



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCR NO. 6 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN PETER MBAABU.....1<sup>ST</sup> ACCUSED**

**KENNETH NJAGI.....2<sup>ND</sup> ACCUSED**

**CAROLINE KAMBURA.....3<sup>RD</sup> ACCUSED**

**VINCENT MURIUKI.....4<sup>TH</sup> ACCUSED**

**J U D G E M E N T**

1. **JOHN PETER MBAABU, KENNETH NJAGI, CAROLINE KAMBURA and VINCENT MURIUKI**, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons respectively are all charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

The particulars of the charge as contained in the information presented to this court are that on 30<sup>th</sup> July 2016 at Gichwe village, Kithitu Sub-Location within Tharaka Nithi County, the four unlawfully murdered Abinja Thara Muchiri, the deceased herein.

2. All the accused persons denied committing the offence and the prosecution lined up a total of five witnesses with a view to proving their case. The prosecution's case hinged on direct evidence.

3. The first prosecution witness called by the prosecution was Purity Kaari (PW1) a daughter to the deceased. She told this court that on the material date (30<sup>th</sup> July 2016) she was going to sleep at around 11.40 pm when she heard a motorcycle roaring as it passed by where she resided. She explained that though she stayed with her mother (deceased), she slept in a different house 2 metres away from her mother's house. She further stated that their homestead is about 10 metres away from the road. She told this court that she heard the motorcycle stop at the 1<sup>st</sup> accused house which was next to their homestead as she explained that the 1<sup>st</sup> accused was her paternal uncle (i.e brother to her father). According to her, she heard the 1<sup>st</sup> accused say

"**Umundi ni umundi**" which in Kimeru is translated to mean "**something will happen today- leo ni leo**" and shortly after she heard a stone hit their roof.

4. The witness went on that she observed that she then heard footsteps of people running outside and then she heard her mother's house being knocked hard on the door as the deceased began screaming. She told this court that she jumped out of her house through the window and hid behind a rabbit's cage next to her house. While there, she told this court that she saw the 1<sup>st</sup> accused and one Nkonge push the door leading to the deceased's house before entering in and dragging her (deceased) out. She told this court that she saw the 1<sup>st</sup> accused clearly because of light from a lantern lamp inside the deceased's house. She further stated that she saw the 1<sup>st</sup> accused cut her mother (deceased) on the head using a machete as the 3<sup>rd</sup> accused Caroline Kambura aided by directed a light from a spot light she carried. She added that it was the 3<sup>rd</sup> accused who had also beamed the light from the torch to door of the deceased as the 1<sup>st</sup> accused Nkonge broke it to gain access.

5. The witness also stated that as the 1<sup>st</sup> accused was attacking the deceased he told Nkonge "**Bamo fanya kazi**" adding that in Kimeru '**bamo**' refers to a person of the same age set and that Nkonge started assaulting the deceased as well upon being prompted by the 1<sup>st</sup> accused. She further added that as the two were attacking her mother, the 4<sup>th</sup> Accused (Vincent Muriuki) and one Mutembei proceeded to her house

and knocked it down before going inside. She also stated that she saw the 2<sup>nd</sup> accused Kenneth Njagi go in and when they missed her (PW1) inside the house, the three (Mutembei, 2<sup>nd</sup> and 4<sup>th</sup> accused) came out and joined the fray in continued assaulting the deceased as she screamed begging for mercy. She heard the deceased ask the 1<sup>st</sup> accused why he was killing her when she had assisted him when he (Peter Mbaabu) was sick. She told this court that the 1<sup>st</sup> accused was unrelenting as he insulted her instead and that shortly after the deceased went quiet as the 3<sup>rd</sup> accused took a machete from the 1<sup>st</sup> accused and cut her on the leg as the deceased laid down. She added that when the deceased stopped screaming, the six assailants namely, Mutembei, Nkonge, John Peter Mbaabu (1<sup>st</sup> accused), Kenneth Njagi (2<sup>nd</sup> accused), Caroline Kambura (3<sup>rd</sup> accused) and Vincent Muriuki (4<sup>th</sup> accused) all went toward the home of the 1<sup>st</sup> accused. According to her, the attack took between 10 and 15 minutes and that the five each had a machete. The witness stated that when the assailants left she rushed to where he mother lay and found her lying in a pool of blood dead. She added that she then rushed into the house, took out a mobile phone and called his brother Peter Gitonga (PW2) who came out of his hiding place with Morris Mawira and Erick Muturi (PW4). She also called the Area Assistant Chief and notified him of the incident. She added that some neighbours later came to the scene.

6. Peter Gitonga (PW2), a brother to PW1 and a son to the deceased on his part told this court that while in his house on the material date (30<sup>th</sup> July 2016) which is within the same homestead with the houses of both the deceased and PW1, at around 11.50 pm he heard a stone smashing on the roof of her sister (PW1). He explained that in their homestead there are three houses, one occupied by their mother (deceased), the other by Purity (PW1) their sister and the other occupied by himself, Maurice Mawira, and Erick Mutugi. He further added that Erick Mutugi was a casual worker engaged by their mother (deceased) while Maurice Mawira was a nephew to him. He stated that when they heard the noise from the roof after stones were thrown, he together with Mawira and Erick Mutegi (PW4) came out and met some people who threw stones at them forcing them to flee and take cover behind bananas in the same homestead. The witness stated that from his hiding place, he saw the assailants break the door of the deceased's house. He added that one of the assailants had a torch which she used to light up the deceased's door. He stated that he recognized the 1<sup>st</sup> accused who is a cousin to him and that he stood behind Mutembei who was breaking the door. He added that one Nkonge was also present and also saw and recognized the 2<sup>nd</sup> and 4<sup>th</sup> accused standing near the door.

7. The witness (PW2) further testified that, when the door broke open, the 1<sup>st</sup> accused and Nkonge entered and dragged the deceased outside and started stepping on her when she fell before surrounding her and started assaulting her by cutting her with machetes as the deceased wailed and screamed for help. He testified that the 3<sup>rd</sup> accused (Kambura) had a torch and aided the assailants by directing the light towards where she lay. The witness added that he could identify the assailants clearly because of the light emanating from his mother's house and the torch used by the 3<sup>rd</sup> accused. According to the witness (PW2), the deceased was cut severally and that Accused 3 was the last person to cut her before leaving her for dead. He added that he could not assist his mother because he was not armed and was afraid to scream for help and that after the assailants left, he saw some light in the rabbit's cage and when he went to check, he found his sister (PW1) also hiding there and was trying to make a call using a mobile phone. He added that they then went to where the deceased lay and found her lying in a pool of blood dead.

8. According to PW3, from the time their father died, the 1<sup>st</sup> accused used to go to their house to insult their mother (deceased) and that both the 1<sup>st</sup> accused and his wife (3<sup>rd</sup> accused) harboured ill feelings against the deceased. The witness stated he saw the 3<sup>rd</sup> accused cut her mother in the leg though he could not recall which leg.

9. Dr. Justus Kitili (PW3) the doctor (PW3) the doctor who performed post mortem examination on the body of the deceased told this court that upon examining the body of the deceased he made the following external findings;

- a. A cut on the back of the head measuring 7 cm long.
- b. Another cut on the back of the head measuring 10 cm long.
- c. Blood in the mouth and nostrils.

Internally he made the following findings;

- i. skull fracture on the oxypital bone of the skull.
- ii. Blood clot on the oxypital part of the brain.

The doctor told this court that he based on his findings, he formed the opinion or concluded that the cause of death was severe head injury inflicted by a sharp object. He stated he issued a death certificate Serial Number 820048 and signed the post mortem report which he tendered as P. Exhibit 1.

10. Eric Mutugi (PW4) was another eye witness to the incident who gave evidence that largely corroborated the evidence of PW1 and PW2. He told this court that he was about to sleep on the material date 30<sup>th</sup> July 2016 at around 11 pm when he heard stones being thrown on the roof of the deceased and when he came out together with PW2 and Morris Mawira, they were confronted by a group of people welding machetes. He told this court that he was able to recognize the group members because they had a spot light. He stated that he recognized the 1<sup>st</sup> accused, one Mutembei and Karuru. He further told this court that he took cover behind some bananas and saw John Peter the 1<sup>st</sup> accused and Karuru break into the deceased's house from where they dragged outside and started cutting her. He further stated that he heard the deceased remark:

**"John you are killing me!"**

He further testified that he saw the 2<sup>nd</sup> and 4<sup>th</sup> accused persons go into the house of PW1 searching for Purity (PW1) but did not find her. He also stated that he saw and heard the 3<sup>rd</sup> accused took a machete before cutting the leg of deceased while remarking:

**" Wacha nikate akikufa "**

The witness stated that he witnessed clearly what was going on from his hideout. He told this court that he could clearly identify the assailants from the light emanating from the broken door directly facing the scene of the attack and where the deceased was killed.

11. The investigating officer, CIP Christopher Wacharity (PW5) also testified told this court about the actions he took upon receiving the news of the murder. He told this court that he proceeded to the scene of crime accompanied by other police officers. He told this court that he found the body of the deceased lying in her compound in a pool of blood and after interrogating the people he found at the scene he proceeded to the house of the 1<sup>st</sup> accused where he recovered a blood stained trouser after conducting a search in the house in the presence of the 1<sup>st</sup> accused and his wife (the 3<sup>rd</sup> accused). The investigating officer tendered the pair of dark grey trouser as P. Exhibit 2 and a light grey and mud stained jacket as P. Exhibit 3. He told this court that the wooden door and the window of the house of the deceased were broken. He added that he arrested the 1<sup>st</sup> and 3<sup>rd</sup> accused from their home adding that the 2<sup>nd</sup> accused was later arrested after he was almost lynched by irate mob who also lynched another suspect to the murder herein.

13. When placed on their defence all accused gave sworn statement of defence denying having anything to do with the murder.

14. The 1<sup>st</sup> accused, John Peter Mbaabu (DW1) stated that he was woken up by the police on 31<sup>st</sup> July 2016 and told he was to be arrested on suspicion of murder. He stated that the deceased was his aunt as his father and her husband were brothers. He denied having any differences with her and claimed that he only came to know of her demise on 31<sup>st</sup> July 2016. He accused Purity Kaari (PW1) for testifying against him claiming they had differed over some bad men who used to visit her. He suspected that the deceased may have been killed by criminal elements that used to associate with PW1. He further told this court that his house was burnt while he was in custody and he reported the incident to the police.

15. Caroline Kambura (DW2) on her part also denied on oath that she was responsible for the murder of the deceased herein. She stated that she was at home on the night of 30<sup>th</sup> July 2016 and did not know what happened to the deceased and that she only came to learn on 31<sup>st</sup> July 2016 that she had been killed when she was arrested. She stated that she did not know how the deceased met her death insisting that she was still shocked. She also averred that she had no differences with the deceased and had no quarrels between them and they used to visit each other.

16. DW2 further told this court that Nkonge "**Karuru**" was a known criminal and that the said person used to visit Purity (PW1) and at one time he saw him demanding money from Purity. She claimed that the said Nkonge was lynched by a mob after she had been arrested for the offence in this case.

17. Kenneth Njagi (DW3) the 2<sup>nd</sup> accused herein also denied on oath that he committed the offence with which he faces in this trial. He stated that on the material day he was at his house throughout the day and spent the night at his place at Kithitu village. He added that he woke up the following day and went to nearby shops to buy soap when he was met with a crowd of people who beat him up. He told this court that he had no idea why Purity (PW1) testified against him insisting that he had no differences with her or any member of her family. He added that Purity used to be his girlfriend before they broke up after she reportedly got another lover.

18. Vincent Muriuki (DW4), the 4<sup>th</sup> accused herein also denied on oath that he murdered the deceased. He stated that he was employed by the 1<sup>st</sup> accused as a casual worker. He told this court that on the material day, he did his job of cutting and chopping napier grass as usual and proceeded with work until 6 pm when he left and went to his home at Kithitu and that it was not possible for him to turn back to the scene of crime at night because of existence of many corners between where he lives and where the 1<sup>st</sup> accused stays. He stated that when he turned up for work on 31<sup>st</sup> July 2016 was arrested. He averred that he was arrested for having been employed by the 1<sup>st</sup> defendant and that the witnesses who testified against him may have done so on that account.

19. This court has considered the evidence tendered by both the prosecution and the defence put forward by all the accused persons. As I have observed above all the four accused herein are being accused of murder and for a conviction to be found in such a case, it is trite that the following crucial ingredients or elements must be established and proved for one to be convicted. They are as follows:-

- a. The fact of death
- b. The cause of death
- c. Actus reus or proof that the deceased met his/her death as a result of unlawful act or omission by the person accused of murder.
- d. Mens rea that proof that the act was done with malice aforethought.

**(a) The fact of death**

20. The fact that Abinja Thara Muchiri (deceased) is dead is uncontested in this case. The evidence of Dr. Justus Kitili (PW3) who tendered P. Exhibit 1 (post mortem report) corroborated the evidence tendered by PW1 and PW3 both of whom are the children of the deceased. The investigating officer (PW5) also testified and told this court that he found the deceased lying in a pool of blood dead in her compound. This court finds that the fact of demise of the deceased in this case has been proved beyond doubt.

**(b) The cause of death**

21. According to doctor's (PW3) evidence the deceased herein died out of severe head injury inflicted by a sharp object. The post mortem report (P. Exhibit 1) tendered by the doctor is consistent with the evidence tendered by PW1, PW2, PW4 and PW5. The deceased was killed through cuts inflicted on her deliberately and the key question is who inflicted those fatal injuries which brings me to the next question for determination.

**(c) Actus Reus**

22. The prosecution has through written submissions by learned prosecution counsel Jane Maari submitted that there is enough proof that the deceased met her death as a result of unlawful acts of violence perpetrated by accused persons. It is a fact that the incident that caused the death of the deceased occurred at night when visibility is poor. This court has keenly looked at evidence of Purity Kaari (PW1). She says that when she heard stones raining at the roof of their house footsteps, she jumped through the window and took cover in a rabbits cage next to her house which was said to be 2-3 metres away from where her mother (deceased) was attacked. She further says she saw John Peter Mbaabu (1<sup>st</sup> accused) and Nkonge enter her mother's house and came out with her dragging her outside where they punched her and violently attacked her with machetes. She says she was able to identify the 1<sup>st</sup> accused, one Mutembei and Nkonge because of the light emitted by a lantern lamp in her mother's house and a torch use by Kambura (3<sup>rd</sup> Accused). Given that the said assailants were people she knew in my view that familiarity lends credence to the positive identification. Besides this, PW1 says she heard accused one tell Nkonge:-

**"bamo fanya kazi"** (bamo when translated means a reference to a person of same age set).

This means that apart from visual identification/recognition, she was able to hear the 1<sup>st</sup> accused speak and given the distance (said to be between 2-3 metres away) that surely must be unmistakable. She told this court;

**" I could clearly see Kambura. She had a spot light which she used to light up the door leading to my mother's house. Kambura was behind the others with a torch. So I was able to identify the people I have mentioned."**

She further says she identified Kambura through her voice as she was speaking to the other assailants as they kept on breaking the door of her mother's house. She says that all the accused were from her locality and she was quite familiar with them.

23. She also says the attack took around between 10- 15 minutes which in my view is sufficient time to identify someone you are familiar with. She also identified the 2<sup>nd</sup> accused and 4<sup>th</sup> accused as they went for her in her house not knowing that she had fled through the window. It is evident that had she not made a timely escape through the window she most probably would have met a similar fate as her mother (deceased).

24. I also find that the evidence of PW1 on recognition is well corroborated by PW2, and PW4. The two eye witnesses say they hid behind some bananas near their homestead and it is from there that they say they observed what was going on. The narratives of events that unfolded at the material time are consistent and point to positive identification of all the accused persons as persons who assaulted the deceased. Of course there was involvement of two others, one Mutembei who is said to be at large and Nkonge alias Karuru who was reportedly lynched by irate mob after the incident. The evidence of PW4 Eric Mutugi was candid especially on the involvement of the 1<sup>st</sup> accused in the killing of the deceased herein. He says he saw the 1<sup>st</sup> accused, Nkonge and Mutembei go into the house of the deceased from where they dragged her outside before setting upon her by viciously attacking her with machetes. He says he heard the deceased plead for mercy saying;

**" John you are killing me..."**

He also heard and saw the 3<sup>rd</sup> accused remark as she picked a machete;

**"Wacha nikate akikufa."** He saw her cut the deceased on the leg which is what the other witnesses (PW1 and PW2) also saw. That last act of cutting the deceased on the leg is consistent with the findings by the doctor (PW3) who performed post mortem examination. He noted a deep cut on the right thigh in the postmortem report (P. Exhibit 1.) The act also points to common intention by accused persons.

The accused persons all said that they had no differences with prosecution witnesses which means the said witnesses had no reason to falsely testify against them. This court finds that based on the consistency of the evidence of the eye witnesses (PW1, PW2 and PW4) the prosecution's case has clearly established the element of "**actus reus**" and connected it with all the four accused persons. The additional evidence of the investigating officer (PW5) that he found 1<sup>st</sup> accused wearing blood stained trouser P. Exhibit 2 and jacket (P. Exhibit 3) gives more weight to the positive identification of the 1<sup>st</sup> accused notwithstanding the fact that during the trial, the blood stains were not visible on the exhibits tendered perhaps due to effusion of time.

25. The investigating officer (PW5) also observed from the scene that the door of the deceased was broken into using a machete and that observation is consistent with the evidence of PW1 and PW2. He (the investigating officer also) noted at the scene signs of struggle on the ground which is indicative of the attack that PW1, PW2 and PW4 described and said they saw as the deceased was being attacked outside her house.

26. The investigating officer also observed multiple cuts on the body of the deceased and fresh blood before collecting the body and taking it

to the mortuary. All the evidence put together clearly establishes the elements of *actus reus* and is well connected to the all accused herein.

**(d) Mens rea/malice aforethought**

27. The question of motive of the murder was not very clearly brought out by the evidence tendered by the prosecution. The intent by the 1<sup>st</sup> accused was however brought out well by PW1 who heard him state;

**"Umundi ni umundi"**

Which I am told is translated to mean **"something will happen today- leo ni leo"**. Shortly after the words were uttered, PW1 states that she heard noises from the roof as stones were thrown into their house. PW4 also stated that he heard the 1<sup>st</sup> accused remark **"leo ni leo"** as he kicked the door of the deceased. He further heard the 3<sup>rd</sup> accused remarking as she picked a panga from her husband (1<sup>st</sup> accused);

**" wacha nikate akikufa"**

That statement in my view is a statement of intent from which ill motive can be inferred. This court finds that the evidence tendered by the prosecution has proved that all the accused persons had a common intention. The attack itself as per evidence of PW1 began with a war cry **"umundi ni umundi"** (translated to mean **"something will happen today- leo ni leo"**) and shortly thereafter stones started raining on the rooftop of their house. I also find the utterances by accused 3 stating **"wacha nikate akikufa"** quite telling because it reveals the common intention or the fact the plan to commit the heinous act was deliberately planned prior to its execution. It is also true as submitted by the prosecution that the provisions of **Section 206** of the **Penal Code** do infer malice aforethought from actions of a person or persons. The section provides as follows:-

**"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

- a. an intention to cause 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....."**

From the actions of all the accused persons in this case as witnessed by PW1, PW2 and PW4, it is evidence that the accused persons herein harboured ill intentions (malice aforethought) against the deceased person. The murder certainly was premeditated, planned and executed jointly by all the four accused persons. The observations made from the body of the deceased by the investigating officer (PW5) and the doctor (PW3) shows that the accused persons' intentions were deliberate and clear to cause the death of the deceased. The remarks made by the 3<sup>rd</sup> accused during the attack that is **"wacha nikate akikufa"** in my view proves beyond doubt that the prosecution has established and proved the element of *mens rea* not only against her (3<sup>rd</sup> accused) but all the four accused herein. With that finding this court finds that the prosecution's case against all the four accused herein has been proved beyond any reasonable doubt. They are hereby found guilty as charged. He is hereby convicted accordingly.

**Dated, signed and delivered at Chuka this 3<sup>rd</sup> day of February, 2020.**

**R. K. LIMO**

**JUDGE**

**3/2/2020**

Judgment signed, dated and delivered in the open court in presence of Momanyi for State, Ms Kaaria holding brief for Kijaru for 1<sup>st</sup> and 3<sup>rd</sup> accused.

**R.K. LIMO**

**JUDGE**

**3/2/2020**

**Court:**

This court has considered the mitigating factors. I have considered the mitigation by all convicted persons. I have also considered the mitigating factors put forward by the Director of Public Prosecution and buttressed by the victim's family members through emotionally charged plea for justice to be meted out. It is true that the deceased met her death through ghastly violence meted out against her with brutality that showed no mercy despite her pleas. I have however considered the principle in **Muratetu's case** convicted persons need a long time in a correctional facility to mend their character and their behaviour. They are hereby each sentenced to serve thirty five (35) years in jail. They have 14 days right of appeal.

**R.K. LIMO**

**JUDGE**

**3/2/2020**