



**Republic v Tharamba & 5 others (Criminal Case 53 of 2016)
[2025] KEHC 68 (KLR) (16 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 68 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 53 OF 2016
EM MURIITHI, J
JANUARY 16, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

MIRITI M'THUMAITA THARAMBA 1ST ACCUSED

FRANCIS MWENDWA 2ND ACCUSED

ROMANO MUGAMBI 3RD ACCUSED

JULIUS KIRIMI M'MWITARI ALIAS MALAYA 4TH ACCUSED

PAUL KAILEMIA NGEERA ALIAS AL QAEDA 5TH ACCUSED

JOSEPH KANYGUITHIA IMOTI 6TH ACCUSED

JUDGMENT

1. By a consolidated charge sheet dated 22nd May 2019, the six accused persons were charged with murder contrary to section 203 as read with 204 of the Penal Code. The Particulars of the Charge were that they “on 19th day of august 2016 at Ntulele Sub-location, Buuri location in Tigania East South Sub-County within Meru County, jointly murdered George Kauyuri.”
2. They denied the charge and the trial proceeded, the prosecution calling 11 witnesses and the when placed on their defence, the 1st, 2nd and 4th Accused gave sworn evidence without calling witnesses. On 22/3/2021 the day of commencement of hearing, the Court was informed by a report by a signal from Meru G.K dated 23/10/2019 filed on 4/2/2021 indicating that the 5th Accused Paul Kailemia Ngeera, No MER/937/2017/CR had died in prison, the case against the 5th accused is terminated by his death and Counsel discharged.



3. On consideration of the evidence for the Prosecution the court had concluded that the prosecution had not established a case against the 3rd accused Romano Mugambi and 6th Accused Joseph Kanyuithia Imoti, and the two were consequently acquitted on entry of a finding of not guilty pursuant to section 306 (1) of the Criminal Procedure Code. In accordance with authority the detailed discussion of the cases against the two accused persons acquitted at the stage of no case to answer was reserved for the Judgment herein so as not to prejudice the fair trial of the other accused persons. (See ruling of the Court dated 16/2/2023 herein.)

The evidence

4. PW1 Florence Kagendo, the deceased's wife testified that on 19/8/2016 at 8:20 pm she had heard people singing outside her house. They were singing Njuri Ncheke Songs and mentioning the names of her husband George Kaiyuri, the deceased. When she heard the song, she called him and the call was received by a bar owner Julius Mwenda who operated a Bar called Vision Corner at Kiwanja ya Ndege AP Post, about 500 metres from her house. The person who received the call had told her that her husband had been arrested by Njuri Ncheke and she would see him after three 3 days. She had gone for her husband's phone together with her son Kelvin Murage and she got the phone from the bar owner and went back home. On the following day 20/8/2016 on information by her sister Glory Kaiyania who came at about 10:00am and told her that she had been told that George had been killed and body found in the forest, she went by hired motor bike to the place where the body was lying face down. She had seen a jacket lying beside him. (The Jacket grey in colour marked MF11). She later attended the post mortem on 23/8/2016 and subsequently recorded her statement at Muthara Police Station.
5. On cross-examination, she said she did not see her husband being taken by the Njuri Ncheke or being beaten and she had not seen the 1st and 2nd accused and she could not identify any person as they were singing while they were very many. She said she knew Julius Kirimi 4th accused for a long time as a friend of the deceased with whom he used to drink but had not seen him killing her husband.
6. PW2 Stephen Nkunja testified that he resided at Ngare mara in Isiolo region and worked as a construction worker. He said that on 19/8/2016 at 8:00 p.m. he had come from work on his way home and at Kiwanjani area he met Njuri Ncheke people who called him by his name nickname Kangeru, the name by which he was known at work. They called him and told him they wanted him to become an elder of Njuri. They were over 10 people and he had identified 5-6 of them. The ones he recognized were Miriti, the 1st accused; Kainyuthia, the 5th accused; Kirimi who was nicknamed Malaya, the 4th accused; Mwenda, the 2nd accused; and the 5th person Kathurima was not before the court. There was light from electricity lighting coming from a single light inside the Airport. The people said they would take him to the elders. Later they put handcuffs on him and took him to Njuri's Ncheke office at Matabiki and left him there saying they were going for Kaiyuri, the deceased. When they left him, they came back with Kaiyuri and they were singing. They were singing Kimeru songs for Njuri Ncheke. He said he was shocked and feared for his life and he ran away all the way home. On 20/8/2016, he had heard that the person the Njuri members had gone for had died. He later went to report the matter at the police station at Muthara reporting that Kaiyuri had been killed, and later he recorded his statement. Before going to the police station, he had gone to an elder by the name Muthirwa but did not find him.
7. On cross-examination, he said he had come from work in the evening and it was about 8:00 P.M. in the night when he heard people singing Njuri Ncheke songs. He said he was not a member of Njuri Ncheke and did not know anything about Njuri Ncheke. He said the elders arrested him and they were taking me to Njuri's office for Matabithi area but he ran away. He said he had heard them say that they were going for Kaiyuri. They took him to the Njuri's office where he found people whom he did not know. He said he at the time on 19/8/2016, he did not know deceased George. He had gone to



Muthara Police Station to report two-three days thereafter. The report to the police was that Kaiyuri had died and he had gone to the police after he heard that Kaiyuri had died. Before he was ordered by the police, he had not told anyone else that Kaiyuri had been taken by Njuri Ncheke. He said he had seen the 1st and 2nd accused persons but he could not tell the clothes they were wearing and he had recognized them from their voices. On further cross-examination, he said that according to him Njuri Ncheke are not good people and he was able to tell the people he met were members of Njuri Ncheke. He said he did not know Romano, the 3rd accused and he had never seen him before. As regards, the 4th accused Julius Kirimi he said he was among the people who escorted him to Njuri Ncheke shrine. Asked whether he was left with Julius Kirimi guarding him, he said Kirimi is the one who said he should be taken to the Njuri Shrine. There were 3 people who were left, Kirimi and 2 others who were left. Kirimi was left with him but he did not know whether they were together in looking for the deceased. When Cross examined for the 6th accused, the witness said the lighting was from the electricity in the Airport at Isiolo Airport, there was no moonlight. When the witness was referred to statement at police that there was moonlight, he maintained it was electricity light and there was no moonlight. When the witness was referred to reference in his statement that “due to bright moon I was able to identifying the following,” he said he was a little frightened and was not his normal self and that part of the statement was not correct. He said he recorded the statement about 2-3 days after the incident. The witness could not tell whether the 4th accused Joseph Kanyuithia had himself been arrested by Njuri Ncheke and whether the 4th accused was arrested in 2018.

8. PW3 Jeremiah Mwithirwa, resident of Isiolo testified that he was Secretary of Njuri Ncheke Isiolo and that on 19/8/2016, at about 8:30 p.m. he had left home and gone to a bar called Moonlight, at Isiolo. At the bar, he had been informed by the bar attendant called Tony that someone had been taken by Njuri Ncheke for a ceremony called Mukaria. He went to his home because it was at night, dressed in warm clothes and taking a torch and a walking stick went to Mukaria shrine to find out why the people had taken the person. When he got at Njuri Ncheke’s shrine, he asked whether a person by the name George Kauyuri had been brought to the shrine. He did not find Kauyuri but found another called Kangera. He enquired from the Njuri Ncheke elders where George Kauyuri was. The elders are many and he had received a list from the Secretary of the Mukaria Njuri Ncheke. The list for the elders involved was given to him by the local Secretary as he (PW3) was Secretary for the District. In the list there was Kathurima, Kirao, Mwenda, Miriti, Kailemia, Julius and others. Miriti (1st accused) Kirao (3rd accused) Francis Mwenda (2nd accused) and one nicknamed Ndege are before the court as accused persons and he pointed them out in Court, save for the 6th Accused whose name he did not know. He knew them as residents of the area as he was then overall Secretary for four (4) Njuri Ncheke shrines of Mukaria, Kagene, Maili Tatu, and Kadebereni. He knew the accused persons as members of the area. The one called Malaya (4th Accused) told them that they had left George in the forest while drunk and unable to walk. He had told them to take him to forest where they had left the person, and he went with 12 elders of the shrine, 6 of whom were been involved in the case and 6 who were not involved. The area is called Matabiki. They took him to the area and he found the said George had died. He told them that it would be a police case because they had killed a person and he took the Secretary of the Njuri Ncheke house, Japhet Nkumira, and he escorted him to the AP Post. They spent the night at the Post and in the morning, they went to the scene and later police from Isiolo Police Station came for the body and on 25/8/2016 he had recorded his statement at CID Muthara.
9. On cross-examination, he said that Kangeero is the person he found at the shrine at 10:30 pm in the night, and that he was coming from his home, having earlier first gone to Moonlight Bar but he had not drunk when he heard that there was one person who had been arrested by Njuri. He said that Tony, the owner of Moonlight bar, told him George had been taken and they had gone to beat him at the shrine. George had been drinking at the same Bar Moonlight bar. He said he used to go to moonlight



for drinks and there was no girl waitress; it is the owner who sells at the bar. Tony was selling drinks at the bar. He knew George but George was not a member of Njuri Ncheke. He confirmed he was the Secretary of Njuri Ncheke Isiolo and that there are 4 houses of Njuri Ncheke under him. His Njuri Ncheke house is the Mukaria shrine although he was overall Secretary, and every house has its own rules. Although, he was Secretary and he belonged to Mukaria, he only got involved in big cases. When he found Kang'eero, he asked where George was and Malaya the 4th accused said he had been left at the forest. Kang'eero was at the Shrine and he did not see Kang'eero leaving the shrine. He said he was told by 4th accused that George had been left in the forest when he could not walk. He said he do not know who killed George. And he did not know that George had died, before he went to the forest. He said he had gone to the bar at 8:30 p.m. and it was about 3 km from the bar to the Shrine. From the bar to the forest where they found the body is 3 km. He had walked the distance. He confirmed that the Bar owner was his relative and they had both recorded statements. He said he knew Njuri Ncheke and when inducting a person into Njuri Ncheke there is no compulsion. The father must accept. It is only when a child with permission of the father misbehaves. He said he knew father to George had died a long time previously. He said he got the report at 8:30p.m. when he went to the bar but he did not get to know when George had been arrested. At the shrine of Mukaria he found many elders and all the accused persons were at the shrine. He had not seen them with George and was only told by the Secretary Japhet Nkumira that they are the ones who took George. There are no minutes for Njuri Ncheke deliberations.

10. On Romano Mugambi Mitanguru, the 3rd accused, the witness PW3 said he knew him physically and Kirao was the nickname he is known by in the area. He said it was the Secretary who knows the 3rd accused better. Reference to the Kilao (Kirao) in his statement was because he did not know his official name. It is the Secretary of the Njuri who knows him as Kilao. Japhet has a record of the members. Njuri Ncheke is a voluntary membership. When he asked whether the Mukaria Njuri had sent the accused to pick George, he was told that nobody has sent them. They had gone out on their own. They are part of Mukaria Njuri Ncheke. He said he was told about what happened but he also went to the scene. He confirmed that he did not see the accused getting Kaiyuri or beating him. He said he found everything finished.
11. When Cross-examined for the 4th accused, he said that Tony merely had told him that George had been taken by Njuri elders and he got the names of the elders at the shrine, where he arrived at about 10:00pm.in the night. He met Murio Aritho who is speaker of the Njuri house and spoke to Murio Aritho and other leaders of the house. Aritho told him that the deceased was not at the shrine. At this time and at the shrine he had seen Julius at the Shrine. It is was not true that it was an elder called Kabai who informed them that George was being beaten in the bush. On being questioned that his witness statement did not indicate that George was in the bush, he said probably the officer who recorded the statement did not write that down. He said he left the shrine with the accused and a few elders of the shrine and it was the accused (4th) who showed them where George was. They were all together with other Njuri Ncheke elders. Elders arrest with permission of the father of the person, not a leader of the Njuri Ncheke. He said that the Njuri Ncheke elders told him that it was the accused persons who had taken George. The blame falls on the elders who committed the act.
12. On cross-examination for 6th accused, he said he was arrested at the Police Station on 25/8/2016 at 8:00am. and stayed in the cells and recorded a statement and got released the following day. List of Njuri members given by the Secretary. He recalled the 6th accused is called Kanyuithia. He said he did not talk to Kang'ero as he was looking for George. He recalled that the 6th Accused was Kanyuithia and he was a member of the Njuri Ncheke.



13. PW4 Grace Kathanu, a farmer and a resident of Kiwanja Ndege, Isiolo testified that on 19/8/2016 at 8:30pm she got a report from one child, Mutabari, who had the cows that entered into the Army Camp Isiolo, and she decided to go for them when the child informed her that he had been chased away. As she received the information as to whereabouts of her cows and as she was leaving to the Army Camp, she heard people on the road singing songs sang usually by old men. She heard them say that they had arrested two (2) people – Kang’ero and Kaiyuri. They said there was another person who had not been arrested, one Stephen who was her son. When she heard the singing, she went out to the road where she found a big group of people and as they sang, said they had arrested George Kaiyuri whom she knew George as a neighbor. The group was singing while going on the road towards Njuri Ncheke house. There were 2 groups - the 1st group which had George Kaiyuri and the 2nd group had Kang’ero. The 1st group came with Kaiyuri and as they led him, he fall to the ground. He had been hit by Kailemia who was not before the court. In the group she identified Maingi who told her to go on with her business and Ndege who had asked her whether she wanted to be given Kaiyuri to go with him. At this time Stephen her son had ran away when he heard the group singing. The following morning, she received a call from a youth named Tony Mwenda, with information that Kaiyuri had died.
14. On Cross examination for the 1st and 2nd accused, she said she knew George Kaiyuri and that on 19/8/2016, she was on the road from home going to seek her cows. She said that she knew George as a neighbor but did not know Miriti Tharemba and Francis Mwenda and she did not see them on that date.
15. On Cross examination for 3rd and 4th accuseds, he said that she knew 4 people in the group – Maingi, Kailemia, Malaya and Kathurima and had not seen Robert Mugambi although there was a large group. She said Malaya was in court and he saw only Kailemia beat the deceased and while all others had sticks she only saw Kailemia beat the deceased who fell to the ground and he told him to rise up and proceed.
16. On cross-examination for the 5th accused, she said she did not identify any other person other than Accused 4 and that it was 8:00 pm in the evening, she was going to look for her cows but she did not have a torch and it was dark and she was not able to identify all of them.
17. PW5 Stephen Katia Kanampiu, a herder residing at Ntulele near Army Camp 78 testified that on 19/8/2016 at 7:00pm while at home, with his children, he was told by one Muchui, the person who had the cows, that the cows had been detained by the Army. He went for the cows and found them on their way home after having been released from the Army Camp. He met the three persons who had been grazing the cows and together they came back home with the cows. He said that the distance from the Army Camp to his home is about 6-7 kms and they used the murrum road where they met with a group of people singing. It was on the road from 78 Army Camp towards the Isiolo Airstrip and the songs were the kind of songs sang by Njuri Ncheke elders. As they usually fear Wazee wa Njuri, Njuri elders, he hid between the cows as they passed each other. The group was coming towards them and there were electric lights on the road and, as the group came near the cows, he saw that the group was pushing a person called Kaiyuri and he identified some of them as Kailemia, Mwenda, Kirimi alias Malaya, Kirao and Miriti and pointed them out - Mwenda the 2nd accused; Kirimi alias Malaya is the (4th accused); Kirao the 3rd accused; and Miriti the 1st (accused). He said Kailemia was not before the court. At a point called Gikandi, near a building so called, Kailemia hit Kaiyuri on the legs using his leg and Kaiyuri fell down. The witness said that he saw Mwenda hitting Kaiyuri on the back with a stick when Kaiyuri fell down. The others were stepping on him, and beating him with sticks. At this time, he was in a place on the side of the road where he had hidden leaving the cows so as to witness what they were doing. He heard the group sing a song calling out his name Katia. He did not know why they were calling out for him. After beating Kaiyuri for 15 minutes, they pushed him to proceed on the road along towards Njuri’s house called Mukaria. He followed them from a distance. There were



many people on the road. As he had heard his name, he followed them for a short distance and then stopped and hid in bushes until he got to his house where he hid in a grass-heap until about 9:00pm. It was moonlight and he saw a person coming into their home and started calling for Gaita. The person calling gaita was Mwithirwa a village elder and Gaita was a neighbor to PW5. There was no response and the elder then followed in the same direction as the other group towards the Njuri's house. PW5 said he spent the night hiding at the grass heap in his home until morning. He woke up at 6:00am and he met with the Mzee Muthirwa using the same route he had used. After sometime Kobia another elder, a next house neighbour, came from the same direction of the Njuri house. PW5 called one Ben, a friend of Kaiyuri, at about 7:00 am and asked him whether he had seen Kaiyuri as he had seen him escorted by people the previous night. Ben called Kabati where Kaiyuri worked. Ben told the witness that Kaiyuri may be dead. He said he knew Miriti (1st accused) as village neighbor for a long time, over 20 years since 1996. He said Mwenda was his friend and had known him for about 12 years and he knew Kirimi for the same time as they used to be together. He said he had lived with Mwenda as herders and he knew Kirao for the same period as his place was immediate neighboring his first beyond a tarmac road and he had known him for about 8 years.

18. On Cross examination for the 1st and 2nd accused he said there was moonlight and when witness was referred to his statement indicating that there was no mention on moonlight, he maintained that there was moonlight and that he had hid in a gully on the road and there were people and that a person on the road could see him where he hid in gully but that in the beginning, he hid with the cows and was not seen. While at the buses, he was not seen. He said he could not identify the persons and cannot tell what clothes people wore. He only knew one person had a cap. He did not know the relation between Kaiyuri and Ben, that they were brothers. He said Grace Kanampiu (PW4) was his mother and he had seen her in the evening but did not know whether she knew the person involved. He knew Miriti as a person from the area where they used to graze and the 2nd accused Mwenda was they co-herdsman and he used to live near the cattle Boma. He confirmed that he was a Njuri Ncheke elder and had been a member for 2 years, but had never heard that Njuri Ncheke elders beat people. He did not know whether the accused are Njuri members. He said that after he was told that George had died he only went to the shops at the centre and, when referred to a contradiction in his statement indicating that that he went to Tony Mwenda, he said he did not go to Tony Mwenda but had called him and his statement was different from what happened explaining that it was recorded for him as he did not know how to read and write.
19. On Cross examination for the 3rd and 4th accused he said he knew the 3rd accused for about 8 years and the 4th accused for about 12 years and his relationship with 3 accused was good and denied that they have a dispute on a plot at Isiolo. He said he saw Kailemia beat the deceased at about 7:00pm when it was dark but he saw him well because at Gikandi building there are electricity lighting shining over the road. He said he hid in a roadside gully, a short distance from the road when the Njuri Ncheke group were moving along. Kaiyuri was beaten and he fell and was brought up again. The Njuri group was asking for him (PW5) through their songs and he was very afraid when he heard the songs. When asked of bad relations with 3rd accused, he said they do not have a bad relationship. He said the 4th Accused has no grudge with him. There had been two (2) groups of Njuri elders and the two groups passed by at the same time with a short distance between them at an interval of under 10 minutes. He had hid and left the cows to be driven by the children as it was near home. He did not know he had left. He did not know whether there was any grudge between 3rd and 4th accused and the deceased.
20. There was no Cross-examination for 6th accused.



21. When re-examined by the Prosecution, he said he did not know to read and that his statement indicates there was light was from Gikandi building and moonlight. He maintained that the was light from Gikandi building and moonlight light, and the light of the building shone on the road.
22. PW6 Julius Mwenda Antony of Isiolo at Kiwanja ya Ndege, a businessman operating a Bar Vision Corner Restaurant and sale of cereals testified that on 19/8/2016 at 7:10 pm, he was at Vision Corner Restaurant at the Centre together with other elders one Sammy and about 4 others. While at the counter, his neighbor and friend George Kaiyuri came and complained that there were persons who were asking him to give false testimony on the matter [of] a plot but he would not do so. The witness said the plot matter was public knowledge in the village and it involved a plot at Kiwanja ya Ndege. He said that the Kaiyuri had ordered for a beer cane extra and soda. As he drunk, he stated complaining against Njuri Ncheke elders and called them “mapepo” demons. He told PW6 and his bar-maid called Frida that he would not comply with the Njuri Ncheke regulations. It was the Njuri Ncheke Office from Mukaria Shrine in the neighborhood about 3km from the Isiolo Vision Restaurant. PW6 said that when George Kaiyuri finished his drink, he went off to his home but later came back after about 30 minutes, about 7:40 - 8:00 pm. When he came back, he asked about the elders who he said he had heard were looking for him. The witness said that for the month previously, George had been complaining about Njuri Ncheke that he could not follow their regulations and he called them “mapepo” (demons). PW6 said that as George complained bitterly, one elder Stanley Mutura Ilingo, who was a member of the Njuri Ncheke organization, came and said that he was the one looking for George and, talking in Kimeru language, that George should have as many drinks as what he would encounter that day, he had never seen it before. He said that George was first laughing it off saying that he would not follow the regulations as they were demons. Stanley asked George whether he had ever been got electrical shock and at this at this time two other elders Kathurima and Mwenda came and stood nearby at the counter without speaking to George. As Stanley was speaking, George told him that even if they went with him, Stanley would be his “father” and Stanley said that there was no problem and if anything was required he would give it for George. At his time George Kanyuri left his phone at the bar saying that the elders of Njuri may take it from him when they went with him, he gave it to PW6’s bar-maid assistant. PW6 said that after George left the phone, other 3 elders come quickly, and he recalled Julius, Kailemia and Kirimi, nicknamed “Malaya”. He identified Mwenda the 2nd accused and Malaya the 4th accused (pointing at the two accused persons). After the 3 came they pronounced “mumu” and carried George away, and the witness got to know “mumu” was a call when Njuiri Ncheke arrests a person who does not belong to their organization. They held him by the coat and on the trousers from the back and left with him. PW6 did not follow them but he called his George’s children Kelvin Murori and Erick Mwirigi and told them and told them what had happened, that their father had been taken by Njuri Ncheke elders. He had then waited at the bar and at closing went to sleep. In the following morning, he learnt from a neighbor that the people who took Goerge did not get to the Shrine of Njuri Ncheke but had killed him on the way. He went to the scene and saw it was true that George Kaiyuri was there already dead, and he had lines on the body especially on the back indicating beatings. PW6 called the OCS Isiolo Police station who sent a vehicle which came and took the body to Isiolo mortuary. He said that the village members had started looking for the Njuri Ncheke elders who had taken the deceased. The search was led by village elders and the children of the deceased. On the following day he went to Muthara Police Station to record his statement and Kaiyuri’s phone was taken by his child, Kelvin Murori on the 19/8/2016. The witness said he knew the 2nd accused for a long time as a village mate and also as a customer at his bar for about 2 years that the bar had been opened at the time. He also knew the 4th accused, Malaya, who was also a village mate and a customer at his bar for a similar period of 2 years.
23. On Cross examination for 1st and 2nd accused, he said that the deceased was taken between 7:40 - 7:50 pm, before 8:00 pm. at night. He said did not follow the Njuri elders to see where they took him. He



- said inside the bar there was light and he had left the bar at about 11:00 pm and as he went home, it was dark and he could not remember whether there was moonlight.
24. On cross-examination for the 3rd and 4th accused, he said that he had nothing to show that he was the owner of Vision's bar and that on that day, he had seen the 2nd and 4th accused but had not seen the 3rd accused; he did not get to know where the deceased was taken after he was taken by the elders; and he did not see the deceased beating the accused and he did not know who killed the deceased.
 25. There was no Cross examination for the 6th Accused.
 26. PW7 Kelvin Murori Kaiyuri resident of Isiolo Kiwanjani, a child of the deceased who worked as a mason testified that on 19/8/2016, at about 1:00pm he was working at Isiolo at Mzee Kabati's home where they were constructing a house. He was with other Fundis (masons) and his father Kaiyuri was the contractor/foreman. His father Kaiyuri had come at 1:00pm from another work and they left for lunch. After Lunch they went back to work but his father came back at 4:00pm. When he inspected the works but he was a little drunk. After inspecting the works they went to talk to the owner of the bar at the front of the plot. He said that his father had been in the bar on the front part of the plot, which had been constructed with a building, Kabati building, on the front part and they were constructing at the back of the plot. From where they were working, he heard his father as he was arguing and complaining there were people who were selling his plots pretending that they belonged to them. He said one of the persons was their in-law Muriungi who had married his sister. Muriugi came to the Bar and they started arguing with his father in the bar. All this while he was at back of the plot which measured 50x100 feet. He said they were not constructing at the very farthest extent of the plot and it was just about 4 metres from the bar to where they were constructing. PW7 said he went and tried to urge them to stop arguing and when they stopped arguing, he went back to his station of work. Thereafter, Muriungi came and told him to go and hear his father's last words as he would not see the following day. He thought it was just drunkenness and he told him that what they were doing would cause them problems. At this time, his father George was sited in the bar. They closed the construction site at about 5:00pm and he continued to stay there but when it became dark, his father gave him the key to his motor bike and told to take it home and that he would walk home. At about 8:00pm, they received a call by the bar owner Julius Mwenda (PW6) and he asked us to go for phone that their father had left at the bar. He said he had gone with his mother, PW1 Kagendo Kawira, picked the phone and went back home. On the following day, he went to work as usual and as they proceeded with the work, he got a call from Julius Mwenda (PW6) and who informed him that he had heard that his father had been killed. He went to the scene at a forest where the body was lying on the ground and later recorded his statement at Muthara Police Station.
 27. On Cross-examination he said he had heard Muriungi threaten his father but he is not one of the accused and he did not see who killed his father; and he had not seen the 3rd and 4th accused beat up his father, and his father and the accused were friends and used to drink together and he could not say whether they had reason to kill him.
 28. PW8, Dr. Mohammed Abdikadir Guyo, a medical officer at Isiolo County Hospital with a Bachelor of Medicine and Surgery from Kampala University 2013 and who worked since 2014 at Isiolo Hospital testified on Post mortem Report on the Deceased completed by Dr. Taabu with whom he worked with at Isiolo Hospital for 1 year in 2016. He confirmed the handwriting on the report was that of the said Dr. Taabu, and testified that the Post mortem examination was held on 23/8/2016 at 2.49 pm and that Death was 72 hours before post mortem was done. The Body was in good condition, on the head, No obvious fracture; Bruise on right parietal region around 3-4 cm a sign of blunt trauma on the head; Epistaxis – bleeding from the nose. No obvious palpation that is no sign of sound when palpation. No fracture. Slight bruises around the neck. A groove at the back but not present at the front. No



- epinosis – blood under the skin around the groove indicating that the injury was not deep. There was no bleeding under the skin. There was multiple injuries in the body – the body had some indented parts on the side of the abdomen and back with bruises but no fracture on the limbs. Internal - Body not dissected. Identification by 2 people Geoffrey Karairi ID 11399650, Florence Kagendo Kaiyuri ID 7873969 and both signed the Report. Cause of death was given as blunt trauma to the head and abdomen with possible intra-abdominal hemorrhage (bleeding). It was signed Dr. Taabu and stamped with official stamp of Isiolo hospital. Postmortem Report dated 23/8/2016 as Pex No. 3.
29. On cross-examination, he said the Doctor did not dissect the body of the deceased and, therefore, the doctor did not see the inside of the body. He further said sometimes people of certain religion request that body not be opened but he had not seen any request that body not be opened.
 30. PW 9 No 61751 Snr. Sgt David Chege attached to Nyeri Criminal Scene Investigation Unit and Bone expert gazetted Officer by Attorney General under Gazette Notice No. 10284 of 2006 testified that he handled this case when he was in Isiolo as crime scene on 20/8/2016 at about 11:30 am at Kisima in Tigania East with OCS Isiolo C.I. Daniel Kiptoo with other officers. He said that when they arrived at the scene they found a body of a male lying on a foot path towards Ntulele village, with injuries on the back and stomach. The injuries had been caused by blunt object but there was one injury which looked like a stab on the left buttock. The area had been tread on by people who were seeing the body and he could not tell whether there had been a struggle. There was a walking stick and waist belt about 3 metres from the body. They suspected that the walking stick had been used to beat the accused and the wooden walking stick and the belt were identified as PMFI 4 and PMF1 5. He testified that about 5 metres from the body there was a beige-coloured Jacket (PMF1) suspected to have been left behind by the attackers. He produced the photographs taken at the scene of crime: Photograph 1 - Long short of the area of the scene of crime; Photograph 2 - Medium close upshot showing the place where the body lay in the footpath; Photograph 3 - Close up shot of the body showing the appearance of the body and the marking tag B; Photograph 4 A big close up shot showing the deceased's face; Photograph 5 - Long shot showing the position of the walking stick, waist belt, body and bystanders; Photograph 6 Big close-up shot showing the walking stick, waist belt and tag A; Photograph 7 - Big close up shot showing the jacket with tag marked C; Photograph 8 - Big close up shot of the same Jacket widespread on the ground; Photograph 9 - Medium close up shot showing injuries on the deceased back and lacerated wound on the left buttock; Photograph 10 - Big close up shot showing injuries on the deceased's stomach and beating markings on the body. He said he wrote the certificate that he was the person who took the photographs and printed them and certified and signed the same in a Report dated 19/10/2016 and produced the Report as an exhibit together with the photographs - Certificate of 19/10/2016 as PEXh. 6 and the 10 photographs are marked PEX 2 (a) –(j).
 31. On cross-examination for 1st and 2nd Accused he said the deceased had clothes as shown on the photographs and was wearing a coat and that is why they suspected the jacket to belong to the assailants as he had a coat but he could not tell who committed the offence.
 32. On cross-examination for 3rd and 4th accused he said the deceased was injured from the photographs on the back, left buttock and on the stomach - Photographs 9 and 10 - there are 3 areas of the body - Back, stomach and buttock. On the Jacket and deceased, he said he took the photograph of the jacket as it was at scene of the crime.
 33. On Cross-examination for the 6th Accused he said there were markings of people who had gone to see the body and the people had trespassed the whole area by the time the police arrived at 11:30am. He said they could not confirm whether the stick and belt belonged to the attackers but the bystanders said they found the belt and stick on the scene.



34. PW 10 Stanley Kilingo Mutura resident of Gambella, Meru County, Tigania East, Sub County, a boda boda operator testified that in 2016, he worked as boda boda operator at Isiolo-Kampala. On 19/8/2016 at 6:00pm, he had taken a customer from “Kampala” area to Isiolo arriving at Isiolo at 6:30 pm. After dropping the customer, he started on journey back to Kampala using the road going to the Isiolo Airport. As he went by Moonlight bar near the airport belonging to Antony Mwenda, he stopped at the Bar and entered for a drink. He found a man who was known to him, Kaiyuri, his cousin whose father and his father are brothers. There was also the bar maid who was selling drinks at the bar. He ordered for his beer. Kauyuri was drunk and was singing. Kaiyuri asked him to buy him a drink and he bought him a “Ndume” drink, a Busaa like drink served in mugs. He also took his beer and they sat at the same table. Kaiyuri would drink while singing and dancing. As they went on drinking, an old man called Mwenda came and after saying hello to them, sat at another table. Then the owner of bar, Tony, came and greeted them. After sometime, another old man called Kathurima came and asked Kauyuri to buy him beer. Kauyuri did not buy him beer. Mwenda left the bar and after a short time, Mwenda came back with a group of old men, among them Julius, ‘Malaya” nickname for Kirimi, Kailemia and others whom he did not know. The old men had a mark on their forehead indicating that they were members of Njuri Ncheke. He said that he knew the accused persons having variously engaged with them in the past. He knew Mwenda the 2nd accused for about 10 years as they were working together as boys grazing in the forest. He also used to see him at the bar and knew him as a member of Njuri Ncheke He knew Kirimi the 4th accused by meeting him at the Town and had known him for 7 years and he knew he was a member of Njuri Ncheke. He knew the 1st accused as Miriti. Miriti was in the group and he was left out of the bar and he knew him as a member of the Njuri Ncheke. The witness said he heard the name of the 6th Accused, Kanyuithia from Mzee Kathurima that day. When these old men came, they ordered Kauyuri that he was under arrest they encircled Kauyuri while he was dancing. Mwenda did not have the Njuri Ncheke mark. It is like he was their agent to find out where Kauyuri was. The old men were all carrying sticks (fimbo). They pushed Kauyuri out of the bar. PW10 said he was at the bar at the time they pushed Kaiyuri out of the bar. He went out after them and found mzee Miriti (1st Accused) and Kanyuithia (6th Accused) with another person they had been arrested. The person who had been arrested is Kang’eero. Outside, the bar he saw the elders beating Kauyuri with sticks. He saw Miriti and Kanyuithia with the other suspect and that is when he called mzee Kathurima whom he knew for a long time as a member of Njuri Ncheke and he (Kathurima) called Julius. He saw Kathurima and Julius (4th Accused) beating Kauyuri and he called Kathurima and asked him why they were beating Kauyuri. At this time there were other people outside the bar. The lighting at the bar was the electricity bulb - inside the bar. He said he had then gone back to his drink and on the following day, Saturday 20/8/2016, his brother Elijah Laichena told him he had received a call that Kauyuri had been killed. He said he was later the following Monday arrested and he recorded a statement at Muthara Police Station.
35. On cross-examination for 1st and 2nd accused, he said he was drinking beer but he was not drunk as he had just come. Kauyuri was drunk and he had found him already drunk. He said that inside the bar there was lighting but outside the bar there was darkness. He said that the 1st accused did not enter the bar and that he knew the 1st accused and could not have been mistaken. He said that the 2nd accused (Mwenda) came into the Bar and sat in the Bar but did not ask for Kauyuri to buy him beer. When witness was referred to his statement that Mwenda had asked to be brought beer, he corrected that it is Kathurima who asked for beer not Mwenda. He said that Mwenda (2nd Accused) was in the Bar when the Njuri Ncheke came to pick Kauyuri. He stated he did not see Miriti beat the deceased, saying that Miriti was at the other suspect. He said he also did not see 2nd accused beat the deceased.



36. On Cross-examination for 3rd and 4th accused he said he did not see the 3rd accused anywhere that day and he even did not know him. He said he saw the 4th accused Kirimi. “Malaya” when they came to the Bar with Njuri Ncheke mark. When asked whether it was true that he had been quarreling the deceased, he said they had never disagreed with the deceased. When asked whether it was true the deceased was ‘heckling’ with another person, he responded that the deceased was singing and drinking alone. When the witness is referred to his statement which said that “the deceased were heckling at each...” and asked who the deceased was heckling with, he responded that there was only Mwenda the 2nd Accused in the bar and they were talking not heckling. He said he had been arrested and charged in the matter and asked how he was discharged, he said he was discharged and told that he would be a witness and denied that he had bribed to the released. He said he did not know whether the Accused No 4 had disagreed with the deceased. He said he did see any reason that the 4th accused could have killed the deceased and it was only that he was in the group. The deceased was beaten outside the Bar. It was dark outside the Bar. There was no light outside. It was only the light of the bar.
37. On Cross examination for 6th accused, he said he did not know Kanyuthia (6th accused) and that it was dark outside the Bar. He accepted that he did not know how the deceased died and it was his brother who told him that he had died.
38. PW11 No. 95348 PC Kennedy Karanja of DCI office, Tigania testified that the case was investigated by CPL Margaret Muthoni in 2016. He said Cpl Margaret Muthuri is now attached to DCI Luanda and he had taken over the case in 2020 and would testify on her behalf. On 20/8/2016 at 9:00 am according to the statement of CPL Margaret Muthoni, it is shown that one deceased John Kauyuri was discovered in Ntulili area of Tigania East Sub-County. The report was made at Isiolo. Police station by one Joshua Karichia, Assistant Chief of Ntulili Sub-Location. They were with APC Alfred Mwirigi No. 224996 Report was recorded as OB/16/8/2016 at 9:00am. The OCS Isiolo Police Station Chief Inspector Kiptoo together with Sgt Chege who was the Isiolo Crime Scene office together with others went to the scene of crime at Ntulili Village and found the body of the deceased.
39. They established from the witness that the deceased had been taken on 19/8/2016 at 8:00pm from a certain bar named Moonlight Bar. The Bar was operated by one Anthony Mwenda. They established that the deceased had been taken by Njuri Ncheke elders of the shrine Mukaria shrine. They got the names of Kailemia, Mwenda Riitho, Malaya, Mwithirwa, Stanley, Julius and others not known. It was established that he had been taken to the shrine by the elders who had been armed with rungun. The OCS and Sgt. Chege were able to recover exhibits at the scene.
1. A Khaki brown Jacket now produced before the court (MFI1) now PEx. No. 1.
 2. A belt before court marked (MFI5) now Exhibit No. 5.
 3. A walking stick, which is before the court (MFI4) now produced as PExh No. 4.
40. According to the initial report, the jacket belonged to one Mwenda. The scene was processed according and the body of the deceased was taken to Isiolo Hospital Mortuary awaiting post mortem. The accused were arrested on 22/8/2016, when Miriti M’Maita (1st accused) and Francis Mwenda (2nd accused) were arrested at Isiolo Police station according to the investigation Diary OB No. 25/22/8/2016. The others were arrested later on 30/8/2016, Julius Kirimi (4th accused present in custody). Upon arrest they were taken to Ngundune Police Station and later charged with murder.
41. On Cross-examination, he said the Jacket belonged to Mwenda. The information about the jacket was given by the members of the public who were at the scene under the OCS visited the scene. On further cross examination, he said he did not investigate the matter. He said the 3rd accused was implicated



by a witness but he could not point to the witness who mentioned the 3rd accused. He said he did know whether the 4th accused had any grudge with the deceased or of Muriungi's grudge with Deceased. He said it was Kathurima who was quarrelling / arguing with the deceased but Kathurima is not one of the accused persons. He said that Grace Kanampiu (PW4) said she saw 4th accused at about 8:00pm. When asked whether he knew that the 3rd accused was in hospital, he said he did not know that the 3rd accused was in hospital, but on further cross-examination accepted that the investigating diary shows that on 22/8/2016 under OB25/22/8/2016 - Romano Mugambi was arrested at Isiolo General Hospital. Finally, he said the exhibits of walking stick, belt and Jacket were not subjected to any test on the items to show to whom they belonged.

The Defence

42. The Defence gave sworn testimony as follows. Accused No. 1 Miriti Thumatia Tharemba testified as DW1 where he gave an alibi defence that he was not at the scene of the incident of the killing but at home with his family between 7:00 -10:00pm on night of 19/8/2016 when it was alleged that the deceased was killed by the accused person. He said he lived at Matabithi Isiolo where he worked as a farmer. He did not know the deceased. He knew Njuri Ncheke Chairman Cypriano Mwithirwa but he did not belong to the Njuri Ncheke of Cypriano Mwithirwa although he was a member of Njuri Ncheke. He said that on 19/8/2016, he was at home with his family at Matabiki, Isiolo. He was with Murithi his son, Mukami, his wife Eunice Mwonthea between the evening 7:00pm and 10:00pm, when he went to sleep. During the day he had been at the shamba collecting stones on the shamba. He said in Njuri Ncheke they do not beat people and if one wants to become a committee member of Njuri he comes to the Committee and he is educated on the requirements and they do not force people to become members. He said that he was not at the incident of the killing of the deceased.
43. On Cross-examination for the Prosecution, he said that the leader of Njuri Ncheke Muthirwa said he was told he was there but that was incorrect. He said Mwithirwa is the Chairman and director of Njuri Ncheke and he is the one who directs. He said he did not know the deceased George Kauyuri.
44. DW 2 Francis Mwenda Kiturio a construction worker residing in Isiolo, at Kiwanjani said he knew the deceased from 2014 as construction Foreman and he had asked him for work as a construction worker. On 19/8/2016, he did not see Kaiyuri. He said the bar the witness testified on was facing corner or moonlight and on this day, he went by the Bar in the morning at 8:00 am to take Marwa beer. After taking 2 mugs he took a vehicle to Kadebene to visit his uncle and check on the goats that were there. He left at 3:00pm from Kadebene to Isiolo and he went by Kauyuri Catholic Church to check on the construction work which had stalled when materials got finished, and left for home at 5:00pm and did not leave home which is at Kauyuri in the same area. He had stayed home with his wife and his two children. He said he was not a member Njuri Ncheke.
45. On Cross examination for DPP, he said it was not true that he was with others at the Bar. He said that PW10, Stanley Ilingo, who said he had seen him had a grudge with him over a plot. He said he knew the 1st accused from 2015 when he DW2 came to Isiolo from Archers Post. He said the 1st Accused used to sell charcoal and he used to sell charcoal to him. He said he knew the deceased as foreman. He said he came to Kiwanjani area in 2014 that is when he got to know him. The witness who knew him was Totia (PW5) must be the one who told the others about him. Totia is the one who was showing him to the others at the Police Station and he had a grudge with him over shamba. He said he knew the 4th accused from construction work. He said that on 19/8/2016 he was at Kadebene where he went in the morning to check on his goats at his uncle's home.



46. DW3 ACCUSED Julius Kirimi Mwitari said he was working at Kiwanjani as a mason and on 19/8/2016, he had woken up in the morning and gone to work at Tururuba behind General Hospital Isiolo. He was at work from 8:00 am to 5:00 pm he went home, at Kiwanjani. Before he opened the house, he heard people who were singing and he recognized the people singing as Wazee wa Njuri Ncheke, (Njuri Ncheke elders). They had a person called Nkunja. When DW3 got there, Nkunja was pleased that he had gone and he pleaded with him not to leave him as the elders wanted to kill him and asked him to accompany him to where they were taking him at Njuri Ncheke. DW3 escorted him to Njuri Ncheke where there are 2 houses, the one for the persons who have been arrested and the other for committee members, and when they got there Nkunja was put in the holding cell. DW3 said that the 2nd accused was at the Njuri Ncheke, and this was at about 6:00pm. He said a telephone call was made by one Stanley calling Mwenda (2nd accused) and Mwenda was told that the person they had been looking for had been found at a Bar called Vision Corner, not Moonlight. Moonlight and Vision Corner are two different Bars and Tony is the owner of Vision Corner and the previous owner of Moonlight Bar. The Njuri Ncheke elders all left after the call. There were about 6-7 elders. When they were called by telephone call, the elders went to Vision Corner except him (DW3) who was left at Njuri Ncheke with Nkunja and 2 other elders. He did not know what happened at Vision Corner as he was left Njuri Ncheke at 9:30 pm. Nkunja had left him at Njuri at 8:30 pm and after he left, DW3 heard people singing and he went out and he recognized the people as it was the same Njuri Ncheke elders and they were beating George Kauyuri, the deceased. He said that when he went out he found the 1st Accused had held George Kauyuri on the neck, the 2nd Accused had removed his rubber shoes and was hitting the deceased on the stomach. It was not dark but he could see and when he asked them why they were beating the person, they asked him to help them carry George who had then fallen to the ground. He refused and told them as they were near the Njuri Ncheke, he would go and call other elders to come to help them. They wanted him to help them as he was a Njuri Ncheke elder. He said that the Prosecution witnesses who said he was in the group had tried to interfere with the case because even the elders had been arrested including Mwithirwa but they were released. He said the witnesses were also involved stating that Stanley Riungu, Mwenda the 2nd accused and 1st Accused, called Julius Mwiti and Kanyuithia were there and were all involved including one Baariu. DW3 said he was included in the case because he had gone to tell the elders that there was a person who had been arrested [and] was being beaten. He said that they had included him in the case because he had witnessed the beating and some of the witnesses who testified were involved, and only Nkunja was not involved and the witness were all from the same family. He said that the deceased George was his friend he had no reason to kill George and he was a friend of his family. He wished that the Court understands that when he went to Njuri Ncheke, he was going to report the beating to help George, as he helped Nkunja.
47. On cross-examination for the Prosecution he said that he did not report to the police on 19/8/2016 as he reported to the Chairman of Njuri Ncheke Muthirwa because even if it was Njuri Ncheke who killed, it was not all of them who killed and Njuri Ncheke is not all killers, only the “fake” elders who are killers. The accused were the killers and they were against him because he told the truth. He alleged that Stanley Mutura who testified as PW10 was one of the killers.
48. On cross-examination for 1st and 2nd Accused he said he was a Njuri Ncheke elder and he was assisting Nkunja who had been arrested by Njuri Ncheke and the Njuri Ncheke house where they were is called Matabiki and it was about 8:30 pm - 9: 00pm in the evening. Mwenda (2nd Accused) had received a call from Stanley Kiriongo (PW10) and he could tell who was talking because he heard what they were talking. He heard Stanley say they had seen the person at Vision Corner. Asked why he did not raise the issue in cross-examination of Muthirwa (PW3) he said did not tell his advocate to ask questions as he was waiting for his time to make his defence. He said the deceased was killed 19/8/2016 and he was arrested after about 2 weeks. Asked why he did not report the matter to the police and record a



statement before arrest he said he reported to the Njuri Ncheke as according to Njuri Ncheke rules one should not report matters as they may put the case on you. He said his report to Njuri Ncheke assisted the arrest of the accused including himself.

49. On Re-examination the 4th accused said he was a responsible citizen and he did report to Mwithirwa (PW3) who is the Chairman of Njuri Ncheke. He said that he learnt that that 2nd Accused was called to go and pick the Deceased at the Bar because he heard the telephone call from Stanley to the 2nd accused and the 2nd Accused told everyone that he had been called by Stanley to go for the deceased. He said he was the one who had evidence against the accused and all who participated, and that some of the witnesses are Njuri Ncheke elders - Mukiri, Stanley and Totia – and they are the ones who were trying to implicate him. He said he was arrested at Matabithi where he worked and had not run away. He said he was included in the case because he knew the evidence on the case but he had a good relationship with the family of the deceased.

SUBMISSIONS

50. When the matter came up on 25/9/2024 and 30/10/2024, Counsel for the 4th Accused Mr. Otieno C. and Counsel for the Prosecution, Mr. Masila, indicated that they did not wish to file submissions and chose to rely on the evidence on record. Counsel for the 1st and 2nd Accused in Written Submissions dated 29th October 2024 highlighted the evidence and made submissions on the applicable law as follows:

“The Law

Your Lordship the 1st and the 2nd accused persons are charged under s.203 of the Penal Code

which states: “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

Your Lordship in the case of Republic v WOO (2020) eKLR the case of Anthony Ndegwa Ngari v-Republic (2014) eKLR, the Court of Appeal held:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order 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.”

Your Lordship, it is not in dispute in this case that the deceased died.

Your Lordship from all the witnesses who adduced evidence in support of the prosecution case, there was no eye-witness. They all adduced hearsay evidence which in law is inadmissible and cannot be relied by this Honorable court to hold that they have proven the case beyond reasonable doubts as is the threshold in criminal cases.

The accused persons in their defence were very categorical they they were not present [and] that they did not kill the deceased. No witness called by the prosecution witnessed the same. Therefore we submit that there is no direct evidence to prove that the accused persons indeed caused the death of the deceased.



Your Lordship in the same case of R-VS- WOO the court stated that:

“Where the prosecution fails to prove the guilt of the accused person beyond reasonable doubt that the accused person is the person who with malice aforethought killed the deceased, then the accused person is by law entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

Your Lordship in the instant case. we submit that the prosecution has failed to meet this threshold and urge this Honourable court to set the accused persons free unconditionally.

Authorities -

1. Republic -Vs-WOO (2020) eKLR
2. Republic -Vs-Stanley Muthike (2018) eKLR

We so humbly submit.”

51. Judgment was reserved.

Issue for determination

52. On a murder charge, the Court will examine the evidence before it to establish whether the ingredients of the offence of murder have been proved against the accused persons. The ingredients of the offence of murder are now settled as three key elements for proof, namely:

- “i. Death of the deceased occurred;
- ii. That the death of the deceased was caused by an unlawful act or omission by the accused person.
- iii. The accused in committing the unlawful act or omission possessed malice aforethought.”

See Republic vs. Nyambura & 4 Others [2001] KLR 355 (per Etyang, J.) approved by the Court of Appeal in subsequent decisions including Mwangi v Republic (Criminal Appeal 13 of 2012) [2021] KECA 149 (KLR) (19 November 2021) (Judgment) and Anthony Ndegwa Ngari v Republic [2014] eKLR cited by the Counsel for the 1st and 2nd Accused.

53. The Court will, as counselled in Okethi Okale v Republic [1965] EA 555, consider the entire evidence before it as a whole and will consequently keep in mind the respective defences of the Accused persons.

Death of the Deceased

54. In this case, therefore, the issue before the court is whether the accused were the perpetrators of the death of the deceased George Kaiyuri whose death, as expressly conceded by Counsel for the Accused 1 and 2, was established by witness testimony and medical evidence and, if so, whether they did it with malice aforethought.



Death caused by the unlawful act of the Accused

55. PW10 said that the elders who went for the arrest of the deceased had all been armed with sticks. PW8's evidence on the injuries on the head, abdomen and back and the cause of death as blunt trauma to the head and abdomen was consistent with the testimony of assault by the accused on the deceased using sticks and kicks. Although, the walking stick recovered from the scene, as with the Jacket exhibit, was not tested for DNA to show its owner, the other prosecution evidence placing the accused at the scene is sufficient to support the charge.
56. Beating is an unlawful act and the death by blunt trauma to the head, stomach and back link the deceased's death to the accused's unlawful act. What the Court must determine finally is that the accused are the perpetrators of the unlawful act causing death.

The case against the Accused persons

57. The Court has considered the evidence presented before by the prosecution and the defence against the ingredients of the offence of murder required to be proved against the accused. The case against each accused is considered separately as required by law: As reiterated (with regard to bail consideration) by Chesoni, J. (as he then was) in *Nganga v Republic* (1981) KLR:

“Where more than one persons are jointly charged with a criminal offence, the case of each accused person must be examined on its own facts....” Similarly, In *Munyole v. R* (1985) KLR 662, [1985] KECA 88 (KLR, the Court of Appeal (Hancox, Nyarangi, JJA & Gachuhi Ag. JA) held that: “It is so well established, as to make it unnecessary to cite decided cases, that in a joint trial involving more than one accused person the evidence against each accused be considered separately, and the case against each must be such as to prove the guilt of that particular accused beyond reasonable doubt. It is also a misdirection to deal separately with one part of the evidence and omit to relate it to the whole as the judge appears to have done.”

Identification of perpetrators

58. The issue of identification of the accused 1, 2 and 4 being one relevant across the accused persons may conveniently be dealt with at the same time.
59. The Court is acutely aware of the circumstances of the purported identification in this case. All the witnesses agree it was after 7.00pm in the evening. Apart from identification inside the PW6's Bar, which was lit by electricity lighting, the identification at the various points of alleged identification, and identification using lighting from the moon, electricity light shining on the road from a building at Gikandi building or from security light at the neighbouring isiolo airport can only be taken as “difficult circumstances”. It was not shown that its intensity and length of identification time was adequate for positive identification free from possibility of error.
60. Consequently, the Court must in accordance with authorities seek corroboration. In the leading case of *Roria v. R* [1967] EA 383, 384 the Court of Appeal for East Africa has guided as follows:

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C said recently in the House of Lords in the course of a debate on s. 4 of the



Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity."

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. In *Abdala bin Wendo and Another v. R.* (1) this court reversed the finding of the trial judge on a question of identification and said this (20 E.A.C.A. at p. 168):

"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

61. To be sure, this case is not based on the identification evidence of a single witness. Four witnesses, being PW2 who was arrested by Njuri Ncheke elders alongside the deceased; PW4 the mother of PW5 who met with the elders while getting out to collect her cows from the KDF camp; PW5 who on return from collecting his mother's cows encountered the elders escorting the deceased and the other suspect PW2; and PW6 the owner of the Bar from where the deceased was arrested by the Njuri Ncheke elders; PW10, the Njuri Ncheke member who was at the bar when the deceased was arrested - identified the persons involved at various points in the events leading to the death of the Deceased. The principle for caution in accepting identification evidence cannot employ with the same vigour in the case of identification by four persons as against a single identification witness.
62. The court has considered the identification evidence of PW5 Stephen Katia at the Gikandi building as corroborated by the evidence of the Barkeeper Julius Mwenda Antony PW6 Julius Mwenda Antony who saw the accused in the lighted circumstances inside his Bar, as well as the evidence of PW2 Stephen Nkunja who had been arrested and taken to Mukaria Njuri Ncheke Shrine. The witnesses identified the accused persons at different times in the transaction chain, and it cannot be said that the evidence was that of a single witness on identification but rather by multiple witnesses.
63. However, the caution of the court in accepting their identification evidence is called for in the night-time circumstances of the identification. Consequently, in view of the circumstances of the identification at night without sufficient lighting at two places by a roadside and outside electricity-lit building, the Court will warn itself of the dangers of convicting on such difficult identification and proceed to look for corroboration.
64. The Court disregards the purported identification evidence of PW3 Mwithirwa who testified that he was merely informed by Japeth, the Secretary of the Mukaria Shrine, who gave him a list of the local



Njuri members who were present and involved in the disputes before the Njuri Ncheke at Mukaria, Isiolo.

Accused Nos. 3 and 6 Acquitted at Case to Answer stage

65. The Court acquitted the two Accused No. 3 Romano Mugambi and Accused No. 6 Joseph Kanyuithia Imoti at the stage of no case to answer as the Court considered that by the evidence presented by the Prosecution as regards the two accused, it was not shown, as required by section 306 of the Criminal Procedure Code, that there was evidence that the accused had committed the offence.

Accused No. 3

66. PW2 Nkunja whose credentials as one of the persons arrested by Njuri Ncheke gives his evidence weight did not see the 3rd Accused. PW4 the mother of PW5 who met the elders outside her gate while on her way to recover her cows did not see the 3rd Accused. PW5 who followed the elders when they mentioned his name as a wanted person did see the 3rd Accused but did not ascribe any role to him in the incident. PW5's evidence of identification of 3rd Accused as one of the elders escorting Kaiyuri and the other suspect is not corroborated by any of the other witnesses. PW6, the owner of the bar from where the deceased was arrested by the elders testified that he had not seen the 3rd Accused, and the same with PW7, the deceased's son. PW10 a member of Njuri Ncheke who was present at the time of arrest of the deceased also said he did not see the 3rd Accused and he did not even know him.

Accused No. 6

67. Apart from having been named by PW2 Nkunja who had been arrested by the Njuri Ncheke elders as having been involved, no specific role was ascribed as having been played by the 6th Accused in the incident; PW3 the district Secretary of Njuri Ncheke did not know the 6th Accused let alone his involvement; PW4 Grace Kathanu, mother of PW5 Stephen Katia and PW5 himself did not see Accused 6. PW6 the Bar-owner and PW7, the deceased's son who was working near the PW6's Bar did not mention the Accused No. 6 as having been at the Bar or having been involved in the incident relating to the death of the deceased. PW10 Stanley Ilingo said he only got to know the 6th Accused from one Kathurima that day and he said that the 6th Accused together with the 1st Accused Miriti had been with the other suspect outside the Bar.

Accused No. 1

68. Accused No. 1 Miriti Thumaita Tharemba gave alibi defence denying that he knew the deceased but conceding that he was a member of Njuri Ncheke, an elders' grouping which he said does not beat people, and that Muthirwa PW1 was its Chairman and director. He said that he was at home with his family between 7:00 - 10:00pm on night of 19/8/2016 when it was alleged that the deceased was killed. As to his involvement, the Prosecution witnesses PW2 identified him at using lighting from Isiolo Airport near the road as part of a group that arrested him and took him to the Njuri Ncheke shrine. PW5 identified him as part of the group of elders he saw singing and escorting suspects to the Njuri Ncheke.
69. PW10 who was at the PW6's Bar when the deceased was arrested said he saw the 1st accused Miriti in a group of elders who had been left outside the bar. PW10 knew the 1st accused as a member of Njuri Ncheke and that the 1st Accused and the 6th Accused were with the other suspect, other than the deceased, they had arrested. PW4, PW6, PW7 did not name the 1st accused as having been seen, and the list by PW3 as having been on a list of persons given by the local Njuri Ncheke secretary who did



not testify is hearsay. The 1st Accused's evidence alibi defence does not rebut the consistent testimony of the prosecution by PW2, PW5 and PW10 as to his having been present at the scene.

70. On re-consideration of the evidence, in the absence of evidence of common purpose within the meaning of section 21 of the Penal Code, as would tie the events of arrest of the suspect Nkunja who testified as PW2 and the beating of the deceased as to constitute a common purpose to kill or beat, wound or otherwise do harm to the deceased.
71. Consequently, there is no proper basis for the conviction of the 1st accused for events that happened to the one of two suspects when the accused was only involved in dealing with the other. PW2 who testified as to his arrest said the 1st accused was involved in his arrest and PW10 said that the 1st accused was outside the Bar with PW6 with another person, Kang'eero the PW2, they had arrested. The evidence of DW3 that the 1st accused had held the deceased by the neck while the 2nd accused beat him on the abdomen, is evidence of a co-accused, which requires corroboration, as discussed below, and the Court has not found such corroboration to support a finding of his involvement in the beating to death of the deceased, which is the subject of the charge before the court.
72. The Court does not feel safe in convicting the 1st Accused for the murder of the deceased on the scanty evidence.

Accused No. 2

73. Accused No. 2 Francis Mwenda Kiturio gave an alibi defence, which when considered against the evidence of the prosecution does not raise any reasonable doubt. The explanation that there was a grudge with PW5 Itotia who must have identified the accused to the other witnesses does not show why these other witnesses would testify against the accused No. 2. if it were true that he had spent the whole day at Kadebene checking on his goats and coming home in the evening and not leaving home that night as to be at the scene of the killing.
74. He was identified by PW4 as having been present in the group that she met as she went to collect her cows; by PW5 as the one who beat Kaiyuri on the back with a stick when he fell down following a hit on the legs by Kailemia (the deceased 5th Accused); and by PW6 as the one who with Kathurima had come to arrest the deceased from his Bar. The court rejects the 2nd Accused's alibi defence, and finds that he was part of the group which assaulted the deceased eventually leading to his death.
75. Moreover, the evidence of the Accused No. 4 would support the finding of guilt on the 2nd Accused who was said by DW3 to have beaten the deceased on the stomach using his shoes. The Court, however, need not rely on the evidence of the co-accused who could well have chosen to remain silent upon being put on his defence.

Evidence of Co-Accused

Accused No. 4

76. Accused No. 4 Julius Kirimi Mwitari tendered evidence implicating his co-accused, Accused Nos. 1 and 2. The evidence of a co-accused against an accused must be taken with great caution as a co-accused may be motivated to implicate his co-accused in an effort to extricate himself. The court must look for corroborative evidence before acting on the evidence of a co-accused or accomplice.



77. As a co-accused, the testimony of the 4th Accused, even if it be a confession, is evidence against himself, which must be corroborated as against the other accused persons. See *M’Inanga v Republic* (1985) KLR 294 that –

“The court may only take the confession into consideration against a co-accused. A confession by an accused person involving his co-accused when unsupported by other testimony, is evidence of the weakest kind against such co-accused. It is accomplice evidence needing corroboration....”

78. If the Accused 4 is an accomplice, as observed by the Court of Appeal in *Benard Munungi Njau v Republic* [1979] eKLR (Madan, Miller & Potter, JJA), as regards accomplice evidence, caution is necessary:

“This is a case where corroboration was required by practice established to have force of law; however, as stated in Phipson’s Manual of Evidence (8th Edn):

“In no case, however, is the tribunal precluded from acting on uncorroborated evidence, provided that the danger of so doing is duly pointed out” and, as the magistrate also pointed out in his judgment, the position is the same under section 141 of the *Evidence Act*, which reads:

An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal because it proceeds upon the uncorroborated evidence of an accomplice.”

79. Accused 4’s evidence is evidence of a co-accused, which on general principles require corroboration for the evidence to be used as a basis for conviction of his co-accused.

80. The evidence of Accused No. 4 freely and gratuitously given in his defence supports the charge and does not, as he probably planned, exonerate him. The consistent identification evidence of the key witnesses - PW2 who had been arrested alongside the deceased and taken to the Njuri Ncheke Shrine - not only placed the Accused No. 4 at the scene, being the person who said that PW2 be taken to the Shrine; the person who told PW3 that George Kayuri had been left in the forest while drunk and unable to walk. PW10, the Njuri Ncheke member testified that the 4th Accused had come in a group of elders who arrested the deceased at the PW6 Bar. PW6’s testimony also indicates that the 4th Accused was with elders Kathurima, Kailemia (deceased 5th Accused), Mwenda (2nd Accused) and Stanley Ilingo (PW10) when they declared “mumu, mumu” and arrested him, carrying the deceased holding him by the coat and on back of his trousers. While PW10 may have been part of the arresting group, the allegation of a grudge with him does not exonerate the 4th Accused in view of the evidence of other independent witnesses PW2, PW4, PW5 and PW6.

81. The incident leading to the death of the deceased was, on the evidence, perpetrated by a group of Njuri Ncheke elders who beat the deceased with their sticks and kicks as testified by PW5. The common intention in all present in the group that arrested the deceased and while leading him to the Shrine beat him with sticks and kicks as testified by PW4 Grace Kathanu who testified that - “There were 2 groups the 1st group had George Kaiyuri and the 2nd group had Kang’ero. The 1st group came with Kaiyuri and as they beat him he fall to the ground. He had been hit by Kailemia; Kailemia is not before the court. In the group identified Maingi who told me to go on with my business. There was also Ndege who asked me whether I wanted to be given Kaiyuri to go with him”.



82. PW5 witnessed the beating at another stage of the journey from the bar to the Njuri shrine, saying said “I identified Kailemia, Mwenda, Kirimi alias Malaya, Kirao and Miriti. Kailemia is not before the court. Mwenda the 2nd accused (pointing) Kirimi alias Malaya is the (4th accused) pointing Kirao is the 3rd accused (points) Miriti is the 1st (accused) points. They were pushing a person called Kaiyuri. At a point called Gikandi, a building so called, Kailemia hit Kaiyuri on the legs using his leg and Kaiyuri fell down. When he fell down I saw Mwenda hitting Kaiyuri on the back with a stick. The others were stepping on him, and beating him with sticks.”.

83. As testified by PW5, PW6 and PW10, the Accused NO.4 was part of the group that arrested the deceased George Kaiyuri from Vision Bar and escorted him towards the Njuri Ncheke shrine when he was beaten leading to his death, and he is together with the members of his group taken to have had a common purpose to discipline, beat and do harm, if not to kill the deceased. PW6 described the arrest of the deceased at his Bar as follows:

“At this time two other elders Kathurima and Mwenda came and stood nearby at the counter. They did not speak to George. As he was speaking; George told Stanley that even if they went with him, Stanley would been his “father” Stanley said that there was no problem and if anything was required he would give it for George. At his time George Kanyuri left his phone at the bar saying that the elder of Njuri may take it from him when they went with him, He gave it to my bar maid assistant. After the left the phone, other 3 elders come quickly. I recall Julius, Kailemia and Kirimi Nickname “Malaya”. I can see 2 Mwenda the 2nd accused and Malaya the 4th accused (pointing at the two accused persons). After the 3 came and pronouncing “mumu” and carrying him away. I got to know it was a call when Njuiri Ncheke arrests a person who does not belong to their organization. They held him by the coat and on the trouser from the back. They left with him.”

84. The presence of Accused No. 4 in the Njuri Ncheke Elders group which arrested and beat the deceased is inculpatory, especially when considered that the Accused as he stated on cross-examination never reported the matter of the beating or killing to the police until he was arrested and never told of his evidence owning up to his presence at the incident and implicating his co-accused, which was offered in court until he was placed on his defence.

85. The law on common intention prescribes, as observed by the Court of Appeal in *Njoroge v. R* (1983) KLR 197, 204 common intention may be inferred from the presence of the accused persons at the scene of crime and involvement in some aspects of the offence, as follows:

“Both appellants said that they did not plan to kill the deceased, that their intention was to rob him of money only, and it was Karuga by himself who killed the deceased with the axe. If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.

The appellants and Karuga set out to rob the deceased. All three were armed. Assuming that it was Karuga who killed the deceased with his axe the appellants joined him to dispose of the body by throwing it into a pit, but changed their mind and threw it into the bush. Muiruri carried a big stone to throw it with the body into the pit. They brought the body out of the house. They were aiding Karuga in pursuance of a common purpose to rob which resulted in the death of the deceased which was a probable consequence which could necessarily ensue as a result of their unlawful design to rob, and each of them is deemed to have committed the



act as provided in section 21 of the Penal Code (cap 63). Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault R v Tabulayenka s/o Kirya (1943) 10 EACA 51.

Apart from the direct evidence of possession of the deceased's stolen cattle and sheep and his garments by both appellants, the remaining circumstantial evidence was such as to be explained only upon the hypothesis of the appellants' guilt and incompatible with any other innocent explanation. The three assessors were unanimously of the opinion that both appellants were guilty of murder. We agree.”

86. The Court finds, therefore, that in addition to the Accused Nos. 2 and 4 – those named Kathurima and Maingi, who was never charged, and Kailemia who was charged and his trial terminated when he died in prison and with involvement, probably, of PW10 as alleged by PW5, PW6 and Accused No. 4.

Malice aforethought

87. Section 206 of the Penal Code is clear as to the meaning of malice afore thought as follows:

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

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

88. By their acts of bludgeoning the deceased with sticks, the accused must be taken to have intended to cause the death of the deceased or to do grievous harm on him at the very least, and from the nature of the injuries, they must be taken to have had the knowledge, or to have been indifferent, that the act of beating the deceased would probably cause the death of or grievous harm on the deceased.

89. The deceased complained, according PW6 (Julius Mwenda Antony), that he was sought to give false testimony relating to a land dispute about a plot of land at Kiwanja ya Ndege. According to PW5, people feared the Njuri Ncheke elders to the extent that he had to hide when he heard them singing about his summons. Being referred to Njuri Ncheke or being sought by its elders sent the chill down many a spine and many feared, as PW2 testified, of losing their lives in the course of the Njuri proceedings.

90. The case before the court appears to have been an overzealous attempt to compel adherence to dispute resolution methods, discipline and or recruit members to the traditional Meru Elders grouping of Njuri Ncheke in the course of which the deceased was beaten and suffered fatal injuries at the hands of the accused persons. There was no sufficient evidence of involvement of the accused persons nos. 1,



3 and 6, and there was no evidence led on the basis of which the court may infer a common purpose, within the meaning of section 21 of the Penal Code, for the arrest of the PW2 Stephen Nkunja Kang'eero and the beating unto death the deceased, which is the subject of the murder charge herein.

The trial of Accused No. 5 terminated by Death

91. Accused No. 5 Paul Kailemia is deceased and his trial was, consequently, terminated by his death.

Conclusion

92. It came out from the evidence that the deceased was assaulted in an exercise of some elders of the Meru traditional association of Njuri Ncheke to compel his attendance and adherence to its dispute resolution process over some plot of land at Isiolo. What happened is a brazen affront to the Rule of Law which under Article 50 (1) of *the Constitution* guarantees every person a right to a fair hearing, not before Njuri Ncheke and other traditional associations using fearful methods of ordeal and similar proceedings, but in terms that “(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

93. It is opportune to state that the constitutional right to freedom of association under Article 36 of *the Constitution* protects every person from forced membership to any association, body or grouping of people, as well as from unwanted regulation, discipline or control by an association or its members over non-members, in terms of sub-article 2 that “(2) A person shall not be compelled to join an association of any kind.” The association of Njuri Ncheke or its members cannot lawfully force persons to become its members or impose its code of behaviour and discipline over persons who are not its voluntary members. In attempting to enforce its discipline or dispute resolution procedures over the deceased, the accused who are members of Njuri Ncheke not only violated the deceased’s constitutional right to freedom of association but also committed an offence of murder which resulted from the injuries occasioned during their assault on him.

Orders

94. Accordingly, for the reasons set out above, pursuant to section 322 of the Criminal Procedure Code, the Court after full trial finds that the Prosecution has established the case of murder contrary to section 203 as read with 204 of the Penal Code against the 2nd and 4th Accused persons but the case against the 1st Accused has not been proved beyond reasonable doubt.

95. Consequently, the 2nd Accused Francis Mwendwa and the 4th Accused JULIUS Kirimi M’mwitari alias Malaya are convicted for the offence of murder contrary to section 203 as read with 204 of the Penal Code as charged that they “on 19th day of august 2016 at Ntulele Sub-location, Buuri location in Tigania East South Sub-County within Meru County, jointly murdered George Kauyuri.”

96. The Accused No. 3 Romano Mugambi and Accused No. 6 Joseph Kanyuthia Imoti are acquitted upon the finding of not guilty entered in accordance with section 306 (1) of the Criminal Procedure Code at the stage of Ruling on Case to Answer

97. The 1st Accused Miriti M’thumaita Tharamba is, upon full trial, acquitted of the charge of murder contrary to section 203 as read with 204 of the Penal Code, and there shall, therefore, be an order for his immediate release from custody unless he is otherwise lawfully held.

98. The prosecution of deceased Accused No. 5 Paul Kailemia Ngeera alias Al Qaeda was terminated by reason of his death.



99. The Bail bond for the Accused No. 4 is cancelled, the Surety discharged and the Security shall be returned to the depositor.
100. The sentencing proceedings shall be taken on a date to be fixed in consultation with Counsel for the Accused and the DPP.

Orders accordingly.

DATED AND DELIVERED THIS 16TH DAY OF JANUARY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mutege for 1st and 2nd Accused.

Mr. Kabaale for 3rd Accused.

Mr. Otieno C for the 4th Accused.

Mr. C. Mbaabu for the 5th Accused.

Mr. Kaimenyi for the 6th Accused.

Ms. B. Nadwa and Mr. Masila, Prosecution Counsel for the DPP

