on the clothes hanging line and that they found the 1st accused wearing blood stained safari boots. PW10 also testified that they saw a blood stained motor cycle make Skygo blue in colour Registration No. KMCE 776U. PW10 urged that they linked the motor cycle to the scene at Iruru River because of the tyre prints at the scene and blood stains.

52. The Court considers that the circumstances under which the police went to conduct a search at the 1st accused's home was due to suspicion. There was no direct evidence linking the 1st accused to the murder. The Court of course considers the unusual and rather strange occurrence of the recovery of a blood stained panga from underneath the 1st accused person's bed and the recovery of blood stained clothes, less than 3 days after the death of the deceased. However, the Court cannot ignore the fact that there was no linkage of the said panga or clothes to the killing of the deceased. The fact that a blood stained panga was recovered from underneath the 1st accused's bed was, therefore, a mere ground of suspicion which cannot be used to secure a conviction.

53. In *Joan Chebichii Sawe v Republic*, Criminal Appeal No. 2 of 2002 [2003] eKLR, (2003) KLR 364, the Court held as follows with respect to suspicion: -

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

54. In addition, the Court has also considered the medical evidence that was adduced from the DNA examination of the items recovered. Out of all the items recovered, only the DNA profile generated from the blood stains from the panga and the rubber strip from the motorcycle matched the DNA profile of the 1st accused as a perfect match. Even then, this was of no probative value to the Prosecution's case as it does not, in itself link the 1st accused to the deceased's killing. It merely implies that the blood on the panga was for the 1st accused and this means that the 1st accused could have been involved in a fight. Without placing the deceased at the home of the 1st accused on the material date, and without linking the blood thereon to the deceased, this Court does not find, beyond reasonable doubt that the said panga is what was used to kill the deceased.

55. It is unfortunate for the Prosecution's case that the rest of the findings from the DNA test were linked to an unknown male origin and some were said to have degenerated. The DNA test may thus have been compromised owing to the time constraints leading to the degeneration. However, that was for the investigating officers to deal with and the Court's duty is merely to consider the evidence as has been presented.

56. All in all, the Court finds that the DNA evidence did not implicate the 1st and 3rd accused persons in any way to the killing of the deceased. Further, as the Court has found that the hearsay evidence of the Investigating Officer is inadmissible in the circumstances of the case, the Court considers that there is no evidence to confirm that the deceased was with or was in the 1st accused's home on the material date.

57. The Court has also considered the defence of the 1st and 3rd accused persons who claim that there was a fight between the 1st accused's son and the 3rd accused over a motor cycle that the 3rd accused had come to collect. The 1st accused's son was called as a witness who confirmed that the 3rd accused had cut his hand and that this explains the fact that a panga was recovered in their home. The Court considers that despite the corroboration between the evidence of the 1st accused, the 3rd accused and that of DW2, the 1st accused's son, the DNA evidence revealed that the blood on the panga recovered from the 1st accused's home was for the 1st accused and this proves that the fight involved the 1st accused. Further, during cross-examination, the 1st accused indicated that there was nothing to show that his son, DW2 went to hospital to seek treatment from the injuries he sustained.

58. Further, the Court does not believe the 1st accused's explanation during cross-examination that they normally hide pangas under the bed to keep them away from children. The Court considers that under ordinary circumstances, there would be no reason to keep a blood stained panga under the bed. The Court considers that the panga may have been kept there so as to conceal certain facts.

59. The 3rd accused person testified that on the material day, she was with her husband who was supposedly left outside the 1st accused person's gate while drunk, as she entered to collect the motorcycle. The Court considers that her husband was not called as a witness and this creates doubt as to the truth of her defence.

60. The Court does not entirely believe the 1st and 3rd accused persons' accounts in their respective defences. However, going by the glaring inconsistencies and gaps in the Prosecution's case, the Court finds that requiring the defence to explain the inconsistencies in their defence, would be to ask the defence to prove their innocence, which is contrary to the constitutional principle providing for the presumption of innocence until proven otherwise.

61. This Court does not, therefore, find that the Prosecution linked the 1st and 3rd accused persons to the act of the killing.

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

62. 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;

63. In the present case, the Prosecution failed to establish any motive proving why the accused persons would have wanted to kill the deceased. The alleged fight was not proven and was based on hearsay evidence. Even if it was proven that there was a fight, the Court considers that no one saw how the deceased was killed and thus the Court is unable to determine, from the manner in which the death was executed, whether there was malice aforethought.

64. The Court is only aware that the deceased was injured on the head and the head being a sensitive part of the body, there might have been malice aforethought. The uncertainties around the circumstances of the death, however, make it difficult for the Court to find that there was malice and to link it to the accused persons.

65. This Court does not, therefore, find that the Prosecution proved that the accused persons possessed the requisite malice aforethought, that is required to secure a conviction for the offence of murder.

Conclusion

66. The deceased died of ***‘Cardio Pulmonary arrest secondary to head injury and broke neck. Secondary cut wound and strangulation.’*** The deceased is said to have gone to take illicit brew at the home of the 2nd and 3rd accused persons (termed as the drinking den) on the material day. PW5, PW3 and PW4 all confirm to have been with the deceased at the drinking den, but that they left him there and went home. The Court has, however, established that the evidence of PW5, PW3 and PW4 were inconsistent, with regard to the timings when they were all at the drinking den together and when they left, all of them claiming to have left the deceased behind.

67. With regard to the 2nd accused, the Court considers that the Prosecution’s main linkage of the killing to the 2nd accused was the fact that the deceased went to drink at her home. The Court, however, considers that the evidence reveals that other than the Prosecution witnesses, there were other revelers at the drinking den, some of whom were not called as witnesses. Further, none of the Prosecution witnesses testified that the 2nd accused was last seen with the deceased, save for the fact that he was seen drinking at her home. The Court considers the possibility that the deceased may have left the 2nd accused’s home and met his assailant and death elsewhere. The Court has further considered that the medical DNA evidence did not implicate the 2nd accused to the killing and that the evidence that a fight broke out in the presence of the deceased and the 2nd and 3rd accused was hearsay evidence, thus inadmissible. The Court does not therefore find the 2nd accused liable for the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

68. As for the 1st accused and 3rd accused, the Court considers that they were not seen with the deceased on the material date. PW5 confirmed that he did not see the 1st and 3rd accused persons at the drinking den. The linkage of the 1st accused to the killing, as testified by the Investigating Officer, PW10, was based on hearsay evidence, which in the circumstances of the case is inadmissible. It was also based on suspicion which as per ***Sawe vs Republic*** (2003) KLR 364, however strong it may be, is not a basis for conviction. The Court further considers that the medical DNA evidence did not implicate the 1st and 3rd accused persons in the killing.

69. The 1st and 3rd accused’s defence was that on the material date, they were at the home of the 1st accused and a fight ensued between the 1st accused’s son and the 3rd accused over a motorcycle, leading to the 3rd accused injuring the 1st accused’s son on his hand with a panga. Notwithstanding that the 1st accused’s son was called as a defence witness, the Court does not find their defence to be true. To this end, the Court considers that the DNA results of the panga were said to match the 1st accused person’s profile only, meaning that the 1st accused was the one involved in a fight.

70. It would appear to the Court, that the accused persons and their witnesses contrived a lie in their defence. Despite the Court’s view that the accused person’s defence is not truthful, the Court considers that there was no evidence adduced by the Prosecution that placed the deceased in the 1st accused’s home on the material day. The Court thus finds that to require the defence to explain this inconsistency would be to require them to prove their innocence, contrary to the criminal law principle of presumption of innocence. It is also instructive that the burden of proof is always on the Prosecution to prove their case beyond reasonable doubt. The Court does not, therefore, find the 1st and 3rd accused persons liable for the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

71. The Prosecution’s case was based purely on circumstantial evidence as shown in the opening address by Ms Murithi, Prosecution Counsel on 26th February 2019 as follows: -

“On 6th September 2015, the deceased was seen at a joint taking illicit brew with his friends. On the following day, his body was found lying at Iraru bridge and it was discovered that the deceased was with the accused when he came out of the drinking den. They trailed him home. The deceased was found dead on 7th September 2015. They are the ones last seen with him. We shall call 10 witnesses and shall be relying on circumstantial evidence.”

72. It is a case of ‘last seen with the deceased.’ No evidence was adduced to show that the 3 accused persons killed the deceased i.e. *actus reus* and no *mens rea* was proved. It is a case of suspicion based on hearsay statements given by the Investigating Officer but not proved by any witnesses before the Court. In the respectful view of this Court, the charges should have been terminated at the level of ‘no case to answer’ under Section 306 (1) of the Criminal Procedure Code.

73. It would appear to the Court that the accused persons who gave statements on oath and their witnesses who testified for the defence as well as some of the Prosecution witnesses may have committed perjury. The Court would, therefore, request the Directorate of Criminal Investigations through the Director of Public Prosecutions to initiate investigations against the 3 accused persons, their witnesses and prosecution witnesses for the possible crime of perjury and related offences, and to take appropriate action upon the outcome of the investigations.

74. For the above reasons, this Court will acquit all the accused persons of the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

ORDERS

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

i) The Accused persons, Philip Kavili Muthengi alias Mwitii, Mercy Kianjia Kinyua, Lydia Kaimenyi Kinyua are acquitted of the charge of murder contrary to section 203 as read with 204 of the Penal Code.

ii) The security deposited for the accused persons shall be returned to the depositors.

iii) The Court requests the Directorate of Criminal Investigations, through the Director of Public Prosecution to initiate investigations against the 3 accused persons, their witnesses and prosecution witnesses for the possible crime of perjury and related offences and to take appropriate action upon the outcome of the investigations.

Order accordingly.

DATED AND DELIVERED ON THIS 2ND DAY OF DECEMBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. B. Nandwa Prosecution Counsel for the DPP.

M/S Gikonyo & Ngugi Advocates for the Accused.