



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 24 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MWINZI KINYIRI.....1ST ACCUSED

MUGAO KINYIRI.....2ND ACCUSED

ERIC MULUNGYE KINYIRI.....3RD ACCUSED

ERASTUS SYENGO KINYIRI.....4TH ACCUSED

MUTATI KINYIRI.....5TH ACCUSED

MULIWA KINYIRI.....6TH ACCUSED

SARAH KAMUNDA MWINZI.....7TH ACCUSED

RACHAEL MWENDE MULUNGYE.....8TH ACCUSED

PURITY MAKASI KINYIRI.....9TH ACCUSED

ANASTASIA MUTHONI KINYIRI.....10TH ACCUSED

JUDGEMENT

1. The ten (10) accused persons herein (1) John Mwinzi Kinyiri, (2) Mugao Kinyiri, (3) Eric Mulungye Kinyiri, (4) Erastus Syengo Kinyiri, (5) Mutati Kinyiri, (6) Muliwa Kinyiri, (7) Sarah Kamunda Mwinzi, (8) Rachael Mwendu Mulungye, (9) Purity Makasi Kinyiri and (10) Anastasia Muthoni Kinyiri stand charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of Count 1 are that on 8th December 2014 at Siokereke village, Siokereke Sub-Location Ngongoni Location, Tseikuru Sub-County within Kitui County murdered **Japheth Mwinzi Kinyiri**.
3. The particulars of Count 2 on the other hand are that on the same day and place murdered **Ruth Kanini Kimanzi**.
4. On being brought to court, have all denied the charges, and in attempting to prove their case, the prosecution brought 9 witnesses.
5. **PW1** was **Kangaria Mwinzi** also called **Wingate** a 21 years old Primary School Teacher and daughter of the deceased.
6. It was her evidence that on 8/12/2014 while she was at the farm with her sister, aunty **Wanja Kimanzi** and **Ruth Kanini Mwinzi** (deceased) cultivating they were joined after half (½) an hour by her father **Japheth** (deceased).
7. Shortly thereafter, **Syengo Kinyiri** called his sister **Muthoni Kinyiri** both of whom were cultivating on a neighbouring farm and told her to bring the implement. Then, **Mugao** picked a machete and stick and walked into their farm screaming saying “*this person has bothered us*”

- today is today.” At the same time **Syengo** screamed calling his brother **John Mwinzi** and his wife **Sarah** – who all came rushing. **Syengo** also called **Eric Mulungye** and his sister **Makasi** and all came and surrounded them – screaming saying that they would kill **Japheth Mwinzi Kinyiri**. According to her, the wife of **Eric** by the name **Mwende** came running accompanied by **Muliwa Kinyiri, Syengo** and **Mutati Kinyiri**.

8. She then stopped cultivating and asked, her father **John Mwinzi** to come home and discuss the issue amicably but **John** said that was impossible and threw a stone at **Japheth Mwinzi**. **Muliwa Kinyiri** then hit **Japheth** with a stick, and as the witness tried to leave with the sister, **Mugao** and **John Kinyiri** hit **Japheth** with hoes and he fell down.

9. Then **Eric** hit **Japheth** several times on the head, and **Sarah** then lifted a hoe and pointed at the witness who then ran away to a nearby bush on a hill; where she met her sister. While at the hill they saw attackers surround their mother **Ruth** who was lifting her arms in despair.

10. They then ran, and explained the incident to the Assistant Chief **Mr. Majira** and together they went back to the scene accompanied by other people, and on arrival found both the father **Japheth Kinyiri** and her mother **Ruth Kanini** had been killed.

11. The chief and sub-chief then called the police from Tseikuru who came and took the bodies in a vehicle and proceeded to the house of **Eric** where all the accused persons had gathered, and took them to the police station.

12. According to this witness, **John Mwinzi** threw the first stone to her father **Japheth** which hit him on the forehead, and also hit him with a hoe. **Mugao Kinyiri** was the first to enter the farm and hit **Japheth** with a club. **Eric** the 3rd accused cut **Japheth**. The 4th accused was one of the people who surrounded **Japheth** while he lay down. According to her, all the accused persons had surrounded **Japheth** before the witness ran into the bush on the hill, from where she saw them surround her mother **Ruth** who lifted her arms in despair. She estimated that about 4 to 10 people surrounded her father **Japheth**.

13. She then clarified that all the male accused persons were stepbrothers of **Japheth**, while **Sarah** was wife of **John Mwinzi**, **Rachael** wife of **Eric**, and **Purity** daughter of **Muliwa**. **Anastasia** was sister of **John Mwinzi**, and **Muliwa Kinyiri** was the stepmother of the deceased **Japheth**, and her children were **Muliwa, Eric, Mutati** and **Makasi**. The witness stated that **Muliwa Kinyiri**, and **Mwende** came from the house, but the rest were from the farm.

14. According to her, she told the accused to discuss the matter home because she was aware of an existing land dispute and a pending court case.

15. In cross-examination, she stated that the house of **Muliwa** was near the farm, and **Japheth's** house was almost a kilometer away, and that they were cultivating the farm they had cultivated since her grandfather was alive, and that all the adjoining farms were for **Kinyiri's** family. She stated also that the school was not far and that on that day **Syengo** and **Muthoni** cultivated together in one farm while **Mugao** cultivated separately in another farm.

16. She agreed that **Japheth** her father at the time had a hoe and machete. She said that **Syengo** arrived first and called **John** who hit **Japheth** with a stone after the rest had arrived. She denied witnessing a fight between her father **Japheth** and **John**, and maintained that her father was hit with a stone, and that though he pushed her, he did not fight anyone. She agreed that when her father was hit, he did not run away but she ran away. She agreed that her father was hit on the hand carrying the machete which must have fallen off.

17. She denied hearing her father respond to her stepbrothers, and stated that her mother **Ruth** also deceased, urged the attackers to allow discussions at home. She maintained that **Sarah** pointed a hoe at her though she did not follow her as she ran away. She stated that the bush on the hill was not far, and that they did not stay there long but merely looked back and saw the mother **Ruth** raising her hands in despair and proceeded past their father's homestead to the assistant chief, after informing their grandmother about the incident, who also went with them to the scene.

18. She admitted that there was a pending land case at Kyuso Court, which was commenced after the death of her grandfather. She agreed that her grandfather drowned when she was 13 years old in the Tana River in a canoe steered by her father **Japheth**. She agreed that the accused were from two houses (wives) of her grandfather.

19. She did not know the type of dispute in the pending court case. She said that her biological mother died long ago, and **Ruth** was thus her stepmother. According to her, while she was in school **John** and **Eric** robbed her stepmother (**Ruth** the deceased). She denied that her father **Japheth** wanted to cut **Muliwa**, and said that **Muliwa** found the commotion ongoing. She maintained that she did not have a grudge against any of the accused.

20. In re-examination, she maintained that her family had cultivated that farm for many years, and that her father was killed on his farm.

21. This witness was stood down to be recalled later to identify exhibits, which had not been received from the Government Analyst, but she does not appear to have been recalled according to the record.

22. **PW2** was **Majira Gaisu** the Assistant Chief of Ngongoni Sub-Location, Tseikuru Sub-County, Kitui County. He stated that **Japheth** the deceased was not from his Sub-Location, but from same location where the chief was **Daniel Mwanzia**.

23. It was his evidence that on 8/12/2014 while in office, **Kangaria Mwinzi** and her sister **Gatwiri** informed him that their father had been attacked by people at his farm, as the area Assistant Chief **Nancy** was away.

24. He then rode on his bicycle to the scene which he knew before, and found the body of **Japheth**, and about 100 meters away found the

body of **Ruth Kanini**. He phoned police from Tseikuru who arrived one hour later and took the bodies away, and the police also went to the homestead of the accused persons and arrested them. He stated that the reportees merely said their father had been attacked but on arrival they found two bodies of dead people, after a journey of 1½ hours.

25. He was aware of an existing land dispute in the family, with several reports made to the chief and the police. He stated that at one time they wanted to sit down and resolve the dispute but the deceased **Japhet** failed to come. He stated that the 1st, 2nd, 3rd and 4th accused persons were stepbrothers of **Japhet**, while **Sarah** was the wife of 1st accused, **Rachael** wife of **Eric**, **Purity** stepsister of **Japhet**, as well as **Anastasia**.

26. According to him, the long standing land dispute was between the deceased **Japhet** and his stepbrothers and sisters as reported to the chief's office.

27. In cross-examination, he stated that he was the secretary of the Konja clan and a distant uncle of the accused, as well as the deceased. He stated that the clan chairman Kithome had earlier called a meeting but they could not force **Japhet** to attend the meeting, and the meeting could they not proceed in his absence.

28. He stated that **Japhet** the deceased was older than the accused stepbrothers and confirmed that the older **Kinyiri** had drowned in Tana River while travelling in a canoe steered by **Japhet**. He confirmed that on 6/12/15 he received a phone call that **Japhet** had threatened his siblings with arrows and advised the reportee to inform the police.

29. He stated that the allegation then was that **Japheth** claimed that his siblings were illegitimate children, and wanted to take all the land. According to him the family was not at peace since the elder **Kinyiri** died.

30. In re-examination, he stated that the deceased was selfish, and that he was not sure about the nature of the claim in the pending court case.

31. **PW3** was **Richard Musyoka** a Primary School Teacher and brother in law of **Japhet Kinyiri** the deceased, having married **Japheth's** sister.

32. According to him, on 8/12/2014 while at Tseikuru market he was informed on phone by the Assistant Chief **Mr. Kilonzi** that **Japhet** had been killed with his wife. He proceeded to Tseikuru police station and shortly thereafter police arrived with the bodies and then took the bodies to Matuu Nursing Home.

33. On 12/12/2014 he was present at Matuu Nursing Home with **Kimanzi Mwinzi** the father of **Ruth** and both identified the bodies for to the doctor for postmortem examination.

34. **PW4** was **Kimanzi Mwinzi**, the father of **Ruth**, the deceased. On 8/12/14 at 12 noon while at home in Ngongoni, received a report that **Japhet** and **Ruth** had been killed at the farm. He rushed to the farm and saw the bodies, both lying face downwards. He then proceeded to the police station with **Mutegi Kinyiri** who had given him the information on the deaths.

35. The police then proceeded to the scene at 3 pm leaving him behind, coming back with the bodies at 6 pm. He then accompanied the bodies to the mortuary.

36. On 12/12/2014 he witnessed the postmortem examination which was conducted by **Dr. Kioko**. According to him, all the accused were brought to the police station on the date of the killing.

37. **PW5** was **Winjoy Gatwiri Mwinzi** a Form 2 Student at Tseikuru Secondary School aged 17, and a daughter of the deceased **Japhet Mwinzi** and **Ruth Kanini**, as well as a sister of **Wingate Kangari Mwinzi** (**PW1**), **Naomi Gacheri Mwinzi** and **Jackline Muthoni Mwinzi**.

38. She identified all the accused persons in court and described their relationships as members of one larger family. She stated that **Kangari** the mother of **Muthoni** and the mother of her father **Japhet Kinyiri** were not among the accused persons. According to her all the accused lived almost one (1) kilometer from her home.

39. It was her evidence that on 8/12/2014 at 8am while at their farm cultivating with her sister **Wingate**, **Vivian** her aunt and her mother **Ruth Kanini**, their father **Japhet Kinyiri** joined them carrying a machete. At that time, **Erastus** and **Muthoni** were cultivating at a nearby farm, and when **Erastus** saw **Japhet** arrive, **Erastus** called his brother **Mugao**, who in turn told **Erastus** to bring the items.

40. **Erastus** then picked a bow and arrows, and called his brother **Mwinzi** three times and said – “*today I will kill this dog*” – referring to the witness' father. They then approached with **Muthoni Kinyiri** carrying a hoe and stones, **Mugao Kinyiri** with machete and a club, and **John Mwinzi** with a hoe and stones. Then **Erastus Kinyiri** called his sister **Makasi Kinyiri** and **Eric** came with a hoe, a machete and stones, while **Makasi** had a hoe and stones.

41. They then surrounded them in their farm and screamed – “*today we will kill him as he has really bothered us.*” – In the process, those who were at home **Mulungye Kinyiri** came with a stick and stones, and **Rachael Mwendu** came with a stick and stones. **Mutati Kinyiri** also came with a stick and stones, and same applied to **Syengo Kinyiri** who had a catapult and stones. **Anastasia Muthoni** was also present and all surrounded them. When the witness asked what they were doing **Mungao Kinyiri** responded and said that **Japhet** had bothered them for long and that they would kill him, and **Muliwa Kinyiri** then hit **Japhet** on the right hand and the machete dropped, and when he bent to pick it up **Mwinzi** hit him with a hoe at the back of the neck, and then **Mugao Kinyiri** hit him on the back and he fell down.

42. Then **Eric** cut him with a machete on the head. When the witness saw the father (**Japhet**) fall down, she ran up to a nearby hill from where she observed each of the assailants attack her father with what they carried. She then ran away with her sister **Wingate** leaving behind their mother trying to escape. According to her, **Vivian Wanja** ran away just after the attackers arrived. As she was at the hill she saw her mother near **Syengo** lifting her hands as if gesturing for peace.

43. It was her evidence that she ran away after her father had been killed and lay on the ground. According to her, her mother **Ruth Kinyiri** lifted her hands in despair just next to her father. She then ran and reported the incident to the sub-chief and together proceeded back to the farm, where they found the father with cuts all over the body and with a severed leg cut. The mother was dead a distance away with a cut on the neck and hands.

44. The chief then phoned the police from Tseikuru police station who arrived at 12 noon and proceeded to the farm where they picked the two bodies, hoes and sticks used in the attack. They then found all the accused persons seated in the house of **Eric** having changed their clothes. According to her, the police recovered the machetes and clothes used during the incident, with the machetes recovered from the house of **Eric**, while clothes of **Muliwa Kinyiri**, **Eric**, **Rachael Mwendu** were all recovered from around the homestead together with a machete and bow, and the police thus arrested the accused persons and took them to the police station.

45. She identified the items picked by the police that is a stick in possession of **Mugao** MFI-1, a hoe in possession of **Mwinzi** MFI-2, a machete in possession of **Eric** MFI-3, a pair of grey trousers won by **John Mwinzi** MFI-4, light blue shirt of **Mulungye Mwinzi** MFI-5, with blood stains on the sleeve, a blue piece of cloth – “leso” of **Muliwa Kinyiri** MFI-6, a light blue skirt of **Muliwa Kinyiri** MFI-7, a blue leso with patterns of **Rachael** MFI-8, a blue striped T-shirt of **Eric** MFI-9, a dark brown pair of trousers belonging to **Eric** MFI-10, a white blouse belonging to **Makasi Kinyiri** MFI-11, a piece of cloth with dark flowers won by **Makasi** on the head MFI-12. She stated that other clothes won by the culprits were not recovered, including a white T-shirt won by **Muthoni Kinyiri**.

46. She was not aware of any existing dispute between the accused and her late father. She maintained that all the accused persons whom she identified in the dock, killed the deceased.

47. In cross-examination, she maintained that all the accused persons were involved in the killing, including **Muthoni** – though **Muthoni** did not touch any of the deceased. According to her, **Makasi** and Sarah surrounded the deceased. She stated that **Muliwa** hit **Japhet** with a stick, thought the stick was not in court. She stated that **Mwendu** and **Muteti** (the man) surrounded the deceased, while **Erastus Syengo** was the person who called the rest. According to her, **Eric** cut **Japhet** with a machete, and **Mugao** hit him with a hoe stick. She maintained that **Mugao** also had a machete.

48. According to her, **John Mwinzi** hit **Japhet** with a hoe, after first throwing 3 or 5 stones at him, which were bigger in size than those used with catapults. She maintained that her father **Japhet** joined them later at the farm carrying a machete and oar. She said their farm bordered that of **Erastus Syengo**. She clarified that initially **Muliwa** was not present, but was attracted by screams – “*uwiii, uwiii!*”.

49. According to her, her father **Japhet** tried to run away but was overcome. The mother **Ruth** tried to run away but was not able to do so. According to her, it was **Muliwa** (6th accused) who started hitting her father, though **Muliwa** came following screams. Before **Muliwa**'s arrival the rest had just surrounded them. She said her father could not run away as he was the target of the attack and they prevented him from doing so. She denied a suggestion that, that morning there was a boundary dispute between her late father and **Syengo** who pushed each other or that her father started the fight by hitting **Muliwa**.

50. When shown the short sleeved blue blouse of **Muliwa**, she denied that the blood stains in the left sleeve were from **Muliwa**'s blood. She maintained that the blood stains were from her late father and arose from a cut inflicted on him by **Muliwa**. She denied that her late father cut **Muliwa** with a machete. She stated that though **John** threw stones at her father, the stones did not hit his hand knocking down the machete.

51. She said also that her deceased stepmother **Ruth** was not armed. She confirmed that neither the deceased, nor herself screamed though the attackers screamed to call one another. She maintained that though she held her father's hand and asked him to go home, she did not push her. She insisted that **Eric** cut her late father with a machete which was in court.

52. She said that she observed from the nearby hill that the attackers had surrounded her late mother. According to her, **Vivian** ran away earlier, and agreed that she did not witness anybody hit her stepmother. She was not aware of an existing land case between her late father and any of the accused persons filed at Kyuso Court. She agreed that after the incident, none of the accused persons escaped, but all went home.

53. She confirmed that her grandfather Kinyiri drowned in the Tana River in a canoe belonging to her father, but did not know who was piloting the canoe then.

54. In re-examination, she maintained that **Muliwa** arrived when the others had surrounded her late father. According to her **Muliwa** was older than all the attackers and was mother to **Eric**, **Mutati Kinyiri**, and **Makasi Kinyiri**. She maintained that the first screams to call the rest came from **Syengo**. She said that none of the attackers was empty handed, and all said they would kill her late father **Japhet** because he had really bothered them. She maintained that her father was killed in his farm, and that **Syengo** was the last person to talk to her stepmother, so he was the person to say what happened.

55. **PW6** was **V W** a 16 year old girl, and sister of **Ruth Kanini** deceased. Their home was about 6Km from that of the deceased but she used to visit them. She knew all the accused persons **John**, **Mugao**, **Syengo** and **Muthoni** being of the same mother whose name she could not remember. **Eric**, **Mutati**, **Makasi** from same mother **Muliwa Kinyiri**, while **Mwendu** was wife of **Eric**.

56. According to her, the accused came to **Japhet**'s farm just after he had arrived from checking his canoe and put the oar at the green house. Then after 5 minutes, **Syengo Kinyiri** said today they must kill the person (**Japhet**), and called **Mugao Kinyiri**. At that time **Syengo** was

with his sister **Muthoni Kinyiri**, **Mugao Kinyiri** then called **Eric** who was with his sister **Makasi Kinyiri**. **Eric** then called **John Mwinzi** who was with his wife **Sarah Mwinzi**.

57. Then the attackers entered the deceased's farm and **Muliwa Kinyiri** was the first to hit **Japhet** with a big stick. In the encounter **John** carried a hoe and stones, **Mugao** had a hoe and big stick, **Eric** had a hoe and machete, **Mutati** had a big stick and catapult, **Muliwa** had a big stick, **Makasi** had a hoe and stones, **Mwende** and **Eric** had hoes, **Makasi** had a hoe and stones, **Muthoni** had a hoe and big stick, **Syengo** had a bow and arrows, **Sarah** had a hoe and big stick. According to the witness they all surrounded them before **Muliwa** hit **Japhet** on the upper arm, and then **John** hit him with a hoe on the back of the neck and he fell down, then **Eric** cut him thrice with a machete.

58. When **Japhet** fell down, the witness ran away to a nearby hill where on looking back she saw the attackers surrounding **Ruth** who was lifting and opening her palms in front of **Syengo**. The witness then ran home and informed her parents that **Japhet** had been killed. The parents proceeded to the scene and came back with news that **Ruth** was also no more.

59. It was her evidence that **Wingate** and **Rachael** ran from the scene after her. She said that the attackers called **Japhet** a dog, and that she left after she witnessed the killing of **Japhet**. She identified the attackers in court.

60. In cross-examination, she maintained that she was in Class 6 in 2014. She denied that **Japhet** carried a machete, and denied that he was cut using his own machete. She denied that **Japhet** cut **Muliwa's** upper arm. She agreed that **Japhet** did not run away though **Winjoy** held his hand and told him to leave those people alone and go home. She agreed that **Japhet** had a bigger body physique than any of the attackers. She said that she ran for 6Kms home. She maintained the attackers called one another and denied that she lied to the police.

61. In re-examination, she stated that **Wingate** and **Winjoy** held their father to prevent him from being hit.

62. **PW7** was **Syengo Njeru** a traditional medicine man from Ngomeni, who knew the deceased **Japhet** and **Ruth**. According to him the accused were related to the deceased. On 8/12/14 at 8 am he heard noise while at his farm and on going there he met **Muliwa** shouting, while **Japhet** was holding a piece of timber. According to him, those making noise were saying that **Japhet** had felled grass on **Muliwa's** crops. As he approached **Japhet** pointed a stick at him and he went home.

63. On next morning, he received information that **Japhet** had died. He said that he did not see **Ruth Kanini**. He emphasised that he saw **Japhet** with **Muliwa**.

64. In cross-examination, he stated that **Japhet** and **Muliwa** quarrelled in the farm. He maintained that he did not see any other person. He stated that **Muliwa** complained that **Japhet** had spoiled her crops. He said the father of **Japhet** had 4 wives.

65. In re-examination, he said that **Japhet** did not quarrel him. He said that he did not see **Japhet's** children.

66. **PW8** was **Dr. Abdalla** Mohamed a doctor at Mwingi Level 4 Hospital. It was his evidence that he had previously worked with **Dr. Muli Simeon Kioko** who filled the postmortem forms for the two deceased persons **Ruth Kanini Mwinzi** and **Japhet Mwinzi Kinyiri**, but was now on study leave.

67. On the postmortem form for **Japhet Mwinzi** he said that it was filled on 12/12/14 at Matuu Nursing Home Mortuary. Clothes were all blood stained. It was the body of a male African about 40 years old of good nutrition. The body had been well preserved but rigor mortis (stiffening) had set in.

68. The left hand was severed at the wrist joint. There were cut wounds on the back of the skull, including the left earlobe. There was a cut wound on the left elbow. There was a deep cut wound on the lumbar region, (back of waist) and severed legs at the ankle joints. Internal appearance was normal.

69. Cause of death was massive haemorrhage secondary to multiple cut wounds. It was noted in the postmortem form that a blood sample was removed for further examination. He produced the postmortem form as an exhibit.

70. On the postmortem form for **Ruth Kanini Mwinzi**, examination was also done on 12/12/2014 at Matuu Nursing Home Mortuary. All the clothes were blood stained. It was the body of female African of good nutrition and a small body frame. The body was well preserved but rigor mortis had set in. Externally there was a deep cut on the scalp region, and an open fracture of the left occipital region. Internally, there was an open fracture on the left temporal bone – with haemorrhage in the head.

71. The cause of death was cardio pulmonary arrest secondary to haemorrhage due to deep cut wounds. It was also noted that a blood sample was taken for further analysis. The form was signed and stamped. He also produced the postmortem report as an exhibit.

72. In cross-examination he stated that the body colour and hair differentiated Whites from Africans.

73. **PW9** was **Cpl Paul Macharia** the investigating officer. He was on duty at Tseikuru Police Station on 8/12/2014 when the OCPD informed him of a murder incident at Siokereke area, Ngongoni Location. Together with **PC Nyanje** and **PC Omari** and the OCPD, proceeded to the scene about 25Km West of the Police Station where they found a crowd, and the Assistant Chief **Mr. Manyika** guided them to the exact place where they were shown the body of **Japhet Mwinzi Kinyiri** lying near the bank of Tana river. The body had deep cuts on the head, which were spread all over. The left hand was severed on the wrist and elbow, and the left leg was amputated near the ankle. They also found a blood stained hoe near the body.

74. Then they were shown the body of **Ruth Kanini Kimanzi** also lying in a pool of blood with three deep cuts on the head. The body lay

face downwards. They photographed the scene where the two bodies lay 260 meters apart, with the first body lying near the river bank in a farm. He drew a rough sketch plan of the scene, and later prepared a fair sketch plan. The sketch plan showed the farm where the deceased were weeding, where they found the bodies, and the respective measurements. He produced the sketch plan as an exhibit.

75. On enquiries, he learnt that the deceased were attacked by the accused with machetes, hoes, clubs, stones and bows and arrows while they were weeding in their farm with their children and a sister of the deceased female. He was given the names of the attackers who were related or members of the same family. He learnt that the culprits alerted one another and when they arrived at the farm, **Muliwa Kinyiri** first hit the male deceased, with a club on the head, followed by **John Mwinzi** who hit him with a hoe on the shoulder. When he fell **Muliwa** hit him with a club on the back and then **Eric Mulungye** cut the male deceased (**Japhet**) three (3) times on the head with a machete. It was then that all the rest discorded on him with the weapons they carried, after chasing away the deceased's children, who had witnessed the incident.

76. According to him the children observed all this from a nearby thicket, from where they also witnessed the attack on the female deceased **Ruth Kanini**. He also learnt that as same family members the accused persons had a long standing dispute with **Japhet** and that there was a pending land case in Kyuso Court. He took possession of the hoe and club which were near the body of **Japhet** as exhibits. He produced the hoe and wooden club as exhibits.

77. They then picked the two bodies from the scene and found all the co-accused relaxing outside the house of **Eric Mulungye Kinyiri** and arrested them. They noted that **John Mwinzi Kinyiri** had fresh bruises on the head, and **Muliwa Kinyiri** had a bleeding left arm while **Sarah Kamunda Mwinzi** had a cut on the small right finger.

78. He conducted a search in the homes of the accused with the help of the children of the deceased and recovered one pair of brown trousers and a stripped T-shirt belonging to **Eric Mulungye** both blood stained. They also recovered a pair of grey long trousers belonging to **John Kinyiri**. He produced these items as exhibits. According to him the search was conducted with the assistance of **PC Nyanje**.

79. On further search, they recovered a blue blouse, a shirt and piece of cloth "leso" belonging to **Muliwa Kinyiri**. These were hidden in a thicket outside **Muliwa's** house. He produced them as exhibits. They further recovered a "leso" in **Eric's** home belonging to **Rachael Mwende**. All had blood stains. He produced them as exhibits.

80. They also recovered a scarf, a clean machete in the house of **Eric**. It was washed clean, so they thought it was suspect. It was produced as exhibit.

81. On the same day, the two bodies were removed to Matuu Nursing Home to await postmortem examination. He referred the injured accused to hospital for treatment and preparation of P3 forms. He received P3 form for **Muliwa** which he produced in court, another for **John Mwinzi Kinyiri** which he also produced as exhibit, together with treatment notes. He also produced treatment notes and P3 form for **Sarah Mwinzi**.

82. He filled an Exhibit Memo Form and instructed **PC Nyanje** to take exhibits for analysis of the Government Analyst. He received the Analyst's report dated 29/7/15 prepared by **Henry Kiptoo Sang**. He produced the report as an exhibit.

83. On 12/12/2014 he requested **PC Nyanje** to accompany relatives of the deceased to Matuu Nursing Home where both bodies were identified for postmortem examination. He then charged the accused with the offences. He knew **Eric** and **John Mwinzi** before as he had handled their cases.

84. In cross-examination, he stated that, that he knew of previous family cases, in which **Japhet** was the complainant, and at Kyuso Court, he found that the family had many cases.

85. He said he found all the accused persons sitting outside **Eric's** house, and found no evidence of arrow injuries on the deceased. He was convinced that all the accused persons hit the deceased, and confirmed that according to the Government Analyst's report, the blue "leso" had no blood stains. According to him, some weapons could have been thrown into the river. He disagreed that **Japhet** ignited the fight, and maintained that **Muliwa** came from the house screaming and, in the company of others, surrounded **Japhet** who tried to defend himself.

86. He stated that the attackers chased away the daughters then attacked **Ruth Kanini**, and maintained that it was a planned attack and the land dispute was the motive.

87. In re-examination, he said that the clean machete found must have been used and washed. He reiterated that blood stains were found in the clothes taken for analysis.

88. That was the end of the prosecution evidence.

89. When put on their defence, each accused person elected to tender sworn testimony.

90. **DW1** was **Anastasia Muthoni** (accused 10). She said that she was 17 years old attending Kalembei Secondary School in Form 3. She is a family member of all the accused and the two deceased. According to her, her deceased grandfather had four wives. The elder wife was **Syamburi** and none of her children were involved in the case. Next wife was **Mukundi**, mother of **Japhet Mwinzi** (deceased). The 3rd wife was **Muliwa Kinyiri** – mother of **Eric**, **Mutati** and **Purity Makasi**. The 4th wife was **Kalula** – mother of **John Mwinzi**, **Mugao**, **Syengo**, and **Anastasia** (herself).

91. On 8/12/14 a Monday, in the morning, she went to the farm with her brother **Erastus Syengo** to cultivate about 1Km to 2Kms from home with hoes. At the neighbouring farm they found **Kangaria**, **Gatwiri**, **Wanja** and **Ruth** (deceased) cultivating in their farm and singing

loudly, that some people would go and leave behind their livestock and houses. **John** and his wife were on their own farm, and in between there was a road. **Ruth** and children were about 50 meters from them, while **Eric**, **Purity** and **Makasi** were in their own farm downhill and she could not see them.

92. Shortly thereafter, **Japhet** (deceased) passed carrying a machete and oar from the river. He then walked to his farm passing near their fence and asked why **Erastus** had placed grass on the fence, and **Erastus** said there was nothing wrong with that. He then picked a pole and pushed the grass away. **Erastus** then called **John** who came and enquired about the issue and **Japhet** said that he was young man. Then **Eric** came from his farm with his wife and asked about the matter. Thereafter, the wife of **Japhet** came and there was an exchange of words. The children of **Japhet** came and surrounded him – **Kangaria** told her father to remove the grass but **Gatwiri** told him not to remove the grass.

93. The noise of **Gatwiri** and her sister attracted **Rachael** and **Muliwa** who were at home. **Muliwa** arrived and asked **Japhet** why he was talking rudely to his siblings, and **Syengo** who was cutting trees near the river was attracted and came. **Japhet** then told **Syengo** an elder not to interfere with family matters, and in the process **Japhet** cut **Muliwa** with a machete on the upper arm and this caused ran home, and **Rachael** who was pregnant pleaded not to be left behind. She assisted her for a distance then left her behind, but she also ran home.

94. On arrival at home, she informed her mother about the incident, and discouraged her from going to the scene because she was partly deaf. **John Mwinzi**, **Erastus** and **Mugao** then came home, and **John** had an injury on the head, and said he had been hit with a hoe. They said **Muliwa** was at home, but did not say where **Japhet** was. She assisted in giving first aid to the injured, who said **Japhet** was dead.

95. At 2pm, the police arrived in a motor vehicle, and they were all taken to the police station. According to her, **Mutati** was not present at the scene, but they were arrested together at home. At the police station, she said she did not see anything because the police asked her with a lot of harshness. She denied killing **Mwinzi** or **Ruth**.

96. In cross-examination, she confirmed that **Japhet** was her stepbrother and **Ruth** his wife. She was aware of a family land dispute, which was not resolved. She had not heard **Japhet** sing except that day. She said she saw all the accused except **Mutati** at the scene. She admitted that initially everyone was in their respective farm. She admitted also that the disputed fence was between her mother's farm and **Japhet's** farm, while **John's** farm was 50 meters away. She maintained that though **Mutati** did not come to the scene, she stated that in the pending court case at Kyuso - her mother **Kalula** and **Muliwa** were the defendants, and that **Muliwa** was the mother of **Eric**, **Muteti** and **Purity**. She said that she heard **Muliwa** tell her son **Wambua** at 10am that **Japhet** was dead. She said that initially, she gave a false statement at Kyuso Police Station.

97. **DW2** was **Mutati Kinyiri** a 16 years old boy. He confirmed the family relations described by **DW1 Anastasia Kinyiri**. It was his defence that he was aware that on 8/12/14 **Japhet** and **Ruth** died. He stated that on that day, he went to their farm which was a distance from **Japhet's** farm. He came home for lunch at 1pm only to find everybody gathered there and her mother injured on the shoulder. Shortly thereafter, the police arrived and arrested him, though he was not at the scene of the killing.

98. In cross-examination, he stated that in the morning as he took cows to plough, and met **Japhet**, **Ruth** and children going to their farm which was about 3Km from their farm. He insisted that he left the farm for home at 1pm, and added that his brother **Wambua** left the farm at 10.30am to fetch water. He admitted though, that he told the police that he left the farm at 10am.

99. He denied going to the scene to find out who had cut his mother. He denied that he was charged and not **Wambua**, and that he was at the scene.

100. **DW3** was **John Mwinzi Kinyiri** who in his sworn statement said that he was a farmer, and namesake of **Japhet Mwinzi Kinyiri**.

101. On 8/12/2014 a Monday he was with his wife **Sarah** at his farm. At around 9am **Japhet** passed near them by the road and did not talk to them, and proceeded down to the river. It was his evidence that his farm and his mother's farm bordered the farm of **Japhet** which had a small fence. According to him his sister **Anastasia** and brother **Erastus** cultivated his mother's farm that morning, while **Eric** cultivated with his sister **Purity** on **Eric's** farm. **Japhet** was at his farm with **Ruth Kanini**, **Kangaria Mwinzi**, **Gatwiri** and **Wanja** cultivating on **Japhet's** farm – as they sang abusive songs such as – “*some will go leaving their wives and others will not cultivate their farms*” – though they did not mention names. He thought the songs related to him and the others as they did not have a peaceful life.

102. When **Japhet** came from checking his boat at the river, he passed near **Anastasia** and **Erastus**, and then he heard noise of people talking in harsh voices and proceeded there with hoes in his hand and met **Japhet** with a fencing pole, and a machete. **Japhet** used the fencing pole to push weeds on the crops, and when he asked him why he was moving grass on the fence onto the crops, he said he was not his neighbour. **Purity** and **Eric** heard the noise and came, and **Gatwiri** the daughter of the deceased told **Japhet** not to be threatened by people. **Kangaria** the deceased's daughter held **Japhet** by the hand but he refused to heed and continued to push the grass while his wife **Wanja** drew near.

103. **Muliwa Kinyiri** and **Rachael Mwendu** heard the noise from home and came and an elder **Syengo Njeru** came and **Muliwa** asked what the problem was, and **Japhet** was very rude and told him not to get involved. **Syengo** could not pacify the situation and left while the rest remained there exchanging words with **Japhet**.

104. According to him, **Japhet** then approached **Purity Makasi** with a machete and when she ran away, he cut this accused's mother **Muliwa** on the upper arm and a fight broke out between them and **Japhet** and his wife **Ruth**. **Japhet** chased **Eric** who hit him with a stone and fell and when **Japhet** rose, the fight continued. According to him the fight also involved the children of **Japhet**. Later he noticed that **Japhet** had fallen and **Japhet's** children then left.

105. He stated that at the beginning of the fight, **Muthoni** left, **Muliwa** left after she was cut, **Rachael Mwendu** was hit with a hoe by **Ruth** and as she was pregnant she left. **Sarah** his wife left and **Purity** was chased with a machete and left. All the male people involved did not

leave the scene, until after the fight was over.

106. He said he had a hoe, and **Japhet** had a machete and a pole, **Eric** had a machete and a stone, others had hoes. He said he was told by **Eric** that **Japhet** had a bow which he hid somewhere. He said the quarrel took long but the fight with machetes and stones lasted for 20 – 30 minutes. He identified some of the items (exhibits) produced in court by the prosecution.

107. He said that the fight ended when **Japhet** fell and he went home, and learnt later that **Ruth** was dead. He said the fight was a tough fight. He identified a P3 form in which it was recorded that he suffered a bruise on the side of his face and stated that it was caused by **Ruth**. He said that what he said to the police was in order to avoid further beatings.

108. According to him their disagreement with **Japhet** started in 2007 when their father died mysteriously in the river while he was in a canoe rowed by **Japhet**. He also said the mother of **Japhet** was a **Mutharaka**, and **Japhet** said that the other two **Kamba** wives of his father were imposters who did not deserve inheritance, and that though they called a meeting of elders, the two Tharaka wives of his father refused to attend.

109. According to him, there were a number of cases in Kyuso Court in one of which he and **Eric** were implicated by **Japhet** as having robbed his wife. **Muliwa** and Rachael were also accused by **Japhet** for attempted arson. **Eric** and himself also took **Japhet** to court for theft of a cow and the case was dismissed. He denied planning to kill **Japhet**.

110. He was cross-examined at length. He said that though he fought **Japhet** he did not kill him as he died in a fight. He denied he had intention to kill, and said he only fought **Japhet** though **Ruth** hit him. Though they reported the disappearance of their father, the police did not blame anybody.

111. **DW4 Muliwa Kinyiri** said on oath that when she arrived at the scene; she met all the male children of **Kinyiri**, but did not meet the school boy **Mutati**. She also met females such as **Kanini** (deceased), **Mwende**, **Sarah**, **Muthoni** and **Makasi**. She did not see the females do anything. There was also another man **Syengo alias Kauwaya** who tried to pacify them but **Japhet** did not agree.

112. **DW5 Purity Makasi Kinyiri** also said on oath that she went to the scene attracted by shouts. She said she was chased by **Japhet** by pointing his hoe and machete. She was also cross-examined.

113. **DW6** was **Rachael Mwende Mulungye** – wife of **Eric Mulungye**. She said on oath that she went to the farm, but was not feeling well and went to hospital then home, where police arrived later. She was cross-examined.

114. **DW7** was **Erastus Syengo Kinyiri** stepbrother of **Japhet**. He said on oath that he was at the scene and described how the incident occurred. However, he only heard of the death of **Japhet** when the police came. He was cross-examined.

115. **DW8** was **Mugao Kinyiri**. He said on oath that on 8/12/14 as he was going to the river to check on fish traps, he met **Kangaria Mwinzi** and her sisters running. Though he tried to talk to them they did not talk to him.

116. On his way back, he was shocked to see the body of **Japhet Kinyiri** lying on the ground. He proceeded home and as he talked with others on the matter, his mother **Muliwa** came from her nearby house bleeding from her arm. He was cross-examined.

117. **DW9** was **Sarah Kamunda** stated on oath that she was attracted to the scene by screams. She met all the rest except **Mutati**. She also did not see **Mugao**. According to him, when she enquired about the problem, **Gatwiri** hit her arm with the timber piece of a hoe, and she ran home. She was wife of **John Mwinzi**. She was cross-examined.

118. **DW10** was **Eric Mulungye Mwinzi** – who stated on oath that she was at the farm when **Makasi** informed him of a quarrel uphill and he went there. He described what happened. According to him, when **Japhet** charged at him he felt very offended, went home and phoned the Chief of Tseikuru and told him to inform the police about the conflict. It was **Mugao** who told him later that **Japhet Mwinzi** was lying on the ground dead. He denied cutting **Japhet Mwinzi** or killing him. He was cross-examined.

119. That was the end of the defence evidence.

120. This is a murder case of two persons, a husband and wife. The accused persons are ten (10) in number.

121. In all criminal cases the prosecution has the onus to prove their case against the accused beyond any reasonable doubt. The accused person does not have any burden to prove his innocence. The prosecution has the burden to prove their case beyond reasonable doubt, even if the defence raises a defence of alibi. See the case of **Leonard Aniseth vs Republic [1963] EA**. The accused can merely raise doubts in the prosecution case.

122. The prosecution has the burden of proving beyond any reasonable doubts all the ingredients of the offence. In a murder case the prosecution has to prove four ingredients. First, whether the deceased died. Secondly, whether the death was unlawful. Thirdly, whether the accused caused the death. Fourthly, whether the death was caused with malice aforethought.

123. Did **Japhet Mwinzi Kinyiri** and **Ruth Kanini** die? The evidence of both the prosecution and the defence is that indeed, the two died. The police who were called and went to the scene at their farm near the Tana River on 8th December 2014 saw the dead bodies lying some meters apart. Each body had several wounds, and they took the bodies to Matuu Hospital Mortuary.

124. The postmortem report on **Japhet Mwinzi Kinyiri** filled by **Dr. Muli Simeon Kioko** and produced in court by PW8 **Dr. Abdalla Mohamed** had recorded that it was the body of a male African about 40 years old, with several cuts on the body and severed wrist joint and ankles of the legs. Cause of death was haemorrhage secondary to multiple cut wounds.

125. With regard to **Ruth Kanini Mwinzi**, she had deep cut on scalp, an open fracture of left occipital region. Cause of death was cardio pulmonary arrest secondary to deep cut wounds.

126. In my view, the prosecution proved beyond any reasonable doubt that both **Japhet Mwinzi** and **Ruth Kanini** died.

127. Were the deaths unlawful? From the evidence on record both died on their farm. There is no suggestion that anybody was authorised by law to kill any of the two deceased persons in the way they died. I find that both deaths were unlawful.

128. Were the deaths caused by the accused persons? It has to be borne in mind that the deceased are two people, and the accused persons are then (10) in number.

129. This is a matter in which ten (10) people stand charged with the murder of two people. From both the prosecution and defence evidence, the incident occurred in broad daylight. Starting with accused 5 – **Mutati Kinyiri**. The prosecution evidence connecting the accused with the offence is that of three eye witnesses. PW1 **Wingate Kangaria Kinyiri**, PW5 **Winjoy Gatwiri Mwinzi**, PW6 **Vivian Wanja**, and to a lesser extent PW7 **Syengo Njeru**. In their defences each of the accused tendered sworn testimony and was cross-examined. **Mutati** was a young man, and the evidence on record is that he might have been at the scene. He said that he went to graze cattle before going home at 1pm when he found the rest assembled there before the police came and arrested him. He was the son of **Muliwa Kinyiri** who was said to have been injured in the incident. In my view, **Mutati Kinyiri** was not proved by the prosecution beyond any reasonable doubt to have killed any of the deceased persons.

130. I now go to **Muliwa Kinyiri**. She was an old woman and stepmother of the male deceased person **Japhet Kinyiri**. The evidence on record from eye witnesses is that she was attracted by screams from others and came to the farm from her nearby house. She had an exchange of words with **Japhet Kinyiri** regarding his placing weeds on her farm and then hit the deceased **Japhet Kinyiri** with a hoe. She was said to be the first person to hit **Japhet Kinyiri**, but then she was hit back on the upper arm she ran away home. In my view, what the prosecution established was a mere assault by her on **Japhet Kinyiri** causing actual bodily harm. She did not kill the deceased **Japhet**. She also did not kill or assault **Ruth Kanini**. She however committed an assault on **Japhet Kinyiri** causing actual bodily harm.

131. I now turn to **Purity Makasi Kinyiri**. This one was also at the scene. Though she was at the scene, it is not clear what exactly she did in the attack other than generally surrounding the deceased. I find that the prosecution did not prove the offences alleged against her.

132. **Anastasia Muthoni Kinyiri** also surrounded **Japhet Kinyiri**. There is no evidence that she killed or assaulted him. She did not kill or assault **Ruth Kanini Kinyiri**. The prosecution did not prove an offence against her.

133. **Rachael Mwendu Kinyiri** also participated in surrounding **Japhet Kinyiri**, but not **Ruth Kanini**. No offence was proved against her.

134. **Sarah Kamunda** participated in surrounding **Japhet Kinyiri**, but there is no evidence that she killed **Ruth Kanini**. From the evidence on record, she was not proved to have committed the offences charged.

135. The evidence shows that **John Mwinzi Kinyiri**, **Mugao Kinyiri**, **Eric Mulungye Kinyiri** and **Erastus Syengo Kinyiri** participated in the killing of **Japhet Kinyiri**, each doing certain acts which caused his death. From the evidence of eye witnesses PW1 **Kangaria Mwinzi** and PW5 **Winjoy Gatwiri Mwinzi**, PW6 **Vivian**, **Erastus Syengo** called the rest and somewhat led and coordinated the attack which resulted in the killing of **Japhet**.

136. **John Mwinzi Kinyiri**, **Mugao Kinyiri**, **Eric Mulungye Kinyiri** and **Erastus Syengo Kinyiri** also participated in the killing of **Ruth Kanini Kimanzi**. Again **Erastus Syengo** led the attack and was clearly seen by the eye witnesses PW1 **Kangaria Mwinzi**, PW5 **Winjoy Mwinzi** and PW6 **Vivian Wanja**.

137. Was the death of **Japhet Kinyiri** caused with malice aforethought? Malice aforethought is defined under section 206 of the Penal Code. It is an intention to cause death or do grievous bodily harm. It is called premeditation. There appears to have been a long standing dispute in the larger family of the late **Kinyiri** on the issue of land and its inheritance in that polygamous family. It was reported to the elders, and at times ended up in court. There appears to have been a simmering problem which only awaited an explosive moment, and it came that day because of a small problem of grass being put on the road by other members of the family, and **Japhet Kinyiri** removing the grass from the path and allegedly, pushing it into to the farm of **Muliwa** who was initially not even at the scene.

138. The injuries suffered by the deceased were severe and serious. **Japhet Kinyiri's** limbs – wrists and ankles were even severed from the rest of the body. In my view however, from the totality of the evidence, the killing of **Japhet Kinyiri** was not with malice aforethought or premeditated and was thus manslaughter, as it arose from an altercation that morning.

139. The same applies to the killing of **Ruth Kanini**, who was also viciously killed simply because she attempted to defend her husband and infuriated the attackers. It thus cannot be said that the killing was pre-meditated. I find that malice aforethought was not proved, and thus the killing of **Ruth Kanini** was also manslaughter.

140. What are my findings with regard to each of the accused persons herein? **Mutati Kinyiri**, **Sarah Kamunda Mwinzi**, **Rachael Mwendu Mulungye**, **Purity Makasi Kinyiri**, and **Anastacia Muthoni Kinyiri** are found not guilty of the offences. I acquit them of both counts of murder and set them free.

141. I find **John Mwinzi Kinyiri, Mugao Kinyiri, Eric Mulungye Kinyiri** and **Erastus Syengo Kinyiri** guilty of the lesser offence of manslaughter contrary to section 202 of the Penal Code on both counts, and convict each of them for the two offences accordingly.

142. As for **Muliwa Kanyiri**, I find her guilty and convict her of assault causing actual bodily harm on **Japhet Mwinzi Kinyiri** contrary to section 251 of the Penal Code. I acquit her on the charge of murder of **Ruth Kanini**.

Dated and delivered at Garissa this 1st day of November, 2018.

.....

George Dulu

JUDGE