REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL CASE NO. 2 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MUTURI MUNENE.....1ST ACCUSED

NANCY ANYANGO OKETCH..... 2ND ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Ms. Emukule advocate for the 1st accused person

Mr. Nyongesa advocate for the 2nd accused person

J U D G M E N T

Francis Muturi Munene and **Nancy Anyango Oketch** hereinafter referred as the accused persons were arraigned before Court indicted with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. In brief, it was alleged that the two jointly on 24.1.2018 at Jua Kali, area, of Mpeketoni Sub-County within Lamu did murder **Joram Wambugu.**

The 1st accused who was represented by **Mr. Gekanana** pleaded not guilty whereas **Ms. Emukule** appeared on behalf of the 2nd accused who also denied the charge. In order to discharge the burden of proof to disapprove the innocence of the accused persons, the state relied on the evidence of the six witnesses, this perpetual burden of proof rests entirely with the prosecution and at no moment does it shift to the accused person except in statutory provided for circumstances.

The concept of proof of beyond reasonable doubt finds its true construction and interpretation in a number of authorities i.e. **Woolmington v DPP {1935} AC 462, Miller v Minister of Pensions {1947} 2 ALL ER 372 – 373.** In **Andrea Obonyo & Others v R {1962} EA 562**, the Court held as follows:

> ***"As to the standard of proof required in criminal cases Denning L. J. as then was) had this to say in Bater v Bater {1950} 2 ALL ER 458 at 459***
>
> ***"It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges having said that, on proportion as the crime is enormous so ought the proof to be clean in criminal cases the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt."***

In **R v Stoddart {1909} 2 CR App Rep {217 – 242}:**

> ***"In criminal cases, the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is required, and the more the crime, the higher will be this minimum of necessary proof. The prosecution cause of action against the accused person's focuses on the elements of the offence weighted together with the evidence of the witnesses who saw or circumstantially can attest to the existence or non-existence of the facts to discharge the burden of proof and standard of proof in such a scenario."***

In **Abdu Ngobi v Uganda S.C. CR. No. 10 of 1991** the **Supreme Court** expressed itself in the following language:

> ***"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weakness of each side, weigh the evidence as a whole, apply the burden of proof as always vesting upon the prosecution and decide whether the defence has not raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted, but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incident as charged."***

For the Court to establish whether the offence of murder has been proved against the accused persons its enjoined to consider the totality of the evidence adduced by the prosecution. I think it makes sense to state which of the elements constitute the offence of murder contrary to Section 203 of the Penal Code:

(a). The death of a human being.

(b). That the death was unlawfully caused.

(c). That in causing death, the perpetrators was or were motivated with malice aforethought.

(d). That the evidence connects the accused person (s) positively with the commission of the crime.

Ingredient No. 1 on the death of the deceased, I find it preferable to refer to the evidence of **(PW2) – (PW6)** on the matter of death of the deceased.

According to their respective testimonies, on 24.1.2018, at Jua Kali area, the deceased body was found lying on the ground with visible trauma to the head and bleeding from the ears and mouth. In addition to the observations made by **(PW1), (PW2), (PW3), (PW4)** and **(PW5).** The pathologist **Dr. Kamaami Samwel (PW1)** pointed out that from the postmortem examination report the deceased cause of death was head injury secondary to being strangled. The specification of these evidence is consistent with the principle in **Nyamohunga v R {1990 – 1994} EA 462** which states that:

> ***"Proof of death is traditionally satisfied through medical evidence."***

Aspect out the prosecution has discharged the burden of proof beyond reasonable doubt that **Joram** is dead.

Ingredient No. 2

That the deceased death was as a result of an unlawful act or omission. The requirement of actual causation of death is simply that there must be a cause and effect relationship between the accused's conduct and the deceased's death. In everyday interpretation on the cause of death , the Court is looking at some continuation of factors of actual causation and proximate cause of the death of the deceased what the Law envisages in an unlawful act or omission is the factual evidence that the fatal injuries would not have occurred but for the accused's unlawful act or omission once the prosecution has introduced evidence that the accused negligent act or omission caused or increased the risk of harm to the deceased and that the harm so sustained is conclusive as the cause of death, then the burden of proof has been discharged beyond reasonable doubt.

As reflective of Section 213 of Penal Code. The general rule as to the burden of proof on the issue of causation. The prosecution is required to produce evidence, that the conduct of the accused was substantial factor in bringing about the harm the deceased suffered. A mere possibility if such causation issues of death is not enough and if it remains one of pure speculation and conjecture or the probabilities or at best even balanced the burden of proof remains undischarged.

In the instant case, the prosecution referred the Court the evidence by **(PW2)** who testified that he saw the 1st accused rob the deceased of his money on 24.1.2018. The following day the deceased body was found on the ground with injuries to the back. This evidence of an assault is attributable to an unlawful act or omission against the deceased on that fateful day. It should be pointed out that the deceased who had been sent to the shop by **(PW3)** prior to that particular moment witnessed by **(PW2)** happened to be general good health with no physical injuries.

Further, the prosecution strongly submitted on this issue by the production of the postmortem examination report as adverted to by **(PW1) Dr. Kamaami**. The prosecution expert **(PW1)** confirmed that the deceased had suffered injuries gotten from an attack occasioning serious harm to the head accompanied with strangulation. Therefore, if the injury is the loss of a chance of another human being to survive, then there is no difficult to find that the unlawful factor test surrounding. The death of the deceased has been satisfied considerably within the textual context of Section 203 of the Penal Code.

Ingredient 3

Malice aforethought, thus under Section 206 of the Penal Code, the code provides expressly that the offence of murder is committed with malice aforethought when a person carries out all or any of the acts set therein under. Accordingly, then, the ingredient of malice aforethought is established by the prosecution where there is manifestation of an intention to cause death or to do grievous harm to another or knowledge that the act or omission will cause death.

In furtherance of malice aforethought, the intentional and unlawful act should be for the purpose of causing death or serious bodily harm. In

order to discharge the burden of proof on malice aforethought. The prosecution adduced evidence.

Thus: First was the evidence of **(PW2),** that he saw the 1st accused attack and rob the deceased. This unlawful act was done simultaneously by both accused persons. Initially, the 2nd accused was seen pushing a bicycle as the 1st accused sought assistance for it to be stored at **(PW5)** facilities. It is also certainly evidence from **(PW5)** testimony that the deceased was attacked by the 1st accused as the immediate response to the scene revealed him on assessment showed a motionless body lying on the ground.

These witness **(PW2)** and **(PW5)** provide. Firsthand information which paints a sordid picture on the grave injuries and subsequent death of the deceased. The gruesome and devastating murder was corroborated by the evidence of **Dr. Kamaani (PW1)** who produced the postmortem examination report on behalf of **Dr. Khalifa**. He was of the opinion that the probable origin of the cause of death is attributable to the head injury and strangulation.

Malice aforethought and unlawful acts or omission by a perpetrator of murder denotes indiscriminate criminal conduct done without due regard to the right to life as entrenched in Article 26 of the Constitution. This crime contrary to Section 203 of the Penal Code was committed unlawfully accompanied with malice aforethought.

(4). Participation of each of the accused persons

In this respect, the accused persons are charged jointly with the offence of killing the deceased. This brings into perspective the provisions of Section 20 as read together with Section 21 of the Penal Code. Section 21 of the Code provides the features of criminal responsibility as follows:

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

The other overriding elements of a common intention concerns characteristics of it being formed at the very onset or during the commission of the offence. It may also arise spontaneously on the spur of the moment. According to Section 10 of the Evidence Act, anything said, done or written by any of the persons deemed to have a common intention, in reference to their common intention is relevant evidence of such intention. What is required of the prosecution is evidence tending to show that the individual accused persons were infact part of the conspirators in a gang of two or more, sharing a common intention, purposed to commit a particular offence.

See the illuminating principles in **Rex v Mikaeri Kyeyuniu {1941} 8 EACA 84 Wanja Kanyoro v R {1965} EA 501, Livingstone v R {2005} 1 EA 229, R v Nyambera {2001} KLR, Karani v R {1991} KLR 622, Rex v Tabulayenka S/o Kirya & 3 others {1943} 10 EACA 51**. In any given case, trying to untangle the facts to determine the existence or non-existence of common intention. The **Court in Ismael Kiseregwa & Another v Uganda CA CRIM Appeal No. 6 of 1978** held as follows:

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

It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions, and the omissions of any of them to disassociate himself from the assault. It can develop in the course of events, though it might not have been present from the start. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death. Let us go back to basic facts of this case. Everything on common intention is deducible from the evidence of **(PW2)** who saw the 2nd accused with the deceased pushing closely by the 1st accused from behind. Suddenly, when the 1st accused caught up with the accused he grabbed him and simultaneously with the 2nd accused robbed him of his money. Apparently, the deceased never left that scene where he fell down at the time of the robbery **Francis Mwangi** testified that on the same day of 24.1.2018, the 2nd accused went to his premises seeking room to store her bicycle.

As **(PW5)** declined the request simultaneously he heard screams to the effect, '*you have robed me'*. When he turned to look at the scene, it was the deceased, lying on the ground unconscious. He also established that the deceased was bleeding from the mouth. Thereafter he reported the matter to the police. This deceased was the one **(PW3)** confirmed that she had sent him to the shop but took time to return back. She further testified that the deceased body was later to be recovered at Jua Kali area with sustained injuries.

In answer to their non-involvement with the death of the deceased, the 1st accused stated as follows. That on 24.1.2018 he saw the 2nd accused with the deceased. He later welcomed him being highly intoxicated. They went round to social clubs but he did not manage to have additional drinks. Further, the 1st accused stated that the deceased was to be found lying down on the ground at the scene. He denied any such participation of killing the deceased as implicated by the prosecution.

The second accused on her defence stated that on the aforementioned date she spent most of the time in social clubs with a view to lure customers as a sex worker. **(DW1)** further evidence was to the effect that one of the customers who approached her was the deceased. They had a conversation on whether they could share an evening together, which she consented so as to secure some money to feed her children. With that agreement, **(DW1)** told the Court that they proceeded to another place while pushing the bicycle of the deceased. At the same time

the deceased gave her some money as a consideration for the conjugal provision for that day. She pointed out that because the deceased was so intoxicated, she agreed to assist in pushing his bicycle.

According to the accused, the deceased was beaten by some other people she did not know nor positively identify. It was the accused evidence that following the attack she raised an alarm but the three men were never apprehended as they took flight from the scene. Unfortunately, both of them were to be charged with the offence which she denies they did not commit. Everything else in actual causation Law as stated by the accused persons is directed at expanding the range of suspects who will be deemed to be actual cause of the deceased fatal injuries. Notwithstanding, that position taken by the accused persons, it is clearly evident that **(PW2)** and **(PW5)** identified the accused persons as the principal perpetrators in the commission of the offence of murder.

While the 1st and 2nd accused defence statements tends to shift blame to other accomplices. These requisite pieces of evidence from **(PW2)** and **(PW5)** provide corroboration to the evidence of **(PW3)** who had sent the deceased to the shop on the 24.1.2018 during the day. By close of business on the night of 24.1.2018, the deceased was yet to be seen at her home alive. In **(PW3)** evidence, the deceased left home while in good health. Its quite evident from the chain of events described by **(PW2)** and **(PW5),** it was after the robbery that serious body injuries and subsequent death became most probable if not inevitable.

The evidence by **(PW5)** attest to the fact of the two accused persons took flight from the scene where the body of deceased lay on the ground serious harm on his body the Mpeketoni, Sub-County Hospital pathologist on examining the body of the deceased opined that the cause of death is traceable to the head injury. Secondary, to hypoxia, being assign of strangulation. Having defined the boundaries within which the accused are placed as key actors to the murder, their evidence failed to whittle it down.

In the instant case, before me, I have subjected the evidence of **(PW2)** and **(PW5)** to very close scrutiny and evaluation. I am of the conceded view that both witnesses for the prosecution offered credible evidence capable of holding the accused culpable for the death of the deceased. The evidence in a continuum contained the important aspect of Law of evidence which is *Res gestae*. The principle element of the doctrine of *Res gestae* is that whenever, a crime or any transaction is a fact in issue, the evidence can be given of every fact which forms apart of some transactions. These facts which surrounds the happening of an event are called *res gestae.*

The final situation I will cover in which this Court will hold the accused persons responsible for the death is the piecing together the last seen together theory. In the instant case, the accused persons were the ones last seen together with the deceased before his body was discovered at the scene. The time gap of the two accused persons seen together and the deceased death is important in the link to implicate them with the offence of murder contrary to Section 203 of the Penal Code.

In the comparative jurisprudence, the Court in **Sharma v State of Assam {2017} 6 Scale 556** stated as follows:

> ***"The last seen theory comes into play where the time gap between the part of time when the accused and deceased were seen. Last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused, when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come a conclusion of guilt in those cases."***

Therefore, in the present case and in the light of the aforesaid analysis, I am satisfied that the burden and standard of proof of beyond reasonable doubt has been established against the two accused persons for the offence of murder contrary to Section 203 of the Penal Code.

As a consequence, I enter a verdict of both guilty and conviction against each of the accused persons as charged.

Sentencing verdict

It is with a sense of inspiration I echo the following words by King C. J. in the leading **South Australian case of Yardley v Betts {1979} 22 SASR 108 at 112 – 113**:

> ***"To say that the Criminal Law exists for the protection of the community is not to say that severity is to be regarded as a sentencing norm. Times and conditions change and the approach of judges, to their task must be influenced by contemporary conditions and attitudes. But public concern above crime however, understandable and soundly based, must never be allowed to bring above departure by the Courts from those fundamental concepts of justice and mercy. Which should animate the criminal tribunals of civilized nations…… The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion assist another human being to avoid making ruin of his life, we ought surely to do so."***

In the case, I have taken into account the mitigation and aggravating factors as submitted by the respective parties involved in this trial. The Court is also empowered to ante-date the commencement date of the sentence by factoring in the time the convict have already been held in remand custody pursuant to Section 333 (2) of the Criminal Procedure Code.

The option available for this offense is a periodical imprisonment as a substitute of the maximum sentence of death. The main focus of this sentence would be to promote the convicts as Law abiding members of the community and the aspect of deterrence given the weight in the circumstances of the case. The harm caused by this offence that resulted in the death of the deceased is immeasurable.

Backed by the vast majority of aggravating factors, I sentence each of the convict to 28 years custodial sentence with effect from 8.2.2018. Orders accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 20TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the State

2. Mr. Nyongesa for the 2nd accused person

3. Ms. Emukule for the 1st accused person