



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NUMBER 26 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER KIPROTICH KOSGEY.....1<sup>ST</sup> ACCUSED**

**BENARD KIPLANGAT ROTICH.....2<sup>ND</sup> ACCUSED**

**BEN CHERUIYOT KIPROTICH.....3<sup>RD</sup> ACCUSED**

**R U L I N G**

1. The accused persons **Peter Kiprotich Kosgey, Benard Kiplangat Rotich, Ben Cheruiyot Kiprotich** are jointly charged with **Murder Contrary to Section 203 as read with Section 204 of the Penal Code** vide information dated 8<sup>th</sup> June, 2018 and filed on the same date.
2. The particulars of the charge are that on 23<sup>rd</sup> May, 2018 at Salgaa Trading Centre in Rongai Sub-County within Nakuru County jointly with others not before court, murdered **Ronald Samuel Kumbu**.
3. The accused persons were arraigned in court on 14<sup>th</sup> June, 2018 when the charge was read to them and each pleaded not guilty.
4. The matter was set down for hearing and the prosecution called seven (7) witnesses.
5. The accused persons were represented by Mr. Ngotho, Ms Morande and Ms Mugweru Advocates respectively.
6. At the close of the case for the prosecution the issue for determination is whether the prosecution has established a prima facie case to warrant the accused being put on the defence.
7. **PW1, David Kipchumba Koech** testified that on 23<sup>rd</sup> May, 2018 at about 7.00 a.m. he received a phone call from a boda boda rider telling him that there was a body near Jamia Mosque. He rang one Inspector Noor who told him to go to the scene and check whether it was true. He went there and saw a body of a person lying on the ground facing upward with blood on the back of the head. He reported to IP Noor who came to the scene and removed the body to the Mortuary.
8. PW1 further testified that he later made enquiries. He was told that the 1<sup>st</sup> accused person had taken a phone from a certain lady with whom he was living and had been chatting with the deceased who was a lorry driver through that phone. The deceased was said to have had a relationship with that lady. PW1 went looking for the 1<sup>st</sup> accused and the said lady because he knew the 1<sup>st</sup> accused. He found that they had disappeared. He asked for the 1<sup>st</sup> accused person's number. He testified that he gave the said phone number to his friend who '**works with these people who track phones**'. He testified that this friend traced the 1<sup>st</sup> accused and the said lady to Chepseon Kericho County, a place called Pinin. PW1 then spoke to the village elder who told him that he was with the 1<sup>st</sup> accused and the lady. The village elder took them to Brooke Police Post. The village elder then rang the OCPD Rongai who sent IP Noor to get the two. He accompanied IP Noor to Brook Police Post. They got the 1<sup>st</sup> accused and the lady. These two were rearrested and taken to Salgaa Police Station. The 2<sup>nd</sup> and 3<sup>rd</sup> Accused were arrested at Salgaa. He testified that he knew the 1<sup>st</sup> and 3<sup>rd</sup> accused persons.
9. On cross examination, PW1 stated that the boda boda rider who called him is a member of Nyumba Kumi. He said that when he rang and have him the report, IP Noor came to the scene almost immediately. He testified that he was told by some people that the body was that of a "**mtu ya lorry**" whom he had never seen before.

10. He said he knew the 1<sup>st</sup> accused because he was an employee of Paradise Hotel at Salgaa where he used to take tea.
11. He testified that the lady in question was living with the 1<sup>st</sup> accused as husband and wife. That she had told him that the deceased person was her *mpango wa kando*. That the 1<sup>st</sup> accused had found out and on the material night had taken her phone, and while pretending to be the her, began to chat with the deceased. That the incident both the herself and the 1<sup>st</sup> accused disappeared.
12. Regarding the 2<sup>nd</sup> Accused he said he did not know him or the reasons for his arrest. Regarding the 3<sup>rd</sup> Accused person he testified that he did not find anything about him from the lady. That he had only come to the scene. He confirmed he did not know who killed the deceased.
13. **PW2, Wesley Chepkwony**, testified that he was a landlord at Salgaa at the material time. On 22<sup>nd</sup> May 2018 at around 11.00 p.m. he was with his wife at home about to sleep. He heard people screaming, went outside and saw an unknown person being beaten by many people among whom were his tenants. He went there and told them to stop. It was raining heavily. One person told the person who was being beaten to get up. He got up very slowly and walked away although he was really struggling to walk. Everyone left.
14. He testified that the following day on his way to work he saw the body of the person he had seen being beaten the previous night. He said that the deceased had been beaten by Kiprotich the 1<sup>st</sup> accused and he had seen the 2<sup>nd</sup> and 3<sup>rd</sup> accused both of whom he knew as Ben at the scene.
15. On cross examination by Mr. Ngotho Advocate, he told the court that he had eight (8) mabati single room rentals about 50 metres from his house. That this is where the 1<sup>st</sup> accused was living with a certain lady as his wife. That when he heard the screams it was about 11.00 p.m. That the incident was in a field nearby. That it was raining heavily and it was dark. That there were no lights so he used his mobile phone's torch light to see. That at the scene where the screams were coming from he found five (5) or six (6) people including two ladies one of whom was the one living with the 1<sup>st</sup> accused and the other was a tenant, and that there was another person by the name Mathew. He said he did not call the police because the persons he found there stopped fighting and he did not think that a person would die. He said when he saw the body it had a swollen face, and foam from the mouth but the person he had seen the previous night did not have a swollen face. He said the point where the deceased was assaulted to where his body was found was about 30 metres to 50 metres.
16. Cross examined with regard to the 2<sup>nd</sup> accused he said that when he arrived at the scene the beating had already taken place and he never witnessed the beating. He said the person was down on the ground and he noted that he was a stranger. He said he identified the six (6) persons he found there as his tenants. He said he told them to stop beating the person because they had sticks. He said it was the 1<sup>st</sup> accused who told the person to get up. That it was obvious he was in pain. That he left the accused persons there and the person who had been beaten left. That when he found the body he saw that it was the same person he had seen the previous night. He confirmed that he did not see the accused persons beat the deceased. He said he identified the accused persons using his torch. On Cross examination by Ms. Mugweru Advocate, he confirmed he had not seen the deceased on his plot on that fateful day. He said he heard screams of a man shouting uuui! Uuui! Uuui!. He said that he had other tenants other than the three (3) accused. He said he could not recall whether one Emmy Cheruiyot was one of his tenants.
17. Questioned about the light he had, he said it was his mobile phone's torch. That because it was raining he had to put it off. He said he could not recall the clothes the person who was being beaten was wearing, but that he was as dark as the 2<sup>nd</sup> accused, stout like himself (the witness) and similar height as the witness himself about 5' 3''. He testified that the person did not talk to him. He said that when he found the body it was about 5:00 am. That it was a bit dark. That he looked at the body with fear but still went close enough and checked it keenly. He said that when he found the body he called PW1. Asked whether he was a boda boda rider he said no, that he ran a hotel in that town.
18. **PW3 Maureen Chebet** testified that she was with PW2, her who she said was her husband. That at the scene they found five (5) to seven (7) people. That both 2<sup>nd</sup> and 3<sup>rd</sup> Accused were present, and there was a person on the ground. She testified that the person by the name Peter was saying that that he had found the man who was on the ground with his wife. He slapped the man, then they told the man to leave. She said she did not see him walk while she was there. She said that she too saw the body the following day while going to work and called Nyumba Kumi.
19. On cross examination she said she saw the body about 6:30 a.m. before her husband as she went to work. That when she saw the body she called another person by the name Hellen and they both confirmed that he was dead.
20. Asked about the night of the incident she said when they went to the scene she saw torches. That her husband PW2 did not have a torch. That the persons she identified at the scene were Peter, Peter's wife, Ben but she could not identify the person who was on the ground. That she was only able to identify him on the morning after the incident.
21. On further cross examination she said that when she and her husband got to the scene, there were the seven (7) people standing and one seated on the ground, she said she never saw him get up and walk. Her statement was put to her where she had told the police that her husband had pleaded with them to stop beating the man yet she never testified witnessing the beating. In addition she had stated in her statement that she had not heard the person who told the man on the ground to get up and leave yet she testified that she heard the 1<sup>st</sup> accused tell the man to get up and leave. She stated that her husband left home after her that day, and that she is the one called Nyumba Kumi after seeing the body.
22. She further told the court that the persons she saw at the scene included the accused persons, two ladies and Mathew and Edu. That she saw the person in the dark and could not identify him. That she did not see the deceased being beaten.
23. **PW4 No. 236618 IP Abdi Nassir Noor** was at the material time the Officer in charge Salgaa Police Station. He testified that on 23<sup>rd</sup>

May 2018 at around 6.00 a.m. he was called by PW1 who told him that there was a body within Salgaa trading centre. He went to the scene and found a man who had been killed. He checked his body and found a driving license in his pocket bearing the name Ronald Samwel Kunju and a copy of identity card indicating that he was a Mijikenda from Kilifi, Kaloleni SubCounty. While he was at the scene a person came and introduced himself as Ali Tembo, Ugandan National, who said he was a driver and that the deceased was his turn boy. Ali informed him that they had a mechanical problem and had parted ways with the deceased at around 11:00 a.m. the previous day and he did not know what had happened to the deceased. IP Noor testified that he called the scenes of crime personnel who came, examined the scene, and took photos and then moved the body to Nakuru Provincial General Hospital Mortuary.

24. He testified further that the next day he received a call from PW1 the Nyumba Kumi telling him that the person who had committed the crime was in Kericho with the lady who was with the deceased. That he went to Kericho and with the assistance of Nyumba Kumi looked for the two and found them. That one of them began to chew a piece of paper which he recovered. His attempt to produce the piece of paper was resisted by the defence. It turned out that the same had not been supplied to the defence and was not even mentioned in his own statement of PW4. The attempt to have the matter adjourned for the prosecution to arrange to produce the same was denied.

25. IP Noor continued to testify that the two were brought to Rongai Police station where the male suspect told them that his brother Philip had the deceased's phone. That they went up to the home of the said Philip and recovered the phone make Samsung which was later identified by Ali and the family of the deceased. IP Noor testified further that the accused persons were mentioned by witnesses especially the landlord and his wife who told him they found them beating the young man, and when they tried to stop them, they refused to listen and they killed him. He produced the phone as Exhibit 3.

26. On Cross examination by Mr. Ngotho Advocate, he confirmed that he was the arresting officer, he said he went to Kericho to arrest the 1<sup>st</sup> accused after they tracked his phone. He said the phone number was obtained from the hotel where the 1<sup>st</sup> worked. He said never spoke to the owner of the hotel but to the 1<sup>st</sup> accused's colleagues. He said the colleagues told him that the 1<sup>st</sup> accused had left work and never returned. That the landlord told him he did not have the 1<sup>st</sup> accused's phone number though he was his tenant. He said he was not the one who had arrested the accused. That it was Nyumba Kumi from the 1<sup>st</sup> accused's home area who arrested him. That he simply re-arrested him from the Nyumba Kumi with the help of officers from Brookebond Police Post. Further that when he recovered the phone belonging to the deceased it was off but he never switched it on or charged it to read the messages. He said he was led to the accused by the land lord and his wife. He said the 1<sup>st</sup> accused and his girlfriend lived in the same house.

27. He also said that he did not take the registration number of the lorry where deceased was alleged to be turnboy. He said that from the information he received from eye witnesses, one Mathew had lifted a stone hit the deceased with a stone. He testified that the said Mathew worked with the 1<sup>st</sup> accused to kill the deceased. That Mathew assisted the 1<sup>st</sup> accused to kill the deceased. He said the deceased was killed because he was involved in a love triangle.

28. He testified that he did not attend the Postmortem examination but when at the scene he noticed that the body had injuries on the head. On cross examination by Ms. Murande Advocate, he stated that 2<sup>nd</sup> accused person was identified by PW2 when he went to the scene and found him amongst the people who were beating the deceased. He said there was a possibility the 2<sup>nd</sup> accused person also went to the scene upon hearing screams just like the landlord. He said that apart from the landlord and his wife there were no other persons who responded to the screams or who said they saw the 2<sup>nd</sup> accused at the scene. He said that the landlord and his wife did not report to the police that there was a fight happening or that someone was being beaten. They were also the first ones to identify the body though they did not know whose body it was. He denied the possibility that the landlord and his wife could have killed the deceased. He also said that the lady in the love triangle one Purity Chepkemioi told him that there was a fight between the 1<sup>st</sup> accused and the deceased over her. He said that the ODP recommended that she be treated as a witness. That she only recorded a cautionary statement. That there was no other evidence other than that of the landlord and his wife of the presence of the 2<sup>nd</sup> accused at the scene.

29. On cross examination by Ms. Mugweru Advocate, he said there was a crowd, the landlord and this wife were present. He confirmed that the deceased was neither from Salgaa nor a tenant of the landlord and his wife, and he could not explain how they were able to identify the body they said they saw and the person they said was assaulted by the accused persons. He said the deceased was beaten in the morning yet the couple did not call the police when he was being beaten but only called after he was dead. He conceded that it was possible that the two could have injured the deceased.

30. Regarding the deceased's mobile phone he said he relied on what the 1<sup>st</sup> accused told him to prove that that was the deceased's phone; that his brother had the deceased's phone, took them to his brother where they recovered the phone. He confirmed that he did not know what model the phone was, or even whether the line was registered in name of deceased. He also confirmed that he did not name the lady alleged to be in the love triangle in his statement. He did not also state in his statement who he arrested by name, writing only that he had arrested suspects. That even though they were first arrested by Nyumba Kumi and police officers from Brookebond Police Post the suspects were not booked at the Police Post OB.

31. This witness was at pains to explain where he got the evidence that the accused persons killed the deceased or that the person the landlord saw being beaten was the same one whose body was found dead in the morning. He could not say whether the body that was found could have been brought in from another place.

32. On the issue of weapons used to assault the deceased, he said that those who witnessed the beating did not mention any weapons. On the issue of the love triangle he denied the possibility that the lady in the love triangle had an affair with the landlord, the accused and the deceased. He said that the deceased's mobile phone was not tracked.

33. On re- examination this witness told the court that he did not suspect the landlord and his wife because as per the statement of Purity the deceased was killed by the three accused persons. He said deceased was beaten between 2:00 a.m. and 3:00 a.m.

34. **PW5, Eunice Mapenzi Kenga**, wife to the deceased testified that on 23<sup>rd</sup> May 2018 she was notified by her sister in law and deceased's boss about the deceased's death. She travelled to Salgaa in company of her mother in law and upon arrival they went to Rongai Police Station, recorded their statements and thereafter proceeded to the Mortuary where they positively identified the deceased body. She said she saw signs of having been stabbed with a metal rod on the deceased's neck and face.

35. Questioned about her phone conversations with the deceased she said that he never put off his phone, they spoke every day when he was on safari. She said that it was not normal for him not to call her, and the last time they spoke was on 21<sup>st</sup> May 2018 at 8.00 p.m. That she was worried but could not follow up with his office because she had money problems.

36. She said that his journeys were to Uganda and not to Salgaa. She was not aware he had any friends at Salgaa. She could not recall the name of the driver with whom the husband worked.

37. **PW6, No. 60627 PC George Mathenge**, testified how he joined PW4 at the scene they got information that the deceased was a conductor for Kyoga Transporters. He said that where the body was there were signs of a big scuffle, of people, foot prints, disturbed and flattened grass. According to him, the problem started from a nearby mabati structure which was occupied by a lady and a man. It was alleged that the deceased had visited that structure where he was found by the 1<sup>st</sup> accused who was a friend to that lady whose name was Purity. That the 1<sup>st</sup> accused followed the deceased to where he was staying and began to raise alarm. Neighbours came, followed the deceased and a fight broke out and the deceased suffered fatal injuries. He testified further that where the scuffle happened was near the house of the owner of the plot where the accused persons were tenants. That this landlord tried to stop them from beating the deceased but they would not listen.

38. He testified that the 1<sup>st</sup> suspect left with the deceased's phone which had a green cover, and upon his arrest he took the police to where he had hidden the phone at Salgaa. His friends the 2<sup>nd</sup> and 3<sup>rd</sup> accused were identified by the landlord.

39. On cross examination he testified that the body had a stab wound cut caused by a blunt object on the head. He could not recall any injury on the neck. He could not tell who called the wife of the deceased about the death. He said he knew from the landlord that the cause of all this was a woman with whom the 1<sup>st</sup> accused disappeared after the incident. He said he spoke to the employer of the 1<sup>st</sup> accused. He said he learnt of the whereabouts of the 1<sup>st</sup> accused from PW1. That the inventory for the recovery of the phone was not produced. He confirmed that the phone was not subjected to forensics to confirm who the deceased was speaking to before his death. He did not have any statement from the person from whom the phone was allegedly recovered, neither did he have any evidence that the phone produced in court was shown to the wife and mother of deceased, or whether the two identified the same as that of deceased.

40. **PW7, Dr. George Biketi**, an assistant Director of Medical Service Department of Health Services Nakuru County, testified that he conducted a post mortem examination on the deceased's body. He stated that the deceased's body had defence wounds on the left wrist, bruises and collection of blood under left lower limb skin, blood clots from the nostril, bruises on the digestive system, blood collection under the skin anterior abdominal wall, swelling on the head, deformed left supra orbital region, irregular wound and depressed skull fracture. He concluded that the cause of death was severe head injury from massive blunt trauma on the head and produced postmortem report as Exhibit 4.

41. On cross examination, he stated that massive blunt force to the head is what broke the firm bone of the skull protecting the brain, that from the patterns of the injuries sustained by the deceased, the object used could have been irregular for example stones, sticks, off cut or a piece of wood. He said there were superficial injuries to the deceased's abdomen and confirmed there was no injury to the neck. He said he could not establish the date of death as the body was already embalmed. He denied that the body could have sustained the head injury from a fall in the mortuary due to mishandling.

42. The parties herein did not file any submissions.

43. The only issue that falls for determination is whether the prosecution has made out a case to warrant the accused persons to be put on their defence in terms of **Section 306 of the Criminal Procedure Code (Cap 75) Laws of Kenya**.

44. **Section 306 of the Criminal Procedure Code** provides:

*“(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.*

*“(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”*

45. According to **Bhatt vs Regina** [1957] EA 332 at page 335 paragraphs (a) and (b) a *prima facie* case is made out when:

*“a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”*

46. In Republic vs Abdi Ibrahim Owl [2013] eKLR a *prima facie* case was defined as follows: -

***“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8<sup>th</sup> Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:***

***“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.”***

***This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”.***

***A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”***

47. In Republic vs Wachira (1975) EA 262 Trevelyan, J paired with Hancox, J(as he then was) held that;

***“it has been settled for many years that the sufficiency or otherwise of the evidence at close of prosecution case, so as to require the an accused to make his defence thereto, is a matter of law, a court is only entitled to acquit at that stage if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witness is so incredible and untrustworthy that no reasonable tribunal, properly directing itself ,could safely convict. Apart from these two situations, a tribunal should not in general be called upon to reach a decision to conviction or acquit until the whole of the evidence which either side wishes to tender has been placed before it. if, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at any stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict on the evidence so far laid before it, there is case to answer”***

48. The court was discouraged from giving reasons for its findings at this stage in the case of Festo Wandera Mukando vs The Republic (1980) KLR 103, the court stated as follows;

***“... We once draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment .Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submissions is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned”***

49. I have set out the case for the prosecution in great detail to enable the determination as to whether it set out a prima facie case against the accused persons to warrant each being put on the defence.

50. To establish a prima facie case the prosecution is expected to not only demonstrate that a person was killed, but that there is evidence to show that the three accused persons did it, jointly and with malice afterthought, and that if the accused persons were to remain silent the court could proceed to convict.

51. There is no doubt that the a person died, an unnatural death, caused by blunt trauma to his head.

52. The case for the prosecution is that the only eye witness to the alleged killing of the deceased were PW2 and PW4, and one Purity, the girl alleged to have been living with the 1<sup>st</sup> accused.

53. The evidence by the prosecution witnesses is problematic when it comes to the question as to whether it places the accused persons at the scene of the killing to warrant their being put on the defence.

54. PW2 and PW4 were categorical that they did not see the accused persons inflict injury on the deceased, nor the injuries that the pathologist confirmed caused the death of the deceased. In fact, their evidence is such that they created a scenario where they could not state with certainty whether they identified the person they allege was assaulted by the accused persons to be the same person whose body they say they found the night after the alleged incident.

55. The two alleged that they found a person, surrounded by a crowd lying on the ground in the field near their plot. It was around 11.00 p.m. it was raining heavily and was dark. PW2 said he used the torch of his mobile phone but had to switch it off. PW4 said he did not have a torch. They claimed that 1<sup>st</sup> accused slapped the person but at the same time that one Mathew hit the person with a stone.

56. They said that when the person was told to leave, he got up and left and everyone left. It is this couple who found a dead person in the field near their plots. They are the same couple who claimed that the person they had found being beaten was the same person they found lying in the field dead. However neither of them could explain how they were able to identify the deceased person as the same person they alleged to have been beaten by the accused persons.

57. The investigating officer IP Noor, and PC George Mathenge told the court that the person who was with the deceased before the alleged assault was the said Purity. That Purity was the cause of the death of the deceased herein as she was the 1<sup>st</sup> accused's girlfriend but was having an affair with the deceased.

58. This Purity was never called as a witness to identify the deceased person as the alleged lover as no one else knew who he was. In fact, the prosecution was at pains to explain how the deceased came to be in this mix. One version was that the 1<sup>st</sup> accused discovered from Purity's phone that she was having a conversation with deceased using her phone. He pretended to be her and lured him, and attacked him, while calling for help. This scenario was not taken to its logical conclusion by the prosecution to establish that there was indeed such a phone conversation.

59. There is no evidence as to what happened to Purity's phone and why it was not obtained by the investigating officer as the key to the alleged murder set out in this scenario. On the other hand the deceased's phone was allegedly recovered and was produced in court. However there was not a single piece of evidence to prove it was the deceased's phone. The police officers who recovered it could not agree on its physical description. IP Noor said it had a yellow cover, PC Mathenge, that the cover was green. The make was unknown. The phone was not subjected to any forensics to reveal the alleged text conversation between the deceased, and 1<sup>st</sup> accused using Purity's phone, neither was there any evidence at all that the mobile phone produced in court belonged to the deceased person or still whether it had a line registered in his name.

60. The prosecution even introduced another mysterious character named Paul alleged to be the brother of the 1<sup>st</sup> accused from whom it is alleged the deceased's mobile phone was found. This Paul never recorded a statement, no inventory was made of the recovery of the said mobile phone. Clearly therefore this scenario remained just that,

61. The 2<sup>nd</sup> scenario the prosecution pushed forward through the testimony of PC Mathenge was that the deceased was found inside the house of which the 1<sup>st</sup> accused and the mysterious Purity shared as husband and wife. That when first accused found the deceased in that house, he raised alarm, the deceased took off and the first accused chased him, the others followed and they beat him up. That these accused persons were tenants of the PW2 and his wife PW4, and it is these two (2) who went to the scene and tried to stop them from beating him.

62. This scenario again was not taken to its logical conclusion, the only person who could have positively identified the body that was found at the field as that of the man alleged to have been found in her house by her alleged lover, is the said Purity. She never testified. And no explanation was given despite IP Noor telling the court that the prosecution chose to treat her as a state witness despite her being one of the suspects in the murder.

63. It was the evidence of the prosecution that through the deceased's wife that the body had a visible neck injury, a stab wound caused by metal rod. The post mortem report produced by Dr. Biketi confirmed that the body of the deceased had no such injury. In fact the two (2) key witnesses could not agree as to whether the accused persons had any weapons.

64. The prosecution evidence on how the accused person were identified as the culprits remains highly doubtful even at this stage. There is no evidence that the accused persons were tenants of PW2. In fact PW2 alleged they were his tenants, yet he did not even have the mobile number for first accused.

65. PW2 and his wife were the only persons to hear the alleged screams of the victim, the same ones to witness the beating, the same ones who did not call the police or nyumba kumi when they allegedly found a fight going on. They were again the same people who discovered the body, and identified it as that of the person they allege they witnessed the accused persons beating up, and only then did they call nyumba kumi.

66. Their evidence does not add up with regard to what happened that night, who first found the body, and it is strange that the police did not consider them as suspects, a fight breaks out involving their tenants, and a person they do not know. They do not call the police. They give police contradictory evidence of what happened at the scene. The following morning they are the first ones to discover the body. Their testimony again is contradictory.

67. PW2 said he was the first one to find the body as he went to work. PW1 the Nyumba Kumi said he was called by a boda boda person. PW2 said he was not a boda boda person but ran a hotel in town. PW2 says, she is the first one to find the body and calls her friend one Hellen to come and see. She says her husband leaves home after her. Who is telling the truth here?

68. Clearly these two (2) ought to have been persons of interest as the coincidence that they were the last persons to see victim of assault walking away from the scene of a mob injustice and the same ones to discover his body, though they did not see him properly, they did not identify him and the alleged scene of fight, they did not speak to him, yet they were the ones to say he was indeed the same person, a person they had never seen before, they had never spoken to. This coincidence was not explained. Neither could they explain why they did not report the alleged assault to the nyumba kumi, but reported the death.

69. The arrest of the accused persons was also not explained by the prosecution why they were arrested? The investigating officer alleged that it was PW1 who led to the arrest of Accused 1 and Purity from his home in Kericho. That a village elder from Kericho assisted to trace them, took them to Brooke Bond Police Post from where IP Noor re-arrested them. There is no evidence that the 1<sup>st</sup> accused was arrested in Kericho, as neither the alleged village elder, nor any officer from Brooke Bond Police Post testified to that effect. PW1 and IP Noor testified that they tracked the accused persons through his mobile phone. No such evidence of tracking was produced in court. It is not clear when 2<sup>nd</sup> and 3<sup>rd</sup> accused were arrested and how they were identified. PW2 and PW3 claim to have seen them at the scene, but as I have pointed out their evidence is contradictory and incredible as regards the circumstance surrounding this offence.

70. It is clear that this matter was not investigated to prove that 1<sup>st</sup> accused had a girl friend or wife by name of Purity who was caught in a

love triangle with a certain man, whom the first accused found in her house or that first accused lured using her phone to the house where he assaulted him or that the alleged Purity's lover was the same person who was found dead in the field by PW2 and PW3 or how the couple were able to identify the accused persons and the deceased at the scene.

71. The Court of Appeal in **Erick Onyango Odeng' Vs R (2014) e KLR**, had this to say about contradictory evidence:

**“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse the contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”**

72. In **Richard Munene v Republic [2018] eKLR** the same court said;

**“... As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.**

**It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”**

73. I have carefully considered the contradictions, inconsistencies and discrepancies in this case. There are several scenarios presented by the prosecution as to how the offence might have been committed. They are not trifling. They go to the core as to whether the accused persons were even at the scene of the alleged offence in the first place. The whole case for the prosecution is incredible.

74. It is unfortunate that the deceased lost his life. A family lost their breadwinner, a father, a brother, an uncle. However the prosecution has failed to establish a prima facie case against each of the accused persons and as matters stand the evidence before me would not sustain a conviction if the accused chose to remain silent.

75. I therefore proceed under **Section 306(1) of the Criminal Procedure Code** to record a finding of not guilty, to dismiss the charge of murder and acquit each of the accused persons accordingly. Each is to be set at liberty unless otherwise legally held.

**Dated, Delivered and Signed at Nakuru this 19<sup>th</sup> day of January 2022.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

CA Edna

For accused Notified N/A

For state Notified N/A

Accused 1-Present

Accused 2-Present

Accused 3-Present