Republic v Kipchirchir & 2 others (Criminal Case E072 of 2021)
[2024] KEHC 10132 (KLR) (12 August 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E072 OF 2021

RN NYAKUNDI, J

AUGUST 12, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JOSPHAT KIPCHIRCHIR ..... 1ST ACCUSED

GIDEON KIPRONO ..... 2ND ACCUSED

LAMECK KIPKORIR ..... 3RD 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. The particulars of the offence are that on December 16, 2021, at Bukwo Village, Ngenyiel location, Turbo Sub County, within Uasin Gishu County, the accused persons jointly murdered Nelson Kipleting.

2. The accused persons pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The lead prosecution counsel in these proceedings was Mr. Mark Mugun for the state whereas the 1st Accused person was under the retainer of Learned counsel Mr. Okara. The 2nd Accused was under the retainer of learned Counsel Mr. Miyienda and the 3rd Accused was under the retainer of learned Counsel Mr. Keter.

3. The prosecution called 5 witnesses who gave evidence to establish the ingredients of the offence of murder

Prosecution's Case summary

4. Having presided over the matter and having gone through the submissions by both counsels, the submissions by the state counsel captures a fairly true record of the evidence adduced and I shall proceed to adopt the same.

5. PW1: Eric Kiprotich Tenten testified that he is a casual labourer. On the night of 15th December, 2021 at around 1930 HRS he had been hanging out with the deceased and they decided to go to a local chang'aa den to entertain themselves. They had two cups of chang'aa in the first den, moved to the next and bought two more cups then went to Bukwa centre. He ordered a bottle of chrome gin, which they drank together then went to the homestead of Mr. Bungei where they continued drinking. Lameck, the third accused, joined them, was offered a drink which he accepted and it was at that juncture that he realised he needed to get home before he became inebriated. Having struck an accord about that with the deceased, they both left for home but passed by a kiosk where he bought a loaf of bread which he shared with the deceased. As they were eating the bread while walking home, he heard someone call him by name and ordering him to stop. That person sounded angry and hostile. He turned back and saw the three accused persons in hot pursuit. Because he had differences with Joseph Kipchirchir (1st Accused) he took off, crossing a fence and left his friend, the deceased behind. He turned back and saw all the three accused persons roughing up the deceased. He called them out by name and cautioned them not to harm his friend. He then continued moving further away from them but could hear his friend groaning in pain, to which he yet again demanded that his friend should not be harmed. He then went home and slept. The following morning, he was informed that his friend, the deceased, had been killed and his body was lying beside a road, very same spot he had seen the accused persons attacking him the previous night. He then surrendered the information to the police. This witness was certain that he was able to recognise the three persons as the attackers because on the particular night, the sky was clear which was further enhanced by the bright moonlight. He similarly maintained that in as much as he had partaken of alcoholic drinks, the drinks had not taken a toll on him such as to mistake the people who attacked his friend. He stood firm on this even under heavy and intense cross-examination.

6. PW2: Simion Sitienei testified that in the early morning of 16th December 2021 he was notified that a body of a man resembling his brother had been seen lying beside a road. He rushed there and confirmed that in deed it was his brother, the deceased. The body appeared to have injuries on the back of the head, neck and face. It also appeared that he had vomited prior to his untimely demise. He made private inquiries as to who was last seen with his deceased brother and was informed that the deceased and PW1 had been drinking together. He was aware that Joseph Kipchirchir (the 1st Accused) and PW1 had differences. He later identified the body before a post-mortem examination was conducted.

7. PW3: Julius Busienei Menjo testified that in the morning of 16th December 2021, he was asleep at home when he was woken up cattle dealers and informed of a dead person lying beside the road. He rushed there and in as much as he was unable to identify who the dead person was, he noted that the body had visible injuries on the head and there was vomitus on the ground. He notified the local authorities and soon, the deceased's brother (PW2) came to identify the body. Their private investigations revealed that the deceased had been last seen alive in the company of Erick Tenten (PW1) with whom he had been partaking of drinks.

8. PW4: PC David Kamuren testified that on 16th December 2021 at around 0530HRS he was on crime stand-by duties when he was informed that a body had been found lying beside a road in Bukwo village. He booked the report and immediately rushed to the scene where he found a body of a male adult with visible injuries on the face and back of the head. He then took over the investigations which revealed that the deceased had been last seen in the company of PW1 and that they had been drinking in a local

chang'aa den. His investigations further revealed that the duo had been attacked by the three accused persons while on their way home. Because of the differences with the 1st accused, PW1, had managed to pre-empt the attack and flee but the deceased was not so keen. According to him therefore, this was a case of transferred malice.

9. PW5: DR. Wanambisi testified that on 20th December 2021 he conducted a post mortem on the body of the deceased. The body had a cut wound on the forehead, ecchymosis (a bruising caused by blood leaking from broken blood vessels into skin tissue) around the right eye. There was also a blood clot in the pulmonary vessels. The head had extensive fractures on the skull with epidural haematoma. He then concluded that the cause of death was due to a severe head injury secondary to blunt head trauma caused by high impact/energy and also due to pulmonary embolism.

The defence case

10. The 1st accused gave a sworn statement denying the offence of jointly being involved in the killing of the deceased. He narrated of the events of the day of 16th December, 2021 that he had gone to the club where he met six people or on about 9-9:30pm. He was able to identify some of the six persons he met who included the 2nd and 3rd accused and while the rest he did not know their names. According to the 1st accused on or about 10:00Pm he left with the 2nd & 3rd accused and on the way the 2nd accused branched to his homestead. He was left in company of the 3rd accused and they too arrived at their respective homes. The following day, he received information within the village that there was somebody who was found lying on the road and the police were informed who came and collected the body. He was then asked by the police to record a witness statement. That is all he knew about the facts surrounding the night of 16th December 2021.

11. Next was the 2nd accused Gideon Kiprono who denied the offence that he participated in the killing of the deceased as alleged by the prosecution witnesses. He recalled that he was in the club together with the 1st and 3rd accused where he continued to play a pool table until 10:00PM when they left the aforesaid club.

12. Last was the 3rd accused, Lameck Korir who gave evidence that on 16th December, 2021 that he had gone to a local pub where he had some drinks in company of the 1st & 2nd Accused. There was no time he ever had contact with the deceased.

13. In support of the case for prosecution, learned senior prosecution counsel canvassed his case by way of written submissions urging this court to find that all the ingredients of the offence of murder have been proved beyond reasonable doubt to warrant the court to find the accused persons guilty and have them convicted of the crime as initially charged of causing the death of Nelson Kipleting. He buttressed his arguments by placing reliance on the following authorities:

    a. Anthony Ndegwa Ngari v Republic (2014) eKLR

    b. Reuben Taabu Anjononi v Republic (1980) eKLR

    c. Roria vs Republic (1967) EA 583

    d. Maitany v Republic (1986) eKLR

    e. Mbelle v Republic (1986) eKLR

    f. Karani v Republic (1985) eKLR

    g. Vura Mwachi v Republic (2016) eKLR

h. Republic v Ismail Hussein Ibrahim (2018) eKLR

14. On the part of the 1st Accused person, learned counsel M/s Okara countered the submissions by the prosecution inviting this court to find that the prosecution failed to prove that the offence herein was committed by the 1st Accused person and his Co-accused persons acting in concert pursuit of a common intention. The learned counsel further invited this court to find that the was no chain completely and it to find that it was not established that the Accused persons planned, set and executed the alleged offence and also that the prosecution also failed to establish malice aforethought pursuant to Section 206 of the Penal Code. In agitating for that perspective, it was learned counsel's contention that the evidence that the prosecution has adduced before the Honourable Court, against the 1st Accused is simply circumstantial evidence rather that direct evidence and that the only circumstantial evidence linking the 1st Accused person to the charge therein is that he was seen with the deceased person at Bukwo Centre on the night that the deceased was murdered. It was learned counsel's contention that the principles in the following authorities would demonstrate that the charge falls short of the requirements set by the law of a case proven beyond reasonable doubt to call for a finding of guilty and conviction of the accused.

a. Woolmington v DPP (1935) AC 462

b. Millers v Minister of Pensions (1942) AC

c. Bakare v State (1985) NWLR

d. Republic v Andrew Omwenga (2009) eKLR

e. Abanga alia Onyango v Republic CR. APP No. 32 of (1990) UR

f. Sawe v Republic (2003) eKLR

Analysis & Determination

15. Having given that background and having considered the evidence tendered and the submissions filed, it is my singular duty to establish whether the prosecution has mounted a case against the accused persons within the required standard of proof of beyond reasonable doubt as the one who killed Nelson Kipleting.

16. The prosecution's evidence is appraised as against the provisions of Section 107(1), 108 and 109 of the *Evidence Act*, which provides as follows:

107: (1)Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108: The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109: The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

17. The Court in Mbugwa Kariuki v The Republic [1976-80] 1 KLR 1085 emphasized:

> " That the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.

18. The standard of proof is the extent to which a party ought to prove its case in order to succeed. This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented. This court should therefore examine whether the prosecution has discharged such a legal onus.

19. This initial burden of proof that the state bears to proof all the ingredients of beyond reasonable doubt in order for the accused persons to be convicted may only appear to be shifted to the accused persons only in two circumstances. First, is in the exceptional circumstances formulated under section 111 of the *Evidence Act*. Secondly, where the defence raised falls within the rubric of insanity, justification, excusable, self-defence or any other presumptions known in law. When an accused person raises any of these defences, more so the ones on self-defence, provocation, he/she is not denying the facts rather he/she affirms the action or omission asserted by the prosecution but invokes justification or excuses against criminal liability. The other defences like insanity are to have him/her exonerated from liability for reasons of mental infirmity such as in this case.

20. Under Art. 50 (2) (a) of *the Constitution* of Kenya 2010, the accused is presumed innocent until the contrary is proved either by direct or circumstantial evidence. Two primary classifications are used for evidence: circumstantial evidence or direct evidence. Circumstantial evidence indirectly proves a fact whereas direct evidence directly establishes a fact.

21. In People v Bretagna (298 NY 323, 325-326 [1949]) the court addressed itself in the following language:

> " Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. * * * Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred" see People v Hardy, 26 NY3d 245, 251 [2015) By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)"; Schneider v Kings Hwy. Hosp. Ctr., 67 NY2d 743, 744 [1986]"

22. An analysis of the facts of the case reveal that is purely a circumstantial evidence case. The black's law dictionary defines circumstantial evidence as indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical inference that the fact exists. In simpler words, it is evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue.

23. It is trite that any crime in our legal system must comprise mens rea and actus reus. The trial court is under duty to ensure that before any conviction is entered both actus reus and mens rea have been proved to the required standard of beyond reasonable doubt. See Joseph Kimani v R 2014 eKLR). In

this case, the following ingredients of the offence of murder must be proved beyond reasonable doubt without any conjecture or suspicion.

a. The fact of death of the deceased

b. The death was unlawfully caused

c. The death was caused with malice aforethought

d. The accused persons participated in or caused the death of the deceased.

24. Section 203 defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.

25. The first issue for consideration is proof of death. In the instant case, there is no dispute of the deceased's death. This was confirmed by all the prosecution witnesses, more so by the evidence of PW5 who carried out the post-mortem on the deceased's body. The body had a cut wound on the forehead, ecchymosis (a bruising caused by blood leaking from broken blood vessels into skin tissue) around the right eye. The respiratory system had pleural effusion (accumulation of fluid). There was also a blood clot in the pulmonary vessels. The head had extensive fractures in the skull with epidural haematoma. He then concluded that the cause of death was due to a severe head injury secondary to blunt head trauma caused by high impact/energy and also due to pulmonary embolism. Accordingly, it is my opinion that the prosecution has satisfied this element beyond reasonable doubt.

26. The next ingredient is to determine whether the death of Nelson Kipleting was through an unlawful act or omission.

27. Put differently, it must be presented in evidence that the victim of the murder suffered either physical or bodily harm as a result of the unlawful act of omission or commission. That the evidence demonstrates beyond reasonable doubt that the injuries inflicted leading to the loss of survival of a human being as known in law were unlawfully executed. It is therefore necessary to appreciate the scale of evidence on this ingredient as submitted before this court by the prosecution. In the present case, directly, the flow of evidence by the prosecution witnesses point out to the 1st Accused person as the perpetrator.

28. In murder cases, or manslaughter for that matter, causation is a central issue. The prosecution must adduce evidence connecting the acts or omissions which contributed or caused the death of the deceased. The Prosecution establishing the cause of death is non-negotiable in so far as section 203 of the Penal Code is concerned.

29. The allegedly causative acts or omissions need not to the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death (The maxim here is that of acts or omission which occasion the acceleration of death)

30. The provisions of section 213 of the Penal Code which defines causing death to include acts which are not the immediate or sole causes of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances;

a. He inflicts bodily injury on another person and as a consequence of the injury the injured person undergoes a surgery or treatment which causes his death;

b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or/and proper precautions as to his mode of living;

c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused;

d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and

e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

31. In the case of R v Gusambisi s/o Wesonga (1948)15 EACA 65, every homicide is unlawful unless rebutted by evidence that it was either justifiable or excusable. These principles bring into play the provisions under section 17 on self-defence and section 207 as read with 208 of the Penal Code on provocation.

32. In this respect any potential defences to the unlawful acts which causes death have been excluded in respect of all of that range of acts which caused the fatal injuries leading to the victim succumbing to death. That those acts or omissions done by the offender were in the prosecution of an unlawful purpose to endanger human life. As a matter of emphasis, the element of unlawfulness to cause death in exceptional circumstances is excusable by law in the event of an accident, natural causes, insanity self-defence and also provocation.

33. Article 26 (1) of *the Constitution* guarantees every person the right to life. Therefore, no person is permitted to kill or cause the death of another person unless otherwise as provided for in our constitution or any other enabling statute. The law in Kenya presumes every homicide to be unlawful unless it is accidental or excusable or authorised by law. On this ground the court has to take into account the guidelines in Juma Lubanga v R (1972) HCD in which the court made the following observations:

> " Grievous harm as defined in the Penal Code involves a consideration whether the harm is such as seriously to interfere with the health or comfort, and the answer to the question may depend on the nature of the injury and the circumstances of the case."

34. The post-mortem report prepared by PW5 revealed that the deceased's cause of death was due to a severe head injury secondary to blunt head trauma caused by high impact/energy and also due to pulmonary embolism. This was not opposed by the Defence. In the circumstances, I am persuaded beyond reasonable doubt that the deceased, Nelson Kipleting died of an unlawful act.

35. The other question is whether it was the 1st Accused who unlawfully caused the deceased's death. None of the prosecution witnesses actually saw the subject kill the deceased. In essence, the prosecution case was based on circumstantial evidence. In Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

> " However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence.
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> Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for

proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: - "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

36. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

> " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:
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> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; 9iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

37. In this case, PW1 testified that on the night of 15th December, 2021at around 1930 HRS he had been hanging out with the deceased and they decided to go to a local chang'aa den to entertain themselves. They had two cups of chang'aa in the first den, moved to the next and bought two more cups then went to Bukwa centre. He ordered a bottle of chrome gin, which they drank together then went to the homestead of Mr. Bungei where they continued drinking. Lameck, the third accused, joined them, was offered a drink which he accepted and it was at that juncture that he realised he needed to get home before he became inebriated. Having struck an accord about that with the deceased, they both left for home but passed by a kiosk where he bought a loaf of bread which he shared with the deceased.

38. PW1 further testified that as they were eating the bread while walking home, he heard someone call him by name and ordering him to stop. That person sounded angry and hostile. He turned back and saw the three accused persons in hot pursuit. Because he had differences with Joseph Kipchirchir (1st Accused) he took off, crossing a fence and left his friend, the deceased behind. He turned back and saw all the three accused persons roughing up the deceased. He called them out by name and cautioned them not to harm his friend. He then continued moving further away from them but could hear his friend groaning in pain, to which he yet again demanded that his friend should not be harmed. He then went home and slept.

39. PW1 also testified that the following morning, he was informed that his friend, the deceased, had been killed and his body was lying beside a road, very same spot he had seen the accused persons attacking him the previous night. He then surrendered the information to the police. This witness was certain that he was able to recognize the three persons as the attackers because on the particular night, the sky was clear which was further enhanced by the bright moonlight.

40. PW2 testified that he made private inquiries as to who was last seen with his deceased brother and was informed that the deceased and PW1 had been drinking together. He was aware that Joseph

Kipchirchir (the 1st Accused) and PW1 had differences. He later identified the body before a post-mortem examination was conducted.

41. From the evidence adduced by the prosecution, it is clear that the 1st Accused person was the last person to see the deceased prior to his death. In his defense, the 1st Accused stated that the only circumstantial evidence linking him to the charge herein is that he was seen with the deceased person at Bukwo centre on the night that it is alleged that the deceased was murdered. He further stated that the chain of circumstantial evidence is not complete as the deceased was unknown to him and he met the deceased for the first time at the Club at Bukwo centre on the night when it is alleged that the deceased was murdered. The 1st accused also stated that, one Erick Kiprotich Tenten, who is the prosecution witness herein, is the one who left with the deceased and the said witness has been adversely mentioned and that a lot surround him.

42. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene of the incident by PW1 as the last persons to be in company of the deceased before he died they had a duty to give evidence on matters within their knowledge as to the commission of the offence.

43. In the Nigerian case of Stephen Haruna v The Attorney-General of The Federation (2010) 1 I LAW/CA/A/86/C/2009 the court opined thus:

> " The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

44. Similarly, in the Indian case of Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh, JT 2006 (4) SC 16 the court held that:

> " Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."

45. The accused persons in this case are thus required to offer an explanation on how the deceased met his death. Sections 111(1) and 119 of the *Evidence Act* provides as follows:

> " 111.
>
> (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise,

that such circumstances or facts exist: Provided further that the person accused shall be 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."

"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

46. In the circumstances of this case, it is my view that the accused persons' defence failed to offer any explanation as to how the deceased might have met her death. Their defense, in my mind, amounted to a mere denial. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the Accused who unlawfully caused the deceased's death.

47. The next question to be answered is whether this is a case of the doctrine of common intention under Section 21 of the Penal Code. This is in respect of the 2nd and 3rd accused respectively. Section 21 of the Code provides the features of criminal responsibility as follows:

"When two or more persons, form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

48. The Court in Ismael Kiseregwa & Another v Uganda CA CRIM Appeal No. 6 of 1978 held as follows:

"In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. It it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter."

49. The ingredients of common intention were enunciated in Eunice Musenya Ndui versus Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows: -

(1) There must be two or more persons;

(2) The persons must form a common intention;

(3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;

(4) An offence must be committed in the process;

(5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

50. The prosecution case of placing the 2nd & 3rd accused at the scene came from the testimony of PW1 who positively identified both of them through voice recognition. In arriving at this conclusion, I place reliance on the principles in Roria v Republic (1967) EA 583, in which it was stated as follows:

> " Subject to 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."

51. The evidence of PW1 on voice recognition was not controverted by the 2nd and 3rd accused persons

52. Finally, on the question of whether there was malice aforethought on the part of the accused persons, one has to first get the definition under Section 206 of the Penal Code which defines Malice aforethought as follows:

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

53. The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, the Court of Appeal held as follows:

> " Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
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> i) The intention to cause death;
>
> ii) The intention to cause grievous bodily harm;
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> iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases

does it matter that the act and intention were aimed at a potential victim other than the one succumbed....."

54. In the instant case, malice aforethought can be inferred from the post mortem report which shows inflicted serious bodily injuries to the deceased, which is supported by the opinion of the pathologist that the cause of death was severe head injury due to blunt head trauma. The serious injury largely targeting the head demonstrates that the perpetrators were extremely reckless to a point of disregarding the value of human life. This was an unlawful act committed against the deceased with malice aforethought. As noted above, the accused person with a common intention and malice aforethought taken together establishes the prosecution case beyond reasonable doubt for the offence of murder contrary to section 203 of the Penal Code. Whereas the defence raised some form of an alibi defence, the same did not controvert. The prosecution witnesses who circumstantially placed them at the scene of the crime. For those reasons, I find each of the accused persons guilty of the offence and they stand convicted of the alleged offence as framed by the state.

Sentence

1. The court has arrived at a fairly complex stage of the proceedings; that of imposing an appropriate sentence. Sentencing requires striking a delicate balance by considering the offence and the circumstances surrounding it together with the interests of society. This court is also required to consider the various objectives of sentencing as laid out in the Judiciary Policy Guidelines 2023 together with the factors enumerated in the case of Francis K. Muruatetu v Republic (2017) eKLR.

2. The accused persons before court were charged and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence ordinarily attracts a death penalty but its mandatory nature was declared unconstitutional in the Muruatetu case. The court therefore is called upon to impose an appropriate sentence considering the circumstances surrounding the offence.

3. In agitating for a lenient sentence, the accused persons offered their mitigation. In a nutshell, each of the defence counsel riding on the protocol set my learned counsel Mr. Miyienda, submitted that each of the accused person regrets the offence and they asked the court to take into account their age, personal circumstances and the aspect of rehabilitation and that the court should not focus more on deterrence and retribution for there is a likelihood of having the accused persons rehabilitated within the community. In essence, each of the defence counsel agitated for a non-custodial sentence.

4. I have considered the mitigation advanced by the accused person and the factors set out in the Muruatetu case being; Age of the offender, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other relevant factor.

5. The Judiciary Sentencing Policy Guidelines also have identified some of the objectives that a court should have in mind so as to mete an appropriate sentence. The factors include:

    a. Retribution: to punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

e. Community protection: to protect the community by incapacitating the offender.

f. Denunciation: to communicate the community's condemnation of the criminal conduct.

g. Reconciliation: To mend the relationship between the offender, the victim and the community.

h. Reintegration: To facilitate the re-entry of the offender into the society.

6. In my judgement, I have dealt extensively with facts on which the accused were convicted of the offence of murder. The injuries inflicted on the deceased person dictate the seriousness of the offence. The post mortem report indicated that the cause of death was severe head injury due to blunt trauma. The injury on the head demonstrated that the perpetrators were determined to terminate the life of the deceased.

7. In State v Banda and Others 1991(2) SA 352 (B) at 355A-C Friedman J explained that:

> " The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirement. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns."

8. The approach to sentencing is not complete unless and until a trial court directs its mind to the Bill of Rights in *the Constitution* as read with Section 333(2) of the Criminal Procedure Code on pre-trial detention. The provisions of the code are tailored to effectuate the period spent in remand custody before an accused person's case has been heard and determined to finality. This provision is underpinned on the presumption of innocence enshrined in our constitution that an accused person arraigned before a court of law is presumed innocent until proven guilty by the state. This right lies at the foundation of the administration of criminal justice. The bill of rights protects and guarantees the right to human dignity in Art. 28 and to have that dignity respected and protected. In Art. 29 of the same Constitution, every citizen enjoys the right to freedom and security which includes the right not to be deprived of freedom arbitrarily or without just cause. On may argue that Art. 49(1h) provides the right for an accused person to be released on bond or bail on reasonable conditions pending a judge or trial unless compelling reasons not to be released exist. The Article is easier said than done for reasons that most trial courts grant punitive bond terms which many suspects are not able to abide and therefore without more, pre-trial detention amounts to punishment. Given our constitutional democracy entrenched with the rule of law, the legitimacy of pre-trial detention was kind of outlawed for every offence in Kenya is bailable. It matters not whether it is a felony or misdemeanour. Each suspect has a right to bail. The effect of bail administration upon the accused is with regard to the likelihood that he might not be able to attend trial as scheduled hence setting high amount of bail negates Art. 49(1h) of *the Constitution*. The issue of pre-trial release of a person charged with a crime is one of the most important components in a criminal justice system for both the state and the accused person. It is inherent in *the Constitution* that Pre-trial detention seriously restricts the physical liberty of a suspect or accused person. In making the interpretive arguments to give credit for the period spent in remand custody, one has to look at the constitutional imperatives under the Bill of Right. Therefore,

at the end of the trial when an accused person is found guilty as charged and convicted for the alleged offence, he/she has a right to be accorded credit of the period spent in remand custody. Freedom from bodily restraint has always been at the core of the liberty protected by *the Constitution* but one must also look beyond the bodily restraint to the effects of psychological and emotional impact of pre-trial detention when once innocence has not been disapproving beyond reasonable doubt. *The constitution* provides in Art 25(a) that no person shall be subjected to cruel, inhumane or degrading treatment or punishment which is also entrenched in international instruments as expressly provided for in Art. 2(5) & (6) of *the Constitution*.

9. It is useful to take note of the words in Section 333(2) of the Criminal Procedure Code. It is a tenate of Constitutional Law. Whilst crime prevention is a legitimate state objective, any measures imposed to deal with this objective should not be arbitrarily, unfair or base on irrational considerations. In my view therefore, in the instant case, there is prima facie evidence that the accused persons in the context of this trial did not benefit from Art. 49(1h) of *the Constitution* on the right to bail. As the code puts it, they are entitled to discounted period of the overall sentence imposed by this court as a sanction of breaching the Penal Code for the offence of murder

10. Finally, imposing a sentence is an exercise that calls the trial court to objectively and purposively apply its mind underpinned on the objectives and principles as aforementioned. In attempting to strike a fair balance, the court in S v Rabie 1975 (4) SA 855 AD at 862D-F stated as hereunder:

> " A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive for severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality."

11. Having taken all the aforesaid factors into consideration together with the circumstances surrounding the offence, when striking a proper balance, the aggravating factors outweigh the mitigating circumstances and as such, the accused persons are hereby sentenced to 15 years each with a credit period of 2 years and 8 months pursuant to section 333(2) of the Criminal Procedure Code.

12. Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF AUGUST, 2024

R. NYAKUNDI

JUDGE