REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 12 OF 2015

REPUBLIC ..... PROSECUTOR

VERSUS

PETER KENGA MITINGI alias

KENGA CHARO .....1ST ACCUSED

JAMES SAFARI GONA alias

SAFARI KITSAO .....2ND ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Ogeto for the 1st & 3rd accused persons

Ms. Mwarandu for the 2nd accused

JUDGMENT

The accused persons are charged of murder contrary to Section 203 as read with Section 204 of the Penal Code. The specific facts are that on the 17th May, 2015 at Bunyale Village, Jiha sub-location Bamba, den sun, the accused jointly with others not before court murdered **Ngumbao Kadenge Mitingi**. Each of the accused pleaded not guilty to the charge. **Mr. Ogeto,** learned counsel represented the accused persons whilst **Ms. Sombo** represented the State. The facts and exact characterisation of the prosecution case is based on the evidence of twelve witnesses.

PW1 – Kahindi Ngumbao testifying before the court stated that on the night of 16th May, 2015 he heard screams from the deceased house and swiftly left for the scene. On arrival (PW1) found that the deceased who is also his father has been assaulted to death. PW1 stated that the incident was reported to the chief of the area and a further report made to Bamba Police Station. It was also his testimony that the killing happened while the deceased was in company of his wives namely **PW4 – Nyeru Ngumbao** and one **Sidi Mwasaro Ziro – PW3**. Following police action PW1 told the court that the body was collected from the scene and taken to Kilifi Hospital Mortuary for post-mortem examination.

PW2 – Kaingu Ngumbao Mitingi, a son to the deceased testified that it was on the 26th/27th May, 2015 he heard some movements from the deceased house accompanied with distress alarms. In his response PW2 threw a stick towards the house of the deceased and by a source of moonlight he saw one James, the 2nd accused and another person not before Court. PW2 further stated that in his observation the accused persons were armed each with a panga. On arrival at the acused home, he found the deceased fatally injured.

PW3 – Sidi Mwazaro Ziro wife to the deceased testified that on 27th May, 2015 while staying in the same house with her co-wife – **Nyevu (PW4)** and the deceased, robbers broke into their house and seriously assaulted the deceased by stabbing him with pangas.

According to PW3, she was able to positively identify the 2nd and 3rd accused persons and another not in Court with assistance of moonlight and tin lamp. PW3 further explained that when the assailants left the scene she raised an alarm seeking help from relatives and neighbours. That is how the chief and the police came to know of the murder.

On cross-examination by the defence counsel **Mr. Ogeto** for the 1st accused, PW3 told the court that in her recollection he was not among the assailants who killed the deceased that night. With regard to the 2nd accused, the witness testified that **Charo** and **James** looked alike. Further PW3 stated in court that it was James, the 2nd accused who cut the deceased with a panga. It was also PW3 testimony that two of the killers had covered their faces except one who was not masked. She also confirmed to the court that the initial identification of one **Charo** as a suspect was an error and mistake.

PW4 – Nyevu Ngumbao identified herself as wife to the deceased testified that on the fateful night they spent a night in the same house. That is the time three armed men allegedly armed with pangas inflicted fatal injuries to the deceased.

According to PW4 by a source of light form solar lamp and moonlight she was able to identify the assailants to be the 1st accused, **Peter**, the 2nd accused **James** and one **(Rama)**. To her recollection she testified to have recognized the accused persons.

On cross-examination by learned counsel **Mr. Ogeto** for the 1st accused PW4 testified that there was moonlight though not coming through the house. In her further evidence at the initial inquiry she had identified **Charo** to be one of the prime suspects to the murder. However, it later became evident that he was mistakenly identified and his name omitted after a family meeting.

Further cross-examination by **Mr. Mwarandu** counsel for the 2nd accused PW4 stated one of the killers was at the door while the other one was inside the house. She also told the court that prior to the attack they were asleep but with a solar light she managed to positively identify the accused persons.

PW5 – Kadii Mramba a neighbor to the deceased testified that she had responded to the screams emerging from the deceased's house. On her way to the scene she explained that there was one person who pursued her until she was able to make a comeback to her house. According to her evidence she saw the persons to be Peter and Rama. She however confirmed that during the recording of her witness statements to the police, no mention or description of the accused persons was captured in the statement.

In further cross-examination by learned counsel **Mr. Mwarandu,** the witness stated that she did not give any names or description to the police because she was confused. It was also her testimony that someone flashed a torch at her and as she ran back to her house she fell down on the door. She also told the court that she saw the killers but did not name them while recording the statement with the police.

PW6 – Kafadzi Fondo evidence was to the effect that following the death of the deceased, the family sought assistance from him to apply his skill and knowledge in sorcery to identify are people who killed the deceased.

In this case the samples to be used was deceased blood and other paraphernalia. In exploiting and use of the supposed supernatural powers the accused persons surrendered to him to confess to the killing of the deceased. Their objective was to have him cleanse them of the wrongful act of killing the deceased.

According to the evidence by PW6, upon the accused commitment to give full –disclosure on the murder, it was agreed to have it reduced into writing. In the alleged confession statement **PW6** stated that the accused voluntarily disclosed on the planning and execution of the murder against the deceased. He also identified the murder weapon being the panga which killed the deceased.

Following this elaborate evidence by **PW6**, he then set in motion a plan to have them arrested soon after leaving his clinic. He gave instructions to the area Chief **PW7.** It is from that encounter a report was made to the police to coordinate an arrest of the accused persons contrary to the general believe by the accused persons that they were safe and free. Further, evidence adduced by **PW6** showed that he wanted them arrested to face a charge of murder before a Court of Law. Be that as it may be the alleged confession statement made by the accused was admitted in evidence, albeit it did not meet the statutory test as provided for under Section 25 as read with Section 25A of the Evidence Act.

This formed the basis upon which **PW7 James Randu** the Assistant Chief **PW8** and **PW9** determined the arrest and prosecution of the accused persons as perpetrators of the offence.

PW8 – Cpl. John Amdany of Bamba police station testified that on 22nd June, 2015 while at the police station he received information about the murder suspects being held up at the home of PW6. In conjunction with the **OCS PW10** an operation was mounted to effect an arrest. Following a tip off that they were on board a certain minibus. PW8 testified that when the vehicle approached the road block it was flagged down. Thereafter, the two accused persons were arrested and taken to the police station to be investigated for the offence of murder. The witness identified the accused persons as the suspects arrested in connection with this offence.

PW9 – Sgt. Francis Rono of Bamba police Station testified to the effect that on 17th May, 2015 he visited a murder a murder scene at Bunele Village, where he drew a sketch plan and documented it by taking photographs in support of the prosecution case. PW9 produced sketch plan exhibit 12, and alleged panga as murder weapon – exhibit 13.

PW10 – Chief Inspector Solomon, received the information on the murder of the deceased. PW10 testified on the nature of investigations, carried out including the involvement of the medicine man PW6 to assist in the arrest of the accused persons. PW10 further testified on the inventory of exhibits recovered associated with the commission of the offence, a pair of track suit and T-shirt, sport shoes, a white cap, a wallet and mobile phone all produced in evidence to support a link in the chain on circumstantial evidence to implicate the accused persons with the offence. PW10 also did participate in the identification of the body to the pathologist (PW11).

Further, PW10 told the Court that the medicine man (PW6) initiated the process which successfully led to the arrest of the accused persons.

PW11 (Dr. Zainal Zahran) of Kilifi County Hospital. In her testimony she stated to court that the deceased apparently suffered injuries to the chest, arm, shoulder plate and left side of the head. She opined that the deceased died of fracture of the skull and tissue laceration. The injuries to the head and deep penetrative wound to the chest remained to be the dominant cause of the death the post-mortem examination report was taken in admitted as exhibit 14. Having considered the evidence for the prosecution accused persons were placed on their defence.

Defence case

The charge having been laid on the basis of the prosecution witnesses, each of the accused was placed on his defence. The 1st accused in his address to the court denied the offence. He raised an alibi defence whilst particulars were that on the material day he was away in Mombasa and not at the scene of the murder.

As one of the sons of the deceased, the 1st accused testified that he had also to be informed of the murder and therefore took time off to attend the burial. He was only shocked to have been arrested thereafter in connection with the offence.

For the 2nd accused, he also denied the offence and further relied on an alibi defence. According to the accused he is unaware why the police implicated him with the offence he never committed.

The closing submissions of both counsels was to the effect that the prosecution has failed to discharge the burden of proof of beyond reasonable doubt to warrant a verdict of guilty and conviction for the offence of murder.

It is against this backdrop I proceed to determine whether the prosecution discharged the burden of proof of beyond reasonable doubt.

Analysis and determination

The court now is being asked by the defence to confirm that the following elements of the charge of murder contrary to Section 203 of the Penal Code have not been proved to secure a verdict of guilty and conviction, against the accused person jointly and severally:

(a) The death of the deceased.

(b) That his death was unlawfully caused.

(c) That the accused persons in causing death had malice aforethought.

(d) That in committing the offence they formed a common intention under 21 of the Penal Code.

(e) That the accused were positively identified and placed at the scene.

The evidence by the prosecution was both ***"direct and circumstantial"*** in character and endeavoured to show that the accused persons in exclusion of anyone else committed the offence.

The burden of proof in criminal cases like the instant one lies with the prosecution, in reference to the Judgment in the case **of Woolmington v DPP {1935} AC 462 and Miller v Ministry of Pensions {1947} 2 ALL ER 372** . Both cases strengthens the guiding principles that in reaching a conclusion to obtain a Judgment in favour of the prosecution, the burden of proof of beyond reasonable doubt must be discharged.

At the heart of the charge of murder as distinct from other homicides is the ingredient of malice aforethought. The evidence as it manifests itself ought to establish the following circumstances as defined under Section 206 of the Penal Code.

(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 actually killed or not, although such knowledge is accompanied by indifference, whether death or grievous bodily harm is carried or not or by a wish that it may be caused.

(c). Intent to commit a felony.

(d). Intent to facilitate the escape from custody of a person who has committed a felony.

As earlier stated above there is a causal relationship between the intention to cause death or to do grievous harm. In terms of Section 4 of the Penal Code grievous harm means any harm which amounts to maim or permanent injuries or injury likely to permanently disfigure any internal or external organ, membrane or sense.

Therefore, in murder crimes the act to inflict harm with an intention to cause death to another person constitutes the unlawful element of the offence.

In **Rex v Mutomo S/o Luigo & Another {1936} 3 EACA** the court held that:

> ***"It is necessary to find that the act of the accused was an unlawful one from facts of the case that by an act of omission or commission of an assault to inflict harm resulted in the death of the deceased."***

The Law therefore envisages that the unlawful act or omission to do grievous harm to another person that as a consequence death results, must be a dangerous one that endangers life. Suffice to say that in this case from the evidence of **PW1 Kahindi Ngumbao, PW2 Kaungu Ngumbao, Mitingi Sidi Mwazaro PW3, PW4 Kitsao Ngumbao.** Their evidence showed that on the night of 17.5.2015 the deceased was attacked while sleeping in his house. At the time of the assault he was in company of PW3 and PW4. The degree of force used by use of pangas severely inflicted fatal harm in which he died instantly. According to the postmortem report provided by PW12 the deceased was alleged to have sustained serious multiple injuries to the chest, arm, shoulder, left side of the head and middle aspect of the thigh.

In my view, the prosecution has discharged the burden of proof on unlawful act or omission as an ingredient of the offence beyond reasonable doubt.

When it comes to malice aforethought as defined under Section 206 of the Penal Code, the fundamental principle of the Law can be inferred as applied and approached in the case of **R v Tubere S/o Ochen {1945} EACA 63** the court held:

> ***"That if upon the whole evidence in the case, the rational hypothesis is consistent with the nature of the weapon used, the manner it was used, the part of the body targeted, the gravity of injuries and the conduct of the accused person an inference of malice aforethought would flow more easily, than incidents of isolated of unlawful acts of intention. This more so if the accused used a stick to inflict harm other than a sword, a firearm or other dangerous weapon to maim or to do grievous harm."***

The consideration of proof under Section 206 of the Penal Code on malice aforethought is not an inference from the act of killing, but like any other fact in issue must be founded upon cogent evidence.

Where the prosecution case against an accused person is based on either direct or circumstantial evidence and depends upon drawing of inferences therefrom the court.

In **Common wealth v York** held:

> ***"When, on the trial of an indictment or murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of Law is, that it was malicious, and an act of murder, and proof of matter of excuse or extermination. Lies on the defendant, which may appear either from the evidence adduced by the prosecution or from the evidence by the defendant. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence and decide the fact on which the excuse or extenuation depends according to the preponderance of evidence."***

The direction and manifestation of malice aforethought in which the court is entitled to infer in exercise of discretion is on the gravity, weapon used and the nature of the injuries as stated in the case of **R v Godfrey Nyocho Mutiso {2008} eKLR, James Masomo v R {2015} eKLR.**

In the instant case, the prosecution evidence adduced both direct and circumstantial from PW1 – 12 establishes that the persons who subjected the deceased to violent attacks inflicting multiple injuries primarily had one purpose an intent to cause death or to do grievous harm.

During the attack in which PW3 and PW4 appeared to have been present the perpetrators were not acting in self-defence or risked any imminent danger to life or property to sanction the use of force.

It remains true to the evidence by the prosecution the extent of liability by the attackers transcends the defence of self. It will thus be seen from the evidence that the deceased without notice was assaulted and stabbed at night and without any retaliation to defend himself the attackers claimed his life by inflicting stab wounds and thereafter took flight from the scene. By reason of my finding of fact, I am satisfied that the deceased was killed by people with the requisite malice aforethought.

Having considered the above elements, the question whether the accused persons participated in the commission of the crime is to be determined by identification evidence. The link has to exist between the commission of the crime and the participation of the accused persons.

It is clear from **R v Turnbull {976} 63 CR Appeal R132** alive to all dangers of visual identification one must ask the question whether on all the facts of the case the prosecution as a matter of fact established beyond reasonable doubt that the accused committed the offence of murder.

I would therefore not hesitate to answer in the negative but save for testing the principles in **R v Turnbull (supra), Abdalla Bin Wendo & Another v R {1953} EACA 166, Roria v R {1967} EA 583** with the evidence and the guidelines which have stood the test of time in the above cases as paraphrased in the following passage:

> ***"Whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications, of the accused, special need for caution before considering or reliance of correctness of the identification is necessary. The court***

should warn itself of the possibility that a mistaken witness could be convincing one and that a number of such witnesses could be mistaken. The court should further 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 implied in any way? Had the witness ever seen the accused before. How often? If only occasionally, had he any special reason for remembering the accused? How long did time elapsed between the original observation and the subsequent identification to the notice? Was there any material discrepancy between the description of the accused given to the notice by the witness when first seen by them and his actual appearance? Recognition might be more reliable than identification of a stranger, but even then, the court should remind itself, that mistakes in recognition of close relatives and friends have been made sometimes."

I have carefully considered the prosecution case more specifically on identification of the accused persons. The evidence on this parameter was mainly captured by **PW2 – Kaungu Ngumbao Mitingi**, **Sidi Mwazaro Ziro (PW3)** and **Nyeru Kitsao Ngumbao (PW4).** The manner in which the witnesses presented the fact on identification was in a number of ways that of recognition. Here each of the witness had a different version on which he or she was able to identify accused persons on the material night. According to PW3, with the source of moonlight he was able to positively identify the assailants who caused the death of the deceased.

As outlined in his evidence, PW3 went further even to describe that each was armed with a panga. On evaluation of his testimony, the insignificance of it on visual identification or recognition for that matters runs into the following problems on the legal requirements issue. Identification on prior familiarity of the accused falls within the rubric of visual identification. The prosecution did not interrogate the witness as to the strength of the moonlight, visa viz the position of the accused and the witness.

Similarly, in the first report to the police, the witness did not give any description of the accused or mention any names to the extent of consistency with his familiarity with the accused. The evidence by PW1 is based on accused persons who are said to be running away from the scene. How much time did he have to observe and recognize them to a level that amounts to positive visual identification, remains mistaken and suspicious.

With regard to PW3, she asserts that the assailants broke into their house at midnight abruptly and by use of big lamp and moonlight, she positively identified the accused persons namely **Peter, James** and another not before court by the name **Rama**.

Her evidence starts to run into problems when she admits that at one time she had confirmed **Charo** to be part of the gang which attacked them and killed the deceased. As if that was not enough during cross examination, by the defence counsel, she admits that there was a lot of confusion as to the identity of the perpetrators. Although PW3 emphatically stated that the accused persons were positively identified, her initial statement with the police indicates that two of the assailants had masked their faces. The question is who among the accused in court was on a mask and the one without?

The court has to take judicial notice of the circumstances that were prevailing to infer a positive identification in this case. The court was invited to appreciate the presence of a large lamp, but unfortunately it was never part of the exhibits for the prosecution, evidence.

Further while the evidence by PW3 placed reliance on moonlight, the court was not told the conducive surroundings which made it possible for moonlight to illuminate the scene so that she was absolutely certain of the accused persons being at the scene in exclusion of anyone else.

The factors as to intensity of the light, the position of the light with that of the accused persons and the witness, the time taken with the accused persons seeking guidance from the principles, in the above cases remained essentially subjective. There was misrepresentations and contradictions with the evidence of PW1, PW3 and PW4 that remain inconclusive on recognition of the accused persons.

Furthermore, the confidence of an identification witness is often thought to indicate the accuracy of identification. What was not credible with PW3 and PW4 went as far as their own self-admission of being confused, to identify **Charo** as one of the suspects only to retract that evidence as an error on the face of the record.

Once the evidence of PW1, PW3 and PW4 is expunged from the record there will be nothing else to connect the accused persons with the offence. The admissibility of visual identification evidence pursuant to the settled principles in the above cited authorities in my respective view was poor and mistaken. The witnesses had persistently and consistently perjured themselves, tainting their view on identification of the accused persons.

On visual identification, none of these witnesses saw the accused at the scene as alleged because the surrounding circumstances remained opaque and obstructive. It is apparent therefore the evidence in this case is of a very poor quality thus making the danger of mistaken identity even greater. It is very plain that the surrounding circumstances at the scene, where the deceased was attacked, the time the incident occurred, the conditions in which the witnesses found their safety, being on asleep mode, the source of light being relied upon out rightly renders visual identification very difficult.

This was an outright couched evidence and given its materiality to the prosecution case, I am afraid the tests in **Turnbull case (supra)** persuades me to say it was not free from the possibility of error. I therefore reject it in wholesome.

The findings in this trial would be incomplete without, mentioning the unprecedented confession statement recorded before a magician one **Kafadzi Katoi Fondo (PW6)** by the accused persons. The evidence in so far as it relates to the confessional statement was of a nature that PW6 using his witchcraft skills, knowledge and tools made the accused person to record confession and admission on how they executed the murder against the deceased.

It is significant to note that according to **Chief Inspector Solomon (PW11)** the accused persons were arrested at the behest of PW6 on his information report that they had gone to his clinic to confess to the murder.

The issue of the Law raised by the prosecution case is of such a fundamental importance not capable of escaping the attention of this court. The rule of admissibility of a confession statement is provided for under Section 25A of the Evidence Act. **Its expressly provided that a confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a Magistrate or before a police officer other than the investigating officer, being an officer not below the rank of Chief Inspector of Police and a third party of the person's choice the case has raised an important question of Law as to the test to be applied on admissibility of confession statements.**

In **R v Simon Njuguna {2011} eKLR** the court noted:

> ***"All confessions not made in court must be obtained in accordance with the evidence (out of court confession Rules 2009). There is no room so far as I understand the Law today for admissibility of a confession made to a member of the public without the necessary safeguards of Law as provided under Section 25 -32 of the Evidence Act and under the 2009 rules."***

In Section 26 of the Act:

> ***"a confession or any admission of a fact is not admissible in a criminal proceedings if the taking of the confession or admission appears to this court to have been caused by any implication, threat or promise having reference to the charge against the accused persons."***

There are bewildering issues on this part of the evidence adduced by PW6 in support of the prosecution case. In this case PW6 evidence points out that before performing the witchcraft ritual of having the killers confess to the murder, he was provided with the deceased blood. The accused persons came with their clothes and pangas used in the murder that provided a breakthrough inducing the accused persons to record a confessional statement on how they killed the deceased. With great respect the statement itself was one made under duress, and an inducement that the accused confession would forbear them from being bewitched or killed by the family members of the deceased.

The plain meaning of the word confession carries with it the phraseology of voluntariness. It follows that the confession before (PW6) who is gifted with magical powers cannot be said to be voluntary. The other test of recording a confession statement which is expressly provided in Law is the adherence to the out of court confessional Rules 2009.

My interpretation of the Law on confession statement applying the basic rule is comprehensively equivalent to a plea of guilty entered by an accused person in reference to the charge. The court in **R v Becker {1929} A. D. 167** held:

> ***"That by a confession is meant an unequivocal acknowledgment of guilt, the equivalent of guilty before a court of Law."***

To sum it up, the burden is verily on the prosecution to discharge it by demonstrating the confession before court was voluntarily obtained and is admissible to proof the existence of facts in issue under Section 107 (1) of the Evidence Act. I am quite at a loss to understand why such evidence on confession statement recorded before a magician/sorcerer would directly find its way to the proceedings without any objection to its legality and admissibility criteria prescribed under the Evidence Act not followed to the letter by the prosecution and the defence, under Article 50 of the Constitution on right to a fair hearing.

Although the confession statement was thought by the prosecution to be of probative value from their point of view, and they tendered it in evidence, I am of the opinion that it was ill advised. The statement of such significance in Law must meet the test under Section 25A of the Evidence Act to begin with before anything else on its admissibility. Unfortunately, even with PW6 magic and witchcraft powers he is not one such persons, authorized officer recognized under the Law to receive and record confession statements of the suspects to a crime.

The other fundamental question which arose with regard to this piece of evidence and the dangers arising from this line of admissibility of and probative value is the very unconstitutionality of it in consonant with the right to a fair trial under Article 50 (4) of the Constitution.

In the instant case the confession statement so adverted to by the prosecution was obtained in total disregard of the provisions under Section 25A of the Evidence Act.

This evidence of PW6 ought to be excluded for being in breach of the prescribed procedure by the Evidence Act which was easily not complied with. All what the magician needed to do was to report the accused persons to a police officer of the rank of a Chief Inspector and above for the accused persons to record the confession.

Mystical power of PW6 and fear of harm or curses supposedly may have manipulated the accused persons to believe that conformity with the demands made by PW6 would save them from community curse and witchcraft.

This is a case where PW6 had been approached by the family of the deceased to search for persons who might be held responsible for the death. As a practitioner he must have found himself in a precarious position to deliver to the family whom he established through his occult forces, regardless of whether, the suspects he has named committed the offence or not.

As deeply entrenched culturally as is the case with witchcraft these magical powers applied to obtain a confession statement from the accused persons is against the legal protocols and a corpus of their fundamental rights to a fair hearing under Article 50 (4) of the Constitution on evidence obtained that violates the right to fundamental freedom in the bill of rights.

In my view, the evidence by the prosecution on visual identification and so called confession statement never went far in establishing a link, a connecting factor between the accused persons and the offence of murder they faced at this trial. The standard that the guilt of an accused

person shall be proven beyond reasonable doubt by the prosecution demands of this court that in doubtful cases like this one it be resolved in favour of the accused persons. At the end of the day, I echo and paraphrase the words of our constitution under Article 50 on the right to a fair trial and Section 107 (1) of the Evidence Act.

That in any prosecution, the presumption of innocence puts the burden of proof on the prosecution to prove the contrary and this means that an accused cannot be conscripted to incriminate himself or herself and that there must be sufficient and watertight case to substantiate the alleged offence to sustain a conviction.

This court shall decide in favour of the accused persons under Article 50 (2) (a) of the constitution on the right to presumption of innocence that there is a doubt regarding the existence or non-existence of facts comprising the elements of the crime. I am inspired by a quote from **Rene Descartes**:

"If you would be a real seeker after truth, it is necessary that at least once in your life you doubt, as far as possible, all things."

In this case, I have reasonable grounds specifically stated that doubt is inevitable in exercise of discretion to set the accused persons free and to be free indeed by acquitting each of them of the charge of murder contrary to Section 203 of the Penal Code.

Regarding the victims may you live to fight another day for justice has explained itself and taken a position that may the rule of Law reign. Be not discouraged with the scars that have shaped your lives following the death of the deceased. This Court take cognizance that becoming a victim of crime is a deeply traumatic experience for you. The scars, physical and mental impact would linger with you for many years to come.

Further, having found that in the instant matter the purported medicine man was neither a Magistrate or a police officer above the rank of an inspector any such proceedings to record a confession statement from the accused was a nullity. It is also clear to the Court that admissibility of confessions is dependent upon strict compliance with the rules commonly referred to as ***(The evidence out of Court confessions Rules 2009).*** The guiding dictates on the rights of an accused person and the mandate of the recording officer are properly spelt out. It is evident that the medicine man was never qualified under Section 25A of the Act to record any confession statement or competent to adhere to the path set in the rules.

The Court firmly takes the view that the so called confession statement if admitted would have such an adverse effect on the right of a fair hearing and the Court therefore declines to admit it.

Considering the foregoing, I leave you with the words of the classical **Greek Philosopher Hera Cleitos** who spoke of *"justice"* as a principle of the utmost importance for the whole reality. He personifies justice as an active agent in the universe, as the eternal strife between opposites. The apparent peaceful state of harmony is impossible without the warning of opposites. Justice – understood as this strife – keeps both sides from overstepping their bounds. All things have this struggle of the opposite going on trade of them.

They depend on this strife for their existence. That is why **Rawls** concluded perfect procedural justice is rare, if not impossible, in cases of much public interest. ***"An innocent man may be found guilty, a guilty man may be set free." "That the hallmark of Kenyan adjudication anchored in its adversarial system."***

May God show you the truth!

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF OCTOBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the DPP

The Judgment delivered in absence of the parties