



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 34 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH THIONGO WAWERU.....1ST ACCUSED

HENRY NGUGI KARUGA ALIAS MWENE CIO.....2ND ACCUSED

JULIUS KANYIRI WAMBUI ALIAS KAMURANG'A.....3RD ACCUSED

JOHN NJOROGE GACHO ALIAS NJINALO.....4TH ACCUSED

HARRISON KIBANDE MARUBU.....5TH ACCUSED

JOSEPH MUCHUI MUIRURI.....6TH ACCUSED

BENARD MURIGI KARANJA.....7TH ACCUSED

JOSPHAT MACHARIA MARUBU ALIAS KASEE.....8TH ACCUSED

MARY MUGECHI MBURUR ALIAS WAMUGECH.....9TH ACCUSED

JOSEPH NYAMU KAGO ALIAS KIMANGU.....10TH ACCUSED

PATRICK IKUU MUGO.....11TH ACCUSED

SAMUEL IKUU MUGO.....12TH ACCUSED

PETER MBURU MUNGAI.....13TH ACCUSED

PETER MURIGI NGIGE.....14TH ACCUSED

ZACKARIA NGARUIYA MUTWE.....15TH ACCUSED

JOHN KAMAU KARIUKI.....16TH ACCUSED

SIMON NGUGI GITAHU.....17TH ACCUSED

DAVID MUIRURI CHOMBA ALIAS.....18TH ACCUSED

JUDGMENT

1. Kihiu Mwiri Farmers Company is a land buying Company in Murang'a County. It is one of the old ones which has been steeped in controversy over the distribution of the land to its members. According to information received during this trial, Kihiu Mwiri has at least 3507 *bona fide* members and owns at least 1285 acres of land in Murang'a County. Many of the members are heirs to the original members

who passed on and transmitted their shares to them.

2. In the recent past, Kihui Mwiri has been in the news for all the wrong reasons. News of leadership wrangles have been competing for topical space with news of murders and disappearances of officials of Kihui Mwiri. At long last, around 2014, the Authorities seemed to move to action. That action resulted, among other things, in the present trial in which eighteen (18) members of Kihui Mwiri were charged with the death of four individuals.

3. Each of the eighteen (18) Accused Persons faced four counts of murder contrary to section 203 as read together with section 204 of the Penal Code. All the victims of the alleged murders are associated with Kihui Mwiri Company in Murang'a County. The four counts respects the alleged unlawful killings of Peter Kimani Kuria on 10/05/2016; Paul Muhuhi Bernard on 28/06/2015; Joshat Kibe Nyoike on 29/07/2015; and Zakary Chege Kiratu on 29/07/2015 respectively.

4. The first sixteen Accused Persons had initially been charged in Nairobi before the case was transferred to the Kiambu High Court and the Information amended to add the last two Accused Persons. All the eighteen pleaded not guilty to the substituted Information and the case proceeded to full trial. I continued hearing the case after my transfer from Kiambu High Court to Nakuru High Court since the case was already at an advanced stage at the time of the transfer.

5. The Prosecution called seventeen (17) witnesses and closed its case. At that stage, I returned a No Case to Answer verdict for fourteen (14) of the eighteen (18) Accused Persons. In the same vein, I ruled that four (4) of the eighteen had a case to answer and put them on their defence. This judgment is with respect to those four – the first four Accused Persons. Each of them gave sworn evidence and none of them called any witness.

6. PW1 in the case was Pharis Mwangi Njoroge. He was the Acting Chairman of Kihui Mwiri at the time of his testimony. In his testimony, Pharis gave a brief history of Kihui Mwiri and the wrangles that led to the executions, disappearances and murders there. In short, Pharis explained that there were two rival groups. One group was led by Peter Kariuki Macharia who had been the Chairman for a while. He was, according to Pharis, replaced in valid elections held in 2011 at Thika Stadium. The person who replaced him as Chairman was Peter Kimani Kuria (the 1st Deceased). The whole slate of directors of Kihui Mwiri was also replaced in those elections.

7. It is fair to say from the varying accounts by Pharis and the other witnesses that Peter Kariuki Macharia refused to hand over the reigns of power to the Peter Kimani Kuria group that was elected in 2011. A bitter leadership wrangle ensued. Pharis detailed the efforts the Peter Kimani Kuria group made to take over Kihui Mwiri Company. When the Peter Kariuki Macharia group completely refused to hand over, the Peter Kimani Kuria group decided to start a parallel office. They also decided to start a new register of members since they could not access the original registers from the Peter Kariuki Macharia group.

8. What was the real cause of division between the two rival groups? According to Pharis, the genesis of the disagreement was the division of the land belonging to Kihui Mwiri and the members. Evidence from the trial showed that there were three main related causes of wrangling.

9. **First**, according to Pharis as well as other witnesses, the Peter Kariuki Macharia group was preying on the members by selling their pieces and registering new members using fake certificates hence disenfranchising bona fide members.

10. **Second**, witnesses sensationally claimed that the Peter Kariuki Macharia group had carved out a prime parcel of land belonging to Kihui Mwiri and had sold it to a Company which was owned by prominent people in Government. That parcel which was carved out of Kihui Mwiri, according to the witnesses, is called Breeze Farm. It measures either 240 acres or 134 acres. Some witnesses said the Sale Agreement they had seen put it at 134 acres but the actual land sold was 240 acres. Breeze Farm is owned by a company predictably called Breeze Ltd.

11. It was clear during the trial that the topic of Breeze Farm and Breeze Ltd invoked fear and terror among the denizens of Kihui Mwiri. The Witnesses at the trial spoke in hushed tones about Breeze Ltd. They were terrified of mentioning the name and its owners or directors. Indeed, everytime the issue came up, the witnesses requested in camera proceedings for fear of their lives and limbs. To protect the witnesses and their families, this judgment does not identify the witnesses who made specific allegations about Breeze Farm. However, the essence of the allegations is captured by a witness who, in closed door proceedings stated as follows:

I also met [XX, a prominent lawyer] about Breeze Farm. I also know that the Cabinet Secretary [XX, Cabinet Secretary in the National Government] was one of the owners of breeze Farm. This was the name I didn't want to mention. These are the 3 people I know that claim Breeze belongs to them.

I know that the security team in Muranga beginning with the County Commissioner and the owners of Breeze are the ones who contributed to the security situation at Kihui Mwiri.....I said in my statement that I suspect that it was Kariuki Macharia group that caused the death. I also know that Breeze Ltd was involved in the deaths. This was the true cause of the conflicts of Kihui Mwiri.

12. In this excerpt, I have also redacted the names of those mentioned adversely for security purposes.

13. **Third**, witnesses claimed that a major cause of wrangling was the fact that senior government officials and politicians had been illegally allocated land belonging to Kihui Mwiri yet they are not bona fide members of the Company. A witness stated as follows:

There are rich people and powerful people in government who were irregularly allocated land at Kihui Mwiri. These people include a Governor [name redacted]; a County Commissioner [name redacted]; a District Commissioner [name redacted]; a District Officer [name redacted]; a Chief [name redacted].....We couldn't do anything about these illegal allocations. Instead we requested the government starting with CID Director Muhoro to come help us with intervention.

We reported also to Harambee houseWe have never been able to do anything about the illegal parcels. [The former County Commissioner] got 40 acres; [The Governor] got 34 acres; [The DC] got 3 quarters; [The DO] got 1 quarter and the Chief got 1 quarter. The chief sold to a third party.

All these persons were not shareholders of Kihui Mwiri.

There are other senior people who got bigger plots than typical shareholders or they got parcels and they are not shareholders. An MCA [for example] got 4 quarters as well. There are also some rich people who bought parcels using fake certificates.

14. The theory of the case as it emerged from the Prosecution witnesses, then, was that the Peter Kariuki Macharia Group was propagating these three sets of vices for financial gain. To protect their interests, the theory goes, the Peter Kariuki Macharia Group was killing to maim or kill off their rivals so as to intimidate the other members not protest. The Group also, the theory goes, intimidated members of Kihui Mwiri in other ways such as vicious bodily attacks; administering threats and destruction of property. The ultimate aim was to perpetuate the Peter Kariuki Macharia Group in leadership so that it could continue benefiting financially in these three ways. To effectuate this objective, the witnesses testified that two groups were formed by the Peter Kariuki Macharia Group: One was called "Ward 4"; and the other, "Kula na Kumaliza". The *modus operandi* of these groups was brute force and sheer terror through killings, beatings and damage to property. The Prosecution's case was to link the Accused Persons to these two groups.

15. Given this theory, the Prosecution, then, assembled seventeen (17) witnesses to make its case. I will briefly re-hash the evidence that emerged from the witnesses below.

16. As aforesaid, Pharis testified as PW1. Aside from giving the history of the wrangles within Kihui Mwiri and verbalizing the Prosecution theory of the motive of the killings, he testified that he was aware that the 1st and the 2nd Accused Persons had threatened the 1st Deceased (Peter Kimani Kuria). He testified that Peter Kimani Kuria had reported the matter to the Police but that the Police had not done much about it though a criminal case was, apparently, registered and was pending by the time the 1st Deceased was, unfortunately, gunned down.

17. Pharis testified that the 1st and 2nd Accused Persons were quite opposed to Peter Kimani Kuria (1st Deceased) because he was opposed to both the use of fake certificates to sell *bona fide* members' land as well as the sale of the company land to Breeze Ltd.

18. Pharis testified that Ward 4 was headed by the 1st Accused Person who was deputized by the 2nd Accused Person. This group would, he testified, go and demolish members' houses and sell the plot of the owner and then push them away.

19. In cross-examination, Pharis conceded that even officials from the Peter Kariuki Macharia Group had been killed and some had disappeared without trace. Indeed, Mr. Peter Kariuki Macharia himself disappeared without trace.

20. Pharis also testified that his group reported the threats and violence they were receiving from Ward 4 to the Police and officials of Ministry of Interior but that all the officials chose to do nothing because there was "official" government support for the Peter Kariuki Macharia Group.

21. Paul Gitau Kimani (Paul) testified as PW2. He is the son of Peter Kimani Kuria (the 1st Deceased). His initial testimony was generally along the same lines as that of Pharis about the causes of the wrangles at Kihui Mwiri and the rivalry between the two groups – one led by his father; the other by Peter Kariuki Macharia.

22. Paul spoke of the passion his father had to fight for the interests of the shareholders of Kihui Mwiri to ensure that they all got their rightful share of the land. That is why, Paul testified, his father decided to run for elections as the Chairman of Kihui Mwiri in 2011.

23. Paul testified that those opposed to his father included the 1st Accused Person; the 2nd Accused Person; the 4th Accused Person; and the 8th Accused Person. Paul recalled that the 4th Accused; the 8th Accused and other two people went to see his father at his home in September, 2014. When they left, Paul says that his father told him that the group had proposed that they "unite." He says that he cautioned his father about the group.

24. Paul then testified that his father was very worried about Ward 4 and that in December, 2014, his father told him that he had been threatened by the 1st and 2nd Accused Persons because of his stand on Breeze Farm. He said that the two had threatened to kill him. Paul testified that his father told him that the 1st and 2nd Accused Persons threatened him again in March, 2015 and that he reported to the Police this time round.

25. When Paul was asked to describe what exact threats his father had received, he said that his father told him that the 2nd Accused Person had told him that of the two of them, they will "see who will die first." He also, allegedly told him, that he "(Peter Kimani Kuria) was looking for him with a panga but he (Henry) will do so with a fork jembe."

26. Regarding his final day, Paul testified that his father came back home at 6:00pm and parked his car in the compound. Paul, his parents and one other sibling lived in the same compound but each had their own house. Paul testified that his father took a jacket and went out saying that he wanted to buy a few things. Paul reminded him not to be out late. The father returned at around 7.00 pm. Paul could see him from my house. He went to his car and started polishing his car. He then went back to the house. At around 8.45 pm Paul says he heard his mother talking with some people. Paul thought the interlocutors were people who had come to collect milk since his parents were dairy farmers. However, after about seven (7) minutes, he heard a loud sound like a bullet; then a second one. He rushed out.

27. Paul says he met his mother running towards his house. His first instinct was to go and lock the door to his parent's house – but his

mother shouted to him that the assailants were still inside the house. Paul testified that at that moment he saw a short man emerge from the house. He had a short gun in his hands. There is 100 watts security light in the compound. It was turned on. Therefore, Paul says there was sufficient light for him to see. He says the short man had a Muslim cap on his head. He says he recognized him immediately: it was Kanyiri – the 3rd Accused Person. He had a gun in his hands.

28. Paul's testimony was that when he saw the man, he started running backwards. He says the man shot twice. Paul went behind his father's car and stood near an out-house toilet. The man was going towards him but did not get to where he was. Suddenly, possibly miraculously, the man changed course, and diverted towards the coffee farm. He vanished into the night.

29. Paul, aware that there was a second man inside his parents' house, stealthily walked outside the live euphorbia fence. He tried to peep into the house. He saw another man coming from the house. He also had a cap on his head and had a black jacket zipped all the way up. He had a bigger gun in his hands. He shot in the air twice. Paul says he saw this second man clearly in the glare of the security lights. Paul says he also recognized the man with the bigger gun immediately: it was Njoroge, the 4th Accused.

30. Paul testified that he has known the 3rd Accused Person for a long time; that he is, in fact, a distant relative. His nickname in the neighbourhood is "Dedisha." Indeed, Paul testified that he used to work with the 3rd Accused at Kenya Cuttings Ltd; and that they went to school together at Swani Primary School – him one class behind Paul. They played football together as young boys. There was no chance or possibility, Paul insisted, that he mistook him.

31. When the assailants left Paul went gingerly to his parent's house. He went to the bedroom and found his father lying facing upwards. He had a wound in his stomach and neck and blood was oozing out. The wound was on the left side of the stomach. He checked to see if he was breathing. He concluded that he had died.

32. After about five minutes two people went to the scene. Paul says he recognized them: they were Administration Policemen from the A.P. Police Camp at Kakuzi Mitumbili. They looked drunk. They offered no help at all and Paul says he told them to go out of the house. Later the police came from Gatanga and Kihui Mwiri Camp. They took pictures and removed the body and took it to Thika Police Station. That night some bullets were found at the scene. Paul and his mother also found other cartridges the following morning. They gave them to the Police.

33. Paul says that he immediately told his mother that he had recognized two people but he warned her not to tell anyone because he was afraid for their safety. He concedes that he recorded two statements at the time (on 11/05/2015) and 13/05/2015) but that he did not tell the Police about the two people he says he clearly recognized during the attack. He says that he did not identify the two people because one Policeman warned him that the attackers were colluding with the Police. He therefore concluded that his life would be in danger if he mentioned the names.

34. Paul only mentioned the two names more than a year later – on 13/05/16 – when he was summoned at the CID Headquarters.

35. The next witness was Njuguna Wanginye (Njuguna (PW3)). He was a member of the Executive Committee in the Peter Kimani Kuria team that was elected in 2011 at Thika Stadium.

36. Njuguna has been a member of Kihui Mwiri since 1974. He briefly explained the circumstances which led to the elections of 2011 in which Peter Kimani Kuria was elected as the new Chairman. It tallied with the explanation given by Pharis (PW1).

37. Njuguna testified that the Peter Kariuki Macharia Group refused to relinquish office even after the elections and that this compelled the new team to open up new offices in Thika and Kihui Mwiri. It was while at the Kihui Mwiri in the company of five other people that Njuguna remembers the 2nd Accused Person turning up and issuing a chilling threat. It was on 06/05/2015. Njuguna remembers the 2nd Accused Person was accompanied by Marubu (8th Accused Person). Njuguna was in the company of Peter Kimani Kuria, Migwi, Mbuca; Paul Muhuhi Bernard and Irungu.

38. According to Njuguna, the 2nd Accused Person alighted from his car; offered the six gentlemen greetings then told them in Kikuyu that:

You think you are digging a hole for me using a panga. What you need to know is that I will dig a bigger hole for you using a forked jembe.

39. Njuguna says that they took that as a serious threat. They went and reported at Gitanga DCIO Office the following day. Less than a month after, Peter Kimani Kuria fell to an assassin's bullet. Another month after that, Paul Muhuhi Bernard was also killed.

40. In cross-examination, Njuguna conceded that of the six people – including himself - who had received what he saw as a threat, only two were attacked.

41. John Migwi Mutura testified as PW4. He had been hired by Peter Kimani Kuria as a Records Clerk at the new office the new team had opened at Kihui Mwiri. He corroborated the account given by Njuguna that on 06/05/2015, the 2nd Accused Person went to the office and threatened them using the metaphorical words Njuguna attributed to him: that while they were digging a hole for the 2nd Accused Person using a panga, the 2nd Accused Person would dig for them a bigger hole using a forked jembe.

42. Migwi also testified that Peter Kimani Kuria had once shown him a text he had received which threatened his life. The text reportedly said that the senders wanted Kuria's head as well as that of six other people. Migwi says that Kuria reported the matter to the Police and as a result the following people were arrested: 1st; 2nd; 10th; 11th; 13th; 15th and 16th Accused Persons. He believes these people were charged

with some offence.

43. It was after they were released on bond that the 2nd Accused Person is alleged to have gone to the offices and issued the “forked jembe” threat.

44. The fifth Prosecution Witness was Samuel Kimani Muiruri (Samuel (PW5)). He, too, was a clerk at the new Kihui Mwiri Company office opened by Peter Kimani Kuria’s Group. His recollection of the history of Kihui Mwiri and the causes of trouble at the company was much as the other Prosecution witnesses.

45. Samuel recalls that in January and February 2015, a group led by Thiongo (1st Accused); Kamau Wanjehu (16th Accused) and John Kamau Kariuki went to the Kihui Mwiri office. They wanted to forcibly close the office without authority. They did not manage but the 16th Accused Person threatened that some people would die if the office was not closed. Samuel also recalled that the 9th Accused Person (Mary Mugechi) was part of the group. Samuel recalls her shouting that Kimani was a thief and was not the chairman. The Police at Kihui Mwiri Base Camp managed the situation that time and stopped the group from causing more trouble. Samuel says that some members of the Peter Kariuki Macharia Group were arrested on that day. They included Patrick Ikuu(11th Accused) and another person called Nyamu (10th Accused) and Wanjehu(16th Accused); 13th Accused Person (Peter Mburu); Peter Murigi Ngige (14th Accused); Samuel Mburur (12th Accused); and Henry Ngugi Karuga (2nd Accused). Samuel says they were charged in Murang’a court for the threats.

46. Samuel testified that on 26/04/2015 he was at Kimani wa Ranji’s shop. He had gone to buy credit for his phone. On the way he met Kipande and Gatati. They were with a woman lady friend of Gatati. He saw them together. Samuel says that he heard Kipande telling Gatati (Nganga Wambui) that they had come from a meeting with Henry Ngugi (2nd Accused Person) and Joseph Thiongo (1st Accused Person) and that they had planned to kill 4 people; that he said the plans were complete; that the four people they were planning to kill were Pharis Mwangi; Josphat Kibe, Chege Kiratu; that he then said that there was another “small man” who was becoming a nuisance and that his name was Kimani. That Kimani, he said, makes them “sleep in holes.” This means that they were not able to sleep in peace in their houses. The Kimani they were talking about is Samuel (PW5).

47. Samuel says that he made a call to the Head of Flying Squad, Makuyu with the news. The head told him to go record a statement. Since it was late, Samuel decided to call Gatanga and reported to the DCIO.

48. Samuel testified that on Monday 27/04/2015, Gatati went again to the office and repeated the threat. On 06/05/2015 Henry Ngugi Karuga (1st Accused Person) after being released on bail from the case of threatening, he went straight to the office and upon greeting Samuel, he said that “he can see us from far and hear us from far. Then he said he can see us in heaven.” That is when, Samuel says, the 2nd Accused Person made the infamous threat about digging a hole with a forked jembe.

49. Samuel says that a few days later, Peter Kimani Kuria (the 1st Deceased) was killed. Samuel testified that Paul Muhuhi Bernard was killed immediately thereafter while Josphat Kibe and Kiratu were killed on 27/07/2015 Josphat Kibe and Kiratu were killed and 29/07/2015 respectively.

50. Samuel says that he received a call from Henry Ngugi on 29/07.2105. He promised to give him Kshs 300,000/- to go to their side but he refused.

51. Peter Mwathi Kiratu (Peter) testified as PW6. He is the brother to Zakary Chege Kiratu (the 4th Deceased) in the case. Peter did not involve himself too much with matters related to Kihui Mwiri. Their mother was the original owner and when she passed on, Zakary took over her membership since Zakary had fled the Post-Election Violence in the Rift Valley in 2007/08 and needed a new place to settle.

52. Most of what Peter knows about Kihui Mwiri is what he learnt from his Deceased brother. He was aware of the intense leadership wrangles. Both he and his brother believed that the Peter Kimani Kuria Group was on the right side of the disagreement. This was because the two brothers had been told by the Peter Kariuki Macharia Group that the Kihui Mwiri land had been sub-divided but when they did a search at Surveys of Kenya, they confirmed that there had never been any formal subdivision at Kihui Mwiri. They, therefore, because suspicious of the Peter Kariuki Macharia Group. That is when, Peter says, Zakary became more involved in the matters of Kihui Mwiri and he got to learn of the malpractices taking place there.

53. Peter testified that his brother would occasionally talk of being threatened. He would often speak of Thiongo (1st Accused Person) and Ngugi Henry (2nd Accused Person) with respect to those threats. His brother had called him to tell him of the deaths of Kimani (1st Deceased) and Muhuhi (2nd Deceased) on two different occasions. Then, on 29/07/2015, he got the dreaded call from a friend by the name Wandia who told him to go to Kihui Mwiri urgently because something bad had happened. He rushed to Kihui Mwiri on a boda boda to Field 25. It is about 1 km from P. K. Primary School. On getting there he found both his brother, Zakary Chege, and Josphat Kibe dead from apparent bullet shots. They were on a motor bike. There were spent cartridges on the ground. He picked about 8 of the cartridges at the police request. He testified that he did not know who killed his brother but he knew who had uttered threats to him: the 1st and 2nd Accused Persons.

54. Joyce Bitutu Chege is the widow of Zakary Chege Kiratu. She testified as PW7. She explained how she and her husband escaped Post-election violence and came to Kihui Mwiri to assume Zachary’s mother ownership at Kihui Mwiri. She explained that they paid the requisite fees and was shown a share certificate. They were later asked to pay some fees and for a title. They did. They were shown the parcel of land correlating to their share certificate. They proceeded to build on the land. However, later on, the Peter Kariui Macharia Group came around putting new beacons on the ground. It was then that they realized that beacons had been put smack in the middle of their constructed parcel of land.

55. Zakary felt cheated and joined the Peter Kimani Kuria Group. Joyce testified that her husband became determined to unearth the malpractices which were taking place at Kihui Mwiri. As a result, he received dire threats on his life. In particular, Joyce says that Zakary complained that he had received threats on his life from the 1st and 2nd Accused. According to Joyce, Zakary reported these threats to the Police. However, on 28/07/2015, Zakary was gunned down as he and Joseph Kibe were heading to Ardhi House to take some files which had been requested there. Joyce did not witness the killing – but testified that she was aware of the threats the 1st and 2nd Accused Persons had made on her husband's life.

56. PW8 was Samuel Irungu Muiruri (Muiruri). He was also an administrative clerk at the Kihui Mwiri's new office opened by the Peter Kimani Kuria's Group after the elections of 2011. His version of the wrangles at the Company mirror those given by the earlier witnesses. He was persuaded that the main problem was the Breeze Farm deal. He said:

The main problem was that the former officials had advertised in the newspapers sale of 240 acres. They were selling it for Kshs 87.3 million. In the Sale Agreement, it said they had sold acres 134 for kshs 37M. This happened after they [Peter Kariuki Macharia Group] had been removed from office. Due to this, some people were aggrieved and opposed this un-procedural sale of land. They understood the fraud that had happened. This included Henry Ngugi Karuga (2nd Accused); Kimaru (who was killed). At the time 2nd Accused was opposed to the sale....Kimani, and Muhuhi, Kibe and Chege were killed because of the Breeze Investment land deal. This is because they demanded that the land be returned to members.

57. Muiruri further testified that the 2nd Accused Person and four members of Kihui Mwiri and others were meeting at the New Fulilia Hotel in Thika to discuss some of the issues. He testified that those who used to meet included the 2nd Accused Person; a Mr. Kimaru; Mwangi Ngumi; and a Mr. Gakau.

58. It was Mr. Muiruri's testimony that on 25/02/2014, the group was meeting at the New Fulilia Hotel. His friend, Kimaru went for the meeting. Kimaru told him about the meeting and had warned Muiruri that they should look for him around the hotel if he ever got lost. Muiruri says that he knows that they met at 1:00pm. Muiruri says he called Kimaru to find out his update after about five minutes. He was surprised to find the phone went un-answered. At this point, Mr. Muiruri knew something was amiss. In his words:

On 25/02/2014 they were meeting at this hotel. Kimaru told me. He told me that if they get lost we should look for them there. They met at 1.00 pm on 25/04/2014. I called Kimaru after 5 minutes and his phone had been switched off. He had called me at around 1.00 pm and told me he was at New Fulilia with Mwangi and Gakau. When I called 5 minutes later, he was not available. Henry had not gone into the hotel yet. I was told that Henry met some people who had tied Kimaru, Mwangi and Gakau on the back of the hands and took them downstairs into the boot of a Probox car. It was Henry who told me. I went to report to Thika Police Station.

59. The widow to Josphat Kibe Nyoike (the 4th Deceased) testified as PW9. Her name is Joyce Wanjiku Kibe. She narrated her husband's involvement with Kihui Mwiri, disclosing that he was associated with the Peter Kimani Kuria Group. Joyce testified that her husband used to tell her about the threats to his life by members of Ward 4.

60. Joyce told the Court that she knew some members of Ward 4. They included: Thiongo(1st Accused); Henry (2nd Accused); Kanyiri (3rd Accused); Njindo (4th Accused); Kibande (5th Accused; the 10th Accused; 14th Accused; 13th Accused; 12th Accused; 11th Accused; 16th Accused; and 18th Accused. She insisted that she knew they were members of Ward 4 because she used to see them in Kihui Mwiri and that they used to identify themselves as such especially after committing a heinous crime. She gave an example of when the members of Ward 4 allegedly beat up a man by the name Njuguna for illegally selling alcohol. However, none of the Accused Persons were present on that day. Joyce says other members of Ward 4 were involved in that particular instance.

61. According to Joyce, the first attempt on her husband's life had happened a while ago. She got a call from a woman whose name she does not remember telling her that a group had been sent to attack her husband. She went to the scene where she met four young people. They included a Timothy Macharia (who is not an Accused Person in the case) and the 13th Accused Person. She does not recall the other two would-be attackers.

62. Joyce says that on that occasion she asked the said Timothy Macharia if they had been sent to kill her husband. Timothy declined and said that they had been sent to serve Court papers but that since her husband had run away and refused to accept the Court papers, they would serve them at their home. She conceded that they found the Court papers at home.

63. Joyce further testified that her husband told her that she had received death threats from Henry Ngugi (the 2nd Accused Person). Her story was that Henry was in a vehicle and he rolled down window and told her husband that now that he (1st Accused Person) was in the neighbourhood, her husband will "see". Her husband reported this to her. She is not sure if he had reported this to the Police.

64. In another occasion, Joyce's husband told her that Kanyiri (3rd Accused Person) and Njindo (who is not an Accused Person) had threatened him by telling him that his (the husband's) head was so small that they will only need to use one bullet to kill him.

65. Joyce testified that, however, he did not see who killed her husband. He had left home at 6:00am the morning. He was going with two other people to Ardhi House. She learnt soon thereafter that her husband had been gunned down.

66. Finally, Joyce also testified that her husband kept telling her that the County Commissioner whose name was Kula Hache had kept threatening him. She said that one day the County Commissioner had asked her husband to go see her but a friend of her husband advised him not to go because she feared that the County Commissioner would enforce his disappearance.

67. Francis Mwea Waititu (Waititu) testified as PW10. His pertinent testimony was that he had witnessed members of Ward 4 committing

atrocities at Kihiu Mwiri and that he was also present when the 2nd Accused Person issued the infamous “forked jembe” threat. He identified the 1st Accused Person as the leader of Ward 4 and said that his deputies were the 2nd and 5th Accused Persons. He identified other members of the group as the 3rd, 4th, 15th and 16th Accused Persons. He said that the group was violent and it attacked anyone who dared to dissent. He recalled an attack on one, Peter Muiru who had allegedly refused to pay Kshs. 7,500/- to the group. He says he witnessed the 1st Accused Person and other members of the group demolishing Muiru’s house.

68. Waititu also testified about the day the 2nd Accused Person went to the new offices of Kihiu Mwiri and issued a threat using the forked jembe metaphor. He said that a few days after that threat was issued Peter Kimani Kuria was killed. A few weeks later Bernard Muhuhi was killed. Still a few weeks later Josphat Kibe Nyoike and Zachary Chege Kiratu were killed. The witness clearly thought there was a connection between the threats issued by the 2nd Accused Person, Ward 4 and the killings.

69. Judy Wanjiru (Judy) testified as PW11. She described herself as the widow of Peter Kimani Kuria. After giving an account of the leadership wrangles at Kihiu Mwiri and the rivalry between the Peter Kariuki Macharia’s Group and her husband’s group, she testified about the day her husband was killed. It is important to set out verbatim what she said about that day:

My husband was killed on 10/05/2015. I was in the house. On that day at 6.30 pm, my husband came home and ate supper. He said he would go to the neighbours. I went outside to check for him as he was reversing.

Out there, I met 2 people – they were 2 men from the ward 4 group. They were Joseph Mwiruri Karanja and Robinson Mbugua. They were behind our house. As my husband left, I saw Mbugua making a call.

The two people were on the roadside by our house. I could even hear him making the call. I was quiet close to them. I didn’t talk them.

I went to the house with my children. We started talking about the snacks their dad had brought. That was about 7.30 pm. I then went to sleep.

At around 9.00 pm, I got a call from Paul Muturi telling me that my husband had been killed. He also texted me. I started screaming until women from the neighbourhood came.

After that we did burial arrangements and buried him.

Paul told me that my husband had been murdered at Graystone. I didn’t go there it was at night and I was scared.

70. I reproduced this version of events of the night Peter Kimani Kuria was murdered *in extenso* because a moment’s reflection will reveal that it differs dramatically from the version given by Paul Gitau Kimani. It would appear that Peter Kimani Kuria had two wives because Peter Gitau (PW2) gave an entirely different account – which involved his father being killed in his house at Graystone; and his mother running away from the assailants. It would appear that the wife Peter Gitau was referencing to was not Judy but another one by the name Josephine. Josephine did not, for some reason, testify.

71. Onesmus Nduati (Onesmus) testified as PW12. His evidence had little to do with the case or the Prosecution’s theory of the case. He recalled that on 24/05/2015 he was at the Kihiu Mwiri’s office with some other people when the 2nd Accused Person stopped by. The 2nd Accused Person shook everybody’s hand but when he got to a certain Kimani, he claimed that the said Kimani had greeted him limply – a sign of disrespect. The 2nd Accused Person allegedly told the Kimani that he (the 2nd Accused Person) could “see” him (Kimani) “from very far.” This could be an idiomatic Kikuyu saying implying that one person is in on another person’s plans or plot especially if it is inimical to the interlocutor. In any event, Onesmus clarified that he did not take what the 2nd Accused Person had said as a threat and that the Kimani to whom this was addressed is a different Kimani who is still alive – and is not the Kimani who was later on murdered.

72. The testimony of Samuel Mwaura Wainaina who testified as PW13 was also not quite pertinent to resolving the murders. Wainaina worked in the office helping to vet the authenticity of the share holders. He only knew that Peter Kimani Kuria was receiving threats. He learnt of Peter Kimani Kuria’s death. A few weeks later, he got a call that Zachary and Joseph had been shot. He rushed to the scene in his motor cycle. When he got there he says he found a child who told him that he saw people who were hooded who fired the shots. He did not know anything more about the case.

73. Jane Wambui (Wambui) was PW14 – Paul Muhuhi Bernard’s widow. She recalled that the day her husband was killed he had left her at their shop in Thika at around 5:00pm. He decided to drive home earlier because he was worried about remaining outside their home late because of threats on his life. A few minutes after he left, however, Wambui received a call through her son that her husband had been shot dead. She recalled that her husband had said that if anything ever happened to him, the three people who should be investigated would be the 1st Accused Person; the 2nd Accused Person and a certain Muchiri. She had no further information about who had killed her husband.

74. Joel Ndegwa is a nephew of Paul Muhuhi Bernard (Deceased). He was with his uncle earlier in the day and had taken him to his house in Starehe in his boda boda. Later on, he saw a crowd gathering around Majengo. He got closer and noticed that it was his uncle’s vehicle. On peeping inside, he saw his uncle with his head slumped and blood oozing from his head. He called his uncle’s son and informed him what he had seen. The son came and they took Paul Muhuhi Bernard to the hospital. Unfortunately, he was pronounced dead on arrival.

75. Mary Mugechi Kamanu (Mugechi) had just chatted with Paul Muhuhi Bernard while he was in his vehicle. Shortly after they parted and she walked away, she heard gun shots. She soon realized that it was Paul Muhuhi Bernard who had been shot inside his car. She did not know who had shot him.

76. The final witness was Detective Inspector John Wahome of DCI Headquarters. He and his team was assigned the case on 31/01/2015. The task was to investigate the killings of directors of Kihuu Mwiri Company. On preliminary investigations, Detective Wahome and his team established the following. That Kihuu Mwiri Farmers Ltd is a Public sharing company formed in 1973 by employees of white settlers. To have a smooth running of the farm, the Kihuu Mwiri age group formed a committee to manage the affairs of the farm. However, due to poor management of the Company Assets and other incomes, the shareholders kept on changing the management which resulted in leadership wrangles. The investigations also revealed the existence of the two rival groups. All means of resolving the dispute had failed.

77. Detective Wahome testified that their investigations revealed that the Peter Kariuki Macharia's Group "turned the village into a scene of bloodshed, land grabbing and all sorts of worries within the village. They were spreading terror. The land grabbing spread putting the forces of justice against thugs and land grabbers. This led to all these killings."

78. According to Detective Wahome, the most shocking and horrific scenes were the deaths of Peter Kimani Kuria and Paul Muhuhi Bernard who were killed within one and half months apart. Detective Wahome told the Court that he had learnt that the two had received threats prior to their deaths. They had written their complaints to Murang'a County Security Team – a matter which was handled by DCI Murang'a and their statements taken.

79. Based on that, Detective Wahome investigated the statement Peter Kimani Kuria had recorded before the Murang'a DCI Team and noted that he had mentioned a number of people who, he said, were planning for his and others executions. The statement by Peter Kimani Kuria is dated April 2015 and Detective Wahome produced it as an Exhibit in the case. The statement mentioned two prime suspects: Joseph Thiongo Waweru and Henry Ngugi Karuga. So did a letter Peter Kimani Kuria and Paul Muhuhi Bernard had written to the Murang'a security team dated 01/04/2015. That letter was produced as evidence too.

80. Detective Wahome testified that on 17/05/15, after the death of Peter Kimani, he visited the scene and found the wife. She explained the circumstances regarding the shooting she described one of the attackers as tall and thin as the other one was short. Further investigations revealed that the references were to the 3rd and 4th Accused Persons.

81. Detective Wahome testified that even as they were investigating the two killings, more killings occurred. Other people disappeared without trace. Detective Wahome told the Court that after Paul Muhuhi Bernard was killed, the shareholders and officials were summoned to DCI Headquarters for questioning. Detective Wahome said that during the interviews and interrogations, they were able to identify through circumstantial evidence several suspects linked to the killings. They decided to charge the following six suspects first:

- i. Joseph Thiongo – 1st Accused
- ii. Henry Ngugi - 2nd Accused
- iii. Harrison Kibande -5th Accused
- iv. Joseph Muchui – 6th Accused
- v. Benard Murigi Karanja – 7th Accused
- vi. Mary Mugechi Mburu – 9th Accused

82. During their investigations, the team realized that there was a matter before the Murang'a court where suspects had been charged with a threat to kill. This was in case No. 388 of 2015 at the Murang'a Magistrates court. The charge was threat to kill contrary to Section 322 Penal Code where 9 people were charged. Two of these nine were among the six persons the team had already decided to charge. These were the 1st and 2nd Accused Persons. The detectives decided to include the other seven to the Information.

83. On 13/8/15, acting on some information from members of the public the Detectives arrested two more persons – Julius Kanyiri (3rd Accused and John Njoroge (4th Accused).

84. Detective Wahome testified that they compiled all the available evidence and recommended the charging of the suspects in their custody. A year later, they arrested two more suspects -- Simon Ngugi Gitahi and David Muiruri Chomba (17th and 18th Accused) – and they added them to the Information.

85. Detective Wahome also produced the post-mortem examination forms done on the bodies of:

- i. Peter Kimani Kuria
- ii. Paul Muhuhi Benard
- iii. Josphat Kibe Nyoike
- iv. Zakaria Chege Kiratu

86. As aforesaid, the first four Accused Person were put on their defence. Each of them elected to give a sworn statement.

87. Joseph Thiong'o, the 1st Accused Person's recollection of what happened, naturally, differs from those of the Prosecution witnesses. He testified that he was a Director of Kihui Mwiri since 2013. His recollection is that in 2013 the rival groups were summoned by the Office of the Registrar and a reconciliation ensued. According to him, Peter Kariuki Macharia became the Chair following that reconciliation meeting in 2013.
88. The 1st Accused Person told the Court that after the unification of the two rival groups in 2013, the main task was to vet members to know who the genuine shareholders were before the process of subdividing the land and surveying began. However, the 1st Accused testified that the Peter Kimani Kuria group decided to open their own office which began a parallel process of vetting.
89. The 1st Accused Person hypothesized that it was this action by the Peter Kimani Kuria Group that inflamed passions and got members aligned to the two camps to harden their positions. When the vetting work began, the 1st Accused Person said, many people refused to come to the meetings or to participate in any way. This eventually led to an open conflict between the two groups.
90. The 1st Accused Person testified that the District Commissioner ordered both groups to close their offices but the Peter Kimani Kuria refused to do so. Shortly, thereafter, he says, people started disappearing. Contrary to the theory propagated by the Prosecution witnesses, the 1st Accused insisted that it was directors from the Peter Kariuki Macharia's side who started disappearing first. The first ones to disappear included Newton Chege Muchoro, then 3 young men disappeared: Joseph Kimani Macharia; Mwangi Ngumbi and Solomon Gakau. Afterwards, another director – Ibrahim Mwangi Gachau was shot dead.
91. The 1st Accused Person testified that after Ibrahim Mwangi Gachau was shot dead, Peter Kimani Kuria was next. The other three Deceased Persons in the Information followed next. Afterwards, Peter Kariuki Macharia disappeared.
92. The 1st Accused Person insisted that he knew nothing about these killings and disappearances; and that he considered all who were killed or who have disappeared to be his friends.
93. Henry Ngugi Karuga, the 2nd Accused Person, also categorically denied any involvement in the killings or disappearances. His recollection was that there were parallel elections for the two rival groups in 2011 – with one group electing Peter Kariuki Macharia while the other elected Peter Kimani Kuria. He reckons that that is where trouble at Kihui Mwiri began. His recollection about what happened next mirrors that of the 1st Accused Person. He recalls a meeting called at the Registrar of Companies in which the two rival groups were reconciled and a joint interim board of directors appointed of which he was one. The joint board was tasked to establish the bona fide shareholders as a first step to distributing the land.
94. The 2nd Accused Person says that vetting and verification began but that the Peter Kimani Kuria group started resisting the process. He says the process continued nonetheless. However, when the survey process began, they discovered that part of the land had been sold to Breeze Limited and also to Harvest Limited. They had bought the land from previous directors.
95. The 2nd Accused Person testified that they were in a dilemma what to do and that as they started following up the matter, they were arrested. They were then summoned to the Deputy Commissioner's office as 4 directors and they were arrested for insisting that the whole of Kihui Mwiri land should be sub-divided including the parts allegedly sold to Breeze and Harvest. He produced a letter dated 03/01/2014. It is from the DCC Gatanga Mr. Raikera. It is addressed to the 2nd Accused Person, and to James Kimaru and Job Ngumi. The other two disappeared without trace.
96. The 2nd Accused Person says he stayed in custody for nine months and that he was charged with trespass to land belonging to Breeze Ltd and malicious damage to Breeze's property. When he was released from custody, he says that the DCC called them again to his office and he asked them to leave the land alone. They declined. By that time Newton Chege Muhoro – one of their Co-directors -- had already disappeared. They were charged with the kidnap of Newton Chege Muhoro – even though he was in custody when Newton disappeared. The case was in Kigumo Law courts.
97. Job and Kimaru were released on bond. Three months later they disappeared, while the 2nd Accused was still in custody. After a short while Charles Ngugi Kamau was shot dead while the 2nd Accused Person was still in custody. Ibrahim Mwangi Gichana was also shot dead while the 2nd Accused Person was still in custody.
98. The 2nd Accused Person testified that when he came out of custody in February, 2015, he was thoroughly scared and wanted nothing to do with the Company. By that time, he says, Peter Kariuki Macharia's office was already closed.
99. The 2nd Accused Person believes that he was targeted because he insisted on following up on the land bought by Breeze Ltd. He insists that he was not involved in any killing at all. He insisted that the only charges of threatening he faced was some trumped up charges of threatening Samuel Irungu – and that he was acquitted of those charges.
100. The 2nd Accused Person took exception to the fact that the investigators elected to charge only people who were associated with the Peter Kariuki Macharia while, in fact, many people from that group were either killed or disappeared. He faulted the Prosecution theory as one driven by particular interests in Kihui Mwiri land.
101. Julius Kanyiri Wambui (the 3rd Accused Person) also gave sworn testimony on his own behalf. He testified that since 2010 he was employed as a Matatu driver and that he lives in Umoja estate in Nairobi and hardly ever travels to Kihui Mwiri except to visit his parents. He pointed out that he has never been an official of Kihui Mwiri.

102. The 3rd Accused Person testified that Peter Kimani Kuria was his uncle and his wife Josephine Mumbi his aunt. He pointed out that though Josephine Mumbi was listed as a witness she did not testify. He hypothesized that that could be because she knew that it was a frame-up to say that he killed his uncle.

103. The 3rd Accused Person testified that on the day Peter Kimani Kuria was killed (10/05/2015), he was at work in Nairobi. He said that if he was in that house that night, his aunt would have recognized him and said something immediately afterwards. He said that he actually went to the house the day after he died and participated in funeral arrangements. He insisted that he never killed his uncle, Peter Kimani Kuria and did not participate in his killing. On cross-examination, he said that Gitau (PW2) was his cousin and was also his classmate but that they had a little bit of disagreement: He used to be a driver of a matatu and one day he gave him the matatu to drive and Gitau caused an accident. He had to pay for the damage and Gitau was very bitter with him for that.

104. The 4th Accused Person, John Njoroge Gachu also testified in his own behalf. He also denied participating in the killing of Peter Kimani Kuria or any other person. He said that he was working as a driver on the day he is accused of having killed Peter Kimani Kuria. He said that he had no reason to kill him; and that he was not an official of Kihui Mwiri and has never been involved in any of the wrangles of the company. He testified that though he was a shareholder of Kihui Mwiri because his father bought for him the share, he never attended the AGM and had no motive to kill anyone in connection with Kihui Mwiri.

105. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

106. To successfully obtain a guilty verdict in a murder charge, the Prosecution, therefore, is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

107. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- i. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;*
- ii. *Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not;*
- iii. *Intent to commit a felony; or*
- iv. *Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

108. I already acquitted the last fourteen (14) Accused Persons (that is the 5th – 18th Accused Persons) of the offences charged at the No Case to Answer Stage. Upon a proper analysis of the evidence presented at the time, my conclusion was that no proper case was stated to link these fourteen Accused Persons with the four murders charged.

109. Against the 5th Accused to 18th Accused Person, there was very little evidence adduced to link them with any murders or wrong-doing at all. For most of them, their main offence appears to have belonged to the wrong group in the leadership wrangles at Kihui Mwiri. They were fingered mainly because they belonged to the Peter Kimani Macharia Group. Indeed, Detective Wahome summarized the state of the evidence during cross-examination in his own words:

I don't have any direct link between the death of Paul Muhuhi and any of the Accused persons. I also don't have any direct link between the death of any of the four dead people and the Accused persons. All I know is that the dead people were all officials of Kihui Mwiri. All we had were rumours and speculations.

110. With this assessment, it follows that the Prosecution case came woefully short of establishing the charges of murder beyond reasonable doubt. Rumours and speculations, however juicy and however widespread, like suspicions, do not at some point jell into factual evidence usable to establish prosecution case beyond reasonable doubt. At some point, Detective Wahome said this respecting the 11th and 15th Accused Person:

I am not sure if 11th and 15th Accused had recorded any statement with regard to the charges they faced in Murang'a.

I charged the Accused because they were mentioned by other people during the interrogations of other people. The witnesses said that the 11th and 15th Accused were involved in the killings but I was unable to establish how they did. There was circumstantial evidence. They were being mentioned. The 11th and 15th Accused did not hold any office at Kihui Mwiri. I was able to establish they were in Kariuki's group. They were just members. They had no other official role.

111. In my view, this assessment can be transposed to the 5th to 18th Accused Persons. There were some who were charged because they were suspected to belong to a group called Ward 4 which is thought to be a vigilante group that caused much destruction and mayhem at Kihiu Mwiri. However, very little evidence was adduced to show that they were actual members of the violent group. It is trite that suspicions, however strong, cannot take the place of evidence (See *Sawe v R [2003] KLR 364* where the Court of Appeal held that “suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”). For avoidance of doubt, on analysis of all the evidence presented, I found no concrete and credible evidence establishing that any of the eighteen Accused Persons was a member of the dreaded Ward 4 group. If the Prosecution intended to use membership of the group as a *per se* demonstration of guilt for the murders charged, it needed to do more to establish the membership of the Accused Persons to the group.

112. In any event, there was little evidence adduced at trial to link the amorphous group called Ward 4 with the actual killings. There was much evidence to show that members of the Kihiu Mwiri community were frightened by Ward 4; but no actual evidence was adduced to show that this group actually committed the murders charged; and which of its members did so.

113. It is for these reasons that I found that the 5th to 18th Accused Persons had no case to answer. Indeed, to have required them to defend themselves in the circumstances of this case would have been an abuse of the Criminal Justice System.

114. What about the 1st to 4th Accused Persons? I put these four individuals on their defence because I came to the conclusion at the end of the Prosecution case that there was plausible evidence adduced at trial which, if taken at its highest, and is accepted without regard to the weightiness of the evidence, a reasonable Court *could* convict. (See *R v Galbraith 73 Cr. App. R. 124*).

115. On analyzing the evidence carefully against the elements of the crimes charged, the following has emerged respecting the case against the four remaining Accused Persons.

116. For the 1st Accused Person, no direct evidence was adduced that he either killed or threatened to kill any of the four Deceased Persons. The entirety of the evidence adduced against him was that he was the leader of the radically violent group called Ward 4 and that this group acted as a vigilante militia for the Peter Kariuki Macharia Group. However, as pointed out above, there was no concrete evidence adduced to show either that Ward 4 was, in fact, responsible for the murders or that the 1st Accused Person was a member of Ward 4. This would have been information which needed to have been proved beyond reasonable doubt. However, the generality of the evidence adduced can only rise, at best, to the level of strong suspicion and no more.

117. The only other evidence adduced which tended to link the 1st Accused Person with the murders was the evidence by PW5. He testified that he eavesdropped on a conversation between one Kibande and one Gitati who claimed that they had had a meeting with the 1st and 2nd Accused Persons and that the latter two had informed them of a plan to kill the Deceased Persons. On balance, however, I found this part of the evidence not sufficiently reliable for two reasons. First, I found it incredulous that the witness reported the information to the Police as he claimed to have done since he had no evidence of such reporting such as an OB number. Second, it appeared odd that the witness did not come forth with that information immediately after the four Deceased Persons were actually killed. He only came forward with this information after at least a year when summoned to the CID Headquarters as part of the investigations into this case.

118. For the 2nd Accused Person, there was some evidence adduced to the effect that he personally threatened at least three of the Deceased Persons: Peter Kimani Kuria; Paul Muhuhi Bernard; and Chege Kiratu. There are two questions that arise from the evidence so adduced of these threats:

i. First, what is the quality of the evidence of the alleged threats?

ii. Second, was the action consistent with the threat which would suggest that the 2nd Accused Person actioned the threat?

119. It is important to begin by pointing out that the only two threats which were allegedly issued by the 2nd Accused Person and heard by witnesses who testified were two: the first one was the (in)famous “fork jembe” reference described earlier in this judgment. The second was the alleged threat to Samuel Kimani when he reportedly greeted the 2nd Accused Person with a limp hand shake. All the other alleged threats were only reported to the witnesses by other parties who allegedly heard the 2nd Accused Person uttering them. Needless to say those pieces of evidence do not suffice to prove the veracity of what was allegedly uttered. For example, Gitau (PW2) and Joyce (PW3) all claimed that they were told by Peter Kimani Kuria and Zakary Chege Kiratu respectively that the 2nd Accused Person had issued threats to them. The nature and quality of those threats could not be independently and objectively ascertained.

120. Where the alleged threats were issued to persons who were witnesses in the case, they turned out, in my view, not to be death threats at all. I did not find the reference by the 2nd Accused Person to Mr. Kimani that the 2nd Accused Person “sees” very far in relation to Mr. Kimani to be a death threat. And neither do I take the “fork jembe” reference, in action, to be an actionable death threat. Even if one were to take this reference to be a death threat though, the Prosecution case needed to specifically link the threat with actual action by the 2nd Accused Person consistent with the utterance of the threat in order to link the 2nd Accused Person with the murders. In this case, as against the 2nd Accused Person, there was simply no other evidence other than the evidence of the alleged threats and alleged membership of Ward 4. As explained above membership of Ward 4 does not suffice to link any of the individuals charged with murder; and the alleged threats even if qualitatively found to be death threats, without more, would not be sufficient to convict for murder. A death threat, even if credibly demonstrated, without more only constitutes a motive to a murder. For it to lead to a conviction for the murder, equally credible evidence must be tendered linking the threat to the *actus reus* (the death of the Deceased) as well as malice aforethought. In the present case, there was simply no evidence of this linkage.

121. For the 3rd and 4th Accused Persons, the evidence tendered could only possibly connect them with the murder of Paul Kimani Kuria. The only evidence adduced against the 3rd and 4th Accused Person about their possible participation in the murders was by Paul Gitau

Kimani(PW2). Gitau gave unequivocal evidence that he clearly saw the 3rd and 4th Accused Persons in his father's compound the night his father (Peter Kimani Kuria) was murdered. According to Gitau, they both had guns and he clearly saw each of them shooting – the 3rd Accused Person allegedly at him (Gitau); and the 4th Accused Person allegedly into the air.

122. Both the 3rd and 4th Accused Persons have vehemently denied that they were at the scene or that they were in any way involved in the murder of Peter Kimani Kuria. Each of them gave an alibi defence in addition to denying that they had any motive in killing Peter Kimani Kuria.

123. I have anxiously considered the testimony of Gitau, and, specifically his evidence of identification. I have come to the conclusion that the evidence was simply not credible to link the 3rd and 4th Accused Persons to the murder of Peter Kimani Kuria beyond reasonable doubt. I have come to this conclusion for three reasons:

a. First, I found it incredulous that the witness clearly saw two assailants who had just killed his father in cold blood and he elected to keep that information to himself for more than one year. The explanation that he had been warned that some Policemen were involved and that therefore he decided not to say anything seems incredible to me. If the witness was that afraid of the Police, who else did he mention the matter to? The level of incredulity rises when one considers that the 3rd Accused Person is, in fact, a relative to the witness (they being second cousins). This would mean that there were many avenues outside the official Police channels where the witness could have mentioned the issue. He did not. Through the two statements he recorded, he did not disclose that he recognized the assailants. It is only more than a year later when asked to record a third statement that he suddenly identified the 3rd and 4th Accused Persons.

b. Second, it is also curious – and fatal – that an essential witness was not called to corroborate the recognition evidence of Gitau. This was the evidence of Gitau's mother (Josephine Wambui). According to Gitau's testimony, Josephine saw the assailants (and, in fact, talked with them during the incident). Both the 3rd and 4th Accused Persons are personally known to Josephine (and, indeed, the 3rd Accused Person is a nephew to Josephine). Hence, Josephine must have recognized them if they were, indeed, in her compound on the night of the shooting. In fact, Josephine was listed as a witness in the case. However, in the end, Josephine was not called to testify. No explanation was given about her absence. The position of our law is that the Prosecution is obliged to call all essential witnesses including those that might give adverse testimony. That rule was stated by the Court of Appeal in **Donald Majiwa Achilwa & 2 Others V Republic [2009] eKLR** thus:

*The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See **Bukenya & Others v. Uganda [1972] EA 549**).*

c. Third, the Prosecution made no effort to rebut the alibi defence by the 4th and 5th Accused Persons. Both the 4th and 5th Accused Person gave straight-forward explanations that they were away in Nairobi at their work places during the incident. It was incumbent upon the Prosecution to rebut the alibi defences by the two Accused Persons. If necessary, the Prosecution would have asked for leave to call additional witnesses to marshal this rebuttal. See section 309 of the Criminal Procedure Code and **Victor Mwendwa Mulinge v Republic [2014] eKLR**.

In **Kiarie v Republic [1984] KLR**, the Court of Appeal had the following to say about the defence of alibi:

An alibi raises a specific defence and an accused person who puts forward an alibi in answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a Court a doubt that is not unreasonable....

So it is here. The 3rd and 4th Accused Persons' responsibility was to introduce the alibi defence. They assumed no responsibility to prove the validity of the alibis. They had only to produce evidence likely to raise a reasonable doubt in the Prosecution's case. It was the Prosecution's burden to prove that the alibis are reasonably not possibly true and that despite the alibi defences the facts alleged are nevertheless true. The Prosecution failed to do so here.

124. The truth of the matter is that the intelligence team in this case was called in to pursue criminal prosecution in a situation which was doubly difficult. *First*, a lot of the trails of the killers had gone cold by the time the team swung to action. It was at least a year since the last charged murder had been committed before the Investigations Team from DCI Headquarters started recording statements. It was probably too optimistic to expect them to unearth quality evidence capable of leading to convictions. *Second*, the investigating team was acting under very difficult circumstances: generalized break down of law and order in Kihui Mwiru where violence had become the tool of choice for the citizenry coupled with generalized distrust for the governance structures in the area. Evidence emerged in this trial that the populace at Kihui Mwiru regarded the local leadership in the Ministry of Interior as well as Police leadership in the area as the real problem. It follows that to the extent that this civilian and Police leadership was responsible for collecting and/or preserving evidence related to the killings, the quality of such evidence would be vastly compromised. There is definitely much to be said about a plausible theory of the murders which was seemingly neglected by the investigators: that the members of the Ministry of Interior working in the region; Senior Police Officers; and Senior Government Officials were heavily involved, and, indeed, may have funded the death and destruction that reigned in Kihui Mwiru for almost a decade. Evidence suggested that they did all that for land. Despite flakes and nuggets of this theory coming out from the Prosecution witnesses, there does not appear to have been any efforts whatsoever to consider or pursue this theory.

125. In the end, the trial for the murders of Paul Kimani Kuria, Paul Muhuhi Bernard, Josphat Kibe Nyoike; and Zakary Chege Kiratu turned

out to be no more than a window-dressing exercise. Perhaps the trial served notice on the denizens of Kihui Mwiri that the Rule of Law is alive and well and that it serves the prime objective of ensuring order and security in the society. As the witnesses triumphantly told the Court especially during bail hearings, peace – like a blanket of snow -- had returned to Kihui Mwiri since the charges were brought. However, the criminal trial equally served notice of the limitations of the Criminal Justice System to deal with generalized and macro-level break downs of law and order in the society. The retail nature of the Criminal Justice System becomes definitionally inadequate for offering long lasting justice and security for the citizenry in such circumstances. The Criminal Justice System, then, becomes only an ephemeral salve as society works on the more structural solutions to the underlying issues. One hopes that work is under way for the structural solutions to the Kihui Mwiri problem.

126. **All said and done, though, it is the duty of this Court now to acquit the four remaining Accused Persons of the charges of murder. After due analysis, I find that the evidence tendered by the Prosecution is not sufficient to prove the four counts of murder against the 1st – 4th Accused Persons beyond reasonable doubt. Consequently, I find that the 1st – 4th Accused Persons are not guilty of the four counts of murder of Peter Kimani Kuria; Paul Muhuhi Bernard; Josphat Kibe Nyoike; and Zakary Chege Kiratu. I, accordingly, acquit Joseph Thiong’o Waweru; Henry Ngugi Karuga alias Mwene Cio; Julius Kanyiri Wambui alias Kamurang’a; and John Njoroge Gacho alias Njinalo under section 322(1) of the Criminal Procedure Code. The four Accused Persons shall be set at liberty unless otherwise lawfully held in custody.**

127. Orders accordingly.

Delivered at Kiambu this 15th day of July, 2019.

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JOEL NGUGI

JUDGE