



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 50 OF 2015**

**WILLY MWEMA.....1<sup>ST</sup> ACCUSED**

**KIOKO WILLY.....2<sup>ND</sup> ACCUSED**

**MUSYOKA WILLY.....3<sup>RD</sup> ACCUSED**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. **Willy Mwema, Kioko Willy and Musyoka Willy**, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused respectively, are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63) Laws of Kenya**. Particulars of the offence are that on the **8<sup>th</sup>** day of **November, 2014** at **Mutendea Village, Matinyani Location** in **Matinyani Sub-County** within **Kitui County** jointly murdered **John Muema Mwova** (Deceased).

2. Facts of the case are that on the **8<sup>th</sup>** day of **November, 2014** PW1 **Musangi, Muema**, the Deceased, her son and another were cultivating land and planting when **Muliwa** the mother of the 1<sup>st</sup> Accused raised an alarm by screaming. The Accused persons turned up and assaulted the Deceased and left him having sustained serious injuries. He was rushed to Kitui District Hospital and was referred to Kenyatta National Hospital where he died while undergoing treatment.

3. To prove the case the Prosecution called twelve (12) witnesses. PW1 **Musangi Mwema** the mother of the Deceased stated that while they were cultivating she saw the Accused person running towards them. **Muliwa** raised an alarm urging them to beat up the Deceased. They beat him up until he fell down that is when they ran away. When he confronted them by asking if they wanted to kill him as they killed his son **Mwova**, the 3<sup>rd</sup> Accused raised a panga to hit her but people who had gathered beseeched him not to cut her. However, he hit her and she sustained an injury on the right little finger and head. They ran away. The police were notified. They went to the scene and took away the Deceased. She went along and was treated at Kitui District Hospital as the Deceased was rushed to Kenyatta National Hospital following the nature of injuries that she sustained. Having been injured she returned home as the Deceased was accompanied by his brothers **Isika** and **Muli**.

4. On cross examination she stated that the land they were cultivating belonged to her as it was in the name of **Mumbe Mwova**. That there was a dispute over that portion of land between her and her step-family such that all of them had been prohibited from using it by the clan. That the Accused went to see the Chief who authorized them to plough it an act that made her and her son to go to plant maize on part of the portion and on their way to the land they encountered the 3<sup>rd</sup> Accused. She denied the allegation that it was her and the Deceased who embarked upon hitting the 3<sup>rd</sup> Accused at the outset and that **Muliwa** only screamed on seeing them assaulting the 3<sup>rd</sup> Accused.

5. Further she denied a suggestion that people saw the Deceased attack the 3<sup>rd</sup> Accused with a panga and they acted by killing him. She also denied a suggestion that she was told to go and occupy the land in Yatta but she declined.

6. PW2 **Emily Martha Isika** stated that she followed the Deceased, PW1 and **Maisha** (PW3) who had gone to work on the land. Ahead of him were the Accused persons. On surrounding him the Deceased begged them to let him go but they assaulted him until he fell down. When PW1 screamed and tried to intervene the 3<sup>rd</sup> Accused assaulted her using a panga. He injured her on the finger and head. She ran to report the matter to the police. On cross examination she stated that she found the 3<sup>rd</sup> Accused at the scene therefore she could not dispute an allegation that he was the first to reach the farm. She noted his finger having been cut but denied the allegation that the Deceased attacked the 3<sup>rd</sup> Accused as he saw the Accused persons assaulting him.

7. PW3 **Antony Maisha Juliana** a casual labourer who was on the farm stated that on the fateful date he had been hired by the Deceased. As he dug a hole he saw three (3) men that he identified as the Accused persons herein and a lady. Since two (2) of them carried pangas

while one of them carried a piece of wood and they were screaming ordering them to get out, he ran away and stood by the roadside. People gathered at the place. He went back to the scene to find the Deceased having fallen down and he was bleeding. On cross examination he stated that the Deceased had a slasher and they had encountered the 3<sup>rd</sup> Accused while on their way to the farm.

8. PW4 **Mutuku Mango** was planting on a portion of land that he leased when he heard screams. He ran to the scene of the incident and found Accused persons herein armed with a piece of wood and pangas respectively. While some approximately 50 metres away he saw the 3<sup>rd</sup> Accused cut the Deceased on the head with a panga. He was joined by the 1<sup>st</sup> and 2<sup>nd</sup> Accused. He saw the 1<sup>st</sup> Accused cut him on the nape of the neck. The three (3) left on seeing people gather. He denied the allegation that the Deceased and PW1 found the 3<sup>rd</sup> Accused digging on the disputed land.

9. PW5 **John Muli Peter** found the Deceased on the ground bleeding. He saw the 1<sup>st</sup> Accused crossing the stream having come from the direction where the Deceased was. He assisted the Deceased and after the police visited the scene he went along to the hospital.

10. PW6 **Isika Mwema** got a telephone call from his wife **Emily Martha** who informed him of what had happened. He went and found the Deceased injured. He accompanied him to hospital and later identified his body to the Doctor who performed the postmortem.

11. PW7 **Makau Munyalo** a member of **Akitondo Clan** stated that PW1 and **Muliwa** the mother of the 1<sup>st</sup> Accused were married to the same woman, **Mumbe** who asked the clan to subdivide land between the two (2), an exercise that they did and planted sisal plants. On being shown the portion where the Deceased fell, he stated that it belonged to PW1.

12. PW8 **Joshua Asman** who described himself as the **Akitondo Clan** – Security Personnel stated that he was present when the land was subdivided and on the fateful day he went to the scene and found the mortal remains of the Deceased on PW1's portion.

13. PW9 **No. 2007127861 APC Timothy Wambua** visited the scene of the incident. As they took away the body of the Deceased, PW1 who was injured went along. On arrival at the AP Camp they found the Accused persons.

14. PW10 **No. 64510 Corporal Livingstone Katui** of Crime Scene Support Services visited the scene and subsequently Kenyatta National Hospital and took photographs that he later adduced in evidence.

15. PW11 **Doctor Minda Okemwa** the pathologist did the autopsy of the Deceased.

16. PW12 **No. 10188 PC (W) Grace Galgalo** received the Accused persons who were taken to the station by the Chief, **Matinyani Location**.

17. PW2 reported that they had attacked the Deceased. She re-arrested the three Accused persons and took them to Kitui Police Station. Following her interrogation she established that the 3<sup>rd</sup> Accused had an injury sustained in the course of the fight. She caused him to be taken to Kitui District Hospital where he was treated. On the **9<sup>th</sup> November, 2014** she visited the scene. On the **13<sup>th</sup> November, 2014** she went to Kenyatta National Hospital and saw the body of the Deceased which had multiple cuts and also witnessed the postmortem that was conducted. She investigated the case and established that the Deceased and the Accused, who were relatives had a land dispute. What was not clear is how the Estate of a woman (Deceased) who had married the mother of the Deceased and that of the 1<sup>st</sup> Accused was distributed, although the **Akitondo Clan** had distributed the land according to each household. On cross examination she stated that the Accused surrendered to the area Chief after the incident who took them to the police station. She denied the allegation that the Deceased was attacked by members of the public.

18. When put on their defence, the Accused persons opted to give sworn evidence. The 1<sup>st</sup> Accused stated that he was at a meeting away from home when he heard screams. He ran to the scene of the incident on hearing screams and found the 3<sup>rd</sup> Accused who told him that he had been attacked by PW1, the Deceased and three (3) other people that he did not know. That the Deceased cut him on the finger. That he rang the Chief who advised him to report the matter to the police. As he left with the 3<sup>rd</sup> Accused they encountered the 2<sup>nd</sup> Accused while at the gate. He denied having seen the Deceased at the scene and claimed ownership of the land where the incident occurred.

19. Further, he stated that the disputed parcel of land was his since the clan decided the case in his favour and PW1 lodged appeals up to the county level. He alleged that PW1 and the Deceased were offered a place to cultivate but they declined to move away. He denied having attacked the Deceased. That they went to Matinyani Police Station then the Chief and the wife of the Deceased went and alleged that they had assaulted the Deceased, hence they were placed in custody. On cross examination he maintained that the land in issue was given to him by his grandmother and denied the allegation that the same lady married **Musangi** per their customary law. On re-examination he stated that the owner of the land is **Mumbe Mwova** but there is no title deed.

20. The 2<sup>nd</sup> Accused stated that he left home going to do casual work and he worked until **7.00 a.m.** On his way back he encountered his co-accused persons. The 3<sup>rd</sup> Accused had injuries. They took him to the police station. He denied having participated in the act of killing the Deceased.

21. The 3<sup>rd</sup> Accused stated that he was planting cassava on his father's land when he saw the Deceased, PW1 and some three men that he did not know. The Deceased had a slasher and a catapult while the other persons had a hoe and panga. PW1 carried a basket. To his knowledge PW1 had a dispute over the land with the 1<sup>st</sup> Accused, his father; and PW1 had been given a notice to vacate the land. That the Deceased went and asked him who had prohibited him from cultivating the land. Before he answered he took the catapult an act that made him run but on reaching terraces he fell down. He reached him and cut him on the little finger. He stood, ran, jumped the gate and went to the gate to their home. The Deceased followed him but on seeing people he went back saying that he would plough the land. His grandmother administered first aid on him. His father then arrived and escorted him to the police station. While on the way they met his

brother who went along with them to the police station. At the police station they were placed in cells. He denied knowing how the Deceased was injured. That he was issued with a P3 form but was charged with the offence of assaulting PW1, a case that is ongoing. He denied having been in possession of any implement while planting.

22. The Accused persons called witnesses. DW4 **Anselm Masila Tumbo** stated that on the material date he was at a meeting with the 1<sup>st</sup> Accused when they heard screams at **9.00 a.m.** The 1<sup>st</sup> Accused ran ahead of them. By the time he caught up with him he was talking on phone. There were many people screaming. He saw the 2<sup>nd</sup> Accused arrive on a bicycle going towards their homestead. He then saw the 3<sup>rd</sup> Accused holding his hand bleeding while the Deceased lay on the ground bleeding profusely from the head. He could hear people saying that the Deceased had been assaulted.

23. DW5 **John Mbabu**, who described himself as the treasurer of **Akitondo Clan** stated that the 1<sup>st</sup> Accused and the Deceased had a land dispute. That according to their verdict the 1<sup>st</sup> Accused person was the one to inherit the land from his grandmother. On cross examination he stated that he came to Court in his capacity as the friend of the Accused hence had no minutes of their meeting or Ruling regarding the matter.

24. DW6 **Benjamin Mbuvi Kithuki** stated that he is the chairman of the **Akitondo Clan**. That **Mwova Muliwa** the mother of the 1<sup>st</sup> Accused had a land dispute with PW1. They decided that the land be taken by the mother of the 1<sup>st</sup> Accused following an allegation that PW1 was married to a man who was alive and had paid dowry in her regard. Per their decision PW1 and her family were given six (6) months to vacate.

25. At the close of the defence case it was the submission of the learned defence Counsel, **Mr. Mwalimu** that the Prosecution's case has many contradiction and inconsistencies. That PW2 said that she was present together with a hired man called **Maisha** (PW3) while the said **Maisha** said he was with **Kasino**, the Deceased when the later was attacked by three (3) men and a woman. That the evidence of Prosecution witnesses was couched in a way that it was a frame-up calculated to achieve a particular objective which was to implicate the Accused persons with the death of the victim.

26. He urged that other witnesses never witnessed the incident because PW4 was not mentioned by PW1, PW2 and PW3. And if PW2 was at the scene, she should have mentioned the presence of **Muliwa** the woman who PW1 said was urging the Accused persons to attack the Deceased. And if PW1 was at the scene, why did she state that she only knew **Willy Mwema** yet the two (2) other Accused persons were members of the same family. He questioned why PW1 did not state that she witnessed the Deceased being cut with a panga or he fell down as claimed by PW2.

27. Further, he raised the issue of the Investigating Officer having described the Deceased as **Joseph Muema** and questioned whether the postmortem done was on the correct body and why no statement was recorded from a member of public?

28. That the version of how the Deceased suffered fatal injuries is not in a manner described by the Prosecution witnesses but by **Musyoka Willy** (3<sup>rd</sup> Accused) and **Masila Tumbo** (DW4) that the Deceased was attacked by members of the public for attacking the 3<sup>rd</sup> Accused with a slasher and then he screamed for help and the 1<sup>st</sup> and 2<sup>nd</sup> Accused were not at the scene and did not take part in the scuffle that led to the death of the Deceased.

29. In response the State through learned State Counsel **Mr. Mamba Vincent** submitted that PW1, PW2, PW3 and PW4 did confirm and corroborated each other that the Deceased was on his farm when the three (3) Accused invaded and attacked him senselessly. That they attested to the fact that they were all armed and landed on the Deceased with force. That PW6 and PW7 stated that the dispute between the two (2) families had been resolved and the Deceased was attacked while on his side of the land. That the distance between the attackers and witnesses was close enough to enable them identify each one of the Accused persons.

30. That the voluntary and wrongful act or omission by the three (3) Accused did constitute the physical component of a crime and the act of the Accused was the direct consequence of the death of the Deceased. He called upon the Court to find that there was a common intention formed by the Accused persons to prosecute an unlawful purpose and having prosecuted the purpose the offence committed was murder as each one of them was deemed to have committed the offence.

31. I have duly taken into consideration rival submissions of both Counsels.

32. Issues to be determined are:

- Whether death occurred.
- Whether the Accused persons committed the unlawful act which caused the death of the Deceased.
- Whether the Accused persons had malice aforethought.

33. PW10 and PW12 the Investigation Officer moved to Kenyatta National Hospital where they found a body of a male adult that was identified by PW6 whose name appears in the postmortem form as one of the witnesses who identified it prior to the autopsy being carried out. The request was for ascertainment of the cause of death of **John Muema Mwova**. PW11 **Doctor Minda Okemwa**, the Pathologist examined the body of the Deceased, noted the injuries sustained and formed the opinion that the cause of death was head injury (epidural) and subdural haematoma, fracture base of skull due to blunt and sharp force trauma. This was evidence of the fact of death which is not in dispute.

34. Prosecution witnesses who were at the scene of the incident identified the three Accused persons as the ones who perpetrated the act that resulted into the death of the Deceased. PW1 stated that at the outset as she headed to the farm she encountered the 3<sup>rd</sup> Accused who was

running towards them while in company of his co-accused persons. **Muliwa** the mother of the 1<sup>st</sup> Accused had climbed on a mango tree. She screamed alleging that she had seen a witch and urged them to beat up the Deceased. She said the 3<sup>rd</sup> Accused picked a brick that he used to hit the Deceased. It was her testimony that all the three Accused persons assaulted the Deceased. That one of them hit him with a stick/piece of wood and he fell down. When she tried to intervene the 3<sup>rd</sup> Accused cut her using a panga.

35. PW2 stated that the Deceased, PW3 and PW1 had gone ahead of her and as she followed them the 1<sup>st</sup> Accused was ahead of her. She noted that he carried a panga. He was in company of his sons and co-accused. They confronted the Deceased who was trimming a tree. The 1<sup>st</sup> Accused told the co-accused not to let the Deceased leave the land. As they surrounded him the Deceased lifted up his hands and asked them to let him go home as he had not gone to fight. However, they blocked him and assaulted him. The 1<sup>st</sup> Accused used a brick to hit him and he was overwhelmed, such that he fell down. The 2<sup>nd</sup> Accused hit him with a piece of wood on the head while the 1<sup>st</sup> Accused hit him on the neck thrice with a panga. The 3<sup>rd</sup> Accused used a panga that he later used to cut PW1 as she tried to intervene.

36. PW3 was an independent witness who had been hired to plant the land on casual basis. He was already digging when he saw three (3) men and one (1) lady. Two (2) of the men had pangas while the other one had a piece of wood. On seeing them he feared for his life therefore ran and stood by the roadside only to return after the Deceased had fallen down.

37. In the case of **Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001 (2003) UGCA, 6** the Court stated that not every contradiction would result into evidence adduced by witnesses being rejected. They stated that:

***“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”***

38. Then in the case of **Phillip Nzaka Watu vs. Republic (2016) eKLR** the Court of Appeal expressed itself regarding inconsistencies and discrepancies thus:

***“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”***

39. It is urged that evidence of witnesses was coached. Had this been the case, it may have been unlikely for PW3 to state what he saw and claim that he did not witness the actual act having run off at one point in time.

40. The defence called evidence to disapprove the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Accused were at the scene of crime when the assault was occasioned on the person of the Deceased. The 1<sup>st</sup> Accused stated that he heard screams while some two (2) kilometers away and even after he went to the scene he did not see the Deceased. The 2<sup>nd</sup> Accused said that he met the 3<sup>rd</sup> Accused when he was already injured and they took him to the police station to report the incident.

41. The 3<sup>rd</sup> Accused blamed the Deceased. He said while in company of his mother and another the Deceased confronted him. When he took the catapult that he carried he (3<sup>rd</sup> Accused) ran and fell down. He reached him and cut him on the little finger. He stood and jumped over the fence then ran to the gate to their homestead. When he tried to follow him people went to the scene. He went back saying that he would plough the land. It was his testimony that he did not know how the Deceased was injured as they left going to the police station. DW4 said that when he reached the farm the 3<sup>rd</sup> Accused was holding his hand that was bleeding while the Deceased lay on the ground bleeding profusely and people could not say what happened. Although this was a defence witness, he did not confirm the allegation of the 3<sup>rd</sup> Accused that he ran off leaving the Deceased who went back saying he would plough the land. It is not in doubt that the 3<sup>rd</sup> Accused sustained an injury on his little left finger, but there is no other evidence to confirm that the injury was occasioned upon him by the Deceased as opposed to having been injured in the course of the scuffle.

42. PW4, another independent witness, a neighbor of both the Deceased and the Accused persons was tilling his land and planting seeds when he heard the screams. He ran to the scene and saw all the three Accused armed with pangas and a piece of wood respectively. In particular he saw the 3<sup>rd</sup> Accused carrying a panga, the 2<sup>nd</sup> Accused had a panga while the 1<sup>st</sup> Accused had a piece of wood. He witnessed when they used the weapons to injure the Deceased. He was emphatic that the 3<sup>rd</sup> Accused cut him on the head and he fell down. While the 1<sup>st</sup> Accused cut him on the nape of the neck and they hit the Deceased while he was on the ground. They left the scene on seeing people gathering.

43. Looking at the nature of injuries the Deceased sustained the Doctor who examined the body noted on the head injuries a laceration of the right parietal and midline. The injuries had to be stitched. Then on the nervous system, there was epidural haematoma and subdural haematoma of the right parietal; flattening of the gyri and narrowing of the sulcus and a fracture base of the skull anterior cranial fossa. This was as a result of blunt and sharp force trauma. This was therefore consistent with use of both blunt and sharp objects that caused the injury.

44. From the foregoing the witnesses may have differed in giving some minute details but they were all consistent of the occurrence of the act and of the perpetrators. In the circumstances I find that all the three (3) Accused took part in the act.

45. What has not been stated with certainty is who committed the actual act that resulted into the Deceased suffering the fatal blow? This brings us to the issue of common intention that is defined in **Section 21** of the **Penal Code** thus:

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

In the case of **Njoroge vs. Republic (1983) KLR 197** the Court of Appeal stated as follows:

*“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by an act of someone of the party in the course of his endeavours to effect the common assault of the assembly..... Their common intention may be inferred from their presence, their actions and omission of either of them to disassociate himself from the assault.”*

46. In the case of **Dickson Mwangi Munene & Another vs. Republic Criminal Appeal No. 314 of 2011 (2014) eKLR** the Court of Appeal stated that:

*“..... where there are two or more parties that intend to pursue or to further an unlawful object by unlawful means and so act or express themselves as to reveal such intention.*

*It implies a pre-arranged plan. Although common intention can develop in the course of the commission of the offence.....”*

47. The fact of the Accused having gone to the land which they argued that belonged to them and hence viewed the Deceased as a trespasser armed with weapons suggested a criminal intent on their part. Having gone three (3) of them with another (**Muliwa**) they had agreed to participate, therefore they did act jointly, and were seized of a common intention.

48. The issue to be determined is whether the Accused persons acted with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought thus:

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

*(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

*(d) an 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.”*

49. In the case of **Nzuki vs. Republic (1993) KLR 191** the Court stated that:

*“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-*

*(i) The intention to cause death.*

*(ii) The intention to cause grievous bodily harm;*

*(iii) Where the Accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to the risk as a result of those acts. It does not matter in such circumstances whether the Accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder (See **Hyman vs. Director of Public Prosecution (1975) A C 55**).”*

50. In the case of **Republic vs. Tubere s/o Ochan (1945) 12 EACA 63** the Court of Appeal held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the Accused before, during and after the attack.

51. This is a case where the Deceased, PW1 his mother and the Accused persons had land dispute. PW1 and the mother of the 1<sup>st</sup> Accused were married to the same woman in accordance with the **Kamba Customary Laws**. Clan Elders (**Akitondo**) arbitrated over the matter.

According to the Prosecution the portion of land the Deceased was cultivating belonged to PW1, his mother. PW8 stated that he witnessed the subdivision of the land between the two (2) families and that the body of the Deceased lay on a portion that belonged to PW1. DW6 on the other hand adduced in evidence proceedings of a case between **Muliwa Muema** indicated as 'Deceased' and **Musangi Muema** indicated as 'Alive' where they reached a finding that the land in issue should belong to **Willy Mwema** (1<sup>st</sup> Accused) and PW1 should vacate the land and go back to a man who had paid dowry in her consideration. The Judgment was dated the 22<sup>nd</sup> day of **May, 2014**.

52. Whether or not the Deceased was on a portion of land that the Judgment was in respect of what was established is the fact that the Accused persons went to confront him while armed with pangas. As I aforestated they acted with a criminal intention. They were fully aware that by attacking the Deceased with weapons he would suffer at least grievous harm. When assaulting him they targeted the head. Their unlawful and wrongful act resulted into the Deceased sustaining a fracture. No doubt, they had the intention to cause death or at least do grievous harm to the Deceased. This was malice aforethought. In the circumstances the Prosecution has proved the case beyond any reasonable doubt. Accordingly, I find them guilty of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and convict them as charged.

53. It is so ordered.

**Dated, Signed and Delivered at Kitui this 2<sup>nd</sup> day of October, 2018.**

**L. N. MUTENDE**

**JUDGE**