REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

KARISA MAITHA THOYA alias NDISO.....1ST ACCUSED

SAID KARISA MAITHA alias MOTO.....2ND ACCUSED

BKM.....3RD ACCUSED

CKKM.....4TH ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Mouko advocate for the accused persons

J U D G M E N T

The accused persons are charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The brief facts of the offence was that on the 24.11.2016 at Duke Village, in Chamari Sub-Location, within Kilifi, accused persons jointly with others murdered **Jeremiah Komoro Guyo**. Each of the accused duly represented by counsel **Mr. Mouko** pleaded not guilty to the charge.

The prosecution case has been handled by many prosecutors with the last one being handled by many prosecutors with the last one being **Mr. Victor Alenga**, Senior Prosecution Counsel. Their case is as based on the evidence of six witnesses. That summary of evidence is as follows:-

(PW1) Pastor Joshua Nyamawi testified to the effect that on 21.11.2016 he was conducting a church service with his congregation in a church built within his compound. On that particular day, there was night vigil for the worshippers to stay overnight he however left for his house, in the course of the night, and later stepped out to answer the call of nature. That is when he came into contact with the legs of a human being. On a closer look he identified the person as **Karisa Thoya** the 1st accused in this trial. The short conversation they held was a warning from the accused that his family members should not be allowed to participate in the worship. It happened that the first accused was armed with a panga which he aimed at **(PW1)** with a view to inflict harm. According to **(PW1)** he sought assistance from the members of the church who included one Baraka and a son to the 1st accused. The accused was therefore disarmed of the panga.

However, **(PW1)** stated that he thought it wise to report the incident to the village elder, the Assistant Chief, the locational chief and subsequently the police station. In the morning **(PW1)** saw the 1st accused with his elder son demanding that he drops the complaint he made to the various security agencies. Further **(PW1)** stated that as he was waiting for the chief's directions, he went to the forest to procure some timber. On his way back, he was informed that the accused persons had maliciously damaged the church property. The people he left behind collecting timber had also been attacked. That was the time the deceased also got assaulted sustaining fatal injuries.

On cross-examination **(PW1)** told the Court that he happened not to be present at the actual incident of an attack against the deceased. The next witness called by the prosecution was **Mariam Guyo (PW2)** sister to the deceased who was assaulted on 24.11.2016 and thereafter succumbed to death. **(PW2)** narrated the ordeal in which two boda boda riders ferried some people at **(PW1's)** home. She was able to identify the first, second and third accused persons for being part of those people who went to **(PW1)** house. It was her evidence that on arrival at **(PW1's)** home, they set the property on fire. The same arsonist are the ones who turned against her and the deceased by inflicting

physical harm. According to **(PW2)** it was from those injuries suffered that the deceased died soon thereafter.

Next was the evidence of **(PW3) – Salama Bashora** the window to the deceased. In her testimony on the 24.11.2016 while at home on or about 4.00 p.m. they heard shouts and screams from **(PW1)** house. Some of the screams indicated that **(PW1)** house has been burnt down. In a little while, **(PW3)** saw the alleged people has confront them and proceeded to inflict harm to **(PW2)** and the deceased. She however managed to take flight from the scene before the attackers could get hold of her to cause maim. The following morning, she was to learn of the deceased death arising out of the initial assault. On cross-examination **(PW3)** testified that she did not manage to witness the actual attack against the deceased.

Her testimony was followed with that of **(PW4) Lenox**, the clan elder of the area where the killing occurred. **(PW4)** evidence was to confirm that a report was made by **(PW1)** regarding the arson incident upon his property. That was followed with another offence of an attack against the deceased. Further **(PW4)** told the Court that given the term of evidence they assessed in effecting the arrest against the accused persons as suspects of the arson and murder of the deceased. **(PW4)** evidence was also collaborated with that of **(PW5) – Joseph** who happened to be the locational chief.

Finally, was the testimony of the investigating officer Chief Inspector **Justus Kibo (PW6).** In his evidence this was initially an assault case, but following the death of the deceased, it was escalated to a murder charge for purposes of the instant case. In his investigations correlated the witness statements and post mortem examination which was admitted in evidence under Section 77 (1) of the Evidence Act. In the post mortem the pathologist opined that the deceased cause of death was head injury leading to internal haemorrhage. That formed the foundation of the prosecution case.

Defence Case

The first accused Karisa Maitha told the Court that he did not commit the offence. It was defence that he came to know of the deceased death while attending a burial at a neighbour's home. In support of his defence the accused summoned the evidence of his wife **(DW5)** and his son who testified as **(DW6).** The net effect of their testimonies was to inform the Court of the arsonists who made entry to their home and torched the properties. According to **(DW5),** the 1st accused was never at the scene having spent the day at the bereaved family. The testimony by **(DW5),** was in all material similar with that of **(DW6)** re-affirming that a gang of people went to their home burning houses, carrying away movables and maliciously damaging other properties. He denied any involvement of the 1st accused with the killing of the deceased.

(DW2) Said Karisa, on his part also gave his side of story denying the act of killing the deceased. He only recalled that on his return home he found their homestead having been destroyed by fire. As for the third accused he told the Court that as motor cycle operator, his place of business happened to be Malindi. As regards the fateful day, the accused told the Court that it was neither near nor at the actual scene. It was only after learning of the arson and destruction of property did he visit the house to verify the circumstances of the damage.

Finally, the fourth accused also joined in by denying that he participated in the killing of the deceased as alleged by the prosecution witnesses. The third accused **BK** in his defence denied the murder charge and did tell the Court he was never part of the perpetrators as alleged by the state.

According to the accused he was not even at the scene but in Malindi contrary to the witnesses statements on oath. Further, in his testimony accused alluded to the fact of their houses being burnt on mistaken belief that they had been involved in the death of the deceased. He also denied any knowledge or harbouring a common intention with the persons allegedly who planned the commitment of the crime with regard to the 4th accused, in his unsworn statement he denied being part of the joint offenders who killed the deceased. It was also in his defence that following the death, members of the neighbourhood called for their arrest on suspicion that they had committed the offence of murder against the deceased.

The **5th witness, Mwenda Ali**, gave evidence presenting an onslaught to the prosecution case which tends to implicate the accused persons as the ones responsible for the killing of the deceased. The 6th witness **Maitha Thoya**, also a family member to the accused persons testified that contrary to the prosecution narrative discernible from the defence that none of the named accused was at the scene of the crime.

With these strands of evidence in mind, it is now my task to evaluate it and establish whether the prosecution case merits the threshold of beyond reasonable doubt.

Analysis and Determination

In the instant case, it is trite that the standard of proof is that of beyond reasonable doubt as expounded in the cases of **Minister v Minister of Pensions {1947} 2 ALL ER 372 and Woolmington v DPP {1935} AC 462.** Therefore, the duty to proof existence of a fact to secure Judgment against the accused persons is vested wholly upon the prosecution. It can only shift in exceptional circumstances provided for under Section III of the Evidence Act. However, even in those circumstances nothing falls short of the prosecution discharging the burden of proof of beyond reasonable doubt.

In the instant case, the prosecution is called upon by the dictates of the Constitution under Article 50 (2) (a), to disapprove the innocence of the accused persons on the basis of the Evidence against the indictment. It is settled Law that for an offence under Section 203 of the Penal Code, the prosecution must prove the following elements;

(a). The deceased death.

(b). That the death was unlawful caused.

(c). That in causing death the accused persons did so with malice aforethought.

(d). Finally, that the accused persons directly or circumstantially participated in the killing of the deceased.

As regards the ingredients on the deceased death and the fact on the death being unlawful there is ample evidence from **(PW1), (PW2), (PW3), (PW4), (PW5)** and **(PW6).** It is clear that the initial incident occurred at **(PW1)** home when his property was burnt and destroyed by the arsonists. The arsonists were ferried in his home in two motor cycles. Their unlawful activities did not end there but further perpetuated them by extending it to the home of the deceased. The accused persons as described by **(PW2)** acted in concert in committing the acts of arson, theft and assault. It is at that juncture the deceased suffered serious bodily harm inflicted by the same arsonists. The body of the deceased was subjected to postmortem examination by **Dr. Imran** establishing injuries to the head and opined it to be the cause of death. The totality of the evidence points to the accused persons as narrated by **(PW2)** to have committed unlawful acts at the home of **(PW1)** before descending to the deceased homestead. This was a joint prosecution of the crime by the accused persons defined under Section 21 of the Penal Code as follows:

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

In the case of **Njoroge v R {1983} KLR 197** and **Solomon Munga v R {1965} EA 363** both Courts held:

"If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endevours to effect the common object of the assembly."

Similarly **R v Cheya 1973 EA** held that:

"The existence of common intention being the sole test of total responsibility it must be proved that the common intention was and that the common Act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man think a thing likely to happen is vastly different from his intending that thing should happen. The latter ingredient is necessary under the Section. It is only when a Court can with some judicial certitude hold a particular accused must have pre-conceived or premeditated the result which ensued or acted in concert with orders in order to bring about that result that this Section can be applied."

In relation to this case there was sufficient evidence from **(PW1), (PW2)** and **(PW3)** that the criminal act in question was committed by the accused persons in furtherance of a common intention. This involved in the ordinary cause of invent visiting the home of **(PW1)** to torch down his property and with full knowledge of what they were doing they moved into the home of the deceased where further acts of assault and arson were committed. In concert they were aware of the precise means in which they were going to use to overpower and incapacitate their victims. For example, in the context of the present case the 1st accused had a conversation with **(PW1)** that they should not allow his family to be part of the congregation at the church where he works as a pastor. At this juncture, **(PW1**) did not envisage that serious criminal acts had been designed to destroy the church facilities and cause grievous harm to the congregants. It matters not who applied the fatal blow on the deceased as this was a common intention enterprise as defined under Section 21 of the Penal Code.

Applying the rule in **Teper v R {1952}** in which Lord Normand said:

"Circumstantial evidence must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

First, it appears from the testimony of **(PW1)** the purpose behind the 1st accused camouflaging himself within the church compound was to exert himself with other several persons to further the criminal acts against (PW1) and the deceased family. It is no secret the circumstances of this offence there was no such third person who came to the scene seemingly to commit the alleged offences other than the 1 st accused and his accomplices when they attacked the deceased they knew with certainty that he would die out of the serious injuries inflicted to the head.

The actus reus of the offence can take a myriad forms. It may be a culpable act of omission for an accused person to act in reference to a particular crime. Secondly, the criminal conduct may consist of external manifestation of the accused's intention to act sufficient to constitute an unlawful act punishable under the Law. **Synman, the Learned Author of the textbook on Principles of Criminal Law** observed as follows interalia:

"Before an act can be described as unlawful, it must not only conform to the definitional element, but it must also comply with the quest distance criterion for determining unlawfulness."

The question this Court has to ask is that ***"What conduct of these accused persons would institute an unlawful act or omission to cause death of the deceased?"*** In such a case the concept has to be construed within the umbrella of causation. The tension here is the different between actual causation and proximate causation of death. In a murder charge the prosecution must prove causation, as a fact because the deceased's injury is only tenuously and indirectly connected with the accused's unlawful acts or omission. The most important conceptual aspect of the Law of causation issues of death as expressly stated under Section 213 of the Penal Code, for one to understand it is that the death of the deceased can stem from more than one actual cause. In drawing an inference on causation, the prosecution must decisively

demonstrate that some action by the accused was both the actual and proximate cause of the death of the deceased. Therefore, the conduct which causes a specific result such as death completes the element materially to constitute unlawfulness.

In the instant case, the act or omission on the part of the accused to satisfy the requirement of unlawfulness is to be joined in the evidence of **(PW2).** As far as proof goes unlawful act or omission is generally, a matter of inference deduced from certain acts of the parties accused, done in persuasive of a criminal purpose in common between them.

As adverted to by **(PW2),** it can be said that there was a meeting of the minds for whatever reason to commit the sequence of offence from arson to the murder of the deceased. The subsequent conduct by the accused persons in furtherance of the common intention should satisfy the *actus reus.*

All these pieces of evidence taken at their highest discharge the burden of proof on the ingredients of the deceased having died and that his death was caused through unlawful acts of grievous harm. The next issue to consider is that of malice aforethought as defined in Section 206 of the Penal Code under this ingredient, the prosecution must proof that the accused persons unlawfully acts were actuated with an intention to cause death or to do grievous harm, or be in a position of knowledge that their acts of causing death or inflicting serious harm would occasion death of the deceased. Malice aforethought as an element is at the heart of murder crimes which distinguishes it from other homicides. It may be proved by direct or circumstantial evidence. Malice aforethought is therefore the requisite mental state a killer must have in order to be found guilty of murder contrary to Section 203 of the Penal Code. In this definition of malice aforethought under Section 206 of the Penal Code there are two kinds of malice aforethought to place criminal responsibility for murder against an accused person. It is stated to be either express or implied malice. In express malice, the prosecution ought to proof that the accused person specifically intended to kill the deceased in question. Express malice is therefore a deliberate mind, formed and designed to kill another human being. Whereas in implied malice the evidence must demonstrate that the accused person mental element; conveyed an inferred or presumed malice in the killing of the deceased. He who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them.

In the view of the Law not only may malice aforethought be present when there is no actual design or premeditation to kill or do grievous harm, it may even co-exist with a definite wish that harm may be avoided, if an unlawful act is willfully done with knowledge and foreseeable that the death will occur or serious bodily harm. So far in the instant case direct evidence from (PW2) covers the entire scope of express malice on the part of the accused persons. Their hurting state of mind covers the unlawful acts of arson at the home of (PW1) which was perpetuated further to the home of the deceased where they inflicted fatal injuries as deduced from the postmortem examination report. A glance of the conduct of the accused persons from the testimony of (PW2) disclosed, that here there was express malice aforethought from the unlawful acts of assault targeting the head of the deceased. The evidence here necessarily shows that the willful act of assault under such circumstances was obviously a plan orchestrated to cause death of the deceased. In the case of **R v Tubere s/o Ochen {1945} 12 EACA 63**. Here the factors worthy consideration include, the make and use of dangerous weapons, the force used to target the vulnerable parts of the body, the substantial element of the nature of the injuries inflicted, the perpetrators conduct before, during and after the commission of the crime.

From this passage it appears where person's knowledge of a particular act occurring is to a certain degree of probability he may be taken to have intended that particular act. The success or failure of the prosecution case usually turns on whether the Court can draw an inference of malice aforethought based on all the circumstances of the case including the state of participation in the criminal act and motivation of the accused persons.

Taking the evidence of (PW1), (PW2) and (PW3) the notion that the accused persons intended to kill the deceased or another person is manifested by the harm and damage inflicted both at the home of (PW1) and that of the deceased. If the purpose was only to commit acts of arson, malicious damage and theft the injury could not have assumed such a characterization targeted at the bodily injury of the deceased. The assault or beating of the deceased referenced the intent to kill or to cause serious bodily harm as defined under Section 206 (a) & (b) of the Penal Code on malice aforethought. This dangerous force used against the deceased caused his death bringing the substantial element squarely for the offence of murder contrary to 203 of the Penal Code. To show that the killing of the deceased was actuated with malice aforethought the prosecution demonstrated that manifestation by way of post mortem examination report. In the presence of these circumstances as opined by the pathologist the mental element involved in the unlawful acts was that of killing another human being. Hence it is very proper to make a finding that malice aforethought has been established beyond reasonable doubt to find the accused persons culpable as charged.

It is clear, however that notwithstanding the conflict as to who among the accused persons inflicted the brutal blow, no doubt each one of them actively and consciously participated in the crime of murder.

It is imperative to state that in answer to the charge, accused persons raised an alibi defence. The essence of the defence by the accused persons was that as much the prosecution relies on the testimony of **(PW2),** its their rebuttal that they were elsewhere and not at the scene of the crime.

Its worth noting that the burden of proving the falsity , if all of theaccused defence of alibi lies on the prosecution**. (See R v Sukha Singh s/o Wazir Singh & Others {1939} 6 EACA 145, Ssentale v Uganda {1968} EA 36).** There is a very heavy burden case on the prosecution to challenge the validity of any piece of evidence on alibi defence. It is but a decent respect under the doctrine on equality of arms as early as is reasonably practicable and in any event prior to the commencement of the trial, for the defence to notify the prosecution of its intent to place reliance on the alibi defence. This is in order to rebut the alibi defence notification of the specific place, time, address, activity being undertaken, any witness who was in company of the accused and likely to be called as witness to establish the alibi must shared with. The prosecution in advance. What is being said here is that on the material day and time, accused persons were elsewhere. However, bearing in mind that accused persons bears no burden to prove the alibi defence.

In this instance, the textual analysis of **(PW2)** testimony does reveal an answer to the defence of being elsewhere. The plea of an alibi defence was destroyed by the testimony of (PW2) to the effect that the accused persons were at the place of occurrence where the deceased

was assaulted to death. The alibi defence to the best of my evaluation was a concocted false story which was not consonant with the evidence by the prosecution witnesses. More fundamentally that **(PW2)** in my conceded view, I do not believe the defence evidence in respect of plea of alibi taken by the accused and their co-witnesses in support of that plea.

For ease of understanding the 1st accused denied the charge of killing the deceased that he found himself being arrested for an offence he had no knowledge about or participation. Secondly, he recalled of a conflict between **(PW1)** charges which was a matter pending for resolution by the Assistant Chief. Thirdly, he had attended a burial at the neighbours when the alleged murder was stated to have taken place.

The second accused in his narrative denied that he participated in the commission of the crime. That was also the case for the 2nd accused and 4th accused person distancing themselves from the scene of the murder. What the accused person told the Court is the fact that when the murder was committed, they were not at the scene and so it was impossible for them to be connected with such an offence. However, from the evaluation of direct evidence by (PW2) and circumstantial evidence adduced by (PW1), (PW3), (PW4) and (PW5) the allegation on alibi defence has no legs to stand on. The weight to be attached to alibi defence collapses given the materiality of the evidence by the prosecution witnesses in respect of positive recognition of the accused persons at the scene. In the case of **Anjononi & others v R {1980} KLR** the Court stated interalia:

> ***"Recognition, not identification, of the assailants; more assuring; and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

Based on the above analysis, I find that there is no doubt in the prosecution evidence of proving the elements of the crime of murder contrary to Section 203 of the Penal Code beyond reasonable doubt. In conclusion, I find each of the accused person guilty and do stand convicted for their joint common intention and unlawful acts of causing death of the deceased.

Verdict on sentence

In the instant case each of the accused has been found guilty and convicted of murder contrary to Section 203 as punishable under Section 204 of the Penal Code.

In the submissions by the Learned counsel **Mr. Mouko**, during the sentencing hearing, he urged the Court to take into account the provisions of Section 191 of the Childrens Act as it relates to the third and fourth convicts. According to Learned counsel, the circumstances relating to two convicts which has a bearing to the nature of sentence to be imposed are such that at the time of the alleged offence they were aged below (18) eighteen years. It was further stated that the Court should not treat them as adults as this would deny them their legal rights as expressly stated under Section 191 of the Childrens Act.

However, as much as I appreciate the concerns raised by Learned counsel on this material aspect of the Law, there are compelling grounds for a departure on the prescribed standard penalties under Section 191 of the aforesaid Act. This approach was adopted in the cases **Richard M. Njuguna v R {2019} eKLR, Daniel Langat Kiprotich v State {2018} eKLR, JMK v R {2015} eKLR, JKK v R {2013} eKLR** without emasculating the provisions of the Childrens Act. They cannot be thought of as compelling the conclusion that a sentence lesser than that prescribed by parliament within the precincts of Section 204 of the Penal Code should be substituted with other alternatives.

This is owing to the presence of compelling and substantial circumstances of the offence as reflective in the Judgment of this Court. In a case involving murder a right to life under Article 26 of the Constitution infringed by the convicts, must ensure that the sentence imposed is more severe and that the Courts should not easily intervene by imposing a lesser sentence.

In a case of murder, the nature of the circumstances must convince a reasonable mind that a lesser sentence is improper and not justified in that regard.

The aggravating and mitigating features attendant upon the commission of this offence is classified in our Penal Code and the Constitution as among the most serious offences and in the interest of society weighed against the interest of the convicts deserves a proportionate sentence. This case is particularly important given the age of the children at the time of committing the offence and further largely the age by the subsequent Judgment.

Having balanced all these considerations within the meaning of the Childrens Act and the substantial and compelling circumstances, the 3rd and 4th accused would not benefit under Section 191 of the Childrens Act.

Further, it was noted by the Supreme Court in **Francis K. Muruatetu v R {2017} eKLR** that the pendulum has swung away from mandatory sentencing to a model of sentencing that privileges judicial discretion. It is clear, that the circumstances of a particular case must render the imposition or disproportionate to the crime, the criminal and the legitimate needs of society. Further, under the textual of the judiciary sentencing policy guidelines. The fundamental purpose of sentencing is to continue, along with crime prevention, unhalves, to respect for the Law and maintenance of a just, peaceful and safe society by imposing just sanctions. Consequently, one or more of the following objectives provides a detailed step by step, in sentencing where the discretion to deviate from the prescribed sentence to an individual personal circumstances and other related factors. On this aspect, I emphasize denunciation and deterrence as formulation of specific objectives to impose sentence against the convicts.

In addition, I bear in mind the proportionality principle to reflect the degree of responsibility of the convicts with regard to the third and fourth convicts, the Court finds that despite their youth, what counted as an aggravating was that on the day of the incident they behaved like adults and had shown a great deal of maturity.

I therefore take the cumulative effect of both aggravating and mitigation factors that weigh heavily against a lesser sentence for the two

convicts. All in all I sentence each of the convicts to 20 (twenty) years imprisonment. 14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF OCTOBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mouko for the accused person

2. Mr. Mwangi for the DPP

(moukoadvocates@yahoo.com,jamesmouko63@gmail.com)