

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 105 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

KESUE OLE SURURU.....1ST ACCUSED
LANOI OLE SIMPRI.....2ND ACCUSED
DANIEL NKUITO TIAPUKEL.....3RD ACCUSED
RAYA DAPASH.....4TH ACCUSED

JUDGMENT

1. The four Accused persons **Kesue Ole Sururu, Lanoi Ole Simpri Daniel Nkuito Tiapukel** and **Raya Dapash** (hereafter referred to as the 1st, 2nd, 3rd and 4th Accused respectively) were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge are that on 9th October, 2014 at Muthera farm in Njoro Sub county, within Nakuru County, jointly with others not before Court murdered Koitune Ole Keshe.
3. They all entered a plea of “Not Guilty” and the matter was set down for hearing. The Prosecution called a total of 10 witnesses in support of its case.

Prosecution Case

4. **Noor Meiseyieki Ene Lomara (PW1’s)** testimony was that on 9th October, 2014, at about 1:00 PM, she was at her home when her children returned from school. She recounted that after giving them lunch, they sat outside and suddenly they heard a loud noise.
5. She noted that the noise was coming from the river. She headed to the river ,where she discovered the deceased, Koitune Ole Keshe, lying on his back and bleeding from the leg. She offered him water and asked what had happened. The deceased replied that he had been beaten by unknown people.

6. Other women arrived, and they carried the deceased to the road so as to take him to hospital. It is then that the deceased's phone rang and she answered the call, informing the caller that the deceased was injured. Sadly, the deceased died before reaching the hospital. She did not know who killed the deceased but saw a weapon nearby.
7. The deceased's brother **Martins Ole Keshe (PW2)** recalled receiving a call at 5:00 PM on 9th October, 2014, from his brother's employer, informing him that the deceased had been involved in a fight and was injured.
8. PW2 went to Njoro police station the next day and was informed that his brother had died on the way to hospital. He identified the body at the mortuary and the post-mortem revealed an arrow wound in the deceased's leg. PW2 noted that suspects had already been arrested but did not know who shot his brother.
9. The deceased's employer **Joseph Kakore Ole Mpoe (PW3)** was in Nakuru, on 9th October, 2014. At around 2:30 PM, he received a call from his employee by the name Said Mushe, informing him that one of the workers, Ole Keshe, had been attacked and shot with an arrow by guards at Muthera Farm.
10. PW3 instructed his elder son to go to the scene, while he returned home, where he found his worker had died from an arrow wound to the leg. The deceased died at the home of PW3's neighbour, Ole Nduati, where he had sought help.
11. PW3 reported the incident to the police. He testified that Muthera Farm is about 2 Km from his farm. He identified the four Accused persons as security guards at Muthera Farm and they were his neighbours.
12. His testimony was that Said Mushe told him that the 3rd Accused brought a gang that attacked them and shot Ole Keshe at his home. PW3 admitted to a long-standing land dispute with Muthera Farm but denied fabricating evidence. He confirmed that an arrow was found and taken by the police and that he was told that Administration Police officers supported the attackers.

13. **Raampal Ole Kamoru (PW4)** recalled being at his home in Ololopolos on 9th October, 2014, at 1:00 PM, when he heard shouts and saw people running. He ran to the river and found two women holding deceased who was bleeding heavily and in great pain and not talking. The women were giving him water.
14. They tied his wound, and soon thereafter a crowd gathered. They carried the deceased to the road, but he died before a vehicle arrived. Police later took the body. He saw a small puncture wound on the deceased's left leg but did not know who injured him or what caused the wound.
15. **Saidi Ole Mosolony (PW5)** told the court that he was with the deceased (a fellow herder) on 9th October, 2014 at around 12:00 PM. They let out the livestock to herd and at 1:00 PM, the deceased went to sleep. At 2:00 PM, PW5 went to wake him up and as they exited the house, he saw a group of about six-armed people, approaching. They included uniformed police officers.
16. **PW5** stated that he saw them clearly and identified them but due to fear for his life, he ran inside his house and locked the door. He recounted that while inside the house, he peeped through the Manyatta walls and saw the 2nd Accused shoot the deceased in the leg using an arrow. The deceased shouted that he had been hit.
17. At the same time, the 4th Accused poured petrol from a jerry can on the house, which was then set ablaze. However, that the fire did not spread as he was able to put out the fire with his jacket. He stated that the men had arrived on two motorbikes each carrying three people, armed in bows, arrows and two men were carrying rungs.
18. It was PW5's testimony that after the attack, the men left and a crowd arrived. The deceased tried to run for help but was found bleeding by the river, where two ladies were assisting him.
19. PW5 explained that they carried deceased in a blanket to PW4's home, but the deceased died before a vehicle arrived. PW5 reported that he sustained burn wounds and was hospitalised for four days. He told the court that he

- knew all four accused persons as security guards at Muthera Farm since 2013. He stated that neither he nor the deceased had any problems with them, and he did not know why they were attacked.
20. He confirmed that the deceased was Joseph Mpoe's herder. He clarified that the incident occurred in Lepolos, adjacent to Muthera Farm, and confirmed the ongoing land dispute between Mpoe and the Koinange family, who own Muthera Farm.
21. PW5 confirmed recorded a statement at Njoro Police Station, where he recounted hiding in the house while the deceased pleaded for his life and was shot with an arrow.
22. He also confirmed giving the police the name of the shooter and about the house being burnt. He added that the arrow was recovered and given to the police. He clarified that it was Accused 4, not Accused 2, who poured the petrol. In conclusion, he explained that he went to Mau hospital for his burn wounds the next day. He maintained that he was not a false witness.
23. The pathologist, **Dr. George Biketi (PW6)** conducted a post-mortem on the deceased, Koitune Ole Keshe, on 9th October, 2014, at 10:20 AM. He established that the deceased had:- A wound behind the popliteal region of the right leg with dark blood oozing; superficial bruises, and a 10 cm embalming scar on the right thigh; transected popliteal vessels and a wound and hematoma in the occipital region of the head. He opined that the cause of death was transection of the popliteal vessels on the right leg.
24. It was his evidence that samples were taken for further analysis due to allegations of a poisonous arrow being used. However, no poison was seen in the deceased body. He added that the post-mortem form did not indicate that the attackers were known, only stating '**nine men**'.
25. **CI Joseph Mchembe (PW7)** was the Deputy OCS at Mau Narok Police station at the material time. He recalled that on 9th October, 2014, at 3:26 PM, he received a call from one Sadera, a member of the Peace Committee, who reported that a person had been shot at Lepolos centre. PW7 advised

the caller to rush the victim to the hospital. Five minutes later, Sadera called again, saying that the person had died.

26. PW7 visited the scene while in company of two officers and a police driver. He found Deputy OCPD C.I Kaptich at the scene. While at the scene, PW7 saw two structures and the people informed him the offense occurred there.
27. His testimony was that the alleged murder weapon (an arrow) was found about 70 meters from the structures. He attempted to go to where the body was (about 1 KM away) but the crowd, led by Josphat Mpoe and Joseph Mpoe, became hostile and prevented him from reaching the body. Instead, the crowd attacked the police , forcing them to shoot in the air. PW7 and his team returned to the station without the body.
28. He however collected two arrows and a jerry can with liquid at the scene and handed them over to the CID. He noted the ongoing land dispute between the Mpoe and Koinange families, with both sides accusing each other. He confirmed that those charged were employees of Koinange who were guards at Muthera farm. He also noted that the arrow handed over to him was blood-stained, and OCPD CI Kaptich stated he found it 70 meters away and that all arrows were handed over to the DCI Njoro.
29. On his part, **Samuel Nyakenyania Mbeche (PW8)** of Njoro Police Station was attached to Muthera Farm. On 9th October, 2014, he was with APC Francis Ndambuki and APC Burbus Adana. They did their patrol till evening when C.I Kiptich informed them that something had happened at the far end of the farm.
30. He told this Court that earlier in the day, they had found a crowd from the Mpoe family, who were angry, however, C.I Kiptich spoke with them, and they calmed down. He reiterated that he remained in the police vehicle while all this was going on.
31. **APC Francis Ndambuki (PW9)** recalled that on 9th October, 2014, they were assigned to patrol Muthera farm and at around 10 am, they met Muthera farm manager, Dennis, who informed them of a problem at a place called Base.

32. While in company of APC Mbeche and Balbura Adan, they proceeded there and found workers of Muthera Farm and workers of Joseph Ole Mpoke engaged in a dispute.
33. Both groups were armed with bows and arrows. On seeing the police, the workers tried to run away but were calmed down. Later in the day, C.I Kaptich arrived and informed them someone had been shot and died. They accompanied him to the site but their motor vehicle got stuck on the way. PW9 and APC Adan remained there to protect the motor vehicle and therefore, he did not see the body or the burnt house.
34. Police Sergeant **Patrick Muriuki (PW10)**, was stationed at DCI Njoro on 9th October, 2014. He received information that someone had been murdered within Mau-Narok. They were accompanied by Ole Musiani (PW5), who claimed he had been with the deceased when he was murdered. PW5 narrated to them that on the previous day, they were resting in their quarters in the afternoon when a group of seven people armed with arrows and rungu approached and attacked them.
35. PW 10 recounted Musiani's statement that he went into the house and locked himself, while the deceased was shot by Sururu outside the house. That Musiani also narrated that Simpiri tried to burn the structure, but he (Musiani) remained in the house trying to put out the fire.
36. PW10 did not find the deceased or his body at the scene but he recovered arrows and a jerry can with contents, which were then taken to the government chemist for analysis. However, the government chemist report found no chemical substance in the arrow and no toxic substances were found in the body during the post-mortem.
37. He explained that he interviewed all the accused persons and they claimed at the time of the attack, they were all in Muthera Farm performing their duties as security guards.
38. PW10 added that Musiani (PW5) gave him names and description of the attackers, including Sururu. However, he saw no need for an identification parade as the witness had identified the accused persons. He however

acknowledged the discrepancies in the spelling of names in PW5's statement and their National Identify card.

39.PW10 further stated that PC Mbeche had said that guards from Mpyoe had bows and arrows, but he suggested this might be incorrect as the quarrel occurred in the morning separately from the shooting incident which occurred in the afternoon.

40. PW10 stated that the government chemist report did not show that the arrow recovered was the one that killed the deceased. Finally, PW10 stated that he did not know why CI Kaptich did not record a statement.

The Defence case

41.All the accused persons except 1st accused gave sworn statement in evidence.

42.**Kesue Ole Sururu (1st Accused)** stated that he was a security guards' supervisor at Muthera farm and that on 9th October, 2014, he woke up as usual and assigned duties to his supervisees at Muthera farm.

43.Around 10:00 AM, he took a motor cycle and went to Mwisho wa Lami Centre to fetch drinking water that was usually supplied by CDF. When he returned, he found Administration Police Officers (Aps) on site and gave them his motorcycle for patrol purposes. They returned around noon and he stayed in the office until 5:00 PM, when he heard from a colleague that someone had been killed near Ole Polos. He then went home.

44.On 10th October, 2014, Njoro Police Officers came to his office and randomly picked him and others up. They were taken to Mau Police Station. From there, they were taken to Njoro Police Station where they arrived around 6:00 PM. They were accused of killing someone in Ole Polos and told that they would be charged with murder, but he denied any knowledge of the murder.

45.**Lanoi Ole Simpri (2nd Accused)** testified that on 9th October, 2014, at around 8:00 AM, he left Muthera Farm, where he was the Security Supervisor with 25 guards under him. Since he was unwell, he went to Mau

- Narok Hospital but he did not find any doctor in the morning. He was only attended to at around 1:00 PM and returned to the farm around 3:00 PM.
46. At around 4:00 PM, he was at a centre near the farm while in company of Nasyika Taga and James Esho. He heard news about an incident at Muthera Farm. He immediately went to the farm. The police arrived shortly after. He informed them he did not know what happened as he had been away.
47. The following day, police from Nairobi came and asked them to record statements. He told them he had been at the hospital the previous day. However, they were later arrested and taken to Njoro police station and charged with murder.
48. He maintained that he did not know the deceased but was aware of a land dispute between his employer, Koinange, and the mpoye family, for whom the deceased worked. He stated that the murder scene was about two kilometers outside Muthera Farm and that he did not go there. He also claimed that Muthera Farm guards do not arm themselves with bows and arrows. He affirmed that the Mpoye workers know him very well and that the disagreement was between their bosses not themselves.
49. **Alfred Otieno (DW3)**, a Clinical Officer at Mau Narok Health Center, testified pursuant to a court summons dated 3rd March, 2022, to produce medical records. He confirmed that Philip Simpiri (Accused 2) attended the clinic on 9th October, 2014, as a follow-up client who had been given an appointment for that day. He produced the clinic card (Exhibit 1A) and confirmed it corresponded with the hospital card (Exhibit 1B).
50. He stated that a doctor was present between 8:00 AM and 1:00 PM on 9th October, 2014, but that the time a client is seen is not recorded.
51. **Daniel Nkoito Tiapakel (3rd Accused)** told the court that on 9th October, 2014, he was working as a security guard at Muthera farm with 25 other guards, including 4th accused, Dickson Tayaya, and Paul Nkuruma.
52. Around 8:00 AM, the manager, Dennis, instructed him and two others to check on people working on a nearby farm that was part of Muthera Farm.

- 53.They confirmed that the farmer, John Thiongo, still had a valid lease and reported back to the manager around 10:00 AM. They then remained in the office, ate lunch around 1:00 PM. They then went to Mwisho wa Lami centre at around 2:00 PM, where he parted ways with 4th Accused.
54. Around 5:00 PM, people began asking him about an incident at Muthera, and he learned about a killing from the news around 7:00 PM. He returned to Muthera around 8:00 PM and met APs who told him that someone had been killed and a body found outside Muthera Farm.
- 55.The next day, police from Njoro and Nairobi came and arrested them after recording statements, charging them with murder. He claimed he was not at the scene where the deceased was allegedly killed.
- 56.**Rayan Dapash (4th Accused)** testified that on 9th October, 2014, he was at the Muthera Farm office in the morning hours while in company of Nkuito (3rd Accused), Paul Nkuruma, and Dickson Tayaya. They were instructed by the manager to check on people working on a parcel of land and confirm the validity of their lease.
- 57.After confirming that the lease was valid lease, they had lunch and then went to Mwisho wa Lami Centre, where he parted ways with Nkuito.
- 58.He went to a restaurant and watched the 7:00 AM news about an incident at Muthera. He returned to the farm and slept. The next morning, two police vehicles arrived. He and others were taken to Mau Narok then Njoro police station where they recorded statements . They were charged. He denied killing the deceased, stating the death did not occur at Muthera Farm and he was not at the murder scene. He denied being armed with bows and arrows that day.
- 59.**James Esho (DW6)**, a farmer and a resident of Narok, testified as the witness of the 2nd accused person. He told the court that on 3rd October, 2014 at about 2.00 - 4.00 pm, he met the 2nd Accused coming from hospital and they went to a hotel. They watched citizen news that there was trouble at Muthera farm. He then parted ways with 2nd Accused as he was an employee in the farm.

60. In cross examination, he testified that he only met the 2nd accused as a friend and that he took some of the drugs when they got to the hotel. He testified that he did not know where the 2nd Accused was before 2.00 pm.
61. He testified that the 2nd Accused had worked in the said farm for about 5 years. He maintained that he saw the news at the hotel but he did not visit the farm. On re-examination, he testified that the 2nd accused had just alighted from a Matatu when he met him.
62. **Nasioki Ole Taga (DW7)**, testified that he was a farmer and a resident of Narok and a witness of the 2nd Accused. He stated that on 9th October, 2014 between 2.00 pm and 3.00 p.m., he was in a hotel taking tea at Mwisho wa Lami in Mau Narok in company of James Esho and Nasio Kitaga, when he heard news on Citizen radio that there was trouble at Muthera farm. They then parted ways and Lanoi went to the farm.
63. On cross examination, he explained that James Esho was from his area. Reiterating that he found James and the accused in the hotel, he told the Court that their meeting was a coincidence. They did not plan to meet in the hotel.

Prosecution's submissions

64. The prosecution focused on refuting the alibis and testimonies of the four accused persons, highlighting inconsistencies and lack of supporting evidence in their respective accounts.
65. The prosecution relied heavily on the testimony of PW5, who claimed to have identified the four accused persons among six attackers and specifically alleged that the 2nd Accused, (Lanoi Ole Simpiri), shot an arrow that struck the deceased in the leg, and the 4th Accused, Raya Dapash, poured petrol on the house, causing burns to PW5's arm.
66. The prosecution argued that the 1st Accused (Kesue Ole Sururu), who stated he was at Muthera farm and later at home on the day of the incident, failed to call witnesses such as the AP officers he allegedly gave his motor cycle or a work colleague, to corroborate his alibi.

67. Further, the prosecution submitted that pointed that the 1st Accused's claim of using a motorcycle that day coincided with PW5's statement of seeing him and others on a motorcycle.
68. It was submitted that though the 2nd Accused (Lanoi Ole Simpiri) claimed to be at Mau Narok hospital for treatment on the day of the murder and provided a hospital card and prescription form, there were gaps in his alibi, such as his failure to call his supervisor (Dennis) to confirm permission to leave and contradictions between his testimony and that of a clinical officer regarding the doctor's presence and consultation time.
69. Furthermore, the prosecution submitted that there inconsistencies in the testimonies of the 2nd Accused's witnesses, James Esho (DW6) and Nasioki Ole Taga (DW7), regarding when and where they met the 2nd Accused. The prosecution further argued that PW5 directly contradicted the 2nd Accused's alibi, stating he saw him (2nd accused) at the scene.
70. In respect to the 3rd accused (Daniel Nkuitio Tiapukel) and 4th Accused (Raya Dapash), who claimed to be at Muthera farm office, then on patrol, and later at Mwisho wa Lami center, the Prosecution argued that they too failed to provide corroborating witnesses like Dickson Tayaya and Paul Nkuruma. It was submitted that their alibis do not account for their presence at around 2:00 PM, when the attack occurred.
71. While asserting that the testimonies of the four Accused persons lack credibility, the prosecution argued that PW5, being a victim and knowing the Accused well, provided direct and specific identification of the attackers and their actions, which took place in broad daylight.
72. Further, the prosecution contended that the actions of the four Accused persons demonstrate a common purpose to cause harm, maim, or kill, leading to the deceased's death as described under Section 21 of the Penal Code. It was the Prosecution's position that there direct evidence and lack of credible defence from the Accused persons. Therefore, the Prosecution urged this Court to convict all four Accused persons.

Defence's submissions

73. Emphasis was laid on three elements that the prosecution must establish in a case of murder to warrant a conviction: the death and cause of death of the deceased, that the accused caused the death through an unlawful act or omission, and that the accused possessed the intention to cause harm or kill (malice aforethought).
74. The defence contended that the evidence against the Accused is purely circumstantial and stemming solely from PW5's testimony, which they deem questionable due to the existing hostility between the two groups involved.
75. Citing several cases, including the High Court decision in **Republic v Ali Suleiman Ali [2021] eKLR**, the Defence highlighted that circumstantial evidence must be meticulously examined, especially when other co-existing circumstances could weaken or destroy the inference of guilt. In that regard, they pointed out inconsistencies in PW5's account, such as his description of the house and the contents of the jerrican, which were contradicted by police findings.
76. On admissibility of the 2nd Accused's alibi defence, it was submitted that he presented a credible alibi, stating he was at the hospital and later at Mwisho wa Lami on the day of the incident, supported by his treatment notes and the testimonies of DW6 and DW7. Hence, the burden of proving the falsity of an alibi lies with the prosecution.
77. In support of that line of submissions, reliance was placed on the case of **Victor Mwendwa Mulinge vs R [2014] eKLR** and **Karanja vs R [1983] KLR 501** on this legal principle. In addition, it was submitted that since the Prosecution did not rebut the 2nd Accused's alibi, then it is the defence's submission that the 2nd Accused could not have been at the scene as alleged by PW5.
78. On identification of the Accused persons, the Defence highlighted the significant tension and bad blood between the Muthera farm and the Mpoe family, a fact confirmed by several prosecution witnesses such as PW5, PW8 and PW9.

79.They argued that PW5's identification of the Accused is unreliable because the names are common in the area, and no identification parade was conducted. It was argued that, given the animosity between the parties, the Defence submitted that it was possible that PW5 was attempting to settle scores. The defence further cast doubts on PW5's ability to witness the incident from a mud hut with a single door, especially since no photographs of the house were produced to support his claim of seeing through cracks.

80.On whether the Prosecution proved their case beyond any reasonable doubt, it was asserted that it failed to meet the high standard of proof required in criminal cases. Citing *Muthini v Republic (Criminal Appeal 15 of 2023) [2024] KEHC 2182 (KLR)* and *Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR*, the Defence argued that guilt must be the only rational inference from the evidence.

81.They emphasised that if there is any reasonable possibility consistent with innocence, the court must find the accused not guilty, and even a single circumstance creating reasonable doubt is sufficient. On that basis, it was submitted that the consistent testimonies of the Accused persons, particularly the 2nd Accused's un rebutted alibi, are presented as tangible evidence creating doubt that should be granted to the accused.

Analysis and determination

82. This Court has considered the evidence adduced by both the prosecution and the defence together with their rival submissions. For emphasis, the offence of murder is defined under Section 203 of the Penal Code thus:-

“ Any person who, of malice aforethought caused death of another person by unlawful act or omission is guilty of murder.”

83.It is therefore this Court's duty to analyse that evidence to determine whether the charge of murder was proved beyond any reasonable doubt. To prove said charge, the prosecution must prove beyond any reasonable doubt the three elements of a charge of murder, that is:-

a) The death of the deceased and the cause of that death.

b) That the death was a result of an unlawful act.

c) That the accused persons were the perpetrators of the unlawful act.

d) That the accused persons had malice aforethought.

84. As to the **proof of and cause of death**, there is no dispute that the deceased actually died on 9th October, 2014. PW1 found him lying on his back and bleeding from the leg. He told her that he had been beaten by unknown people. PW4 also found the deceased bleeding profusely from the leg. Despite their attempts to transport him for medical help, the deceased succumbed to his injuries before reaching a hospital.

85. PW3, PW5 and PW7 testified that the injury was caused by an arrow, leading to his death on the same day. The Post-Mortem Report produced by Dr George Biketi (PW6) shows that the deceased had an injury on the popliteal region of the right leg, with dark blood oozing. He had superficial bruises in the right peripheral region and the right femoral region. He had a transected popliteal vessel in his right femoral region. On his head, he had a sub-scapular injury on the occipital region with a hematoma. However, the cause of death was massive haemorrhage due to transection of the popliteal vessels on the right leg. Accordingly, this Court is satisfied that the deceased's death was caused by unlawful means.

86. **On the identification of the perpetrators**, the majority of the witnesses had no direct knowledge of the event. Noor Meiseyieki Ene Lomara (PW1) found the deceased near the river and bleeding but she could not identify the attacker. The deceased's brother, Martins Ole Keshe (PW2), and Joseph Kakore Ole Mpoe (PW3) were only informed of the incident. Similarly, Raampal Ole Kamoru (PW4) found the injured deceased but did not know who caused the injury.

87. The investigating officers and those involved after the fact, including CI Joseph Mchembe (PW7), Samuel Nyakenyania Mbeche (PW8), APC Francis Ndambuki (PW9), and Patrick Muriuki (PW10), did not witness the murder.

88. The Prosecution therefore relied heavily on the evidence of Saidi Ole Mosolony (PW5), who was the sole eyewitness. He claimed to have been with the deceased on the material date. He alleged that the two of them went out of their house, and that is when he saw about six (6) armed people approaching on two motorcycles, and they included uniformed police officers. That some were armed with bows and arrows, and two with rungun.
89. PW5 quickly retreated into his temporary Maasai house and locked himself in, leaving the deceased seated outside. PW5 peeped through a hole in the temporary Masai house, and he saw the 2nd Accused (Lanoi Ole Simpiri), shoot the deceased in the leg using an arrow, while the 4th Accused (Dapash) poured petrol from a yellow jerry can onto his house, which was then set ablaze, and he sustained burn wounds. He managed to put out the fire using his jacket.
90. However, during cross-examination, he admitted having recorded in his statement to the police that the fire went off on its own. Further, he told the Court that he heard the deceased cry out that he had been hit. He stated that the deceased remained outside, pleading for his life. That the deceased tried to run for help.
91. PW5 went on to say that the incident occurred in broad daylight, enabling him to clearly see the assailants, whom he identified as four security guards from Muthera Farm. He saw them through the holes of the manyatta house, and he saw that the police took photographs. However, none were produced as exhibits.
92. The alleged poisoned arrow that the deceased pulled from his wounded leg, as stated by PW5, was allegedly handed over to the police. However, the Report by the Government Analyst James Michel Welimo, who carried out the toxicological analysis of exhibits he received, that is: blood, urine, liver, lungs, muscle tissue, kidney, stomach, blood-stained piece of cloth, arrowhead, stated that no chemically toxic substances were found in the post-mortem samples and the arrowhead submitted.

93. In his statement to police, PW5 named the person who shot the deceased with an arrow is one Sururu. At the same time, he testified that it was Simpiri who shot the deceased.
94. Further in his evidence in chief, he told the court that he saw a group of about six (6) people coming in motorbikes and he knew them. That accused 2 was riding on a motor bike. That each motorbike was carrying three people. That “ ***after they set the house on fire and shot the deceased, all the men got onto the motorbike and went away. It was 8 civilians who came with two uniformed police officers.***” Further, he claimed that they were ***attacked by seven (7) men.*** It is not clear how far the attackers were from the manyatta so that PW5 could see the 2nd accused shoot the deceased.
95. Even if he claimed to have known all the accused persons for a long time, the circumstances under which he purported to identify the attackers and the 2nd accused as the person who shot the deceased were not conducive either.
96. Further, though he testified that the house was set alight and that he managed to put out the fire using his jacket, he told the court during cross-examination that the fire went out on its own. On the other hand, he admitted saying that he saw Kisoï put out the fire using water.
97. Further, though he testified that he sustained only a burn mark on his right hand for which he went to Mau Hospital the next day, he told the Court that one of the attackers shot him on the left hand, but he was not treated for the injury. He admitted that in his statement to the police, he never mentioned the burn injuries or burns on his hand.
98. He did not have medical documents in court. He denied being a false witness. His statement was produced as an exhibit in court upon application by the defence. Further, though PW5 talked of petrol in a jerrican having been used to set PW5’s house ablaze, the Government Analyst’s Report by James Michael Welimo B.SC produced as an exhibit in this case shows that the liquid in the jerrican was analysed and found to contain water, a universal solvent. In the circumstances herein, the contradictions by PW5 make him an unreliable witness in this case.

99. PW3 alleged to have been told by his worker, one Saidi Mushe that the 3rd Accused brought a gang that attacked them and shot Ole Keshe at his home. PW3 however admitted to a long-standing land dispute with Muthera Farm but denied fabricating evidence. His claim that he was told that Administration Police officers supported the attackers remains as hearsay evidence.

100. It is clear from the record that there was a long-standing dispute between the two families over land, and on the material date, both sides were armed with arrows. Indeed, PW9's testimony was that workers from both Mpoye and Muthera farms were armed with bows and arrows earlier on the day of the incident. They were engaged in a dispute over ownership of the land. Further, the information Martin Ole Kesha (PW2) received from the deceased's employer was that the deceased had been involved in a fight and got injured.

101. One arrow indeed caused the death of the deceased, which is unfortunate but from which side of two families was the arrow that shot the deceased? According to PW1, she found the weapon nearby. On his part, PW3 stated that they found the arrow at the scene, and the police took it. PW7 on the other hand told the Court that the murder weapon (an arrow) was found about 70 meters from the structures.

102. According to PW10, the arrow was not on the body of the deceased when he was recovered. It was handed over to him by the OCS, who in turn told him that he got it from C.I Kaptich. C. I Kaptich did not record a statement and did not testify, although he was an important witness in this case. In the circumstances herein, it is not proven that the arrow that was handed over to the police is the one that shot the deceased.

103. Regarding alibi defence, the Court of Appeal in *Erick Otieno Meda v Republic [2019] eKLR* had this to say:-

“In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused

to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.”

104. In this case, the burden of proof did not shift to the defence. With the contradictions noted in the prosecution case, the accused persons defence raises a possibility that it could be true. There is no burden on the accused persons to prove their alibi defence.

105. Regarding doubt in a case against an accused person, Mativo, J (as he then was) had this to say in *Elizabeth Waithiegeni Gatimu* (supra) :-***“The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him ...”***

106. In this case, the prosecution had the burden of proving its case to the standard required by law. This being a criminal case, this Court can only rely on the strength of the prosecution's case, not the weakness of the defence. With the prosecution having failed to discharge that burden, the doubt herein is resolved to the benefit of the accused persons.

107. In conclusion, therefore, each of the Accused persons are acquitted of the charge herein.

Dated, signed and delivered at Nakuru this 7th Day of May, 2026.

**PATRICIA GICHOHI
JUDGE**

In the presence of:

Ms Anyumba for the State

Mr. Mongeri for the Accessed persons.

All accused persons

Erickson , Court Assistant