

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 47 OF 2015**

**REPUBLIC**  
**VERSUS**

**KIILU NDUVA ..... 1<sup>ST</sup>**  
**ACCUSED**

**MULWA NZIOKA ..... 2<sup>ND</sup>**  
**ACCUSED**

**BENEDICT NZOMO ..... 3<sup>RD</sup>**  
**ACCUSED**

**MUTINDA NDUNGE ..... 4<sup>TH</sup>**  
**ACCUSED**

**JOHN NZOMO MUINDI ..... 5<sup>TH</sup>**  
**ACCUSED**

**BENARD MWENDO MUSYOKA ..... 6<sup>TH</sup>**  
**ACCUSED**

**JUDGMENT**

1. The Accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63, Laws of Kenya. The Information stated that on 29<sup>th</sup> December 2014 at Kivae in Athi River Sub- County within Machakos County, they jointly murdered Jackson Maungu John (the deceased).

2. They pleaded not guilty to the charge and the prosecution called a total of eleven witnesses in a bid to prove their case.
3. PW1, Victor Mbinda Muinde, a Jua Kali artisan from Machakos Kiandani, testified that on 31<sup>st</sup> December 2014, while working on a fence at the farm of Mzee Ngelai (Plot No. 2334), he received information from one Muoki that Baba Marion (the deceased) had been killed on the same farm. He stated that he knew the deceased personally, as they came from the same area, and that his father was a friend of the deceased.
4. PW2, Daniel Muoki Morris, a technician from Machakos, testified that on 29<sup>th</sup> December 2014, he was requested by Mr. Mbinda (PW1) to assist him in fencing work alongside the deceased. While they were surveying the farm, he heard commotion from a group of people approaching them. Out of fear, they began to flee, but the deceased was obstructed by another fence and fell down. PW2 testified that the mob caught up with the deceased and assaulted him using rungas, pangas, and stones. He identified some of the assailants as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, noting that the group consisted of about five people. He further testified that he knew the accused persons as they were from the same locality.

5. PW2 stated that he reported the incident at Mavoko Police Station, along with members of the deceased's family. He later attended an identification parade where he identified the accused persons and recorded his statement with the police. He testified that he had known the deceased all his life, as they hailed from the same neighbourhood, and described the deceased as a family man with four children. Upon cross-examination, PW2 stated that he no longer resides in Kivae. He confirmed that the farm where they were working belonged to one Mr. Ngelai, and that they arrived there at around 6:00 p.m. to survey the land. He noted that the crime scene was approximately 500 metres from the nearest police post. According to him, the attackers were a mob of about 50 to 60 people who approached from different directions. He testified that he initially stood still but upon seeing the group, started running away. He stated that he recognized the 1st accused person and knew the others by appearance though not by name.

6. PW2 further testified that he could not clearly identify the specific weapons used, only that he saw the assailants' hands moving as they struck the deceased. He estimated that he stood about 30 metres away from the scene and could see the accused persons assaulting the deceased at around 6:30 p.m. He added that no police officer came to

the scene at that time and confirmed that he later identified the accused persons during an identification parade conducted at the police station.

7. PW3, David Ndolo Ngilai, testified that he works with Malili Ranch as a Committee Director. He stated that on 12<sup>th</sup> December 2014, he met Victor Muinde (PW1), whom he requested to fence his farm located at Lukenya, Plot No. 2334/3, Kenania. He explained that the arrangement was for the land to be surveyed first before they could agree on the fencing costs. PW3 further testified that he later learnt that Muinde had proceeded to the site and while visiting the farm, he was chased away by squatters and his companion was beaten to death. He stated that Muinde informed him that he had reported the incident to the police and that he was also required to record a statement, which he subsequently did.
8. Upon cross-examination, PW3 testified that he only knew that Muinde had gone to the farm and later informed him that they had been attacked by squatters and that his companion had been killed, though he did not know the identity of the deceased. He confirmed that he holds the original title deed to his property, Title No. 2334/3, and that there was no pending court case in relation to the said land. He stated that he was not aware of any group known as

Kivae Residents Organisation, but he is a member of Lukenya Ranching and Farming Cooperative Limited. He further testified that his title deed has never been cancelled by the National Land Commission, and that the land is currently idle, with grass and trees. He added that he had built a house on the land, but squatters removed the roof, and continued to disturb him. PW3 concluded that he learned of the deceased's death on 26<sup>th</sup> January 2015.

9. PW4, (No. 200811297), Inspector Dominic Mureithi Wanjohi testified that on 30<sup>th</sup> December 2014 at about 1300 hours, he received information from Victor Mbinda (PW1) that someone had been attacked at the Kivae area, although the victims' condition was unclear. Acting on this report, PW4 proceeded to the scene, accompanied by officers, and after a search, they discovered a male body lying by a fence near Kisima Park. The body had multiple deep cuts and severed parts. PW4 testified that he immediately informed the OCS, Athi River, and secured the scene. At about 1800 hours, officers from Athi River Police Station arrived and took over the scene. He stated that he did not personally know the deceased but later recorded his statement regarding the incident.

10. Upon cross-examination, PW4 testified that he received the report from Victor at around 1300 hours. Although he was

not aware how Victor obtained his contact, he noted that police officers always often share their numbers during barazas, making it accessible to the public. He confirmed that he proceeded to the scene immediately after the call and found the body near a fence at Kisima Park. He stated that he did not know who had killed the deceased and could not tell the exact time of death. He further testified that there were land problems in the Kivae area between persons holding title deeds and squatters, although he was unaware whether any titles had been cancelled.

11. PW5, Inspector Nobert Magoha, testified that he was attached to the Athi River Police Station, performing general police duties. He stated that on 30<sup>th</sup> December 2014, at about 1800 hours, while at the station, he received a call from the OCS, Chief Inspector Gitau, instructing him to visit a scene of a sudden death within the Daystar area. He was directed to meet Inspector Mureithi (PW4) at the scene. PW5 testified that he proceeded there in the company of a police driver and Constable Sabwa. Upon arrival at Daystar, he met Inspector Mureithi, who directed them to the scene of the alleged murder near Kisima Park where they found the body of an unidentified male with multiple deep cut wounds. He observed that the killing appeared to have occurred the previous day, as the blood had already dried and there was a slight odour. They

photographed the scene, retrieved the body from the bush, and transported it to the Machakos Level Five Hospital Mortuary. Thereafter, he returned to the station and later recorded his statement.

12. PW5 stated that the deceased was initially unknown to him but was later identified by relatives as Jackson Maundu. Upon cross-examination, he testified that he did not know when the first report about the incident was made, but that he personally received instructions on 30th December 2014, and immediately proceeded to the scene, arriving at about 1800 hours. He acknowledged that there were numerous land disputes within the Kivae area, and that the situation had been volatile at the time, though it had since calmed. He further testified that he knew one of the accused persons, Benedict Ndunda Nzomo, from a previous occasion when the latter had lodged a complaint that people were harassing them at Kivae. He stated that the accused had not mentioned any police officer in his complaint but had expressed frustration that police officers were not assisting with the land issues. PW5 confirmed that the scene of the murder was bushy and added that he was aware that Benedict Ndunda Nzomo had a pending robbery case before the Mavoko Court.

13. PW6, Vincent Nguyo John, a mechanic from Mumbuni, Machakos, testified that he knew Jackson Maundu John (the deceased). He recalled that on 7<sup>th</sup> January 2015, he went to the Machakos Level Five Mortuary in the company of his niece, Katunge, where they confirmed that one of the bodies there was that of their brother, the deceased. He testified that the body had visible injuries on the head and that one eye had been gouged out. Thereafter, they went home, and the burial was subsequently conducted. PW6 later recorded his statement with the police.
14. PW7, Alphonse Musembi, a resident of Mumbuni area in Kamoo Village, testified that he operates a motorcycle taxi business. He stated that on 29<sup>th</sup> December 2014, he had been engaged to assist in fencing a plot of land in the Kinanie area. Upon arrival at the site, a large group of people armed with pangas suddenly appeared and attacked them. He testified that the deceased, who was in his company, was unable to escape and was surrounded and assaulted by the mob. PW7 stated that he identified the 1st accused person as the one who gave orders to the crowd to kill the deceased. He further testified that the 2<sup>nd</sup> accused was armed with a panga, the 3rd accused carried a large stick, while the 4<sup>th</sup> and 5<sup>th</sup> accused were armed with stones. He told the court that he witnessed the accused persons physically attacking the deceased.



15. PW8, Stephen Muli Wathome, a motorcycle taxi operator from Mumbuni, testified that on 29<sup>th</sup> December 2014, he was called by Muoki (PW2) and requested to join him for a fencing job within the Athi River area of Kinanie. He testified that he met Muoki at Kimongo and was accompanied by Alphonse Musembi (PW7) and the deceased. They proceeded to the land to survey it and to determine the labour costs. Shortly thereafter, a group of about ten people arrived, armed with pangas, bows and arrows, and stones.
16. PW8 testified that from where they stood, they were able to identify some of the attackers. He stated that he saw the 3rd accused attack the deceased using a panga, while the 4th accused whom he identified in court had a walking stick which he used to strike the deceased. He also mentioned that there was a woman among the attackers who was not before court. He stated that he had known some of the attackers from his previous work at Kimongo area and clarified that he had no personal differences with them prior to the incident. He testified that they fled for their safety and went home afterwards. The following day, Muoki informed him that the deceased had died, and he subsequently recorded his statement with the police.

17. Upon cross-examination, PW8 testified that they reached the farm at about 6:00 p.m., accompanied by Alphonse Musembi (PW7), Maurice Muoki (PW2), and the deceased. He stated that they travelled by public service vehicle to Athi River, from where they took motorcycles to the farm. He denied the suggestion that they had travelled by a private car. He testified that shortly after arriving and beginning their survey, a crowd appeared and chased them away.
18. He stated that although darkness had begun to set in, he was still able to see the 4th accused in the dock attacking the deceased. He could not recall the specific clothing worn by the 4th accused, but confirmed that the 3rd accused was armed with a panga, though he could not remember his attire either. He estimated the number of attackers to be about ten in number. PW8 testified that he mentioned the names of some attackers in his statement to the police. He confirmed that an identification parade was conducted during which he identified the 3rd and 4th accused persons. However, he could not recall whether the officer conducting the parade gave them any warnings or instructions beforehand.
19. He further stated that he left the responsibility of reporting the incident to the police to Muoki (PW2). He

clarified that although the deceased had chest problems, he was not intoxicated on the material day, contrary to the allegations. He testified that one of them had a torch, but he did not see anyone use it towards the direction of the attackers. In his view, it was not sufficiently dark to necessitate the use of a torch, although he could not confirm whether Musembi (PW7) had used one. PW8 stated that he had previously worked in the Kimongo area, but had not heard of any land disputes there, and that he did not own land in that area. He concluded by stating that he did not know the motive behind the killing of the deceased.

20. PW9, Dr. Waithera Githendu, a Consultant Pathologist at Machakos Level Five Hospital, testified that on 7<sup>th</sup> January 2015, she conducted a post-mortem examination on the body of the deceased after it had been identified by two relatives. She stated that upon examination, the deceased's body had multiple cut wounds located on the scalp, shoulders, left knee, left leg, lower and upper limbs, as well as fractures of both the limbs, the 8<sup>th</sup> rib, and the upper spine. She opined that the cause of death was multiple penetrating deep cut injuries, consistent with the use of a sharp object, which also caused the noted fractures and wounds. PW9 produced the post-mortem report dated 7<sup>th</sup>

January 2015, which was marked and produced as an exhibit.

21. During cross-examination, PW9 stated that the body was partially decomposed, particularly the skin. She explained that it was not possible to determine the specific factors that caused the decomposition, noting that decomposition can begin shortly after death depending on climatic conditions such as temperature and humidity. She added that, theoretically, the degree of decomposition could be consistent with the prevailing climate at the time. The injuries observed were consistent with those inflicted by a sharp weapon, such as a panga.

22. PW10, Chief Inspector (CIP) Lilian Otieno, testified that in 2015, she was serving as the Deputy DCIO at Athi River Police Station. On 26<sup>th</sup> March 2015, at about 4:30 p.m., she received a request from the investigating officer, IP Lilian Mutinda, to conduct an identification parade involving three murder suspects, Mulwa Nzioka, Benedict Ndunda Nzomo, and Kiilu Nduva Makite.

23. She testified that she began with the first suspect, Mulwa Nzioka, whom she briefed on the purpose of the parade. The suspect consented to the process and was informed of his right to have a relative or friend present during the parade, which he declined. She then assembled eight other

individuals of similar physical appearance to which the suspect, raised no objection. PW10 testified that three witnesses were scheduled to participate in the identification exercise, starting with Daniel Muoki (PW2). The witnesses were kept separately in the office of the officer in charge of crime, while the suspects were held in the cells, approximately 50 metres apart, to prevent interaction.

24. She stated that the first witness, Daniel Muoki, identified the suspect by touching him on the shoulder, after which the suspect remarked, "Niko sawa." The suspect was then allowed to change position within the parade and opted to stand between the 2<sup>nd</sup> and 3<sup>rd</sup> members. The second witness, Alphonse Musembi (PW7), also positively identified the suspect by touching his shoulder, and the suspect again remarked, "Sawa." The suspect then switched positions a second time, choosing to stand between the 6<sup>th</sup> and 7<sup>th</sup> members of the parade. The third witness, Stephen Muli Wathome (PW8), however, did not identify the suspect, and the suspect once again remarked, "Sawa."

25. PW10 testified that at the conclusion of the exercise, she asked the suspect whether he was satisfied with the manner in which the parade had been conducted. The suspect responded that he was not satisfied, but did not

provide any reasons for his dissatisfaction. Nevertheless, he signed the parade forms, which PW10 produced in evidence as Exhibit 2(a).

26. PW10 further testified that she conducted similar identification parades for the other suspects, namely Benedict Ndunda Nzomo, Kiilu Nduva Makite, John Nzomo Muindi, and Bernard Mwendwa. She produced the corresponding identification parade forms as Exhibits 2B, 2C, 2D, and 2E, respectively. Upon cross-examination, she stated that the investigating officers had shown her the suspects beforehand which enabled her to source suitable members of the parade. She stated that the witnesses were kept at the office of the Officer Commanding Crime, located approximately 10 metres from the cells where the suspects were held. She ensured that the witnesses had no contact with the suspects or with each other after participating in the parade exercises.

27. PW10 confirmed that the office of the Officer Commanding Crime is a private one. She testified that she had briefed the witnesses prior to each parade but did not record this on the parade forms. She noted that the suspects were allowed to change positions after each round, and although she made comments during the exercise, the remarks section of the parade forms did not reflect them. She

testified that the witnesses identified the suspects by touching them on the shoulder, but she did not record the specific part of the body touched, explaining that in her view, it was not necessary to indicate that detail.

28.PW11, Inspector Lydia Mutinda (No. 235716), testified that on 16<sup>th</sup> January 2015, she was informed by the Officer Commanding Station (OCS), Athi River, that a murder case had been reported, and she was assigned to investigate the matter.

29.She told the court that upon commencing investigations, she recorded statements from witnesses indicating that the deceased had been overpowered and killed by a crowd while undertaking fencing work at a plot of land. She further testified that, as part of her investigation, she organized identification parades for several suspects, during which the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> accused persons were identified by witnesses.

30.At this stage, the prosecution closed its case. Upon appreciating the prosecution evidence on record, Justice D. K. Kemei delivered a ruling in which he found that the accused persons had a case to answer and accordingly placed them on their defence. Each accused person elected to give sworn evidence in their respective defences. A total of 7 persons testified for the defence.

31. It is noteworthy that from the record of proceedings, it was brought to the attention of the court on 25<sup>th</sup> July 2018 that the 4<sup>th</sup> accused person had passed away and this fact was duly noted and recorded by the court. The 1<sup>st</sup> accused is also recorded as having passed on.

32. DW1, Mulwa Nzioka, the 2nd accused person testified that he did not know the true identity of the deceased. He stated that on 28<sup>th</sup> December 2014, he was at his home in Kivae Village, within Athi River Sub-County. Earlier that day, he had attended to his farming and dairy activities, thereafter returned to his house at about 4:00 p.m., and later retired to bed at 9:00 p.m. He stated that he was in the company of his wife and daughter throughout. He testified that there were ongoing land disputes in the area, and that certain individuals were attempting to grab the land occupied by residents. According to him, these individuals offered residents Kshs.100,000/= each as compensation to vacate the land, but he declined the offer. He further stated that, as a result, he was charged at the Mavoko Law Courts together with the 1<sup>st</sup> and 3<sup>rd</sup> accused persons in Mavoko PMC Criminal Case No. 1776 of 2015, where they were accused of forceful detainer and the complainant was Desire Land Company Limited. He produced a copy of the charge sheet in that case as



Defence Exhibit 1 and testified that he was later acquitted of that charge.

33.DW1 further testified that an identification parade had been conducted by the police, but he was dissatisfied with the process and made his comments on the parade form. He maintained that he had been falsely implicated in the present case due to his vocal opposition to the alleged land grabbing and because he was perceived as one of the leaders of the villagers who resisted eviction.

34.Upon cross-examination, DW1 stated that he holds a title deed to the land, although he did not produce it in court. He admitted that there is an ongoing court case concerning the same land. He also stated that he was not aware of anyone who had died in the area in connection with the disputed land.

35.DW2, Kiilu Nduva, the 1<sup>st</sup> accused person testified that he did not know the deceased and denied any involvement in his death. He stated that on 29<sup>th</sup> December 2014, he was at his home, tending to his cows, and that he had witnesses, including one Ndunda, who could confirm his presence at home on that day. He testified that certain individuals were attempting to grab their land, and that there is an active High Court Case No. 560 of 2000 in Nairobi concerning the disputed property. He stated that he does not know his

exact age but estimated it to be between 70 and 80 years. He maintained his innocence, reiterating that he did not kill anyone as alleged. He further testified that he does not possess formal ownership documents for the land he occupies, as it belonged to his late father, who had lived on for approximately ten years.

36.DW3, John Nzomo Muindi, the 5<sup>th</sup> accused person, testified that he had no knowledge of the alleged murder. He stated that on 29<sup>th</sup> December 2014, he was working with Consolana Stones Company as a driver, ferrying stones from Katangi to Bamburi. He left work at around 7:00 p.m. and returned home to join his wife and children. He testified that he believed his prosecution arose from land disputes in the Kivae area. He clarified that he does not personally hold title to any land, as the property in question belongs to the Kivae Residents Organization.

37.He further testified that the identification parade conducted by the police was improperly carried out, as the witnesses who picked him out had already seen him beforehand. He stated that he objected to the manner in which the parade was conducted, as he had requested the presence of an independent observer, but his request was denied. He expressed his dissatisfaction with the entire process. DW3 stated that he relied on the evidence of his

co-accused, Benedict Nzomo Ndunda, the 3<sup>rd</sup> accused person, in support of his defence. He produced a gate pass, marked as Defence Exhibit 2, showing that he was on duty on the material day. Upon cross-examination, he confirmed that Defence Exhibit 2 was neither dated nor stamped. He also referred to Defence Exhibit 3, comprising documents in which he had been sued, to demonstrate his involvement in the ongoing land dispute.

38. DW4, Bernard Muendo Musyoka, testified that on 29<sup>th</sup> December 2014, he left his home to join his son, Sebastian, at Athi River following a domestic dispute with his wife. He stated that he arrived at Athi River at around 1:00 p.m., met other relatives and stayed with them until 9:00 p.m., after which he returned to his home in Kivai the following day. He testified that he did not receive any report of a death having occurred in the area on that day. He further testified that his co-accused persons were his neighbours, and that he had lived on the disputed land for over 20 years, as the land belonged to the Kivai Residents Association. He told the court that some wealthy individuals had shown interest in the land and sought to evict them, leading to frequent conflicts.

39. DW4 testified that he was dissatisfied with the identification parade, stating that he was forced to

participate in it. He narrated that he was arrested at night, during which his house was demolished and his property stolen. He further testified that he was the Vice Secretary of the Kivai Residents Association and believed he was targeted for arrest because of his leadership position. He stated that the wealthy individuals offered residents Kshs. 100,000 as an inducement to vacate the land, but he refused to accept the offer, and believed that this case was a consequence of his resistance. Upon cross-examination, he confirmed that the Association did not have a title to the land and that its members had occupied it as squatters for about 20 years, during which frequent disputes had occurred.

40.DW5, Benedict Ndunda Nzomo, the 3<sup>rd</sup> accused person, testified that on 29<sup>th</sup> December 2014, he woke up at his home in Kivai and later proceeded to Mavoko Law Courts for a hearing in a robbery with violence case in which he was an accused person. However, the hearing did not proceed as it was adjourned. He corroborated DW4's testimony regarding the land dispute, stating that he served as the Coordinator of the Kivai Residents Association. He testified that the Association had been engaged in a long-standing struggle against unlawful evictions by individuals claiming ownership of the land.

41. DW5 produced Defence Exhibit 4, a letter dated 4<sup>th</sup> February 2015 written by the Chairperson of the Land Commission to the Machakos Land Registrar, directing that certain land files be made available to them.
- 42.DW6, Anne Mwikali Maingi, testified that the 5<sup>th</sup> accused person, John Nzomo Muindi, is her husband. She stated that on 29<sup>th</sup> December 2014, he left for work at around 7:00 a.m. and returned home at approximately 8:00 p.m. She testified that she was not aware of any incident involving the farm invasion or any killing that occurred on that day.
- 43.DW7, Sebastian Musyoki Mwendo, testified that he knows the 6<sup>th</sup> accused person and confirmed that on 29<sup>th</sup> December 2014, the 6<sup>th</sup> accused was at work. He stated that he only saw him in the afternoon when he returned from work and did not see him in the morning.
- 44.The defence closed its case and parties were directed to file their written submissions. According to the court record only the accused persons filed submissions dated 12<sup>th</sup> October 2022.

**Accused persons submissions**

- 45.The accused submitted that the main issue for determination is whether the prosecution proved beyond reasonable doubt that the accused persons committed the

offence of murder. They contended that the prosecution failed to discharge this burden, as required under the law and as reaffirmed in **Republic v Derrick Waswa Kuloba [2005] eKLR**, where the court emphasized that the burden of proof in criminal cases rests solely on the prosecution. While making reference to section 203 of the Penal Code, the accused outlined the three essential ingredients of the offence of murder: proof of the fact and cause of death, proof that the death resulted from an unlawful act or omission by the accused, and proof that the act or omission was committed with malice aforethought. While they did not dispute the fact of death, they questioned the alleged date of death in view of the decomposition observed in the deceased's body. They highlighted inconsistencies between the prosecution's claim that the deceased was killed on 29<sup>th</sup> December 2014 and the postmortem report which indicated that the body was already decomposed when recovered the following day. According to them, this suggested that the death may have occurred several days earlier, which was inconsistent with the prosecution's timelines and version of events.

46.Regarding whether it was the accused who caused the death, the defence emphasized that no murder weapon was recovered or produced in evidence. They argued that the only evidence linking them to the offence was the

purported visual identification by PW2, PW7 and PW8, which they described as unreliable and inconsistent. The accused relied on the case of **Wamunga v Republic [1989] KLR 426** to submit that evidence of identification must be carefully scrutinized and can only be relied upon when the circumstances are favourable and free from the possibility of error.

47.They highlighted contradictions in the witnesses' testimonies including differences regarding the mode of travel to the scene, the source and sufficiency of light, and the distance from which the witnesses allegedly identified the accused persons. They contended that it was practically impossible to identify persons from 20 to 30 meters away in darkness while fearing for one's life.

48.While citing **Ndungu Kimanyi v Republic [1979] KLR 283**, they submitted that the credibility of the prosecution witnesses was questionable and that their inconsistencies rendered their evidence unsafe for reliance. They further relied on **Joseph Muchangi Nyaga & Another v Republic [2013] eKLR**, where the court held that evidence of visual identification, especially under difficult circumstances, must be watertight. They also cited **R v Turnbull & Others [1976] 3 All ER 549**, where Lord

Widgery CJ set out the guidelines for testing the reliability of identification evidence.

49. The accused urged the court to find that the circumstances under which they were allegedly identified were poor, and the purported visual identification was unreliable, inconclusive unworthy of reliance.

50. On the issue of the identification parade, the accused relied on **David Mwita Wanja & 2 Others v Republic [2007] eKLR** to emphasize the importance of conducting identification parades with scrupulous fairness in accordance with the Police Standing Orders. They argued that the parades in this case were improperly conducted, as the witnesses had not provided prior descriptions of the suspects and that the accused were mistreated during the process. They claimed that the police restrained them from changing positions and poured water on them during the parade. The accused maintained that they were dissatisfied with the process, a fact reflected in the parade forms.

51. They further submitted that the witnesses had already seen them at the time of arrest, rendering the identification parade meaningless. According to them, the only remaining identification was the dock identification, which they argued carried little probative value unless preceded by a properly conducted parade. They cited **Ajode v Republic [2004]**



**eKLR and Muiruri & Others v Republic [2002] 1 KLR** 274, where the courts held that dock identification carries little probative value unless preceded by a properly conducted parade.

52. The accused also submitted that the prosecution failed to prove the third ingredient of murder, malice aforethought, as required under section 206 of the Penal Code. They argued that there was no evidence of intention, knowledge, or any other circumstance suggesting malice aforethought.

53. Turning to their defence, the accused denied the charges and presented a collective narrative explaining the circumstances leading to their arrest and prosecution. They stated that they are leaders and members of Kivae Residents Farmers Association, a group involved in a long-standing land dispute in Athi River. They alleged that they were being persecuted by powerful individuals and corrupt police officers from Athi River Police Station, who sought to force them off their land through fabricated criminal charges.

54. They produced various defence exhibits, including a letter dated 16<sup>th</sup> October 2000 and several court documents, to demonstrate the existence of the land dispute and their involvement in lawful litigation as plaintiffs. They contended that their prosecution was maliciously instigated

by agents of Desire Land Company Limited, the same entity that had filed civil suits and allegedly bribed or coerced residents to vacate the disputed land.

55. The accused further challenged the conduct of the investigating officer, questioning how the police linked them to the offence despite the inconsistencies in witness statements and the absence of any mention of some accused persons in those statements. They suggested that the officer had prior knowledge of their pending cases at Mavoko Law Courts and conspired to frame them for murder to ensure they were remanded in custody.

56. The 5<sup>th</sup> and 6<sup>th</sup> accused persons also relied on alibi evidence, asserting that they were not near the scene on the date of the alleged offence. They argued that their alibi evidence was not challenged and therefore should be accepted.

57. In conclusion, the accused submitted that the prosecution failed to establish any of the ingredients of the offence of murder and that the evidence presented fell far short of the threshold required in criminal proceedings. They relied on **Prosecutor v John Ndung'u Njoki & Another [2012] eKLR**, where the court held that in the absence of independent evidence linking the accused to the murder, the evidence falls short of proving the case beyond

reasonable doubt. They urged the court to find that the prosecution's case was riddled with inconsistencies, lacked credibility, and failed to meet the standard of proof required and consequently, to acquit all the accused persons.

### **Analysis and Determination**

58. This case exemplifies a classic instance of delayed justice arising from systemic inefficiencies. From the court record, the accused persons closed their defence on 27th July 2022 and were granted thirty days to file their written submissions. The matter was scheduled for mention on 13th October 2022 for further directions. However, before those directions could be issued, the trial court was elevated to the Court of Appeal. Subsequently, on 8th February 2023, directions were issued pursuant to Section 200 of the Criminal Procedure Code, whereupon the accused persons consented to the matter proceeding from the stage it had reached. Additional delays were occasioned by the matter being mentioned before different courts and instances where the accused persons failed to attend court.

59. As I write this judgment, I must note that I did not have the advantage of observing the demeanour of the witnesses or parties during the trial. I will therefore rely wholly on the record of proceedings, including the testimonies, exhibits, a

nd submissions filed by both the prosecution and the defence and as contained in the court record.

60. I have carefully considered the evidence presented by both the prosecution and the defence. The burden of proof solely lies on the prosecution to establish that the accused persons significantly contributed to the death of the deceased. The accused persons are under no obligation to prove their innocence.

61. The accused persons are facing a charge of murder contrary to Section 203 of the Penal Code, which section provides that:

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

62. In **Joseph Kimani Njau v Republic [2014] eKLR**, the Court of Appeal emphasized that;

**“In all criminal trials, both the actus reus and the men's rea are required for the offence charged; they must be proved by the prosecution beyond a reasonable doubt. The trial court is obliged to ensure that before any conviction is entered, both actus reus and mens rea have been proven to the required standard.”**

63. In **Republic v Andrew Muecha Omwenga [2009] KEHC 1573 (KLR)**, the court considered the provisions of Section 203 of the Penal Code and outlined the three essential ingredients of murder that the prosecution must prove beyond reasonable doubt to secure a conviction. They are:

**(a) the death of the deceased and the cause of that death;**

**(b) that the accused committed the unlawful act which caused the death of the deceased and**

**(c) that the accused had the malice aforethought.”**

64. Therefore, the prosecution must establish both *mens rea* that is, the guilty mind, and *actus reus*, that is, the guilty act that causes the death. The standard of proof required is that of beyond reasonable doubt.

65. I will therefore consider these elements in relation to the charge against the accused persons, specifically;

*a.) Whether the death of Jackson Maungu John (the deceased) and the cause of his death have been proved beyond reasonable doubt;*

*b.) Whether the prosecution has proved beyond reasonable doubt that any of the accused persons unlawfully caused the deceased's death; and*

*c.)Whether the prosecution has proved beyond reasonable doubt that any of the accused person acted with malice aforethought sufficient to warrant a conviction for murder.*

66. Each of these issues will be addressed in turn taking into account the totality of the evidence adduced during trial (prosecution witnesses PW1-PW11 and defence witnesses DW1-DW7), the documentary exhibits, and the submissions of the parties.

***(a) Whether the death of Jackson Maungu John (the deceased) and the cause of his death have been proved beyond reasonable doubt.***

67.The fact of Jackson Maungu John's death is not in dispute. PW4 and PW5, both of whom attended the scene, recovered a body bearing multiple cut wounds. They arranged for photographs and removal of the body to Machakos Mortuary. Both witnesses gave *viva voce* evidence as to their observations at the scene.

68.PW9 (the government pathologist) conducted a post-mortem examination and produced a report dated 7<sup>th</sup> January 2015 as exhibit 1. PW9 described multiple penetrating deep cut wounds, fractures of limbs and ribs and head injuries consistent with blows from a sharp

implement. She concluded that the cause of death was multiple penetrating deep cut injuries. PW9 also noted partial decomposition of the skin but explained that decomposition rates vary depending on climatic and environmental conditions and that the observed decomposition was not sufficient to determine the precise time of death.

69. Based on the evidence presented, the fact and the cause of death namely multiple penetrating deep cut injuries have been established beyond reasonable doubt. The post-mortem report, together with the evidence of PW4 and PW5 who discovered and secured the body, provide reliable medical and circumstantial proof of death and of the injuries that caused it. Further, PW6 identified the deceased body for the postmortem. I thus find that that the first question is answered in the affirmative: the death of the deceased was proved and so was the cause of the death

***(b) Whether the prosecution has proved beyond reasonable doubt that any of the accused persons unlawfully caused the deceased's death.***

70. This question forms the crux of this case. The prosecution's case that the accused persons participated in the mob assault which resulted in the deceased's death rests primarily on the eyewitness testimony of PW2, PW7 and

PW8, who claimed to have seen members of the mob and identified certain persons among them. Secondly, the prosecution case is anchored on the subsequent identification of the accused by way of identification parades. Notably, there were no recovered murder weapon or forensic evidence directly linking any accused to the injuries sustained by the deceased.

71. I must therefore carefully examine the identification evidence and the surrounding circumstances, applying the well established safeguards for identification evidence. The applicable principles were helpfully canvassed in the accused's submissions and require the trial court to look at the lighting and distance at the scene; the duration and quality of the observation; whether the witness had seen the assailant before; the presence of stress or other factors likely to impair observation; any discrepancies in witness accounts; and the manner in which any identification parade was conducted.

**a) Regarding the immediate observations at the scene**

72. PW2, PW7 and PW8 testified that they had gone to the farm to survey fencing work when they were confronted by a crowd of attackers. All three described a violent mob assault on the deceased.



73. From the evidence adduced PW2 first identified the assailants as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons but after looking at all the accused, he stated that he could identify all the accused persons as being present at the scene. PW7 stated that he identified the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons. According to his evidence the 1<sup>st</sup> accused was telling the rest to kill, the 2<sup>nd</sup> accused had a panga, the 3<sup>rd</sup> accused had a huge stick, while the 4<sup>th</sup> and 5<sup>th</sup> had stones. He stated that some of the attackers were known to him since he used to work at the market. PW8 identified the 3<sup>rd</sup> and 4<sup>th</sup> accused and saw the 3<sup>rd</sup> accused attack the deceased with a panga while the 4<sup>th</sup> accused used the walking stick to attack the deceased.

74. This evidence seems to outrightly place all the accused person at the scene of crime, save for the 6<sup>th</sup> accused. The presence of the 1<sup>st</sup> to 5<sup>th</sup> accused persons being stated by PW2, PW7 and PW8. However, while from their accounts, PW2, PW7 and PW8 had been jointly contracted to do the same work and had together gone to the scene to survey before embarking on the fencing, hence were together, their accounts of the events have material contradictions. First, the evidence of PW7 was that he saw the 3<sup>rd</sup> accused with a huge stick while the 4<sup>th</sup> and 5<sup>th</sup> accused had stones. This contradicted the evidence of PW8 who stated that the

3<sup>rd</sup> accused attacked using a panga while the 4<sup>th</sup> accused had a walking stick. PW2 first stated that the assailants were armed with runkus, pangas and stones, but later stated that he did not specifically identify the weapons the accused persons used to assault the deceased. He just saw their hands moving.

75. Secondly, while these eye witnesses were together, they gave conflicting accounts about how they travelled to the farm: PW7 stated they went by PW2's white car while PW8 emphatically stated they used motorcycles and that there was no car. PW2 also gave differing details. This is not a peripheral contradiction; it relates to the composition of the party and their positions on arrival with possible implications for who could see whom and from what vantage point.

76. There was also uncertainty regarding the time and light conditions: witnesses variously stated the incident occurred at about 6.00–7.00 p.m. and gave differing accounts of whether it was daylight, dusk or dark. PW7 said it was dark and he used a torch to identify attackers; PW8 said darkness was only setting in and that a torch was not required; PW2 said it was about 6.30 p.m. When identification depends on visual observation in low light, the court must scrutinize the reliability of such evidence.

The record therefore raises a real question whether observation conditions were sufficiently favourable and accurate identification.

77. Regarding distance, number of assailants and stress, PW2 stated he observed the mob from about 30 metres and saw large numbers in a chaotic mob. In such circumstances, amongst a pressing and violent crowd where the witness feared for life, the danger of mistaken identity is heightened. Furthermore, the witness failed to provide consistent or detailed descriptions of clothing or other distinguishing features that would aid in reliable identification. That uncertainty detracts from the reliability of the in-scene identifications.

**b) Regarding identification parade**

78. The prosecution also sought to rely on the evidence of identification parades conducted at Athi River under the supervision of PW10 who testified on the parade arrangements. PW10 stated that she sourced eight similarly appearing individuals for each parade and that the witnesses were brought in to identify suspects. The parade forms produced in evidence show that some witnesses pointed out some suspects. However, the record indicates that at least one suspect signed the form expressing dissatisfaction with the parade process.

79. The defence challenges the parade on several grounds: that the witnesses had already seen the accused at arrest or in court prior to the parade; that the investigating officer had showed the parade officer (PW10) which suspect to include; that key details such as the method of identification for example touching of the shoulders were not properly recorded; that suspects were restrained or re-positioned; and that overall, the parade lacked the scrupulously fairness required under the Police Standing Orders. PW10's own evidence, revealed concerning aspects; she admitted that the investigating officers had shown her the suspects when she was sourcing parade members and that she made no contemporaneous remarks to explain all aspects of the exercise. Those admission diminish the parade's force as independent corroboration.
80. More fundamental though, an identification parade is used to identify strangers who a witness had sufficient time to 'mark' and note a peculiar identifying feature. Hence it is always important that the witness provides an immediate description of the suspect and any stand out feature such as dressing, complexion and/or mark. None of the witnesses, PW2, PW7 and PW8 gave any description to the police. One then wonders what the witnesses set out to identify in the identification parades. Secondly, from their own testimonies, the people they identified in the parade

were no strangers. PW2 stated he knew the accused as they were from the locality. PW8 stated he knew some of the attackers having worked in the area previously, while PW7 merely stated that he identified the accused persons. Consequently, these accused being people known, hence recognised by the witnesses, the identification parades were fatally irregular. That evidence lacks any probable value as it is inadmissible.

***c) Defence case (alibi and land-dispute context)***

81. In examining the defence case herein, this Court is cognizant of the fact that the onus on the prosecution is to prove the case beyond any reasonable doubt, and that where there exists any doubt, the same has to be interpreted to the benefit of the accused person.
82. The defence case advanced three elements relevant to the credibility of their case: (i) alibi evidence for the 5<sup>th</sup> and 6<sup>th</sup> accused supported by the testimonies of the DW6 and DW7 which went largely unchallenged in cross-examination; and (ii) a coherent narrative and documentary record showing a long-standing and bitter land dispute involving the Kivae Residents Farmers Association and Desire Land Company Limited.
83. The defence also referred to prior criminal proceedings arising from the land dispute, in which some accused had

previously been acquitted. These facts provide important context and are relevant in assessing possible motives and the possibility of persons with influence using the criminal process to intimidate or persecute the accused. These facts coupled with the contradictions in the identification evidence of the prosecution cast doubt in the prosecution case. This doubt can only be interpreted to the advantage of the accused.

84. Consequently, having weighed all the evidence, I find that the prosecution has not discharged the burden of proof as regarding the identity of the people who caused the death of the deceased to the degree required in a criminal case. The evidence of scene identification is unsatisfactory due to inconsistencies in witness accounts. Further, the identification parades were not conducted with the level of independence and procedural fairness necessary to elevate their probative value.

85. Accordingly, I find that the prosecution has failed to prove beyond reasonable doubt that any of the accused persons before the court unlawfully caused the death of Jackson Maungu John. It therefore follows that the determination of the question whether the deceased's death was caused by malice aforethought in this case is moot.

86. Based on the reasons set out hereinabove, the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused are hereby found not guilty of the offence

of murder and consequently I hereby acquit them under Section 215 of the Criminal Procedure Code. The proceedings in respect of the 1<sup>st</sup> and 4<sup>th</sup> accused persons are recorded as abated on account of their deaths.

87.The accused persons are set free forthwith unless otherwise lawfully held.

88.Orders accordingly.

Dated, signed and delivered at Machakos this 13<sup>th</sup> day of November 2025.

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....ODPP

.....for accused persons

Selina Court Assistant