



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**CRIMINAL CASE NO. 22 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENJAMIN MATHEKA MUSELA.....1<sup>ST</sup> ACCUSED**

**SNOW MBULA ELIUD.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

**Introduction**

1. The accused herein, **Benjamin Matheka Musela** and **Snow Mbula Eliud**, were charged with three counts of Murder contrary to sections 203 as read with section and 204 of the *Penal Code*, Cap 63.
2. In count 1 the accused were charged with the murder of **Danniel Kyalo Mbithi**, the particulars being that on 2<sup>nd</sup> Day of March 2015 at Kaliluni Sub-location, Iveti Location in Kathiani Sub-County within Machakos County jointly with others not before court murdered the deceased.
3. In count II the accused are charged with murder of **Joshua Mutua Kioko** the particulars being that on 2<sup>nd</sup> Day of March 2015 at Kaliluni Sub-location, Iveti Location in Kathiani Sub-County within Machakos County jointly with others not before court murdered the deceased.
4. In Count III the accused persons are charged with murder of **Jackson Musyoki Mutua** the particulars being that on 2<sup>nd</sup> Day of March 2015 at Kaliluni Sub-location, Iveti Location in Kathiani Sub-County within Machakos County jointly with others not before court murdered the deceased.
5. The Accused denied having committed the said offences and as such, pleas of not guilty were entered.
6. In support of its case the prosecution called 11 witnesses.

**The Prosecution's Case**

7. According to PW1, **Francisca Syombua Mbisi**, she was operating a bar known as Wayside Bar. On 2<sup>nd</sup> March, 2015, she arrived at the bar at around 10.00 pm and was with the customers till around 11.00 pm when she and PW2 with two other people went to a room behind the bar after closing the bar door though there were still 6-7 customers as well as her two staff who were known as **Evans Muthanyi** and PW10. Among the said customers, she knew **Mutavi, Musyoki, Dari**, PW2 and **Danniel**. PW10 then reported to PW2 his car was not where it had been parked. PW2 then left with others leaving PW1 with her staff. After about 30 minutes PW2 returned with the car together four others including **Ndanu** and **Danniel** but PW2 did not disclose anything to them.

8. After they closed the bar and PW1, PW10, **Mutavi**, a customer, and the other four boarded the said vehicle which was to drop PW1 in her house. As soon as she got into the vehicle, PW1 fell asleep and was awoken by the sound of a car horn and realised that they were at the gate of PW2's boss, the 1<sup>st</sup> accused. PW1 stated that she knew the 1<sup>st</sup> accused because he had business in Kathiani but had never been to his house and only came to know that that was his house when she was informed by one of the occupants of the car. After that **Mutavi** left the car and she did not know where he went. She also alighted at the gate and entered a home next to the gate. When the gate was opened, the rest who had remained in the car went to the house and she did not know what happened but only heard screams from inside the house. She however did not enter the house because according to her, she was confused and though inside the compound, she did not know who opened the gate.

9. As a result of the screams, the neighbours started gathering outside the gate and when she came from where she was she found many people and saw **Danniel (Danniel Kyalo), Mala and Etule (Musyoki)** on fire burning not far from the gate but did not know who lit it or why they were being burnt. She however saw both the accused persons at the scene before she retreated to when she had come from. According to PW1, the 1<sup>st</sup> accused was the husband of the 2<sup>nd</sup> accused and they were both where the trio were burning. She knew them because they had a shop and jua kali business in Kathiani.

10. In her evidence, PW1 while admitting that PW2 was a friend, denied that he was her boyfriend. When PW10 informed PW2 that the car was gone, PW2 with the others left but since PW1 did not leave the said room she did not know who left with PW2 or where they went.

11. It was her evidence that when PW2 left, **Danniel** and **Mala** were not in the pub but she had seen them earlier. Upon the return of PW2, the occupants of the car with him did not come out and it was not until she entered the car that she saw **Danniel, Mala and Etule (Musyoki)**. They however did not discuss anything concerning the car and it is only PW2 who said that he had been told by his boss to take those who were with the car after PW2 disclosed that it was **Danniel, Mala and Etule (Musyoki)** who were with the car. It was PW1's evidence that there was no fighting or disturbance in the car on the way to 1<sup>st</sup> accused's home. She denied that PW10 was **Etule (Musyoki)**'s girlfriend. In examination she stated that she fell asleep because she was tired and drunk and that when she woke up, it was **Mutavi** who shockingly told her that they had reached the 1<sup>st</sup> accused's house since she was supposed to have been dropped at her house. According to her **Mutavi** went away completely and did not enter the 1<sup>st</sup> accused's compound though PW10 and the rest did enter the compound once the gate was opened. Later she stated that she saw **Mutavi** when the crowd started gathering but did not know when he came back but never saw him enter the gate. It was her evidence that she never talked to anyone at the gate and did not see what was taking place inside the compound. When she came from behind that home she found **Danniel, Mala and Etule** burning but she neither knew who lit the fire nor heard any of the people outside the gate screaming or walking. It was her testimony that PW10 and PW2 were also outside. In her estimation, there were more than 50 people outside the gate and could not tell whether the crowd tried to help or arrest anyone since she returned back where she had come from.

12. In further cross-examination, she disclosed that she knew the 1<sup>st</sup> accused from long ago and that she the 1<sup>st</sup> accused already had a business there. She admitted that there was a time there was a misunderstanding between herself and both the accused when the 2<sup>nd</sup> accused found the 1<sup>st</sup> accused drinking in PW1's bar. She however denied that she was in a relationship with the 1<sup>st</sup> accused and stated that the 1<sup>st</sup> accused just used to go to her bar. According to her, she was summoned to the police after the 2<sup>nd</sup> accused complained that the two were in a relationship and they talked about it and it was finished. According to her she had never talked to the 2<sup>nd</sup> accused and had never entered the 1<sup>st</sup> accused's home or compound.

13. Referred to her statement, she denied that she was hiding and stated that she did not leave the 1<sup>st</sup> accused in bad faith but did so because of the shame. She denied that she planned to frame the 1<sup>st</sup> accused and used PW2 who was the 1<sup>st</sup> accused's driver to hurt the 1<sup>st</sup> accused. According to her, they were just friends with PW2. It was when she came out from where she was that she saw both the accused persons in the crowd and though she admitted that she did not know the 2<sup>nd</sup> accused very well she knew her from before and that when the mob arrived it was in the morning at about 5-6 am, hence it was not dark. Though she admitted that she was drunk, she insisted that she saw them and recognised them outside the gate among the crowd.

14. In her evidence, she arrived when the fire was already lit and firewood was used but she did not see anyone trying to put out the fire.

15. Referred to her statement, she admitted that it was indicated that he was left in the bar and stated that she could not recall very well though he was in the car when they left. She insisted that she did not frame the accused because the 1<sup>st</sup> accused left her.

16. In re-examination she stated that she found all the deceased in the bar but could not tell if they left the bar because she was in the backroom. She added that there was a time when PW10 went to inform her that **Danniel**, one of the deceased wanted to leave the bar and that by the time PW10 went to inform PW2 that the car was gone, **Danniel** had left. She however did not know who left with **Danniel**. It was her testimony that on the way to the 1<sup>st</sup> accused's house, the deceased were quiet and they were not tied. She stated that PW2 had a phone and they were communicating when he went to look for the car.

17. In further re-examination, she disclosed that PW10 and **Musyoka** were lovers. She insisted that when she entered the car she could walk and was aware of her surrounding as she was not very drunk. However, upon reaching the 1<sup>st</sup> accused's compound, she could not enter the compound because of the incidents she had with them in the past but insisted that she was not hiding. According to her, it was only **Mutavi** who got out of the car at the gate and there was no one called **Mutuku** in the car. While she knew **Musyimi** as the accused worker, she denied that she stated that she saw him leave as she neither saw him nor **Muthini**.

18. She then admitted that the 1<sup>st</sup> accused was her romantic friend (lover) between 2006 and 2007 and they met when she was employed in a business at that time before she started the bar though by 2008 their relationship had ended. She admitted that the said relationship was illicit and the complaint was made against her due to that relationship and not because she had committed an offence. It was her evidence that the relationship ended due to the shame and she had no ill feelings because she even stayed on in the same town and started her own business.

19. According to her, when the deceased were being burnt, they were not moving or making noise and she only saw **Musyoki** jerk and that is when she left. She did not check to see if the deceased had any of the injuries and though she saw the two accused at the gate, she was not interested in what they were wearing.

20. According to PW2, **Stephen Mambo Thomas**, a matatu driver, on 1<sup>st</sup> March, 2015 he was employed by the 1<sup>st</sup> accused to drive his matatu No. KBL 782P for another driver who had had an accident. That day, he finished work at 8.30 pm and parked the vehicle in the parking area at Kwa Kileya market. He then entered Wayside Bar where he found PW1, the owner of the bar who was a friend and others drinking. According to him the bar was full. He then asked her if they could sit at the back of the bar where they sat until 2 am. When he

went to the counter she found PW10 who asked whether he was the one who had authorised for the removal of the car as it was gone and had been taken by **Daniel** and another boy. When PW10 opened the bar, he realised that the vehicle was not where he had parked it. He then returned and relayed the information to PW1 that he was going to look for the vehicle and left with **Mutuku** for Kathiani. At Kathiani, a watchman informed him that he had seen the car with **Daniel** go towards Nzaikuni. He requested someone he met to help him with a phone to tell the owner that the car had been taken and he called the 1<sup>st</sup> accused who informed him to look for the car and upon finding it to call him. Failing to find the vehicle at Kathiani, they proceeded to another place called Nzaikuni and after passing Nzaikuni they saw headlights behind them and they realised that it was the car they were looking for. However, when they tried to stop it, it did not stop. When another vehicle came, they stopped it and the driver called **Kitavi** who informed PW2 that the vehicle was seen going in the direction of Kisovo. Upon proceeding to Kisovo they found the vehicle stuck in the ditch, and when the occupants saw them they started running away. By the help of the headlights of the vehicle they were in they apprehended **Joshua** also called **Mala** and **Daniel** who informed him that he had been given the keys by **Musyoki**, a *boda boda* driver who **Daniel** claimed was at Wayside Bar though PW2 did not see him there.

21. PW2 then called the 1<sup>st</sup> accused and explained to him that they had found the vehicle and the occupants at which point the 1<sup>st</sup> accused told him to go and get him so that they go to the police. On their way to the 1<sup>st</sup> accused's they passed through Wayside Bar to get **Musyoki** then accompanied by PW1, PW10, **Mutuku** and **Mutavi** they proceeded to the 1<sup>st</sup> accused's since he did not know the 1<sup>st</sup> accused's home and **Mutavi** was the 1<sup>st</sup> accused's neighbour. Also in the vehicle were **Daniel** and **Joshua** who were not tied and who did not attempt to run away.

22. When they reached the 1<sup>st</sup> accused's gate, PW1, **Mutavi** and **Mutuku** alighted. He then parked the car and the 1<sup>st</sup> accused came and opened the gate and he entered together with PW10, **Daniel**, **Joshua** and **Musyoki**. After entering the 1<sup>st</sup> accused who was with the 2<sup>nd</sup> accused slapped the three, **Daniel**, **Joshua** and **Musyoki** before getting a rope and tying them while the 2<sup>nd</sup> accused kept watch over them. After tying their hands and legs the 1<sup>st</sup> accused asked them who had told them to take the car. The 2<sup>nd</sup> accused then started cutting them with a *panga*. She cut **Daniel** on the head, **Mala** on the buttocks and **Musyoki** on the legs. According to PW2, there were security lights in the compound. The 1<sup>st</sup> accused then took his *panga* and started cutting them all over as they were being turned over by **Mutavi**. According to PW2, **Mutavi** had entered the compound when he alighted via a small gate and returned with **Musyimi**. At that time, the 1<sup>st</sup> accused was cutting the three who were screaming before they eventually stopped moving. **Mutavi** and the 1<sup>st</sup> accused then took the bodies outside the gate after which the 1<sup>st</sup> accused got firewood from his compound and **Mutavi** was shown by the 1<sup>st</sup> accused where to get paper from his compound. PW2 then stated that one of them whom he could not tell lit the firewood.

23. According to PW2, when he told them to take the three to the police, the 1<sup>st</sup> accused told him to go out but he decided to stay and wait for the police. Before the three were burnt, **Mutavi** removed their clothes and stepped on the neck of one of them who was still alive. At that point the 2<sup>nd</sup> accused called the neighbours to come and witness and by the time the neighbours came, they had already lit the fire. At this point, PW2 went to sit out at a kiosk and when the police came he narrated to them what had happened after which they took the bodies away. On 6<sup>th</sup> March, 2015 he recorded his statement at Kathiani police station.

24. It was his evidence that he saw the accused prior to that night since he had asked for work from the 1<sup>st</sup> accused before and they were his customers in a vehicle he used to drive. In his evidence the two were good people and had never differed with them. According to him, neither himself nor the members of the public participated in the cutting and burning of the deceased persons.

25. In cross-examination, PW2 stated that he was employed by the 1<sup>st</sup> accused on 23<sup>rd</sup> February, 2015 and he was given the keys and the vehicle by **Musyimi** at the stage at Kathiani on the instructions of the 1<sup>st</sup> accused. **Musyimi** informed him to temporarily drive it as the driver was not available, as he had been involved in an accident in Athi River. According to him, since **Musyimi** did not tell him where he would park the car, he decided to park at Kwa Kileya because it was near his home, a decision which was approved as **Musyimi** whom he was informed was the manager of the vehicles. He however used to remain with the keys.

26. On the material day 1<sup>st</sup> February, 2015 he parked the car Kwa Kileya at 8.30 pm and went to a meeting at Kahtanguni, about 1km away which meeting ended at 10.30 pm and he returned to Kwa Kileya. During that time, he had the car keys with him. He then entered Wayside bar which belonged to PW1 who was a friend. He recognised, **Daniel** a *boda boda* rider who was known to him having previously carried him. From 10.30 pm they were at the backroom drinking beer until 2 am but he could not remember how many beers he drank. At 2 am when he went to the counter to ask for his bill he met PW10 at the door who asked him if he had given out the keys of the vehicle. By then PW1 was at the back of the bar and he could not tell whether PW1 what PW10 told him since the radio was on. According to him, it was him who informed PW1 about the conversation. Though he was still in possession of the car keys, PW10 informed him that the vehicle had been taken by **Daniel**. After confirming that the vehicle was not there, on his way to relay the information to PW1 he met **Mutuku** going to the front counter and asked him to accompany him to go and report and look for the car. He borrowed a phone and relayed the information to the 1<sup>st</sup> accused who told him to look for the vehicle and upon finding those who had taken the vehicle to take them to the police. It was his evidence that he did not know the telephone for the said **Daniel** and his own phone had gone off and was being charged though he had written the 1<sup>st</sup> accused phone number on paper.

27. When they reached Nzaikuni before they could report to the police they saw the headlight of the car and turned to stop it but it did not. It was at this point that one **Katitu**, a fellow driver, came they asked him if he had met the car and he said he had. They requested him to assist them trace the car and when they caught up with the car, it was being driven by **Daniel**, and after chasing them they apprehended them then he asked one passenger for a phone to call the 1<sup>st</sup> accused. Instead of making a report to the police they returned to Kwa Kileya to pick **Musyoki**.

28. According to PW2, **Joshua** was in the car that was taken and PW1's evidence that **Joshua** (Mutua) was in the pub was not correct. When they returned to the bar he alighted and left **Mutuku** in the car and they found **Musyoka** at Wayside. He stated that they went to the car with **Musyoki** and there was a struggle though he was not aware of the relationship between PW10 and **Musyoki**. At the gate of the 1<sup>st</sup> accused, **Mutavi**, **Mutuku** and PW1 alighted leaving PW10 with the three deceased though he was not aware of the reason for so doing.

29. Upon their return to the Bar, he switched off the engine and **Mutuku** entered in Bar where they wanted to fight. He denied that he called PW1 since he did not have a phone. In his evidence they were 8 people when they were going to the 1<sup>st</sup> accused's home. He confirmed that PW10 was a friend to **Musyoki**. It was his evidence that they found **Mutavi** inside the compound though he could not tell how he entered. It was his evidence that it was the 1<sup>st</sup> accused, **Musyimi** and **Mutavi** who removed the deceased out of the gate after which they started looking for firewood from within the compound to burn them. The said firewood was brought by **Mutavi** after being told to do so by the 1<sup>st</sup> accused and it was the same **Mutavi** who lit the fire. Though there were people present, they did not say anything as they were just calling each other.

30. His explanation for not taking the deceased to the police post was that he wanted the deceased to explain themselves to the 1<sup>st</sup> accused. Asked about PW1, he admitted that she was his girlfriend but denied any knowledge of the relationship between her and the 1<sup>st</sup> accused. According to him, **Mutavi** was working at the Bar and it was PW10 who insisted that they go together though she and PW1 were staying at Kavene. He denied that he planned the killing.

31. In re-examination PW2 explained that **Mutuku** was also a bar attendant in the same club but he left earlier having been sacked. According to him **Daniel** informed them that he had been given the keys by **Musyoki**. Though he was with **Mutavi**, **Mutuku**, PW1, **Joshua** and **Daniel**, only **Musyoki**, **Dan**, **Joshua**, **Mercy** and himself entered the compound since **Mutuku** and PW1 did not while **Mutavi** entered later since the gate remained open. However other people came after the deceased had been killed and burnt.

32. PW10, **Mercy Ruth Mutisya** who was working in Highway Side Bar, Kithunguini in March, 2015 on 1<sup>st</sup> March, 2015 opened the said bar at about 2.00 p.m. At about 8.00 p.m. there were, amongst many other customers, **Musyoki** who was her boyfriend and **Daniel**. The two arrived at about 9.00 p.m. According to her, PW1 the owner of the bar was staying behind the bar. **Musyoki** and **Daniel** who had motorbikes ordered for drinks which she gave them. Apart from the drinks the two were chewing *miraa*. At 11.00 p.m. a police officer arrived and knocked the door and she was ordered not to open the door for them. PW1 was behind room with PW2 who arrived at 10.00 p.m. drinking alcohol. She stated that **Daniel** was called by PW2 and told that PW2 would hand over to him the car keys and **Daniel** left with the vehicle at about 12.00 p.m. after buying PW2 a drink and upon requesting PW10 to open for her the door which PW10 did leaving **Musyoki** behind. She confirmed that she stood at the entrance and saw **Daniel** enter the vehicle and leave. PW10 then returned to the Bar and informed PW1 that **Daniel** left with the vehicle but PW1 did not respond. Later, PW2 left alone and later returned with the vehicle after about 30 minutes and upon his return he assaulted **Daniel**. PW10 then in the company of PW1, **Mala**, **Musyoki** and **Daniel** left for the 1<sup>st</sup> accused's place and upon arriving at the gate PW2 shouted and the 2<sup>nd</sup> accused, whom PW10 only saw that day, appeared and all of them entered the home with the vehicle but soon thereafter, PW1 went into hiding. It was her evidence that the headlights were on. The 1<sup>st</sup> accused then brought a rope and on instructions of the 2<sup>nd</sup> accused, **Musyoka**, **Mala** and **Daniel** were removed from the vehicle and the 2<sup>nd</sup> accused, assisted by others, tied them after the 2<sup>nd</sup> accused said that the vehicle thieves be removed from the vehicle. According to PW10, they found some people in the compound but she only recognized **Mutavi**. The 2<sup>nd</sup> accused then brought a slashers and *panga* and **Mutavi** started cutting the deceased after which **Mutavi** then brought firewood and papers and the deceased were laid down and **Mutavi** started the fire with others and the deceased were burnt. Though **Musyoki** was attempting to escape, he would be returned back to the fire. After that they were taken outside the gate and she was told to get away and no one tried to assist the deceased. Later the bodies were removed by police officers at about 9.00 a.m. and she proceeded to the Kathiani Police Station to record her statement. It was her evidence that prior to that date, she did not know the owner of the vehicle and could not remember him since the only source of light was the headlights and they found about 20 people in the compound. She could only identify the 2<sup>nd</sup> accused who opened the gate and ordered the deceased to be removed and **Mutavi** whom she knew prior to that day. She however denied that she was related to PW1 but admitted that PW1 was PW2's girlfriend. Asked about the 1<sup>st</sup> accused she stated that she saw the 1<sup>st</sup> accused in the compound and that he tied the deceased.

33. In cross-examination, PW10 stated that she had worked at Highway Side Bar for one year and was employed by PW1. From the time she opened the bar at 2.00pm to 4.00pm when the customers started arriving, she was alone. The deceased however arrived at 9.00pm with **Musyoki** being the first followed by **Dan**. PW2 arrived at 10.00 p.m. and by that time PW1 had already arrived. **Daniel** left at 12.00 p.m. and the closing time was 11.00 p.m. According to her, **Musyoki**, **Daniel**, **Mala** and PW2 were there and that PW2 called **Daniel** and told **Daniel** he wanted a bottle of beer and that he would give him the key cars which he did after which **Daniel** left the money at the counter and PW2 took the beer from the counter. After she opened the door for **Daniel** and she saw him leaving with the vehicle and she then informed PW2 that **Daniel** had left. At the time **Daniel** left the rest were all in the Bar including **Mala**. PW2 left at 1.00 p.m. after opening the door and upon his return with **Daniel**, he assaulted **Daniel**. PW10 however denied that she knew **Mutuku**. When they left the Bar, they were with **Mala**, **Daniel**, **Musyoki**, PW1 and a person she did not know and she was informed that they were proceeding to the owner of the vehicle. Though she did not know him, she used to hear of **Dama's** place. Neither did she know his wife before. At the gate PW2 hooted and no one alighted.

34. Inside the compound they found many people about 30 standing in the compound. According to her it was **Musyoki** who told her that it was **Dama's** wife who opened the gate. She stated that it was **Dama** who ordered that the deceased came out after which they were tied by **Mutavi** by the ropes brought by **Dama's** wife. PW10 stated that after she alighted from the vehicle she saw the deceased being cut and burnt by **Mutavi**. In her evidence, she did not see the 1<sup>st</sup> accused cut or burn the deceased but insisted that the 2<sup>nd</sup> accused participated in cutting them. She asserted that PW1 who was standing with her went to hide in a maize plantation but she did not know the reason for this.

35. It was her testimony that PW2 had a phone while in the bar but he never gave it to her to charge it but insisted that he saw him hand over the keys. She stated that the people in the Bar were drunk and that when they entered the compound the people there were not talking and there was no noise in the compound.

36. Referred to her statement, she confirmed that it was indicated that **Daniel** came at 2.00 p.m. and left and came back at 9.00 p.m. and that **Joshua Mala** came at 10 p.m. When they accompanied the others, she thought that the deceased were being taken to the police after being taken to **Dama's** and that in the vehicle no one talked after **Daniel** had been beaten by PW2. She denied that it was the 1<sup>st</sup> accused who opened the gate and insisted that it was his wife who did so. According to her there were no security lights contrary to what was indicated in her statement and **Damas** did not cut the deceased as indicated in her statement. It was her testimony that contrary to her statement, nobody including the 2<sup>nd</sup> accused said they be burnt and it was **Mutavi** who came with papers. According to her, the deceased were burnt outside the gate and though one of them tried to escape **Mutavi** returned him to the fire.

37. In re-examination, she reiterated that she saw PW2 giving **Daniel** the key and that prior to that day she did not know the 2<sup>nd</sup> accused but could not tell if they knew each other with PW1. In her evidence, many people cut the deceased but it was **Mutavi** who started. However, the 1<sup>st</sup> accused did not participate though the 2<sup>nd</sup> accused did. In her evidence, **Daniel** bought some beer at 2.00 p.m. then left and returned at 11.00 p.m. In her evidence, she just heard the 1<sup>st</sup> accused being called **Dama** and repeated that it was **Mutavi** who started before the others joined. She however, never saw the accused participate in the burning.

38. On 1<sup>st</sup> March, 2015 at 8.00pm, PW3, **Muthama Kituku**, was at Kathiani market when he met his brother **Joshua Mutua alias Mala**, and after exchanging greetings he left him and proceeded home. The following day 2<sup>nd</sup> March, 2015, at 6.00am he was called by his neighbour **Christopher Mburu** who informed him that he heard some people were killed and burnt including his brother at Dama's whose owner he knew as the 1<sup>st</sup> accused. He then relayed the information to his wife, his sister and his brother then called cousin **Francis Mutisya** who confirmed to him that he had received similar information. In the company of the said **Francis Mutisya** he proceeded to the 1<sup>st</sup> accused's place which was 200 meters from his place. There they found three burnt bodies outside the gate about three metres away still smouldering. The place had other people and the bodies though badly burnt, he recognised his brother's body since his brother had six toes and six fingers. His brother had one shoe of safari boot but the other was burnt. He proceeded to the gate while other people entered the 1<sup>st</sup> accused's house to check where blood was coming from inside the gate and he did not enter. According to him the deceased brother who was their last born was his 5<sup>th</sup> follower and they were brought up together. It was his evidence that his late brother was in his twenties and was a very polite person who was staying at home while himself he had moved from their father's homestead. He had been with him on 1<sup>st</sup> March, 2015.

39. According to PW3, his late brother was unmarried and was doing farming and that day the deceased never informed him that he was going anywhere. After the police took photos the bodies were taken to the mortuary at Kathiani. He identified the photos of said bodies. Later after the bodies had been taken to Machakos General Hospital, in the company of **John Musanga** he identified the body by the toes and finger ring. It was PW3's evidence that he knew the 1<sup>st</sup> accused whose sister was married by his cousin and they had a cordial relationship. When he went to the 1<sup>st</sup> accused's house, both the accused persons were there and were walking around. He had known the 2<sup>nd</sup> accused for 5 years and had never had a disagreement with her.

40. In cross examination he stated that he had known the 1<sup>st</sup> accused all his life though he had never visited his home despite being a relative. He stated that both accused were teachers. The person who disclosed the information to him was called **Josephat** or **Christopher Mburu** though his statement talked of **Josephat Mburu**. According to him the scene was about 2 – 3 kilometres away and they walked there and found bodies of people and a crowd of more than 30 people who were looking at the bodies which were smouldering. He however did not witness who burnt them and could not confirm that they were burnt by the accused. He stated that there was a vehicle inside the home and the gate was open. He knew the vehicle since it was doing business on the road. It was his evidence that he recorded his statement on 3<sup>rd</sup> March, 2015.

41. PW3 stated that his brother had gone to the market just for a walk and that at the scene there were many people and that PW2 was standing at the main gate of the 1<sup>st</sup> accused before he left. He however neither saw PW1 nor PW10 but was there for about one hour. The accused according to him had nothing and when the police arrived they found him there they took photos and collected the bodies. In his evidence people were entering the compound but were being chased and though he did not enter the compound, he never saw any blood. Nobody was arrested at that time. During the post mortem examination, he was present with his cousin. According to him his deceased brother was a farmer and not *boda boda* rider.

42. In re-examination, he stated that he arrived at the scene before 7.00 a.m. but there was sufficient light and found over 50 people. By then the bodies were still smouldering.

43. On 2<sup>nd</sup> March, 2015 at 6.00am PW4, **Mutinda Mbuvi** was going to open his shop when he received a call from his sister, **Mueni**, who informed him that she had received information that 3 boys were killed near her neighbour's home but she was yet to confirm the same. 15 minutes later she called confirming that she went there and found that one of the deceased was a son to their elder sister, **Milka Mutua**, called **Jackson Musyoki** and that the police had arrived and were investigating and she would call him later. According to her, the bodies was cut in pieces and burnt beyond recognition. After tracing the bodies, he in the company of his said sister found the three bodies at Kathiani sub-County mortuary and recognised the body of **Joseph Musyoki** who was his nephew who was staying with him at the time through a gap in the lower teeth which was his birth mark. The next day 3<sup>rd</sup> March, 2015 he returned to Kathiani police station and recorded his statement. According to him, the body was in three pieces with the head separated from the legs and was burnt beyond beyond recognition.

44. In cross-examination he confirmed that he stated in his statement that the boys were burnt by mob justice as relayed to him by his sister. It was his evidence that he knew the accused as teachers and good people. He stated that he had stayed with the deceased for 8 years and he was polite and never saw him take alcohol at *miraa* and was not aware that the deceased was in a relationship with PW10. At the time of the incident the deceased was a *boda boda* rider.

45. PW9, **Julius Ndunda Munyao**, a driver, on 2<sup>nd</sup> March, 2015 at about 02.30 hours heard PW2, his colleague driver calling his mother. At that time PW2 appeared drunk. He heard PW2 say that his younger brother **Daniel Kyalo** had left with his vehicle towards Kithunguni towards Saikani. He said he was going to pursue it and would inform the mother. Later PW2 called PW9 and informed him he had found the vehicle with the said **Daniel** at Kwa Kawaya at Zaikuni. PW9 told him to report to the police nearby and take the vehicle to the said police post. After some time PW2 called me and told him it was not necessary to take the vehicle and the said brother to the post he would instead take them to Machakos Police Station. PW9 did not however mention that he was going to the 1<sup>st</sup> accused's. In the morning at about 6.00 a.m. PW9 was on his way to work when he met a fellow driver, **Muthui Nzioki**, who inquired from him whether the information he heard that PW9's brother and the other people were stealing when they were beaten and burnt was true. At **Musyoki's** home PW9 alighted and found **Musyoki's** mother and his brother who informed him that **Musyoki** came at night and returned his motor bike and left and had not returned. PW9, then disclosed to them the information he had received concerning his own brother and **Musyoki** and accompanied by

**Musyoki's** brother, **Mutisya**, and they went to report to his employer, **Mbithi Kithunguini**, but found that a report had already been made to him. PW9 sought permission which he was given and they were given a vehicle and together with their parents they proceeded to Damas, the 1<sup>st</sup> accused. Before reaching the place they received a call, from Mulwa's wife, that the bodies had been taken to Kathiani. They then proceeded to Kathiani police station where they reported and then proceeded to the mortuary at Kathiani in the company of PW9's father, **Francis Munyao**, Musyoki's family and **Mutua**. At the mortuary they identified the body of his brother and other bodies. According to him, all the bodies had no clothes and the bodies of **Mutua** and **Musyoki** were badly burnt while his brother's body was not very badly burnt but had deep cut on the head and there was blood oozing from the back. Apart from drinking the deceased was not a criminal and he never heard that he was arrested. He stated that he knew the accused persons as husband and wife though they were not related.

46. According to PW9, when PW2 when to report that **Daniel** had taken the vehicle, he reportedly stated that he would look for the vehicle and once he got his vehicle he would get a report which should not surprise them. It was PW9's testimony that from the 1<sup>st</sup> accused's place to their place was almost 5 kilometres while Zaikuni where PW2 stated he got the vehicle was nearer to police post than to 1<sup>st</sup> accused's. It was his evidence that the information he got was that the people who were beaten and burnt were said to have been stealing but he did not witness anything himself. He stated that he knew the 1<sup>st</sup> accused as a teacher and was employer and did not know anything wrong about both accused persons.

47. In his evidence, PW9 stated that on the day of the incident, he drove the said vehicle before handing over the same to PW2. Though he did not know where PW2 went thereafter, during the time they were together, PW2 was constantly on phone. It was his evidence that the threats by PW2 were directed to his mother concerning his brother to accept the report they would receive concerning his brother.

48. PW.7 **John Musanga Mutisya** was on 3<sup>rd</sup> March, 2015 at 2.00 p.m. in Machakos when he was called to Kathiani Level 4 Hospital to witness the post mortem of one of the deceased, **Joshua Mutua Kioko**, his cousin. He proceeded there and identified the said body which was burnt beyond recognition through the 6 fingers in each hand. There were several cuts on the deceased's leg and hands and all over the body. In his evidence, he knew the accused who were his relatives and he went to school with the 1<sup>st</sup> accused. According to me they are not bad people. Similarly, PW.8 **Bismark Mwathei Mutua** on 2<sup>nd</sup> March, 2015 at about 2.00 p.m. identified the body of his brother, **Jackson Musyoki** at Kathiani Hospital Mortuary. According to him, **Jackson** was the tallest among the three bodies and had 6 large and long toes. The body was burnt and had cuts on the leg and the back. From the hips upwards was burnt beyond recognition but one of the legs was not completely burnt.

49. PW5, **CPL JAMES OLAGO was a scene of crime** investigator who printed the scene of crime photographs having received the same from IP **Joseph Kariuki** of Kathiani police station. Though he was not involved in the case in any other manner, he certified the said prints.

50. PW.11 – **Dr. Waithera Githendu**, the pathologist on 5<sup>th</sup> March, 2015 at Machakos funeral home performed post mortem on the body of **Jackson Musyoka Mutua** who was found somewhere having been burnt by mob justice. The body was identified by PW8 and PW4. Date of death was 2<sup>nd</sup> March, 2015. The body had severe burns and the right and left foot were completely detached while the left distal finger were chopped off. Some bones were exposed and the abdominal lining was also exposed. Due to the extent of the burns she did not assess any changes but concluded that the cause of death was over 80% burns. According to her, the burns completely detached the bones since it was over 60%. All injuries could have been caused by burns due to the extent of the burns. The same day the body of **Daniel Kyalo Mbithi** was identified by **Francis Mulwa Munyao** and **Kisoi Mutua Wambua** who was burnt by mob justice and the date of death was 2<sup>nd</sup> March, 2015 while the examination was on 5<sup>th</sup> March, 2015. The body was completely charred with 60% burns. He had cut wounds on skull 6 cm long causing fracture on the site. The conclusion was that the cause of death was over 80% 6<sup>th</sup> degree burns. According to her, the cuts on the skull could not have been due to the burns since they were sharp. The third case was that **Joshua Mutua Kioko** identified by PW7 and **Muthama Kioko**. Date of death was 2<sup>nd</sup> March, 2015 and the body was burnt to death by mob justice. The examination was carried out on 5<sup>th</sup> March, 2015 and it was completely charred with fracture at right mid forearm, right mid leg and had multiple cuts on the trunk and limbs. In respiratory system was soot with inhalation of burns in respiratory airways. It was concluded that the cause of death was over 80% 6<sup>th</sup> degree of burns. According to her, at the time of being burnt he was still alive. For the other two they unable to find any damages in the lungs due to the excessive burns.

51. PW. 6 Cpl. **James Mwita**, was heading to the station on 2<sup>nd</sup> March, 2015 at 5am when he received a call from the 1<sup>st</sup> accused who informed him that there were 3 thieves who attempted to steal a vehicle from his residence and members of the public were baying for their blood. Immediately accompanied by officers they rushed to the 1<sup>st</sup> accused residence which he knew. On arrival at his residence at the entrance to the main gate he found three burnt bodies but no fire since they had already been burnt. He found members of the public gathered at a distance. Upon entering the compound, he found some people including both accused seated in the house plus one witness PW.2. At the entrance to the house there was a blood patch on the grass that had been washed and there was smell of blood. The place was very wet with traces of blood. He called his senior officers the OCPD and entered the house. Apart from the 3 there were children. He saw some firewood which have been freshly interfered with next to the house. According to him the 1<sup>st</sup> accused informed him that three people were arrested stealing his vehicle and the vehicle that was purported to be stolen was there. It was a matatu Town Hiace Registration No. KBL 782P in the compound. He commenced Investigations by interrogating him as well as PW.2. According to the 1<sup>st</sup> accused, the members of the public had killed the deceased. It was his evidence that it took him only 10 minutes to arrive at the scene from the time he was called since it was 2 km away and he used the vehicle which was ready. By then the deceased had been killed and the fire was not there. All of them were naked and were male and one of them, **Daniel Kyalo**, had a very deep cut on the head while **Joshua Mutua** had deep cut on his hip. The other one, **Churchill Musyoki**, had deep cut on the leg. There were severe minor cuts and they were badly burnt. The witnesses and family members identified them. According to his investigations **Daniel Kyalo** and **Joshua Mutua** had stolen the vehicle in question. He then took photos which he printed himself in Machakos. According to the family members, the deceased were not thieves but were boda boda riders and had a good reputation from the area residents. They removed the bodies took them to Kathiani Mortuary since people were demonstrating. According to him, the demonstrators were demanding justice for the deceased and they wanted to kill the accused. He rushed them to the police station and they were arrested and placed officers to protect their house.

52. According to the witness, he knew the 1<sup>st</sup> accused as a teacher for 8 months. He also knew his home though he did not know the 2<sup>nd</sup>

accused since he had never gone to their home but used to patrol the area and the 1<sup>st</sup> accused was a friend of his. According to him, the people were in their compound. Though they searched the compound for any weapons, they did not discover any. According to his investigations the people who cut the deceased were the accused and one **Mutavi**. However, the information that the deceased was attacked by mob justice was by one of his officers and he meant that they were killed by more than one person but by the time of giving that information they had not completed the investigations. According to him **Mutavi** was still at large.

### The Defence Case

53. Upon being placed on their defence DWI, **Benjamin Matheka Musela**, the 1<sup>st</sup> accused herein testified that on Sunday 1<sup>st</sup> March, 2015, he woke up went to church and in the afternoon proceeded to Kathiani market to open his shop. At around 10pm he returned home, took super and slept. At around 2.30 am he received a call from his watchman from the shop in Kithimani who informed him that he saw one of his vehicles KBL 782P heading towards Zaikoni driven by unknown person carelessly. Since his vehicles were under the management of **Jacob Musyimi** who would assign them drivers and routes, do daily collection and deposit the same, he called the manager and relayed the said information and the said manager told he would find out from the driver. According to the 1<sup>st</sup> accused, normally, the business would close at 9 pm and the vehicles would be parked it at Githunguini market. After 15 minutes about 2.45 pm he received a call from PW2 who informed him that he was standing in for the usual driver, **Mutiso**, who was bereaved mourning the mother. PW2 then informed him that he was heading to Zaikoni to load vegetables in good time for the market and the 1<sup>st</sup> accused then went to sleep. Around 4.45 am, he heard people shouting outside his gate calling his name and mentioning a vehicle which had been stolen and that they had caught the thief though he could not recognise the voices. As he and the 2<sup>nd</sup> accused, his wife, headed towards the gate he recognized the voice of **Musyoka** his neighbour. He then engaged them from inside since part of his fence was worn out and he could see another neighbour as his house was surrounded by many neighbours. The neighbours informed him that they were woken by one **Mutavi** who told them the vehicle had been stolen and thieves apprehended and were being brought to the house. Though he doubted them, more neighbours gathered and after 15 minutes a vehicle appeared stopping down towards the gate and he confirmed that it was one of my cars KBL 782P since its headlights were on. He then opened the gate and car was driven in and at the same time many people also entered but that time he did not know the driver. There was a lot of noise from inside the car with one telling others to come and explain why they had stolen the car and who had sent them for the car.

54. After the vehicle was parked, the driver alighted and rushed to passenger side and pulled the door open shouting that they came out and explained the theft. At first the occupants of the vehicle were reluctant to come out but the driver helped by **Mutavi** dragged three people out and the driver started slapping them while **Mutavi** was kicking them. The mob became agitated and attacked the people with weapons they were carrying, despite his efforts to restrain them. According to the 1<sup>st</sup> accused, the mob demanded to know why robberies were occurring in the 1<sup>st</sup> accused's house since he had been attacked on 9<sup>th</sup> May, 2014 and robbed a robbery which he reported to Kathiani Police Station and a neighbour had also been robbed. According to him there was a spate of robberies in the area including a children's home.

55. Realizing the mob was too large and being unable to restrain them from continuing to assault the three, he told them that he was calling the police called the police but the mob stated that the police would find dead people. He then called PW6, Kathiani OCS **James Mwita** and informed him about the incident but PW6 retorted that he was tired of Kathiani theft and that he was from another theft case but the 1<sup>st</sup> accused insisted. According to the 1<sup>st</sup> accused, his first call to PW6 was about 5.15 a.m. He again called him informing him that the people were almost being killed and he said he was on the way and PW6 arrived at 6.30 am. By then the mob had dragged the people outside the compound and continued attacking them and later set them on fire. By the time the police came, they found when the people had already been set on fire and the 1<sup>st</sup> accused believed they were dead.

56. When PW6 arrived with his team he found many people at the scene but they started disappearing. The accused recognised PW2 and PW10 as well as **Mutavi** who was his neighbour. After PW6 interrogated PW2 and after conducting a search at his compound the police left with the bodies. According to the 1<sup>st</sup> accused during that time, he had no security lights and the only source of light that night was the vehicle's headlights and the neighbours' torches. It was his evidence that after taking their statements PW6 concluded that it was a case of mob justice and it was not until 6<sup>th</sup> March, five days later, that they were arrested after they were called with the 2<sup>nd</sup> accused to the Police Station on the ground that the incident occurred outside his compound. By then they had no worker and would get people to pay to clear their compound with their own tools.

57. The 1<sup>st</sup> accused view was that they were framed and that not all witnesses were called as witnesses such as one **Jackson Musyimi** whose statement was marked as D7 who stated that he saw the people cutting the deceased. That statement was produced as DEX- 2.

58. It was further his view that the evidence against them was informed by the fact that there was bad blood between him and PW1 with whom he had had an affair in 2006 and his wife, the 2<sup>nd</sup> accused intervened and reported the matter to the police station and the relationship ended then. All those who testified such as PW2, PW10 and the said **Mutavi** were working in the same Bar while PW2 was her boyfriend.

59. On her part, the 2<sup>nd</sup> accused testified that she never knew the deceased before. That night after taking super, they went to sleep at around 10 pm. At around 2.30 am she woke up and heard the 1<sup>st</sup> accused talking on phone. Upon inquiring from him, the 1<sup>st</sup> accused informed her that it was their watchman who had seen one of their motor vans KBL 782P in Kathiani being driven very carelessly towards Zaikoni. The 1<sup>st</sup> accused called their manager, **Musyimi**, and relayed what he had been told and wanted to know what the vehicle was doing on the road but she did not hear the response. However, the 1<sup>st</sup> accused informed her that Musyimi had said that he would follow up on the matter and they slept.

60. Barely 15 minutes later, the 1<sup>st</sup> accused received another call and when she inquired he told her a certain man called and told him he was the one having their vehicle at that hour and that he was going to Zaikoni to load vegetables for customers because it was Machakos market day and after that they went back to sleep. Some minutes to 5.00 am around 4.45 am, she heard people shouting the 1<sup>st</sup> accused's trade name Damas and when they got out and proceeded towards the gate, they were informed that they had been awoken by one **Mutavi** who informed them that the accused's car had been stolen and that **Mutavi** got the thieves and brought them. More people started crowding outside the

compound and they saw light of a vehicle coming towards the gate hooting since there was no perimeter wall. As the vehicle approached, she could hear someone saying “you will have to explain why you have stolen the vehicle and who sent you”. The 1<sup>st</sup> accused then opened the gate and as the vehicle drove in, the crowd also entered. As soon as the vehicle was parked, a driver moved from his side went round to passenger side opened the door telling the people to get out and explain why they stole the vehicle and who sent them but nobody got out. He stated dragging them out and slapping and out of the crowd one man assisted him in dragging of the men who looked helpless calling them “thieves” while the crowd demanded that they be brought out. Once out the crowd set upon them beating and cutting them. Though the 1<sup>st</sup> accused called the OCS on his phone with his speaker phone on, the OCS did not come immediately all while they pleaded with the crowd, but their pleas fell on deaf ears. She heard through the speaker, the OCS saying that he was tired of theft cases in Kathiani. In the meantime, the men were dragged out of our compound and set on fire. At around 6.30 am the OCS arrived with his officers and when villagers saw the police vehicle they started going away but the driver, PW10 and Mutavi did not go away.

61. After the OCS arrived he interrogated PW1, PW10 and Mutavi and the accused, searched the rooms and carried the bodies to Kathiani. She confirmed that though the incident was Monday it was not till Friday when they were summoned to Kathiani Police Station and were arrested. She confirmed that their compound had no security light and she was with 1<sup>st</sup> accused alone. She only had a kitchen knife in Kitchen and an axe for cutting firewood but had no *pangas* and slashers in the compound. She also confirmed that in 2014 May we were attacked though there were other neighbours who had been similarly attacked.

62. According to her, there was a time when PW1 had an affair with the 1<sup>st</sup> accused for many years and she reported the affair and the two were called. It was therefore her view that PW1 was hitting back at her. In her evidence, since PW10 was an employee of PW1, she could have been influenced by PW1 to secure her a job while PW2 was PW1’s boyfriend. According to her, **Musyimi** who was never called as a witness stated in his statement that he saw **Mutavi** assaulting the deceased.

63. In support of their case, the accused called **Samwel Muthiani Muasya**, a neighbour who testified as DW3. According to him, on 2<sup>nd</sup> March, 2015 he was asleep when he was called by one **Mutavi**, a neighbour, through the fence. When he came out **Mutavi** told him to go and see thieves who had stolen Damas vehicle and that he was proceeding to inform **Jacob Musyimi** also a neighbour. DW3 took his torch and went out and found **Jacob Musyimi** the manager for Damas outside and the two proceeded to Damas’ place about 300 meters away where they found the vehicle at the gate with a big gathering of villagers. According to him, the driver was shouting telling the occupants that they were going to confirm to the village where they were taking the car. Before Damas appeared, people were asking why the robberies were taking place at the 1<sup>st</sup> accused’s place since prior to this the 1<sup>st</sup> accused and other neighbours had been attacked so people were bitter. The 1<sup>st</sup> accused opened the gate around 5-5.10 am and the driver drove inside. After doing so the driver, helped by **Mutavi** commanded the boys to come out and they pulled them out one by one and made them lie down. The mob descended on the boys with **Mutavi** who seemed to know the boys, despite pleas from the 1<sup>st</sup> accused. The accused persons then made calls and DW3 himself called the area chief who lived a bit far. Between that time and 6, the boys were beaten removed outside to the road where **Mutavi** put the leaves on them and lit the fire and stopped them from escaping. It was not until about 6 am that the Kathiani OCS arrived and searched the place. In his evidence the house was not lit though the people had torches. He however did not see the accused with any weapon as they were busy making calls and pleading with the mob. He further testified that before the vehicle entered the compound, he saw PW1 alight and hide and started making calls. He also saw PW10.

64. Called as DW4, **Jackson Mukula**, a neighbour to the accused testified that on the night of 1<sup>st</sup>/2<sup>nd</sup> March 2015 when in the house, he heard noise and woke up to the shouts of “thieves”. He proceeded where the noise was coming from which was from the 1<sup>st</sup> accused’s place, 300 meters away. Upon reaching there, he found a big mob complaining of rampant theft. He saw people lying down while the accused were inside the compound. According to him the people were saying they were caught having stolen the accused’s properties. It was not until 6.30am that the police arrived while he was trying to get to the 1<sup>st</sup> accused and by that time the deceased had been set on fire. After the police arrived people including himself left.

#### Accused’s Submissions

65. It was submitted on behalf of the accused by their Learned Counsel, **Mrs Morara**, that though the prosecution can prove its case through direct or indirect/circumstantial evidence, in this case, the prosecution had two witnesses (PW2 and PW10) who were present at the scene and witnessed the commission of the offence hence their evidence is direct evidence. The accused cited **Anthony Ndegwa Ngari vs. Republic [2014] eKLR**, for the elements of the offence of murder and section 206 of the **Penal Code** for definition of malice aforethought. They also cited **Bhatt –vs- Republic (1959) EA 332 for the standard of proof**

66. While appreciating that the fact of death of the three deceased persons was proved by the doctor’s evidence and the evidence of their relatives who attended their post mortem and identified their bodies, it was submitted that the prosecution failed to determine that it is the accused persons who caused the death of the deceased persons through their action or omissions.

67. After reproducing the prosecution’s evidence, it was submitted that the testimony that is relevant to this case is PW2’s and PW10’s testimony. However, their testimony is not sufficient to prove the case against that accused persons beyond any reasonable doubt. The testimony of PW2 as to what transpired differs from the testimony of PW10 hence bringing doubt to the possibility that the accused persons are the ones who murdered the deceased persons. Their testimony raises doubt as to whether we have the rightful accused persons in court. As per the testimony of PW10, PW2 was the first one to assault **Daniel** and from PW11’s testimony, the post mortem showed that the said **Daniel** had other injuries other than the burns that were caused by a sharp object. Further, PW10 testified that it was **Mutavi** who started cutting the deceased persons before the mob joined in and cut them too. It was also her testimony that it was **Mutavi** who looked for the firewood and the papers that were used to set the three on fire. In view of the foregoing, it was submitted that the perpetrators of the offence herein are still at large as correctly indicated by PW6 in his testimony and that the only reasons why the two witnesses are in court is because the vehicle involved was theirs and the incident happened within and outside their compound. Accordingly, the prosecution’s evidence did not point at the accused persons as the ones who killed the deceased persons hence not sufficient to find them guilty as charged.

68. From the prosecution’s case, it was contended, it is not clear why PW2 involved the other two deceased persons in the whole vehicle

issue yet the only person he had given the vehicle to was Dan. It clearly indicates that the police did not conduct proper Investigation to establish the motive behind of PW2's action and were instead too quick to apportion the blame on the two accused persons leading to the true murders walk scot free while the two carry the blame which is a great injustice to both the deceased persons and the two accused.

69. In her testimony, PW10 exonerated the two accused persons from the Killing of the three deceased persons as she clearly testified that the three were cut by **Mutavi** and other people and were later set on fire. None of the accused persons told the mob to set the deceased persons on fire. The fact that PW10 testified in cross-examination that she was told by **Musyoki** who opened the gate for them yet she had testified that it was the 2<sup>nd</sup> accused who opened the gate, points to the fact that there is a possibility that she was also told that the 2<sup>nd</sup> accused was the one who ordered the three out of the vehicle and that she brought slashers and *pangas* and that she was in any involved in their killing as opposed to having witnessed the same. The fact that someone else had an interest of having the accused persons falsely accuse of the killing of the deceased persons is demonstrated in the recording of the statements where even PW10 testified before court that some of the evidence that was recorded incriminating the accused persons was not true. Further, PW6 testified that there were other people involved who were still at large which is a clear indication that the testimony of PW2 that it is only the two accused persons who were involved in the killing of the deceased persons was untrue and that his evidence should be taken with a pinch of salt by this court since the same is questionable and should be treated as mere lies.

70. According to the Learned Counsel for the accused, the fact that no murder weapon was recovered from the house of the accused persons or within the compound despite the police officers having conducted a thorough search is an indication that indeed, the people who had murdered the three deceased persons were not from the home of the accused persons. They must have been a mob as claimed by every report made even during the post mortem and the individuals involved must have left with their weapons after accomplishing their mission.

71. It was submitted that if indeed it was true that the accused persons were the ones involved in the murder, PW2 and PW10 would have indicated the same when the police arrived and the two would have been arrested immediately. From the prosecution's case, it is clear that the two were arrested days later. Further, the police did not interrogate other independent witness or record any of their statement's despite PW6 having indicated that when they arrived, there were people watching though from far. PW6 did not indicate what the witnesses present at the scene told him after the interrogating and why he did not effect the arrest of the two accused persons immediately if there was evidence from witnesses pointing at them as the ones who killed the deceased persons.

72. It was submitted that the arrest of the two accused persons was an afterthought and a cover up of the true perpetrators of the offence and that the same ought not to have happened. PW2 had actually threatened the family of one of the deceased persons (the one who had taken the vehicle) that once he found the vehicle, they should accept the report they will receive about his brother. The foregoing shows that PW2 had made a clear plan to harm the deceased persons and he made good his threats when he attacked the brother of PW9 and instead of taking him to the police station as advised, he decided to go set him up to the members of the public and the accused persons as thieves leading to their further attack and death.

73. According to Learned Counsel for the accused, the prosecution's case is marred with material contradictions and major discrepancies especially in the evidence of their key/eye witnesses on the happenings that lead to the killing of the deceased persons. While PW1 testified that PW10 went to the room she was having drinks with PW2 and told him that the vehicle had gone, PW2 on the other hand testified that he went to the counter and that is when PW10 asked him if he had given out the key of the vehicle since it had gone. He testified that he is the one who went to inform PW1 the information he had received from PW10. Whereas PW2 testified that it is PW10 who asked him if he had given out the keys since the vehicle had gone, it was the testimony of PW10 that it is PW2 who called the deceased (Dan) and asked him to buy him a beer and in return, he would give him the vehicle's key. After the deceased bought him the beer, he handed over the key to him and PW10 only went to inform PW2 that Danniell had left with the vehicle.

74. It was also pointed out that when they arrived, PW2 hooted and the 1<sup>st</sup> accused opened the gate while PW10 testified that the gate was opened by the 2<sup>nd</sup> accused and not the first accused. PW2 testified that other than the headlight, there was another source of light in the accused person's compound being the security light while PW10 testified that there was no security light, the only source of light was the vehicle's headlight. None of them testified as to how clear the light was and whether one could use it to see the whole compound or not. Further, PW2 testified that when they arrived the home of the accused persons, only the accused persons were present and that they were the only one who tied the three using rope, then cut them using pangas and later carried them outside and set them on fire and that the only person who help turn the three while the accused persons cut them was **Mutavi**. PW10 on the other hand testified that when they arrived the home of the accused person, they found many people about 20/30. She testified that the **Mutavi** was the one who started cutting the deceased persons and was joined by others and that the same **Mutavi** was the one who looked for the firewood and the paper and with the help of the other people present, set the three deceased persons on fire.

75. According to the defence, it beats logic as to why the two eye witnesses (PW2 and PW10) could contradict each other in relation to key and material evidence that they witnessed at the same place, same time under similar circumstances. It was submitted that the contradictions between the two eye witnesses is so material contradictions that seriously questions their testimony and the prosecution's case as a whole. In support of the defence submissions, reliance was placed on the decision by the Uganda Court of Appeal in **Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6,**

76. Based on Section 124 of the Evidence Act, it was submitted that the prosecution's evidence on record remain uncorroborated since no witness was called to corroborate the evidence of PW2 that it was the accused persons that caused the death of the deceased persons. It was expected that the testimony of PW10 would corroborate the evidence of PW2, however, PW10 gave a very different account of the happening that did not in any corroborate the testimony of PW2. As it is, the evidence of PW2 remain independent and uncorroborated and the same applies to the evidence of PW10. Not witness was called to corroborate the testimony of either of the witnesses. The testimony of the other 9 witnesses did not corroborate the testimonies of the two key witnesses since they were not present at the time of the commission of the offence, and the report that they all got was that the two had been killed by the mob.

77. Further, it was submitted that there is enough evidence on record pointing to PW2 as being the main cause of the events leading to the death of the three deceased persons. There is evidence to the effect that he did assault and injure the deceased persons and that he was the one who labelled them as thieves and the one who with the help of others drugged the deceased persons out of the vehicle to their attack making

him an accomplice to the offence. This submission was based on the decisions in **Ngala Chirongo Mwamee vs. Republic [2018]**, **Antony Kinyanjui Kiamani –vs- Republic (2011) KLR (Criminal Appeal 15/2007)** and **Karanja & Another vs. Republic, Criminal Appeal No. 92 of 1990** and it was contended that PW2 being an accomplice to the offence, it is clear that the evidence given in court was only aimed at incriminating the two accused persons and distance PW2 from the commission of the offence. The law demands that there should be corroborating evidence to the evidence of an accomplice and in this case, there is no such evidence of any witness who corroborated the testimony of PW2.

78. According to the defence, failure to record statements or to call crucial witnesses is viewed as an effort to defect justice by the prosecution. It is usually believed that the failure was intentional and in the event that those witnessed were called, their testimony would have exonerated an accused person. It was submitted that the police conveniently failed to interrogate and record the statement of the other independent witness present at the scene because their testimony would have not been in favour of their case. Further, the prosecution failed to call one **Jackson Musyimi** who had recorded a statement (DEX-2) indicating what had transpired and the people he had witnesses kill the deceased persons. The failure to call this one witness whose evidence was not in favour of the prosecution's case was very intentional and tactical by the prosecution since his testimony would have exonerated the accused persons. It is urged prayer that the court does consider the statement of the said witness and the same be used as part of the evidence available in favour of the accused persons.

79. According to the defence, the incident leading to the death of the deceased persons was at night and most of the prosecution's witnesses were drunk at the time making the circumstances difficult to comprehend what was happening and even difficult for identification. The foregoing is confirmed by the evidence of PW10 who testified that she could not identify the 1<sup>st</sup> accused. On this issue, reliance was placed on the case of **Nganga versus Republic [1981] KLR 483**.

80. It was submitted that the testimony of some of the witnesses called by the prosecution is questionable and hence the court should evaluate the truthfulness of their testimonies especially the testimony of PW2.

81. It was submitted that the defence evidence on what transpired on the night of the incident is clear, consistent and corroborated. Further, their defence is also corroborated by some of the prosecution's evidence. PW10 did confirm that when they arrived at the home of the accused persons, they found many people and that the deceased were attacked and killed by a mob led by **Mutavi**. The evidence that it was **Mutavi** and the mob that attacked and killed the deceased is corroborated by the testimony of DW3 and by DEX-2. Further, PW6 confirmed that the 1<sup>st</sup> accused persons did call him on the material night and reported the incident. The fact that the 1<sup>st</sup> accused called the police, is a clear indication that they had nothing to do with the attack of the deceased persons, in any case, they wanted them to be helped. If indeed the accused persons had the intention to kill the deceased persons or to have them murdered, they would have not called the police seeking their assistance. DW3 confirmed having witnessed the accused persons make calls and the he himself called the area chief. The foregoing is a clear demonstration that the accused persons lacked malice aforethought to cause the death of the deceased persons herein. It was therefore submitted that the prosecution failed to prove the element of malice aforethought which is a crucial element in proving the offence of murder and that the conduct of the accused person on the night of the incident does not paint a picture of guilty people but rather innocent people.

82. Accordingly, the prosecution's case against the accused persons is weak, the evidence available is insufficient, inconsistent and unreliable hence has failed to prove this case against the accused persons as per the criminal required standards and as such, the accused persons should be found not culpable and set at liberty.

### **Prosecution's Submissions**

83. On behalf of the Prosecution it was submitted based on the case of **Woolmington vs DPP [1935] A. C.**, **Republic –vs- Mohamed Koran 2014 eKLR** and Section 203 of the **Penal Code** that the main ingredients therefore are; the death of the deceased and the cause of the death, the accused persons committed the unlawful act which caused the death of the deceased persons and the accused had malice aforethought.

84. In this case it was submitted that the death of the deceased persons and the cause of the death was proved by the evidence of PW-11 Dr. Waithera who conducted post-mortem after the bodies of the deceased were identified by PW7, PW8 and PW9 for the purposes of post-mortem.

85. As to whether the accused persons committed the unlawful act which caused the death of the deceased persons, and that the accused persons had malice aforethought as defined in Section 206 of the **Penal Code** and that once the prosecution proves one or a combination of the above, malice aforethought will be deemed to have established as seen in **Republic vs. Danniell Anyango Omoyo [2015] eKLR** and **Isaak Kimathi Kanuachobi vs R.**

86. Based on the evidence on record, it was submitted that it is quite evident that the attack on the deceased persons was not random or spontaneous. The evidence of PW2, PW6, PW10 and PW11 is that the accused persons attacked the deceased persons cutting them with *pangas* which was planned, pre-meditated and well executed by the accused persons. The evidence implicates the accused persons as the people who attacked the deceased by the evidence of two eye witnesses which neither the accused persons disputed and DW1 went further to confirm that in deed PW2 was at the compound till the time the police arrived and took the bodies.

87. The evidence on record indicates that the deceased persons had multiple cuts on their bodies and the extent of the body burns 80% 6<sup>th</sup> degree burns clearly shows that the accused persons had all the intention of inflicting injuries or grievous harm on the deceased persons which led to their death.

88. When the two accused persons started cutting the deceased persons with pangas while they had been tied up shows that they had malice and intention to inflict injuries on the deceased persons and according to the evidence of an eye witness PW2 the 2<sup>nd</sup> accused further called upon the community to witness what she was doing then lit the deceased persons on fire. The fact that the said motor vehicle that was alleged to be stolen belonged to the accused persons shows that they had motive to harm the deceased persons since they claimed that they had stolen

the same.

89. It was submitted that these injuries could only have been intended to cause the death of or grievous harm to the deceased persons. The Court was therefore invited to find that there was malice aforethought on the part of the accused persons within the meaning of section 206(a) of the *Penal Code*. The accused persons were armed with dangerous and offensive weapon, they set upon the deceased who were not only unarmed but also tied up, the accused persons further set the deceased persons ablaze. Such attack had a clear outcome that it would cause harm, injuries and even death to the victims and that is exactly what happened in this matter. The accused persons had unlawful intention, acted on the said intention with malice aforethought, thus the ingredients of the offence of murder have been proved beyond reasonable doubt and the Court was urged to convict the accused persons of the offence of murder contrary to section 203 of the *Penal Code*.

### **Determination**

90. The prosecution's case in summary is that on the night of 1<sup>st</sup> and 2<sup>nd</sup> March, 2015, PW2 who was temporarily assigned to operate the 1<sup>st</sup> accused's *matatu* parked the vehicle after work and went to PW1's bar for a drink. While there the said vehicle was driven away by one of the deceased, **Daniel**. It is not clear under what circumstances the same was driven away whether **Daniel** was authorised by PW2 to drive it away or not. However, at some time, PW2 left accompanied by one **Mutuku** and went looking for the vehicle after relaying the information to the 1<sup>st</sup> accused. He eventually returned to the bar with the said vehicle accompanied by the said **Daniel** and from there PW2, accompanied by all the three deceased, PW1, PW10, the said **Mutuku** and one **Mutavi** left for the home of the 1<sup>st</sup> accused. There, the deceased were assaulted and lynched.

91. I have considered the evidence on record. Section 203 of the *Penal Code* under which the accused is charged provides that:-

*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

92. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

**“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”**

93. In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M. Odera, J** as follows:-

- 1) **The fact of the death of the deceased.**
- 2) **The cause of such death.**
- 3) **Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
- 4) **Proof that said unlawful act or omission was committed with malice aforethought.**

94. In Mombasa High Court Case Number 42 of 2009 between **Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang** the court expressed itself as hereunder:

**“The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:**

- a) **Proof of the fact as well as the cause of the death of the deceased persons.**
- b) **Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.**
- c) **Proof that such unlawful act or omission was committed with malice aforethought.”**

95. In this case, there was no doubt as to the fact of death of the deceased persons. In fact, this fact is conceded to by the defence.

96. As regards the cause of death, the only direct evidence tending to link the death of the deceased with the two accused persons was that of PW1, PW2 and PW10.

97. According to PW1, a former girlfriend of the 1<sup>st</sup> accused but who by the time of the incident was in a similar relationship with PW2, that night she was very drunk as a result of which she fell asleep almost as soon as she entered the vehicle and though the journey from her bar to her place would have taken only five minutes, she never realised that they had passed her place till they arrived at the 1<sup>st</sup> accused's residence which was twenty minutes drive. Upon realising where she was, she alighted from the vehicle and instead of entering the 1<sup>st</sup> accused's compound, took a diversion into another compound as the vehicle and its occupants drove inside the 1<sup>st</sup> accused's compound. She therefore did not witness the occurrences in the compound and only heard screams. When she left her hideout she found the deceased burning but she

could not tell who had put them on fire and the reasons for doing so. Her evidence clearly fell short of placing any responsibility for the deceased's death on any of the accused persons.

98. As for the evidence of PW10, she testified that the only person she saw between the two accused participating in harming the deceased was the 2<sup>nd</sup> accused. According to her, the 2<sup>nd</sup> accused participated in slashing the deceased. She was however clear in her evidence that apart from the 2<sup>nd</sup> accused, other people also did so including one **Mutavi**. It was her evidence that by the time they entered the 1<sup>st</sup> accused's compound there were many people inside whom she estimated to be between 20-30 people. This piece of evidence fits in with the defence case that as soon as the vehicle entered the 1<sup>st</sup> accused's compound several people entered with it. A totality of her evidence seemed to suggest that no one took any issue with the lynching of the deceased as part of that crowd also participated in the act. This corroborates the evidence of PW1 but contradicts that of PW6 that when he arrived at the scene the crowd was baying for the blood of the accused. She was however categorical that the person who lit the fire that burnt the deceased was the said **Mutavi**.

99. If her evidence is to be believed, can it be said that the death of the deceased was caused by the actions of the 2<sup>nd</sup> accused? According to the evidence of the Pathologist who conducted the post mortem examination, PW.11, the information given to her by the police was that the death of the deceased was caused by mob justice. Upon her examination, she concluded that the death of **Jackson Musyoki Mutua** was due to over 80% burns though she was unable to state whether he was still alive by the time his body was set on fire. Similarly, the cause of death of **Daniel Kyalo Mbithi** whose body was completely charred with over 80% 6<sup>th</sup> degree burns, though had cuts on the skull, could not be conclusively determined as having been caused by the assault as opposed to the burns. As for **Joshua Mutua Kioko**, though the body was completely charred the presence of soot in the respiratory system was an indication of inhalation of burns in respiratory airways and though she concluded that the cause of death was over 80% 6<sup>th</sup> degree of burns, at the time of being burnt he was still alive. What comes out from this evidence is that there was no conclusive evidence that the deceased were dead by the time their bodies were set on fire. That becomes important for a determination as to whether the actions of the 2<sup>nd</sup> accused as narrated by PW10 even if true caused the death of the deceased persons.

100. Going by the evidence of PW10, apart from the 2<sup>nd</sup> accused, the deceased were assaulted by many other people including one **Mutavi** who eventually set their bodies on fire, the fire that eventually caused their death. She was clear in her evidence that the 2<sup>nd</sup> accused did not participate in the said last action. In light of the evidence adduced by PW10 can it be concluded that the prosecution established beyond any reasonable doubt that the deceased suffered fatal injuries as a result of an act or omission on the part of one or more of the Accused persons or that the Accused persons had a common intention of causing the death of the deceased? It is not enough to simply prove that the accused assaulted the deceased. The prosecution must go further and prove that it was that assault either on their own or in concert with others that led to the death of the deceased. In this case there is no conclusive evidence that the deceased's death was as a result of the assault. In fact, according to PW11 at least in one case the deceased was not dead at the time he was set on fire. According to PW10, none of the accused gave instructions that the deceased be burnt and she did not testify that the accused approved of the deceased being burnt. From the evidence of PW10 it is clear that it cannot be conclusively determined that the death of the deceased was caused by the fatal injuries inflicted by the accused.

101. In Republic vs. Alfayo Otieno Ogunga Nairobi High Court Criminal Case No. 26 of 1993, **Khamoni, J** expressed himself as hereunder:

**“Another point to be noted is that Dr Ywaya in his post mortem report talked of the deceased having died from fire burn only. He talked of no other injuries other than those caused by fire burn. It follows that when considering who killed the deceased, the Court should be looking for the person who set fire on the deceased. That is the person who struck the fatal blow in this mob justice case. Who is that person? The Court has no direct evidence.”**

102. In this case whereas there were some other injuries noted, what caused the death of the deceased were the burns and there is no evidence that the said burns were inflicted by the accused or that the accused were accessories to the said action going by the evidence of PW10. It is similarly my view that the prosecutions should have looked for the person who set the deceased on fire, the alleged **Mutavi** since that was the person who struck the fatal blow in this case which according to PW10 was a mob justice case.

103. As for the evidence of PW2, after he parked the vehicle, the 1<sup>st</sup> accused who was with the 2<sup>nd</sup> accused slapped the deceased before getting a rope and tying them while the 2<sup>nd</sup> accused kept watch over them. The 2<sup>nd</sup> accused then started cutting them with a *panga* and she was joined in the act by the 1<sup>st</sup> accused as they were being turned over by **Mutavi** while the deceased were screaming before they eventually stopped moving. **Mutavi** and the 1<sup>st</sup> accused then took the bodies outside the gate after which the 1<sup>st</sup> accused got firewood from his compound and **Mutavi** was shown by the 1<sup>st</sup> accused where to get paper from his compound. PW2 then stated that one of them whom he could not tell lit the firewood. Before the three were burnt, **Mutavi** removed their clothes and stepped on the neck of one of them who was still alive. According to him, neither himself nor the members of the public participated in the cutting and burning of the deceased persons. In his further evidence he stated that it was the 1<sup>st</sup> accused, **Musyimi** and **Mutavi** who removed the deceased out of the gate after which they started looking for firewood from within the compound to burn them. In the said further evidence contrary to what he had stated earlier, the said firewood was brought by **Mutavi** after being told to do so by the 1<sup>st</sup> accused and it was the same **Mutavi** who lit the fire. Though there were people present, they did not say anything as they were just calling each other. Here again, the evidence of PW2 contradicted that of PW6 as regards the attitude of the crowd.

104. If the evidence of PW2 is to be believed, the two accused persons participated in assaulting the deceased. However, he did not attest to the role of the 2<sup>nd</sup> accused in setting the deceased on fire. Based on the reasoning above, it is therefore not possible from his evidence to find that the 2<sup>nd</sup> accused's action caused the death of the deceased. However, it would seem that his evidence was to the effect that the 1<sup>st</sup> accused acted in concert with the said **Mutavi** in setting the deceased on fire.

105. Apart from clear contradictions in his own testimony, the bona fides of PW2 are questionable. According to **Julius Ndunda Munyao**, a brother **Daniel Kyalo**, and who handed over the vehicle to PW2, when PW2 who appeared drunk, went to their home before the said

**Daniel** was found in possession of the vehicle, PW2 threatened he would look for the vehicle and once he got the same he would get a report which should not surprise them. This kind of statement taken together with the evidence of PW10 that it was in fact PW2 who voluntarily released the vehicle to **Daniel** in exchange for a beer portrays PW2 as an untrustworthy person. Even after voluntarily giving out the keys to the vehicle, he went out to look for it and when he found **Daniel**, he assaulted him. He denied that he had a phone yet PW1 testified that he called to inform her that he was returning back. While he was in a relationship with PW1, at first he denied that such a relationship existed. As was stated in **Ndung'u Kimanyi vs. Republic [1979] KLR 282:**

**“A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

106. In this case it is difficult to believe that PW2 was a witness of truth. He had every reason to shift the blame elsewhere considering the fact that he at one point also assaulted one of the deceased. Apart from that he was in an intimate relationship with PW1 who harboured bitterness at the 2<sup>nd</sup> accused who took offence with her relationship with the 1<sup>st</sup> accused.

107. It is worth noting that all the witnesses who gave incriminating evidence against the accused were either having an affair with her or were at one point or the other beholden to her as their employer. They could not therefore be termed as independent witnesses as such.

108. On the other hand, some of those who were mentioned whose evidence could have been crucial were never called to testify in the case. There was one **Jackson Musyimi** whose statement was marked as D7 who stated that he saw the people cutting the deceased. For some unknown reason he was never called as a witness in the case and there was no proper explanation why he never testified. At least the prosecution ought to have tendered him to the Defence to decide whether or not to call him as a defence witness. In **David Kariuki Mutura vs. Republic [2005] eKLR** it was held that:

**“These witnesses were not called to testify. In the case of GEORGE NGOSHE JUMA & ANOR VS ATTORNEY GENERAL, MISC. CRIMINAL APPLICATION NO. 345 OF 2001, the Constitutional Court held that the prosecution has a duty to bring before Court all the evidence gathered to ensure that justice is done. The prosecution cannot be allowed to suppress evidence in their possession even if it is in favour of the accused. Unfortunately, this is what seems to have happened in the instant case. The investigating officer was selective in the evidence he wanted adduced before Court. There was evidence recorded from witnesses that was in favour of the Appellant. This evidence was suppressed for no apparent reason. I think in this regard the Appellant’s complaint that the Learned trial Magistrate erred in disregarding the fact that the prosecution had deliberately suppressed the evidence of the eye witnesses to the accident despite having taken statements from them has some justification. I think that in those circumstances, the trial Magistrate ought to have drawn the necessary inference that the evidence that would have been adduced by the said witnesses would have been unfavorable to the prosecution case.”**

109. In **Gabriel Kimuhu Kariuki vs. Republic [2003] eKLR** the court opined as follows:

**“... It is my holding therefore that although the prosecutor in this case in hand had a discretion to decide which material witnesses to call or not to call he had an obligation to call the three witnesses hereinabove mentioned. But if he did not do so, he should have made them available to the appellant to call them if he so chose to do. On the other hand, the trial magistrate had a duty to impress upon the prosecution of such a duty and call the witnesses itself if the prosecution failed to do so. And finally, in this case, it cannot be arguable that the prosecution need not have called the mentioned witnesses because it had called adequate witnesses. In fact, without calling the said witnesses, the prosecution barely had any adequate evidence on the record upon which it could prove its case. Failure to call them therefore was motivated by a greater negative reason like the fact that if he called them, their evidence would tend to be adverse to the prosecution case. I accordingly have to hold that the prosecution failed to call the witnesses mentioned above because their evidence would possibly exonerate the appellant.”**

110. In **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal opined as follows:

**“It is, to say the least, surprising that the prosecution chose not to call the watchman or offer him for cross examination. The trial magistrate did not consider the evidence about the watchman. That was a further misdirection. The trial court would have been entitled to presume that the evidence which the watchman would have given, which was not produced, would, if produced, be unfavourable to the prosecution who withheld it: R V Urberle (1938) EACA 58.”**

111. Apart from **Musyimi** there was a mention of one **Mutuku** who was similarly in the picture but was never called as a witness. In light of the foregoing, I agree that adverse inference ought to have been made against the prosecution’s failure to call the two witnesses or at the very least to tender them for cross-examination. I associate myself with the sentiments of **Khamoni, J** in **Republic vs. Alfayo Otieno Ogunga Nairobi High Court Criminal Case No. 26 of 1993** where he expressed himself as hereunder:

**“The accused is saying he was not in the mob. He wanted to bring Lilian Akinyi as a witness to support him in his alibi defence but failed to trace the lady. But that failure should not be taken as adversely affecting the defence case. If anything, it is the prosecution’s case which should be adversely affected because the alibi defence of the accused having been known to the prosecution right from the time the accused was in the police cells, it was the duty of the prosecution to set out to disprove that alibi defence and one of the witnesses the prosecution should have gone for in an effort to disprove the alibi was the lady**

Lilian Akinyi. It follows that the failure by the prosecution to bring Lilian Akinyi as a witness draws an adverse conclusion against the prosecution in that the prosecution knew her evidence was going to be against the prosecution's case."

112. The rationale for disclosure of material collected by the prosecution in the course of investigation was explained in Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR, where the Court of Appeal held that:

"The prosecution, at the beginning of his trial, supplied the defence with all the relevant material upon which they intended to rely. That was perfectly right because that material was gathered by the police using the resources provided by tax-payers among whom is the appellant. That material is not the personal property of the police and the police are under a legal duty to gather it on behalf of the public. Of course, no busy-body would be entitled to demand to see that material, unless there be some very good reason for such a demand. But the appellant was a party directly involved in the affair and as public property directly affecting him, he was entitled to. The police were under a legal duty to pass that material to the Attorney General and the Attorney General, who is, in all criminal cases, the prosecuting authority was bound to disclose it to the appellant before his trial and throughout the trial. If the Attorney General received any new information during the trial the Attorney General was bound by law to disclose it. This is because the duty of a prosecutor, acting on behalf of the Republic is not to secure a conviction at all costs but to be a minister of justice, i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any public prosecutor who sees his or her duty as being to secure convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence, whether it supports his or her case or whether it weakens it and supports the case for the accused."

113. On the part of the defence, apart from their own testimony denying participation in the death of the deceased, the 1<sup>st</sup> accused called PW6 and informed him about what was happening and according to him, PW6 was reluctant to go to the scene and only went there after he called a second time. PW6 however confirmed that he was called by the 1<sup>st</sup> accused. Save for the alleged timing as contended by PW6, the conduct of the 1<sup>st</sup> accused was clearly not in sync with that of a guilty person. In David Merita Gichuhi vs. Republic Nairobi Criminal Appeal No. 158 of 2003 (Tunoi, Githinji, JJA and Onyango Otieno, Ag. JA).

"It is incredible that the appellant could have given his correct name to the members of the vigilante group near the home of the deceased when he was proceeding to her home to commit a crime. The fact that the appellant gave his correct name near the home of the deceased is a co-existing circumstance which destroys the inference that he was going to the home of the deceased on the night on 18<sup>th</sup> April, 1999 when Bakari met him...Lastly, Njambi (PW10) testified that she is the one who told the appellant about the death of Elizabeth Naymbura on 21/4/99 and that the appellant decided to remain at the home of the deceased and even slept there. The learned Judge concluded that the appellant went to the home of the deceased as a cover up. There was no evidence to support this finding. If the appellant had indeed committed the crime charged and had in fact seen by Bakari and the members of the vigilante group near the home of the deceased on the night of 18<sup>th</sup> April, 1999, the natural reaction would have been to go into hiding. The fact that he went to the home of the deceased after her death to console the family and even slept there is another co-existing circumstance which destroys any inference that he was the one who committed the offence. On our evaluation of the evidence we have come to the conclusion that the circumstantial evidence relied on by the trial Judge was so weak as to amount to a mere suspicion and could not have been a sound basis for a conviction."

114. Apart from their testimony, the accused called two witnesses who were their neighbours and one of them, DW3 testified that he arrived at the scene when the vehicle was entering the compound and that the deceased were assaulted by a mob.

115. Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 held that:-

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

116. In 1997, the Supreme Court of Canada in R vs. Lifchus [1997] 3 SCR 320 suggested the following explanation:-

"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt."

117. In JOO vs. Republic [2015] eKLR, Mrima, J held that:

"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in

the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

118. **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

119. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated: -

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

120. In this case the investigating agencies could have done a better job. While the evidence of PW2 was that he narrated to the police the events of that night, the police were of the view that that was a case of mob justice according to their report to PW11. One would have expected them, based on the statement of PW2 at the scene, assuming PW2 was truthful in his evidence, to have apprehended the accused immediately instead of doing so days later and upon the accused presenting themselves at the police station. I wish to reiterate the sentiments of **Rawal, J** (as she then was) in **Republic vs. Wilson Gachui Muriuki [2005] eKLR** where she expressed herself as follows:

“Considering all the facets of the evidence led by the Prosecution and that led in defence of 1<sup>st</sup> Accused, I cannot sincerely find that no doubt of its probability has arisen in the mind of the court. I am a very sad person to observe the aforesaid as the case involves deaths of five young people of our society. What I would have expected from the police was a thorough and intensive investigations in the matter so that evidence as required under law is brought before the court for it to dispense justice to both sides. It has become apparent that this case has been investigated and prosecuted half heartedly and without any diligence and I am not happy to comment on that deficiency, especially in the present case. However, I have to bow down to the law of the land and has to enter a finding, which I hereby do, that...the Prosecution has failed to prove the charge as required under the law. Hence, I shall acquit him and direct that he be released unless otherwise held as per law.”

121. I however do not attach much weight to the fact that the weapons used were never recovered. I associate myself with the opinion of **Lesiit, J** in **Republic vs. E K K [2018] eKLR** where the Learned Judge held that:

“49. The murder weapons in this case were not recovered. However, the weapons used could be inferred from the injuries inflicted on the deceased as noted by the pathologist in the Post Mortem Form produced as P. Exhibit 11. The child had severed neck blood vessels with through and through stab wound from left to right of the neck. She also had ligature compression around the neck. She also had depressed fracture on left temporal region of the skull and fracture at the base of the skull. According to the doctor the cause of death was neck compression due to ligature strangulation; neck injury due to sharp force trauma; and head injury due to blunt force trauma. The doctor explained that any one of these injuries could have caused the death of the deceased. The pathologist stated that it was not possible to say which of these injuries singly caused the death of the deceased. Neither could he tell the order in which they were inflicted.

50. The conclusion one can make from these doctor’s findings are that the weapons used were a blunt object heavy enough to cause fractures to the head; a sharp object sharp enough to cut through all the blood vessels and muscle around the neck from left to right; and, a rope or ligature strong enough to cause compression to the neck area enough to cause death. Any person arming themselves with either of these weapons and applying the kind of force that was applied on the deceased cannot have had any other intention but to cause either death or grievous harm to the deceased. Malice aforethought can thus be inferred not only from the weapons used to inflict the injuries but the nature of the injuries that were actually inflicted on the deceased resulting in the deceased death.”

122. Whereas the defence contended that PW2 was an accomplice, I, with due respect disagree. PW2 cannot be described as *participes criminis* in respect of the actual crime charged, whether as a principal or accessories before or after the fact (in felonies) or a person, committing, procuring or aiding and abetting (in case of misdemeanours). His evidence was diametrically and tangentially opposed to the position of the accused for him to be termed as an accomplice.

123. Nevertheless, having considered the evidence presented before me in this case, it cannot be ruled out that the death of the deceased was caused by a mob and that the actions played by the accused if any cannot be said to have led to their deaths. I am therefore unable to find that the ingredients of murder have been proved and having considered the totality of the evidence placed before me, I find the accused persons not guilty of the offence of murder. Accordingly, I acquit the accused of the charges against them and direct that they be set at liberty unless otherwise lawfully held.

124. Judgement accordingly.

**Judgement read, signed and delivered in open Court at Machakos this 5<sup>th</sup> day of November, 2020.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mrs Morara for the accused**

**Miss Oyagi for the State**

**CA Geoffrey**