



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA

HIGH COURT CRIMINAL CASE NO.1 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

WILFRED KIOJI MUTIRIA.....1ST ACCUSED

JEFF MURIITHI KAGWIMA.....2ND ACCUSED

SILAS KIMATHI KAGWIMA.....3RD ACCUSED

FRANCIS MURANGIRI KAGWIMA.....4TH ACCUSED

J U D G M E N T

1. **WILFRED KIOJI MUTIRIA, JEFF MURIITHI KAGWIMA SILAS KIMATHI KAGWIMA, and FRANCIS MURANGIRI KAGWIMA**, the 1st to 4th Accused respectively are all jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as per the information presented to this court are that on 13th February, 2016 at Gakirwe village, Tunyai Location in Tharaka Nithi County the Accused persons jointly with others not before court murdered **BENEDICT MATHEW GICUHI NYAGA** (hereinafter to be referred to as the deceased). All the Accused persons denied committing the offence and the prosecution called a total of eleven (11) witnesses in support of their case. The accused persons when placed on their defence elected to give sworn statement of defence and called no witness. This court shall first look at the evidence adduced by the prosecution and defence before analysing/evaluating the same with a view to determine this case.

2. The first witness presented by the prosecution, **EPHANTUS KIRAKA MBOGO** (PW1) told this court of the existence of an apparent land dispute between the family of the deceased and that of the Accused persons. The cause of the dispute as per his knowledge was that the father of the deceased had bought land from one Ikarachu but that the sons of Ikarachu including the Accused persons herein were unhappy and had previously prevented the deceased from fencing the disputed plot and had caused difficulties to the deceased in his occupation of the disputed plot. The witness further told the court the deceased who was his friend and neighbour had visited him on the previous day prior to the incident and had slept in his house before going out the following day that is on (13th February, 2016) to fence the disputed plot. Later on at 9 pm, PW1 heard that the deceased had been cut to pieces and died. He further told this court that he was in the company of a group of people that who searched the body which they found the body 3 days thereafter about 1 Km away from the scene. After recovering the body the police were called in and they took the body to Chuka Hospital mortuary. The witness (PW1) told this court that he could not tell

who killed the deceased but linked the Accused persons on account of the information he later received concerning the Accused persons surrendering themselves to the police.

3. Stephen Njiru Ndwiga (PW2) on his part told this court that on the material day at around 8 pm he heard from his father that the deceased had been murdered and wondered whether the children to the person who had sold the plot were involved because he knew of a long standing dispute between the deceased and the family of the Accused persons who had previously uprooted fencing posts placed on the disputed plot by the deceased person. The witness further testified that the following day on 14th February, 2016 he together with Ephantus Kiraka (PW1) and one Mr. Njogu went to trace the deceased and that when they could not find him in his home, they went to the disputed parcel where they saw some blood stains on the ground and followed the trail which took them to a nearby river and ended there. He further testified that they later found the body of the deceased floating in the river and they called the police and collected the body. He also testified that he could not tell how the deceased met his death but when he saw the body, he observed many injuries on the body on the head, neck, mouth, nose and arms which were broken according to him. The witness further told this court that prior to the material date, the deceased had told him that his life was in danger from those from whom he had bought the parcel of land in dispute. He further added that during the search for the body of the deceased, the villagers did not assist them and that the deceased had some differences with the area chief.

4. Peter Paul Mugo (PW3), a brother to the deceased told this court that he was at his place of work in Nairobi at the material time and that he received a call from his mother Felista Karioko Nyaga (PW5) informing him that his brother (the deceased) had been murdered. He testified that the deceased was living on a parcel of land at Tharaka purchased by their late father (Angelus Nyaga) in 1978. He further added that he travelled to the scene of crime (Tharaka) on 16th February, 2016 and was present when the body was retrieved from the river. He observed some injuries on the neck, forehead, mouth and the fractured hand before the body was taken to Chuka Hospital Mortuary where he later attended a post mortem examination and identified the body of the deceased (his brother). The witnesses also added that he was aware of the disputes that arose from the excising of the parcel that had been purchased by their late father had reportedly angered the area chief and the 1st Accused opposed the move and threatened the deceased person.

5. Joseph Maina Njoki (PW4) provided more insights and details on how the dispute on the parcel of land began and played out. The witness told this court that the deceased was his brother in law and that he called him from Kirinyaga, where he resided in order to join him when surveyor would demarcate the parcel of land. He testified that he travelled on 7th February, 2016 and that on 8th February, 2016, the surveyor went to the site under police security and carried out the survey work. The witness told this court that as the survey work was going on, a young man he did not know by name but who he could identify as the 4th Accused herein went and threatened the deceased that he would be killed even if the land was surveyed. The witness also added that on 11th February, 2016 he together with the deceased started digging holes to place fencing posts but before much progress was made, he saw two young man coming to where they were digging holes and that they started threatening the deceased with death. The witness told this court that they abandoned the work and he proceeded to Kirinyaga and reportedly told the deceased that he would only return to help him if security was provided. On 13th February, 2016, the witness stated that he received sad news from the deceased's mother (PW5) that the deceased had been killed. He travelled to Tunyai (scene) where they started searching for the body which they found on the 3rd day of search. Apart from observing the injuries visible on the body of the deceased, the witness told this court that he did not witness the murder. He added that when the parcel of land was being surveyed, the 4th Accused person (Francis Murangiri Kagwima) while armed with a panga came to where the deceased and threatened the deceased that even if the land was given to him he would kill him.

6. Felista Karioko Nyaga (PW5) the mother to the deceased testified that she only identified the body of her son at Chuka District Hospital mortuary and that he saw injuries on the body which included a cut on the mouth, a fractured skull, cuts on the neck, back and right shoulder. She further testified that after the post mortem she took the body of the deceased for burial.

7. There was more light shed on the apparent land dispute between the deceased and the family of the Accused persons. This was given by the evidence tendered by Washington Omour Khoi the Assistant County Commissioner Turima Division, Tharaka South Sub-County who also acted for Tunyai Division. He testified that a land dispute involving the said parties was referred to his office by a Mr. Mburio, the Area Chief Tunyai Location who had received complaints from some residents that someone wanted to take away their land. The administrator told this court that the sons of the seller of the land went to his office including the 1st Accused person and that the deceased also presented himself and presented documents showing his entitlement to the parcel which had been purchased by his late father. He further added that he advised the parties to maintain status quo on the parcel but that on 13th February, 2016 he received information while in Nairobi that the deceased had been murdered.

8. Reuben Ngeno (PW7) a police officer who was based at Tunyai Police Post at the material time testified that he was among two police officers who had been assigned duty to give security cover to lands officer known as Daniel Chabari to demarcate the disputed parcel. He added that the lands officer presented them with a letter from lands office showing that a case had been finalised in court and was proceeding to subdivide the parcel and place beacon to mark out the boundaries of the plots. It was his evidence that while the surveyor was going on with his work, some family members from the seller of the parcel raised queries upon which the surveyor told them that since the court had made a decision the only option open to them was to appeal.

9. The witness (PW7) also said that on 10th February, 2016, he received a call from the Area Chief one Julius Mburio Mwenda who informed him that some people had gone to his office and threatened to demonstrate allegedly because;

"Benedict Nyaga (deceased) ni Kikuyu kutoka Kirinyaga na amekuja kutunyang'anya mashamba."

Upon getting this information, the witness told this court that he went and saw the said Chief and had a lengthy discussion on the matter.

He also went and informed the deceased to go and report to the D.O's office. On 13th February, 2016 the witness testified that he got a call informing him that the deceased person had been murdered. He further added that later he got another call from Sgt Moraa (PW8) that four young men had escorted one Kimathi Kagwima (3rd Accused) to report that he had been assaulted by the deceased. He went back to the station and found Kimathi Kagwima (3rd Accused) with a slight head injury on the forehead and that on questioning them, he was told that the deceased fought with Kagwima (3rd Accused) and that the three raised an alarm upon which the deceased ran towards river Mutonga and jumped into the river which according to him was a deep river.

10. The witness (PW7) further added that they went to the home of the deceased at around 11 pm which house borders that of the four Accused persons and that they found no one and had to turn back as it was raining at the time. The following day, the witness added that he went back with Sgt Moraa and the area D.O to deceased's residence. The witness gave a vivid description of what they found at the scene and that there was a road leading to the river where he observed fresh holes that had been dug to raise a fence. He also saw some stones with blood stains and observed signs on the ground showing that there was commotion at the scene. They also recovered the deceased's phone at the scene and started searching for the body since in his view he could guess that the deceased was dead. The witness told this court that there were blood stains and that the trail of the drops of blood led them to River Mutonga and that on a narrow path ***"there were blood stains on the ground showing that something had been dragged along the path to the river"***. He also added that as they went to the river they observed some visible signs on a trench near the river showing that something had been moved along the trench and that they also saw footprints of more than two people headed to the river. He also stated that he observed more disturbances on the reeds in the river besides seeing some blood stains on rocks in the said river. Their attempt to retrieve the body in the deep river with the assistance of local divers did not yield positive results but after two days, the witness added that they received information that a body was floating on the said river and

on reaching there they confirmed that the body belonged to the deceased upon confirmation they took the body to Chuka Hospital mortuary.

11. Sergeant Temita Moraa (PW8) testified and largely corroborated the evidence of P.C Reuben Ngeno (PW7) save that the witness gave a detailed account of regarding when the land surveyor first went to the police post for security during demarcation of the plot which is at the centre of this case. She testified that the request was made on 4th February, 2016 and that the exercise was to take place on 9th February, 2016 which it did with two police officers P.C Leonard Nyongesa (PW9) and P.C Reuben Ng'eno (PW7). The witness added that she received a complaint from the area chief one Julius Mburia on 10th February, 2016 complaining that police officers had gone to help the demarcation of land without his knowledge. The witness added that later on 13th February, 2016 at about 7pm, she got information that the deceased had been killed and that at around 9 pm while at the police post the four accused persons herein went and reported that 3rd Accused person herein had been assaulted by the deceased and that when they screamed attracting members of the public, the deceased allegedly fled towards Mutonga River where he was swept away by the raging waters in the river. The police officer also testified that when they visited the home of the deceased that night they found no one at the scene and that the following day they searched for the body in vain but that on 16th February, 2016 the body of the deceased was found at the same River Mutonga.

12. P.C Wanami Nyongesa (PW9) on his part also gave evidence in this court corroborating the evidence of PW7 (Ng'eno) and PW8 (Moraa). He confirmed that he had been detailed to offer security to the Land Surveyor to place beacons demarcating the parcel of land on dispute on 9th February, 2016. He also confirmed that they met some resistance and protests from the children (sons) of the seller of the parcel. He further added that on 13th February, 2016 while he was in the office he got a call that one Mathew Nyaga (deceased herein) had been killed and that at around 9.30 pm, the Accused persons herein arrived at the station reporting that the 3rd Accused had been assaulted by the deceased. He confirmed that he was the one who booked the assault on the **O.B No. 8/13/2/16**. They also allegedly reported that they eventually overpowered the deceased and as a result, he had reportedly ran away to River Mutonga. It was his evidence that the first Accused (Wilfred Kioji) actually told him that the deceased had plunged into the river and died. The officer's suspicion was raised and he told this court that he decided to lock up the four Accused persons and that his suspicion was later confirmed when they visited the scene the following day where they saw stains of blood at the scene of crime along the path that was subdividing the two parcels of land that had earlier been demarcated by the surveyors. The officer (PW9) also stated that on 16th February, 2016 they retrieved the body of the deceased in the same Mutonga river and that the body bore injuries on the head indicating that a sharp object had been used to inflict the injuries. He further added that the body was found was about 600 metres from the disputed parcel of land.

13. Dr. Justus Mutuku Kitili (PW10) the doctor who performed post mortem examination on the deceased gave evidence by tendered post mortem report P.Exh 1). He told this court that he noted two cuts on the head of the deceased and that the brain tissue was visible from external examination. He also noted a deep cut on the chest and bruises on the chest. He formed an opinion that the death was caused by a severe head injury inflicted by a sharp and blunt object.

14. The investigating officer in this case, Francis Irungu (PW11) told this court that he was called by Sgt Moraa (PW8) on 13th February, 2016 to investigate the whereabouts of the deceased after the four Accused persons reported an incident at Tunyai Police Post. He testified that together with the other police officers they went to the home of the deceased but could not trace him and that because it was late at night they decided to leave the scene and go back the following day which they did. It was his evidence that when they went back the following day he observed that there was a struggle at the scene and saw blood stains which went all the way to the banks of the River Mutonga. Although some divers volunteered to dive into the deep river, the investigating officer testified that they were unsuccessful. He confirmed that he later on 16th February, 2016 received a call that the body had been recovered from River Mutonga and proceeded to the scene and retrieved the body. He further confirmed that seeing visible injuries on the body caused by a sharp object and that the injuries were so deep and serious that it was obvious that he could not have ran and plunged himself into a river with those injuries. He further

added that he preferred the charges against the four Accused persons because they were the last persons to be with the deceased person.

15. When placed on their defence the first Accused persons Wilfred Kioji Mutiiria (DW1) in a sworn testimony testified that he knew the deceased and was in fact his friend. He testified on 13th February, 2016 at around 5 pm while going to visit a friend, he heard screams and saw someone running towards him. That someone according to him turned out to be Silas Kimathi (3rd Accused) and that he fell down before reaching where he (PW1) was and fainted. He also added that he lifted him up with the help of Francis Murangiri (4th Accused) and that they got a boda boda and went to Hospital but that on the way they met Jeff Muriithi (2nd Accused) and decided to first report the incident at the police Post where they were locked up. He denied committing the offence and confirmed the existence of a land dispute which had reportedly caused a demonstration in the village on 10th February, 2016 after a survey work carried out on 9th February, 2016. The 1st Accused further told this court that he heard that the deceased drowned in the river after being attacked by villagers.

16. **JEFF MURIITHI (DW2)** the second Accused also testified on oath that on the material date at around 5.30 pm he had gone to purchase some drugs as he allegedly had a problem with his finger. It was his evidence that the 1st, 3rd and 4th Accused persons found him on the way and that the three were in a motorbike taking Silas (3rd Accused) to the hospital as he had an injury on his forehead. He further added that he accompanied them and on the way the boda boda rider advised them to report the incident at Tunyai Police Post which they did. He told this court that they were locked in after reporting the incident. He also confirmed that they had a dispute over the land parcel the deceased occupied because according to him the land belonged to his late father (Jediel Kagwima). He added that he did not know who had assaulted his brother (3rd Accused) as he was not present when he was allegedly assaulted.

17. Silas Kimathi Kagwima (DW3) and 3rd Accused) testified on oath and denied being related with the other Accused persons. He told this court he had leased land from the mother of the 2nd Accused Jeff Muriithi and another parcel from the 4th Accused person. According to him, the land he was leasing was near or next to where the deceased occupied and that on the material date at around 5 pm he was picking some cow peas on the parcel he had leased when the deceased went and warned him to keep off the parcel. He further added that the deceased went and started slashing the cow peas with a panga before assaulting him by cutting him on the forehead and wrist with a panga. He added upon the attack he ran away screaming and in the process fell down unconscious. According to him he only regained consciousness at Tunyai Police Post and did not know where he was until the 1st Accused (Wilfred Kioji) informed him. He denied having anything to do with the death of the deceased and only heard that the deceased had drowned in a nearby river after being chased by members of public.

18. The 4th Accused Francis Murangi Kagwima (DW4) also testified on oath and stated that the 1st Accused was his nephew while the 2nd Accused was his brother. He denied knowledge of the 3rd Accused saying he had only leased a parcel of land from his mother- Sarabina Nkinga. He further testified that he knew the deceased and that he was occupying their land and did not know how he came to occupy their land. He denied having had a quarrel with the deceased. He testified that on 13th February, 2016 at around 5 pm when he arrived home he neither saw the deceased nor the other accused persons. He added that he heard screams and on going to check he saw the three Accused persons and that he saw the 3rd Accused person with injuries on his head and that they took him to hospital but changed course and decided to report first at Tunyai Police Post where they were locked up. He confirmed that the 3rd Accused was unconscious throughout the journey and only regained consciousness at Tunyai Police Post and that he was unable to talk. He denied the suggestion that the deceased died because of a land dispute because according to him there was no problem about the land.

19. The 1st and 2nd Accused have in their written submissions made through their counsel have submitted that the prosecution has failed to prove their case against them contending that none of the 11 witnesses called by the prosecution was an eye witness to the incident and that the prosecution are relying on

circumstantial evidence. It has been submitted that though the 4th Accused was said to have threatened the deceased, there was no evidence to show that he advanced the said threat. The 1st and 2nd Accused have contended that the only reason why they were arrested was because they had escorted the 3rd Accused person to the police post to report an assault case.

20. The 1st and 2nd Accused have further contended that the investigating officer did not carry out further investigations in regard to the issue of mob justice and that the police never arrested any other person or even recorded a statement from a pastor who was said to be a neighbour near where the mobile phone belonging to the deceased was recovered.

21. The defence have further submitted that for this court to convict on the basis of the circumstantial evidence the following principles apply:-

(i) That the circumstances from an inference of guilt is sought to be drawn must be cogently and firmly established.

(ii) That those circumstances should be of a definite tendency unwillingly pointing towards guilty of an accused.

(iii) That circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

The defence has cited a decision in the case of **G.M -Vs- Republic [2013] eKLR** in regard to the above principles. It has been submitted that the police used the accused persons as sacrificial lambs and that their action was merely based on suspicion citing the decision in the case of **MUSILO TULO -VS- REPUBLIC [2014]** the Accused's Counsel has contended that suspicion alone however high has never sustained any conviction in a criminal case.

22. The defence have further contended that the evidence tendered by prosecution does not lead to a common and cogent conclusion of guilty on the part of the Accused persons because there are other uncovered theories which may have caused the death of the deceased. They have pointed out the following theories namely:-

a. That the deceased assaulted the 3rd Accused and the mob got unhappy and ran after him and killed him.

b. That the accused persons could not have killed the deceased and at the same time presented themselves to the police contending that such a move is normally unusual for murders.

c. The chief who was bitter with the subdivision of the subject property might have incited the mob.

d. The circumstances leading to the death of the deceased does not form a coherent trend that the Accused persons ganged up to kill the deceased. It is contended that the 3rd Accused is not related to the other Accused persons and therefore they could not have colluded to assist him in a fight with the deceased.

The 1st and 2nd Accused have cited the decision in **Simoni Musore -Vs- Republic [1958] EA** where it was observed that circumstantial evidence can be a basis of a conviction only if there is no other co-existing circumstances weakening the claim of circumstances relied on.

23. The 3rd and 4th Accused persons apart from fully associating themselves with the above submissions have contended that the prosecution case is presumptuous and cannot for a basis of a conviction. Pointing out that there was no eye witness, the 3rd & 4th Accused have submitted that the evidence tendered by the

prosecution does not meet the threshold of admissibility and cannot warrant a conviction. It has been submitted that there was no water tight chain of events demonstrated by the prosecution case that links the four accused persons with the murder of the deceased.

24. It is further submitted that the 3rd Accused person was attacked and that after he fainted it was not possible for him to wake up kill the deceased person, drag him to the river and throw him into the river personally or in association with the others. It has further been submitted that the 3rd Accused was not a son of the seller of the disputed parcel and therefore he had no motive to kill. The defence has submitted that the prevailing circumstances particularly the altitude taken by the local chief and members of public indicated that the deceased was killed by a mob after he attacked the 3rd Accused person.

25. The state through the office of Director of the Public Prosecution on its part has submitted that in law **(Section 203 of Penal Code)** murder is committed when a person with malice aforethought causes the death of another by unlawful act or omission. In this regard, the state contends that the necessary ingredients are as follows:-

a. proof of and cause of death.

b. proof that death was as a result of an unlawful act or omission on the part of the Accused.

c. proof that the act of commission or omission was due to malice aforethought.

The state has pointed out that Dr. Justus Kitili (PW10) opined that the cause of death was a severe injury inflicted by a sharp object. The state has also pointed out that P.C Nyongesa (PW9) noted the injuries on the deceased body and probable cause of the injuries and that the same was observed by Felista Kiriuko Nyaga (PW5) mother of the deceased.

26. The state has submitted that they established and proved malice aforethought with the evidence of PW1 and PW4 who confirmed that the 4th Accused had threatened to kill the deceased. The state has contended that the four Accused persons went to report an assault case in an attempt to conceal or cover their criminal act and that they did so knowing that they were going to be discovered. It has been submitted that the land dispute between the deceased and the sons of the vendor (Accused persons) points towards the guilt of the Accused persons. The state has pointed out that it is too much of a coincidence for the 4th Accused person to be heard threatening the deceased and three days later the deceased disappears after allegedly assaulting the 3rd Accused person. The state has submitted that the deceased was killed because of a land dispute and that they had established that the Accused person had intention to kill him.

27. This court has considered all the facts that came out of the evidence presented by the prosecution witness and the defence in this case. I have considered the written submissions filed on behalf of 1st and 2nd, 3rd and 4th Accused persons and the submissions presented by the office of Director of Public Prosecutions. What has clearly crystalized in this trial is that a land dispute is at the centre of the incident that caused the death of the deceased herein. Both the prosecution witnesses and defence are in agreement that there existed a land dispute which bided the deceased on one hand and the family of the accused persons on the other.

28. The evidence given by Empantus Kiraka Mbogo with whom the deceased spent the last night before the fateful day clearly shows that the deceased was belabouring about the frustrations and resistance he was facing in trying to fence off the disputed parcel. Stephen Njiru Ndwiiga (PW2) also testified that the sons of Ikaracho, the deceased seller of the disputed parcel had formed a habit of uprooting fencing posts whenever the deceased tried putting up a fence on the said plot. The evidence of Joseph Maina Njoki (PW4), Peter Mugo (PW3) Washington Omour (PW6), the Assistant Chief, County Commissioner, P.C Rueben Ng'eno (PW7), Sgt Temita Moraa (PW8), P.C Wanami Nyongesa, (PW9) and the IP Francis Irungu (PW11) the investigating officer all confirmed about the existence of some resistance to the occupation and use of the disputed parcel by the deceased. The accused persons in their sworn defence also alluded about their discomfort and/or disapproval of the deceased's claim and occupation of the

parcel in dispute. It is clear from the evidence tendered by both the prosecution that those feelings reached its boiling point when the Lands Surveyor went under tight security provided by police officers (PW7 and PW9) and demarcated the parcel placing beacons to mark out the boundaries on 9th February, 2016.

29. This court on the basis of the above finds as a matter of fact that the deceased in this case was clearly murdered due to the land dispute between him and the family or the children of the deceased seller. This court also notes that the Surveyor who demarcated the disputed parcel must have sensed some resistance or hostility when carrying out his duties and that explains why he sought security from Tunyai Police Post. Those fears were to be confirmed later when the exercise started. It is also apparent that that exercise had been sanctioned through a court process though the details of the process was not clearly brought out. From the evidence tendered P.C Reuben Ng'eno (PW7) and Nyongesa (PW9) had hectic time calming the nerves of the sons of the deceased seller as they clearly expressed their dissatisfaction of the exercise of demarcation carried out by the surveyor one Daniel Chabari.

30. So if the deceased fate arose out of a land dispute, the big question is who murdered him? It is clear from the evidence tendered that there was no eye witness to the incident leading up to the murder of the deceased in this case. No one saw the persons who killed the deceased. It is true as submitted by the defence that the prosecution's case against the Accused herein is basically hinged on circumstantial evidence. I am also in agreement with the defence contention that suspicion alone however strong cannot be a basis of a conviction in criminal cases. The prosecution has also submitted that the guilt of the Accused persons herein is based on circumstantial evidence which they contend establishes beyond doubt that the Accused persons are connected with the death of the deceased.

31. So when does circumstantial evidence form a basis of a convictions? This court has perused through the cited authorities by the defence and in particular the Court of Appeal decision in the case of **Musili Tulo -Vs- Republic [2014] eKLR**. In that case, the Court of Appeal cited in approval the decisions in **G.I -VS- REPUBLIC [2013] eKLR & REPUBLIC -VS- KIPKERING ARAP KOSKE & ANOTHER 16 EACA 135** where the courts observed that for circumstantial evidence to be relied, it must satisfy the following principles/or requirements.

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused and

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and no one else.

32. Now turning back to the circumstances in this instant case, the prosecution has submitted that the evidence of PW2, 7, 8, 9 and 11 has established a firm inference of guilt going by the doctor's opinion on what caused the death of the deceased PW1 (Ephantus Kiraka Mbogo) testified that the deceased slept over in his house a day before his demise and told him about the frustrations and resistance he was facing when he tried fencing off his parcel. His evidence was that the sons of Ikaracho, the deceased seller, were uprooting the posts and filling up the holes meant for the fencing posts. The witness mentioned that the 4th Accused was reportedly one of the sons responsible for removing the posts and frustrating the deceased. The evidence tendered by Joseph Maina Njoki (PW4) was more firm and a pointer to what later took place. He pointed out that as they were witnessing demarcation of land with the deceased on 9th February, 2016, the 4th Accused went and threatened the deceased with death. Again on 11th February 2016, as he assisted the deceased to fence off the disputed plot two young men **"started threatening that they will kill Mathew (deceased)"** The witness (PW4) was even more blunt under cross-examination. He stated that the 4th Accused passed near them with a panga as demarcation was going on and told the deceased that **"even if the land was given to him he will kill him."** This court finds that these threats

were real and the witness must have perceived the same because when they were threatened again on 11th February, 2016, the witness abandoned his mission of helping the deceased fence off the disputed parcel and went back to Kirinyaga where he had come from and where he resided.

33. There is therefore no dispute that the ground where the incident took place was volatile and what perhaps contributed more to the volatility is the fact that the deceased was considered "**an outsider**" in Tunyai in the larger Tharaka area and this factor may have sucked the area Chief one Julius Mburio Mwenda who appeared from the evidence tendered that he took sides against the deceased. PW7 (Reuben Ng'eno) stated that the said chief

was quite unhappy with the demarcation exercise and bluntly told him;

"Benedict Nyaga (deceased) ni Kikuyu kutoka Kirinyaga na amekuja kutunyang'anya mashamba."

This unfortunate statement coming from a civil servant, and an important administrator in my view appears to have been behind or at least could have played a part in emboldening the killers of the deceased to take the law into their hands and committed the heinous act.

34. This court has evaluated the evidence tendered by the police officers (PW7 and PW9) and the Assistant County Commissioner (PW6) and I am satisfied beyond reasonable doubt that the four Accused herein openly expressed their dissatisfaction and/or hostility towards the demarcation process they clearly knew would formalize the exclusive ownership of the disputed parcel by the deceased person. PW7 clearly identified the Accused persons when he found them at Tunyai Police Post making a report concerning an alleged assault. He told this court that;

" The four (4) Accused (pointing at the Accused) were amongst those family members who came to where we were at the time the land was being divided."

PW6 apart from remembering seeing the 3rd and 4th Accused person in his office when they went to complain about the demarcation remembered the 1st Accused because, "**he was able to speak Kiswahili while the rest could not.**"

P.C Wanami Nyongesa (PW9) in his testimony recalled seeing the Accused persons on 9th February, 2016. This is what he said;

"When at the scene on 9th February, 2016 they confronted the Surveyor. I took the initiative to explain to them the court process."

It is instructive to note that among those that were said to have confronted the Surveyor was the 3rd Accused because PW9 stated that he recognized him when he reported at Tunyai police Post on 13th February, 2016 that he had been assaulted by the deceased.

35. The other important circumstance that has an important bearing in this trial is revealed by the evidence tendered by both the prosecution and the defence on what took place at the police post on that fateful material night. The four Accused person all went to Tunyai police post and found Sgt Moraa (PW8) who was in charge of the post. PW8 had prior to arrival of the Accused persons at the station had heard that the deceased had been killed. The officer told this court that she interrogated the four Accused persons more when the 3rd Accused reported that he had been assaulted by the deceased before the deceased allegedly ran for dear life and plunged into Mutonga River where he was swept away by the water. The Accused person also reportedly told the officer (PW8) that "**they were the only ones at the scene at the time.**" The report on the alleged assault was booked by P.C Nyongesa (PW9) under reference No.OB No.8/13/2/16. PW9 confirmed that as he was entering the report on the OB he noted that the 3rd Accused (Silas Kimathi) had a wound on the forehead and was bleeding. On inquiring what had happened, the first Accused Wilfred Kioji, the same person who was the spokesman at the D.O's Office stated that they had;

"fought with the deceased and he was overpowered he ran away to river Mutonga..... and that the deceased had plunged into the river and died."

36. What is clear from the above report made at the police post is that the Accused persons were though a bit economical with the whole truth, is that something nasty had taken place and the officer's initial suspicion was confirmed later when the body of the deceased was retrieved from the said River Mutonga. This court finds that the narrative given by the defence that the deceased died in the hands of a mob inconsistent with the initial report made to the police officers (PW7, PW8 and PW9) at Tunyai police post. That narrative was expounded when in their defence, the Accused persons tried to associate the disapproval of the Area Chief regarding the demarcation exercise, with an unproven fact that there was some demonstration at the Chief's office. This court further finds that the question of alleged mob justice being responsible for the death of the deceased is a narrative clearly aimed at shifting blame from the Accused persons to the faceless '**mob justice**'. There was no evidence adduced showing that there was any demonstration that took place in Tunyai location because of the demarcation of the disputed plot or any evidence that there were other people other than the Accused persons at the scene of the crime. PW7 described the scene near the river where the deceased body was retrieved and stated that he observed foot prints of more than two people headed to the river. This observation in my view is critical because when taken together with the evidence given by PW8 and PW9 on the initial report made by the Accused persons, (who stated that they were the only ones with the deceased at the material time,) cumulatively there is no escape from concluding that the Accused persons and no one else were connected with the murder of the deceased in this case.

37. This court is guided by the principles set out in the case of **MUSOKE -VS- REPUBLIC [1958] EA** also cited in the Court of Appeal case of **Musilo Tulo -Vs- Republic [2014] eKLR** where the court made the following observations;

"It is also necessary before drawing the inference of Accused's guilt from circumstantial evidence to be sure that there is no other co-existing circumstances which would weaken or destroy the inference."

38. The Accused persons have submitted that circumstances and theories exist that weakens an inference being made against the Accused persons herein. They have firstly stated that the deceased assaulted the 3rd Accused as a result of which the '**mob**' became unhappy and turned against the deceased. But I am not persuaded by this narrative because in the first place there is no evidence adduced to show the involvement of a mob. The incident probably took place in the evening and going by the Accused persons' own initial version they gave to the police, that they were the only ones with the deceased. Secondly there is no evidence tendered that showed that the community around Tunyai area were incensed by the deceased person fencing his plot. The only persons who felt aggrieved as per the evidence tendered are the Accused persons and perhaps to a less extent the Area Chief. They therefore had the motive (demonstrated by the resistance they offered when the demarcation was taking place) to cause harm to the deceased. The first Accused had in fact threatened to eliminate the deceased during the demarcation process.

39. This court also finds that contrary to the contention by the defence that it is unusual for murder suspects at times to take themselves to the police, most murder suspects at times report incidents where they have murdered victims to the police either to save themselves from repercussion from members of the public or as a diversionary tactic. This court finds that the Accused in the trial merely reported the assault incident as a cover up of what they had committed. I have noted that the evidence tendered by the Accused in their defence do not simply add up. DW1 testified that he just saw the 3rd Accused (Silas Kimathi) running towards him and fell down just before reaching where he was. He did not see anyone chasing him and did not see any other person in the vicinity. Was that possible? Probably not but what is apparent is that the so called "**mob**" was not there. Furthermore, the 3rd Accused (Silas Kimathi) told this court that after being attacked by the deceased he became unconscious and did not know what transpired thereafter until they reached Tunyai police post. At the same time he also stated that he was screaming that had been cut and the question is how was he able to scream while unconscious or even know that he was screaming in the first place. I also find that it is misleading and a cover up to state that he only came

to when they reach the police post while at the same time recall that the **"other Accused persons made the report as I was unconscious."** How could he consciously follow the proceedings at the police post on arrival when he was unconscious? I find that the version given by the defence on what really transpired diversionary at best. The evidence given by the 4th Accused person is full of inconsistencies. On the one hand he stated that he did not see the 2nd and 3rd Accused on the fateful day (13th February, 2016) and later changed and said that he had in fact seen the three Accused persons in the evening of the fateful day (13th February, 2016).

40. In contrast, the evidence tendered by prosecution witnesses (PW7, PW8, PW9 and PW11) particularly on what happened on that fateful day in my view painted a true picture of what took place. The signs of commotion and the struggle observed at the scene which were along where the holes dug up meant for fencing the disputed plot indicated that probably that is where the deceased met his death. These were signs which included blood stains on the ground indicating that the body of the deceased was dragged along the ground and thrown into the River Mutonga with a view to covering up the murder. The narrative given by all the Accused persons that the deceased ran into the river and plunged into it is clearly negated by the clear observations made by police officers (PW7, PW9 and PW11) and other prosecution witnesses (PW2 and PW4). The blood stains at the scene of crime up to the river where the body of the deceased was later retrieved besides the obvious signs that a body had been dragged along clearly indicate that the deceased person was not running.

41. The evidence tendered by the doctor (PW10) who performed the post mortem examination and the evidence of the mother of deceased (PW5) indicated that the nature of injuries including the brain tissue oozing out of the skull was so serious that a person with the said injuries probably could not run about 600 metres and plunged himself into the river. The doctor opined that the deceased died because of severe head injury inflicted by a sharp and a blunt object. The deceased did not die because of drowning in River Mutonga as the defence wants this court to believe. He was murdered and thrown into that river and the only inference that can be drawn from the evidence tendered is that the Accused persons had the motive and chance to kill the deceased person. The injury suffered by the 3rd Accused person most probably was as a result of the fight that took place between the Accused persons and the deceased. No wonder the Accused persons reported to the police that they had overpowered the deceased and that he had as result ran and plunged himself into the river. That clearly indicates that they attacked and overpowered the deceased and in the process killed him all because of a land dispute. The police officers were quite firm in their testimonies and the actions they took. There had no basis to make the Accused person sacrificial lambs as contended by the defence. There was no grudge existing between any of the Accused person and any of the police officers. Some of the police officers like PW7 had hardly been in that station for 2 years. He told this court under cross-examination that he had been at Tunyai for 1 year and 8 months before the incident took place. This court finds as a matter of fact that the evidence adduced by the police showed that they had no reason to frame the Accused persons herein. PW7 clearly stated; **"I have not created a story against the accused. Firstly I do not know them and secondly I do not have a grudge against them."**

42. It is true as contended by the defence counsels that conviction cannot be founded on suspicion alone however strong such suspicion can be but this court finds that the prosecution's case against the Accused persons herein is much more than mere suspicion. Their conduct at the police just as observed by the police officers who testified in this trial as revealed by the said officers indicate that the circumstances obtaining in this case as observed above cumulatively leads to an irresistible conclusion that the deceased person in this case was brutally murdered and his body dumped into River Mutonga and the only inference that this court and safely make based on the evidence tendered is that all the Accused persons here in one way or the other were jointly involved in that murder. I am unable to find any other reasonable hypothesis theory or any other co-existing circumstances that can negate that inference. This court is convinced beyond reasonable doubt that the prosecution has proved its case against all the Accused persons. The Accused persons should have solved whatever dispute they had over the disputed parcel through a civil process in court rather than resorting to murder. This court finds all them guilty for the murder of **BENEDICT MATHEW GICUHI NYAGA**, (the deceased) and I hereby convict them as charged.

Dated and delivered at Chuka this 17th day of July, 2017.

R. K. LIMO

JUDGE

17/7/2017

Judgment signed, dated and delivered in open court in the presence of Kijaru for 1st & 2nd Accused and holding brief for Mugo for 3rd and 4th Accused and in the presence of Kariithi for deceased family.

R.K. LIMO

JUDGE

17/7/2017