REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 19 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

BARAKA KENGA CHENGO .....1ST ACCUSED

SAIDI MASOUDI SHANGA alias SAIDI BUYOYA .....2ND ACCUSED

WILBERT RASHID RASI alias HAMISI RASHID..... 3RD ACCUSED

SAMUEL TANDALE MWALEMBO alias WILLIAM ..... 4TH ACCUSED

WILSON KARISA ..... 5TH ACCUSED

CORAM: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Mbura for the accused persons

J U D G M E N T

The accused persons are charged with the offence of murder contrary Section 203 as read with 204 of the Penal Code of the Laws of Kenya. The particulars of the charge are that the accused on or about 14.10.2018 at Mutoroni village, Magarini Sub-County jointly with others not before Court murdered **Farah Omar Dahir.**

Each of the accused pleaded not guilty and at the trial they were represented by legal counsel **Mr. Mbura** whilst initially **Ms. Sombo** the prosecution counsel appeared on behalf of the state.

By way of background, the state summoned and adduced evidence from four witnesses to proof the charge beyond reasonable doubt against each of the accused persons.

The pertinent evidence for the prosecution

By way of reiteration, the prosecution's case is about the death of the deceased allegedly killed on 14.10.2018 at Mutoroni village. Reliance was placed on the following witnesses namely:

(PW1) – Mohammed Galgalo who testified to the effect that on the material day. There was a fracas involving some members of the public and the deceased. According to **(PW1)** the deceased suffered both physical and burn injuries which were apparently inflicted by the 1st and 2nd accused person. On approaching the scene, **(PW1)** told the Court that he tried to rescue the deceased but with no avail. In a little while the police from Marereni station had been informed and on among at the scene, the suspects took flight. At the same the deceased was taken to the hospital in order to undergo treatment on cross-examination **(PW1)** told the Court that he was from his house when he came into contract with the incident of an attack against the deceased.

He denied any knowledge on the issue of theft of the alleged motorcycle. He also denied that he was aware the motorcycle was found with

the deceased. He also adduced that at the scene there were many people whose attention was drawn due to the events on the assault of the deceased.

(PW2) – Hassan Dahir testified as a brother to the deceased. He recalled that on 14.10.2018 while at the scene he saw a number of people moving up and down and someone being beaten at the same time. However, inspite of the numbers, **(PW1)** acknowledged that he saw the 1st and 2nd accused assault the deceased. **(PW1)** further testified that he saw the 2nd and 4th accused join in with the 1st and 2nd accused to attack and lit a fire upon the body of the deceased. Sensing the risk of his presence at the scene **(PW2)** stated that he took a decision to step aside and soon thereafter police officers from Marereni came to their rescue. What followed was the dispersal of the members of the public and the deceased being escorted to the hospital.

(PW3) No. 49218 Cpl. Gor on being summoned to Court testified that on the 14.10.2018 while at Marereni Police Station a report came on a fracas involving members of the public and a certain suspect. **(PW3)** further stated that together with other police officers. They moved to the scene where a number of people gathered surrounding the deceased. The victim had already suffered multiple injuries and also body burns on the upper and lower limbs. The crowd by an order of the police dispensed from the scene and an ambulance was sought to take the deceased to the hospital for medical management.

He further testified that the deceased. Later succumbed to the injuries. Thereafter he came to be part of the witness in the postmortem examination being carried out Malindi Sub-County hospital.

(PW4) No. 104661 PC. Abdalla Mawazo of crime investigation branch at Marereni testified that under instructions from the DCIO he was assigned the duties of a murder incident involving the deceased herein. According to his evidence investigations carried out based on the witness statements accused persons were found culpable for the death of the deceased. He further testified that part of the investigations led to the recovery of a motor cycle KMEC 384M, the postmortem examination report on the deceased body, documentary evidence on ownership of the motorcycle which in essence were all admitted as exhibits in support of the charge against the accused persons.

On the other hand, at the close of the prosecution case, each of the accused was duly placed on his defence in terms of Section 306 (2) and (307) of the Criminal Procedure Code. Their evidence can be summarized as follows: **DW1 – Baraka Kenga** in a sworn statement testified that on the alleged day of the incident stated to be on the 14.10.2018 he was not at the scene. He went on to explain that he spent most of time operating motorcycle KMEH 411Y which in the course had a tyre burst. This necessitated him to take it to **Jackson Workshop** for repairs. That is the place he learnt of the death of the deceased who allegedly been killed for stealing a motorcycle. He further testified that all the evidence against him is just a fabrication. Next was **(DW2) Francis Baya** of Tana River. In his evidence **(DW2)** told the Court that on 14.10.2018 he received a telephone call from **IP Nyagah** to go to where he was and pick him up. Before complying with the request, **(DW2)** testified that he passed through Jackson's garage where he met the 1st accused. He left him at the workshop as he drove towards the location of **IP Nyagah.**

DW3 – Said Masoud the 2nd accused gave a sworn statement of defence denying his involvement with the crime of murder against the deceased. It was **(DW3)** further evidence that the information on the death of the deceased just tricked in as he went above his normal duties. **Wilbert Rashid** the 3rd accused gave evidence denying being part of the suspects who killed the deceased.

According to his defence on 14.10.2018 he spent most of his time purchasing materials of timber for his workshop. It was at that moment information came in that someone had been killed on the road.

The 5th accused person **Wilson Karisa** gave a sworn evidence denying as alleged by the prosecution that he killed the deceased. **(DW6) – Gilbert Munga** gave evidence on behalf of the third accused to the effect that on 14.10.2018 they were working in a secondary school. Thereafter he left the third accused taking tea in a hotel. According, to **Gilbert** he was the one who informed the 3rd accused about the incident involving the theft of a motorcycle and assault against the suspect. **(DW6) – Mary Kahindi** a wife to the 2nd accused gave evidence to support an assertion that on the material day he spent most of the time in the house sleeping.

Finally, the 4th accused person in his testimony denied any involvement of assaulting the deceased as alleged by the prosecution witnesses. He explained that he spent part of the day in the field where he burns trees to produce charcoal.

Analysis, Evidence, the Law and determination

In order for the prosecution to satisfy the requisite standard of proof, the relevant provision is Section 107 (1) and 108 of the Evidence Act which provides:

> **"That the burden of proving fact lies on the person who wishes the Court as the case may be to believe in its existence, has the burden of proving it in order to obtain Judgment in his favor."**

There are numerous cases interpreting these provisions in the case of **Woolmington v DPP {1935} AC 462** in which Lord Sankey had stated as follows:

> **"It should be remembered that throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to the defence of insanity and subject to any statutory exception if, at the end of and in the whole of the case, there is a reasonable doubt, by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. The burden is limited to the presumption of innocence. (See Guyo Duba v R CACRA 89 of 1999).**

More specifically, the approach of the Courts has been as stated in the comparative jurisprudence in **Chauya & another v The Republic CR Appeal No. 9 of 2007** in which **Chipeta J** stressed that in Criminal Law, it should always be recalled thrives on the noble principle that:

> **"it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul."**

It is therefore emphasized that trial Courts should endeavor to scrutinize the evidence presented by the prosecution in its entirety with a view to ensure that every element of the offence is proven beyond reasonable doubt. In the event of a doubt the same without reservation should be resolved in favor of the accused. So what is the state supposed to proof beyond reasonable doubt against the accused persons in this case:

(a). The death of a person.

(b). That the death must have been caused unlawfully.

(c). That the unlawful acts were also caused with malice aforethought.

(d). That the death must have been caused by the accused.

In the instant case, the death of the deceased was proved by the postmortem report on the deceased of 15.10.2018 prepared by **Dr. Kombe** of Malindi Sub-County Hospital. According to the postmortem the deceased had suffered blunt injury at the posterior aspect of the head that was bleeding at 50% and second degree burns. In the doctor's opinion the cause of death was severe head injury due to blunt trauma and inhalational burns. That having been no defence of self-defence or other defences of insanity, defence of property, natural or accidental death, there is no doubt that the killing was unlawful.

All that remains to be proved is whether the death was infact caused by the accused persons with the requisite malice aforethought. This phrase has been defined in Section 206 of the Penal Code in the following language: malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.:

(a). **An intention to cause death of or to do grievous harm to any person, whether such 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 such person is the person actually killed or not, although such knowledge is accompanied by indifference, whether death or grievous harm is caused or not or by a wish that it may not be caused.

Therefore, the prosecution in proving this element must establish by way of evidence that the accused in causing death, besides the unlawful act, had the intention to cause death or to do grievous harm to the person named in the charge sheet.

In evaluating the cogency of the evidence, this Court was presented with the testimony of **(PW1)** who saw the 1st and 2nd accused persons assaulting the deceased. In addition, they also set his body on fire and the guise that he was a thief suspected to have a motorcycle.

This claim was also corroborated by the evidence given by **(PW2)** on the chronology of events in which the deceased met his death.

In the evidence of **(PW2)** on the fateful day, he saw the 1st accused at the scene in company of the 2nd accused and 3rd accused attacking the deceased. In **(PW2's)** observation, the 1st accused in executing the murder hit the deceased on the mouth with a club, this was followed with setting his body on fire.

The evidence from the postmortem report by **Dr. Kombe** dated 14.10.2018 admitted in evidence as exhibit 1 materially and substantially demonstrates the grievous harm suffered by the deceased. The deceased was mauled with fatal blunt injuries accompanied with 50 % 2nd degree burns; as assessed by the pathologist in his postmortem report.

In construing Section 206 of the Penal Code on malice aforethought, I must take into account these relevant evidence on the nature of weapons used to inflict the fatal injuries by the attackers. In that sense, the termination of the deceased life was not only unlawful but motivated with malice aforethought.

It is also necessary to consider the elements of recognition which featured prominently as a basis of placing the accused persons at the scene. The Law on identification and recognition in our criminal justice system has been entrenched on settled principles starting with **R v Turnbull & others {1976} 3 ALL ER – 549** In that case **Lord Widgery C. J**. had this to say:

> **"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation." At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the**

accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

The test of accuracy was also stated in **Simiyu v R {2005} IKLR** in which the Court of Appeal held that:

"In every case in which there is a question to the identity of the accused, the fact of their having been a description given and the terms of the description are matters of the highest importance which evidence ought to always to be given first of all by persons or persons who give the description and purport to identify the accused and then by the person to whom the description was given." (See also John Muriithi Nyagah v R {2014} eKLR)

From the record and comparative analysis of the evidence given by **(PW1)** and **(PW2)** and that of the defence as a whole its evident that accused persons were at the scene of the murder. Their roles and participation is well articulated by the prosecution witnesses more specifically **(PW1)** and **(PW2).** These visual identification whose names became the subject matter of the trial was never mistaken or given in error by the witnesses. The inquiry on recognition when weighed with the parameters in **Turnbull case (supra)** discloses that the 1st accused led the team of five in Court to commit the crime of killing the deceased. Identification evidence in Law means that is an assertion by a witness to the effect that an accused was or resembles a person who was present at or near a place where the offence for which is being prosecuted was committed or an act connected to that offence was done, at or about the time at which the offence was committed or the act was done.

After taking into consideration the aforementioned evidence, **(PW1)** and **(PW2)** identified the accused persons whom they saw at the scene of the crime. There was no suggestion that the physical appearance of the accused persons had changed materially between the time when the incident occurred and prior to the purported killing of the deceased.

In my Judgment, there is sufficient evidence on recognition to constitute reliability in placing the accused persons at the scene of the murder. The recognition evidence in this case falls within the Evidence Act to proof the charge beyond reasonable doubt. On the whole, I find each of the accused guilty of the offence contrary to Section 203 of the Penal Code as punishable under 204 of the Penal Code.

Sentencing Verdict

In the circumstances of this case. I have taken into account the principles of Sentencing, moral culpability of the convict, the responsiveness on the pre-sentence report, mitigation and aggravating factors. This was basically a murder committed with malice aforethought. I give due regard that aggravating factors outweigh any mitigation circumstances presented by the convicts. There are also the provisions of section 333 (2) of the Criminal Procedure Code.

These competing considerations in conjunction with the balancing act of discretion and the principle of proportionality I sentence each of the convict to a term of imprisonment of 35 years the date of their arraignment in Court on **5th November, 2018**

14 days Right of Appeal explained.

It is ordered accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF MARCH, 2022

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr Mbura for the Accused

2. Mr Mwangi for the State

3. The convicts – all present