**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE NO. 8 OF 2014**

**REPUBLIC ..... PROSECUTOR**

***VERSUS***

**1. SIRYA KALALE .....1ST ACCUSED**

**2. KIBAO SIRYA ..... 2ND ACCUSED**

**3. KAHINDI KENGA ..... 3RD ACCUSED**

**4. KATANA KENGA ..... 4TH ACCUSED**

**CORAM: Hon. Justice R. Nyakundi**

**Miss. Sombo for the State**

**Mr. Mouko for 1st and 2nd Accused Persons**

**Mr. Ogeto for the 3rd and 4th Accused Persons**

***JUDGMENT***

On 2.4. 2014 the accused persons named herein were arraigned in court charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The brief particulars in the information alleged that on the night of the 16.3.2014 and 17.3.2014 at unknown time at Ziwa la Furunzi village in Malindi District within Kilifi County jointly with others not before court murdered **Kanza Kenga.** Each of the accused pleaded not guilty. At the trial, prosecution called seven witnesses.

The prosecution case was that the accused persons jointly killed the deceased after being suspected to have bewitched a child to one of his sons by the name **Kenga.** The evidence pointing to the role of accused persons in killing of the deceased can be summarized as follows:

**PW 1, Dr. Yegon Erick** testified on behalf of **Dr. Chirega** who conducted the postmortem and prepared the report which formed the basis of establishing the cause of death of the deceased. The postmortem admitted in evidence as **Exhibit 1** opined that the deceased died as a result of cardio pulmonary artery secondary to severe anaemia as a result of deep cut wound on the neck, genital area and right thigh.

**PW 2, Hamadi Hussein** in his sworn testimony referred to the events of 16.3.2014 when he responded to screams emerging from the Furunzi village on arrival, he witnessed the deceased being surrounded by people ready to inflict physical harm on allegations that he was a practicing witch. He testified that noticing danger, he decided to rescue the deceased whom he escorted to the house of **Mwarabu** herein PW 5. According to PW 5, on the said 16.5.2014 he received at his home PW 2, the deceased, **Siria Kalale** and **Rama Chilena**. In the testimony of PW 5 the issue at stake was witchcraft and threats to life and security of the deceased. It was discussed between family members in the presence of PW 2 and it was resolved that they calm down their emotions to enable the conflict and differences be dealt with the following day. PW 5 testified further that come the following day, he received a telephone call that the deceased had been killed. That is when the matter was reported to the police for further action.

**PW 3, Kahindi Mwadzama** testified that on the material day the 16.3.2014, he had attended a burial of the son to the deceased and before the casket could be lowered to the grave a quarrel ensued between the other two sons of the deceased namely **Kahindi (the 3rd accused)** and **Katana (the 4th accused)**. He gave evidence that the quarrel was about the deceased being accused as having bewitched his son. That

quarrel appeared to escalate but no physical harm was occasioned against the deceased. What PW 3 thought ended that evening was to be followed by telephone call confirming that the deceased has been murdered.

**PW 4, Francis Katana** testified that the child **Sinaraha** who passed on was his grandchild. While at the burial, PW 4 was informed that Katana and **Kahindi** wanted to execute an unlawful mission against the deceased in the pretext that he had bewitched his own son **Sinaraha**. Thereafter, PW 4 proceeded to his home but was to be informed that the deceased **Kunga Karisa Kalale** has been found murdered. PW 4 went further to testify that during the initial investigations, he was also arrested but released without a charge.

**PW 5, Francis Charo Mralae** testified that he had attended the same burial in which PW 2, PW 3, PW 4 were also in attendance on 16/5/2014. On the material day PW 5 told the court that as he was consoling with the family **Kahindi Kenga Karisa** requested to talk to the deceased brother before his body could lowered to the grave as it is with Giriama customs. However, as the one co-chairing the burial ceremony with the pastor of the day they turned down the request by **Kahindi Kenga**. In view of the fact that the burial was conducted under the Christian rituals and rites. Further PW 5 testified that in the course of consoling the family members one Katana furiously walked into the meeting with an intention of assaulting his father that he had stayed away from the tomb. In the same meeting, Katana accused the deceased of being a witch. This confrontation was referred to Ganda locational chief and later the police to take further action. Notwithstanding, that the matter had been reported to the security agencies the following day he was to be informed that the same mzee Kenga had been killed.

**PW 6. Fredrick Mwatsuma Mwarabu** the village elder of Furunzi testified that on 16.3.2014, at his home he received Sirya Kalale the 1st accused, the deceased **Kenga, Rama Chuma** and **Hamadi Hussein** who came with a history that had rescued the deceased Kenga from being assaulted by one Katsao the 2nd accused. It was decided, for the security and safety of the deceased he spends a night at the home of **Sirya Kalale** to await police action. In PW 6 testimony, before they could depart to their various homes an alternative decision was reached for the deceased to accompany his family back home till the following day. Unfortunately, he learned the following day that the deceased had sustained several cut wounds from which he succumbed to death.

**PW 7, IP Gitende** gave evidence on behalf of the investigating officer Sergeant Matika. His evidence on oath confirmed that the accused persons were found to have been involved in committing the offence.

At the close of the prosecution case, accused persons were placed on their defence, as follows:

**DW 1 – Sirya Kalale** in his sworn statement and denied that he participated in any way in killing the deceased. In his evidence, he alleged that on the fateful night he spent most of the time at Malindi Hospital where he had gone to seek medication for his strained leg. On arrival at home he met the deceased who had concerns about the rumors being spread within the village that he is a witch and therefore required police protection in regard to threats to his life. DW 1 further testified that he decided to go with **Katsao,** 2nd accused to seek safe haven for the deceased to avoid him being killed by people alleging that he was a witch. On their way, DW 1 gave evidence that there were many people following them but they managed to make it to the home of the village elder (PW 2). However, DW 1 confirmed that the people never gained, entry to the home of the village elder. Having discharged his role DW 1 told the court that the village elder decided instead of waiting for the police they go back with the deceased as a family to await any action the following day. While on their way home, DW 1 told the court that the deceased excused himself to answer the call of nature as he proceeded to his home.

Apparently, according to DW 1, the deceased never made it home safely only to hear from the driver of the tuktuk which came to take him to the hospital that the deceased had been found dead at Furunzi. He denied any knowledge as to the cause of death.

**DW 2, Katsao Sirya** elected to give an unsworn statement. He stated that on the material day, the 16.3.2014, he was at home when at 8.00 p.m. he saw the deceased. According to DW 2, in company of (DW 1) learning from the reports going round that the deceased had bewitched a child by the name **Sinaraha** they took him to the village elder to seek refuge. After a short discussion it was agreed that they go home to await police action. That on their way home, the deceased went to answer the call of nature in the bush. In DW 2 testimony he did not wait for his return but proceeded to his house and **Mzee Sirya**, 1st accused also went to his house. In his evidence (DW 1), mentioned that he was to learn of the death of the deceased the following morning from the people within the village.

**DW 3 – Kahindi Kenga** in his sworn testimony gave a history that the family had been bereaved by the death of his brother **Sinaraha,** who was also a son to the deceased. He explained to the court that when they finished laying their brother to the grave, the family kept vigil the whole night. The deceased though present was in company of the elders. In the morning as he left for his house (DW2), stated that he heard women walking and screaming that the deceased is dead. He denied threatening his father during the funeral of his brother as alleged by the prosecution witnesses.

**DW 4 Katana Kenga** also a son to the deceased elected to give sworn statement of defence denying any knowledge or involvement with the death of the deceased. He denied seeing the deceased that night as they stayed in the funeral home of their brother **Sinaraha** who was being buried on 16.5.2014.

**DW 5, Chazure** testified as the daughter to the deceased and sister to PW 2, PW 3 and PW 4. She exonerated that accused one and two to have committed the offence on 16/5/2014. After the burial, DW 5 testified that together with **accused 3 - Kahindi Kenga** and **accused 4 – Katana Kenga**, they remained at home till the following day. That is when they heard from some women coming from the river to fetch water that the body of the deceased has been found in the thicket.

**DW 6, Edward Kenga**, testified as the brother to accused 3 and 4 to the effect that there was no quarrel between the accused and the deceased. He also joined DW 3, DW 4 and DW 5 to affirm that they spent the night at the funeral home of their brother until the following day. He also learnt of the death of the deceased from the members of the community and his brothers.

At the close of the trial **Mr. Mouko** counsel for the 1st and 2nd accused submitted that the prosecution has presented no evidence that the

accused persons killed the deceased. **Mr. Mouko** submitted that the prosecution has failed the test provided for under Section 107 (1) of the Evidence act on the duty of burden bearer. In this case the prosecution, learned counsel submitted that out of the seven witnesses nobody saw any of the accused inflict physical injuries which resulted in his death. He further submitted the prosecution case which was purely circumstantial was severely withered during cross-examination. Learned counsel placed reliance in the principles pleaded in **James Omwenga v R CR Appeal No. 59 of 2011,R v Silas Onsere** alias **Fredrick Namenya CR Case No. 50 of 2016, Eric Odhiambo v R CR Appeal No. 84 of 2014 , Joan Chebii Chui v R CR Appeal No. 2 of 2002** Learned counsel urged this court to acquit the accused persons.

**Mr. Ogeto** for the 3rd and 4th accused did not manage to file in his written submissions likewise the prosecution counsel **Ms. Sombo.** I think with respect this did not occasion a mistrial as there is far more cogent material on record to draw proper inferences.

I have considered the charge, evidence by the prosecution and the defence with respect to this charge and culpability of the accused persons. The question is whether the offence of murder contrary to Section 203 has been proved beyond reasonable doubt.

**Analysis and Determination**

In this case, the prosecution narrative is to the effect that the accused persons killed the deceased by deliberate acts of assault but staged managed the scene to give the impression that he was killed by some other persons. The defence on their part raised an alibi defence. Their respective defences was unanimous that they also learnt of the death of the deceased the following day from the screams of the women who went to fetch water.

It is trite that at the trial of murder the duty placed upon the prosecution is to adequately call evidence to prove the following elements beyond reasonable doubt.

***1). That there is the death of a human being.***

***2). That the death was unlawful.***

***3). That in causing death the accused persons charged had malice aforethought.***

***4). Finally, the accused persons can be positively, identified and placed at the scene of the murder.***

As espoused under Section 107 (1) of the Evidence Act and the principles in **Woolmington v DPP 1935 AC 462** the onus to establish this murder charge is on the prosecution to prove beyond reasonable doubt that the deceased killing was instigated by the accused persons, persistently with malice aforethought. The threshold of beyond reasonable doubt demands of the court to determine the charge on the inference and manifestation of the prosecution evidence alone without shifting the burden to the accused persons.

In the case of **R v Middleton 2001 Criminal Law Review at page 251 – 252** it was held:

> ***"inter alia That on directions given to the jury on a trial: by the Judge:***
>
> ***"the mere fact that the accused person tells a lie is not itself evidence of guilt. An accused may lie for many reasons and they may possibly be in fact reasons in the sense that they do not mean that he is guilty. For example, a person may lie to bolster a good defence or to protect somebody else, or a person may lie to conceal some disgraceful conduct that he does not want to share with us or a person may lie out of panic or confusion. Now, if you think that there is or there may be an inaccurate explanation for the defence in their accuses for the lies according to the prosecution, then you have no notice of these lies, it is only if you are sure that he did not lie for an innocent reason, that his lies can be regarded by you as evidence supporting the prosecution case."***

Even though the principles illustrated above are essential to the functioning in a trial by the Jury System it is not absolutely out of context in circumstances which arises in a single Judge trial in our jurisdiction. Further, there is no doubt the provisions under Article 50 (2) (a) ***"every accused has a right to be presumed innocent until the contrary is proved."*** is of relevance when considering the burden of proof which rests with the prosecution.

Amenable therefore to this right on presumption of innocence is that in the event of reasonable doubt against the case for the prosecution, such doubt should be resolved for the benefit of accused. From the Practical Treatise of the Law of Evidence by **Thomas Stankey** noted

> ***"Evidence which satisfies the minds of the Jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact absolute mathematical or metaphysical certainty is not essential."* (Wigmore (2497)).**

In this analysis, a conscientious effort would be made to establish whether the prosecution discharged the burden of beyond reasonable doubt in proving the charge of murder contrary to Section 203 of the Penal Code against each of the accused persons. So the primary duty on my part is to consider each singular element and the facts of the case by the prosecution pursuant to Section 107 (1), 108 & 109 of the Evidence Act.

**a). The death of Kunga Karisa Kalale**

This element is premised on the basis that a human being once alive is dead. From the evidence adduced by the seven prosecution witnesses

it is not in dispute that the deceased was confirmed dead on 17.1.2015 at Furunzi area. The family members who include the 3rd, 4th accused persons and the defence witness (DW 1) and DW 2 personally did identify and properly so stated in court that their father is dead.

**PW 1 Dr. Yegon** who produced the post mortem report as **exhibit 1** on behalf of **Dr. Chiruya** confirmed that the body whose report is being presented in court was that of **Kenga Karisa Kulale**. Therefore, the identity and the death of the deceased is not in dispute.

**b. Causation and the element of the death being unlawful**

The offence of murder as legistated under Section 203 of the Penal Code involves the unlawful killing of another human being with malice aforethought. As already indicated in the Constitution under Article 26 ***Every person has the right to life***. In Subsection (3) ***A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written Law.*** Therefore, the actus reus for the offence is in the sense the unlawful act of assault, mayhem, assassination and grievous harm inflicted against the person for purposes of causing death.

Unlawfulness as a component of the offence of murder under Section 203 is regarded as a voluntary act or conduct by an accused person against legally protected right to life under Article 26 of the constitution. Notably, whether the unlawful conduct was justified, the enquiry test must meet the provisions of Section 17 of the Penal Code and the fundamental guiding principles cited in the a passage from **Palmer v R {1971} AC 814, R v Jullieni {1969} 2ALL ER 856.**

A considerable number of cases have adopted the passage in the above landmark case which laid down the English principles on self-defence and its application in answer to the unlawful killing as a defence to the homicide charge. See (Ahmed **Mohamed Omar & 5 Others v R CR NO. 414 of 2012 {2014} eKLR, Robert Kinuthia Mungai v R {1982-88} IKAR 611, Roba Galma Wario v R {2015} eKLR).** In pursuit of these principles**,** the prosecution must therefore demonstrate a causal connection between the unlawful act and the death of the deceased to support this ingredient beyond reasonable doubt. With regard to self-defence there was no such plea raised by the accused persons, that in killing the deceased they acted under the stress of necessity of self-defence.

Significantly, in each of the enumerated injuries, the scientific test or quantifiable probability of death was attributable to cardio pulmonary arrest secondary to severe anaemia as a result of deep cut wound on the neck, genital area and right thigh.

The *actus reus*, involves one whose conduct amounts to extreme disregard to right to human life. I am not persuaded that the ultimate harm which resulted against the death was actually not foreseen or intended by the accused persons. Grievous bodily harm means bodily injury of such a nature that if left untreated would be likely to endanger life or likely to cause permanent injury to health.

As stated under Section 213 of the Penal Code it does not matter whether or not treatment is or could have been available. The facts of the case show that the unlawful killing was not authorized or excused by Law. There is no evidence that whoever inflicted the serious harm did so within the potential defences to a level to rebut the prosecution case beyond reasonable doubt.

This essential element in this trial therefore remains uncontested and on the face of it, the burden of proof has henceforth been discharged by the prosecution.

**c). The main element that distinguishes murder from other homicides is malice aforethought.**

It is trite Law that murder contrary to Section 203 of the Penal Code is not proved beyond reasonable doubt witness an intention to kill or to cause grievous body harm is proved. To answer the question as to what constitutes malice aforethought. Section 206 of the Penal Code enumerates various circumstances whereby it can be manifested and accused person held culpable for murder and not manslaughter.

The founders of our jurisprudence defined murder to be ***"where a person of sound mind and memory and discretion unlawfully kills any reasonable creature in being and under kings palace with malice aforethought either express or implied the death following within a year and a day."*** **(Fubian Laroche v R CA 32 OF 2009 (Trinidad and Tobago").**

Malice aforethought in our case is mensrea of the offence deemed to be established by evidence as stipulated under Section 206 of the Penal Code if the prosecution proves one or more of the elements stated therein.

> ***(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 omissions causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.***
>
> ***(c). an intent to commit a felony.***
>
> ***(d). an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

The Law holds out that proof of any one of the elements in the defined circumstances would constitute malice aforethought. This was the principle in the case of **R v Daniel Anyango Omoyo [2015] eKLR)** and in the *Locus Classicus* case of **R v Tubere S/o Ochen 1945 12 EACA 63** the court held that

> ***"it will be sufficient to infer malice aforethought where it has been established as to the nature of the weapon used, the manner in which it is used, part of the body targeted and injured, the nature of injuries inflicted, the conduct of the accused before, during and after the killing."***

It was held in the case of **Jairus Masano Mbachia v R [2015] eKLR, Morris Aluoch v R CR Appeal No. 47 f 1996 or Ernest Asani Bwire Abang** alias **Onyango v R CA Cr Appeal No. 32 of 1990** ***"That the sheer force of the brutal killing and gravity of multiple injuries inflicted are indication of malice aforethought."***

The substance of Section 203 of the Penal Code provides specifically for the element of intention and unlawful act to cause the death of the victim by inflicting serious harm to maim or cause permanent injury to limb of the body of the deceased. Therefore, before malice aforethought can be imputed, the *actus reus* of the accused that caused the death plays a central role to prove he offence of murder.

One of the building block to invoke malice aforethought as can be deduced from **Tubere case** is what measures accused took that lay in his power to mitigate the danger that they had created by calling for medical assistance or summoning help to have the victim be taken to hospital. This was also the principle in the case of **(R v Miller [1983] 2 AC 161).**

In this case the prosecution evidence alluded into the issue of witchcraft an allegation against the deceased which arose during the burial of **Sinaraha** on 16.3.2014. according to PW 2, PW 3, PW 4, PW 5 and PW 6. There was a mistaken belief among the siblings of the 3rd and 4th accused that their father (deceased) had bewitched **Sina Raha**. That was really the trigger and the link in the chain of events which culminated in an assault and subsequent death of the deceased.

The accused persons in their defence made no reference to this fact that on 16.3.2014 they had made attempts to confront the deceased as the one who killed his son through magical powers of witchcraft. This African sorcery and the power to exterminate life of being has been considered by our courts that nobody should kill another under the excuse of witchcraft. In the case of **R v Kajunasio Mbake [1945] EACA** The court held that a belief in witchcraft cannot be a reasonable mistake in law, regardless of how honestly it is held by the accused and how prevalent it is in his community **(See the book on Criminal Law by William Musyoka J Law Africa Publishing (T) Ltd Report 2016 at page 137 – paragraph 5.**

That the above decision the court observed as follows:

> ***"The accused deliberately killed his father under the honest belief that the father was at that moment killing the accused's son by supernatural means. The court held that a belief in witchcraft was not a reasonable mistake of Law (See also Eria Galikuwa v R [1951] EACA 175)."***

In view of the foregoing, it cannot be gain said that the killing of the deceased can be justifiable on grounds that some group of people or members of a community or family held an honest belief that he practiced witchcraft which he used to cause the death of **(Sinaraha).** Thus such a defence would not be available to the accused persons in the event they were to invoke it to exonerate themselves the unlawful act coupled with malice aforethought for the crime.

A killing of another human being in accordance with our constitution and statute can only be justified and excusable where the plea on provocation and self-defence passes the test under well settled principles in **Palmer v R [1971] ALL ER 1077.**

In the instant case subject to Section 206 of the Penal Code and the principles in the cases cited I hold the following view. There is no dispute that the deceased aged 75 is the father of the 3rd, 4th accused, defence witnesses (5) and (6) in that when on 16.3.2014 the 3rd and 4th accused together with DW 5 and DW 6 participated in the customs and rites of interning the body of **Sinaraha.** The deceased was also present. It is also not disputed from PW 2, PW 3, PW 4, PW 5 and PW 6 the deceased right to life became a big issue given the threats from his own sons alleging that he had bewitched and caused the death of **Sinaraha**. In elaborating the trauma and brutality the deceased must have gone through **(PW 1) Dr. Yegon** evidence as contained in the postmortem produced as **exhibit 1** indicated the serious injuries inflicted to the entire neck and part of the spine, the genitals and right thigh.

The probable weapon used as can be inferred from the nature of injuries was a sharp device. The intended assault was done for purposes of causing death and to do grievous harm which connotes grave permanent maim to parts of a body of a human being. This intention was executed with the full knowledge that the deceased right to life protected under Article 26 of the Constitution becomes untenable. Similarly, its clear that the deceased was killed and left in a thicket to take his last breath without any opportunity to seek medical assistance as provided for under Section 213 of the Penal Code.

It is malice aforethought established by evidence when the act of killing which led to the death of the deceased was executed in such a manner that at the very least the degree of chance of survival was reasonable remote.

I am bound to say that giving by the principles in **Tubere (supra), Ernest Abang Bwire (supra), Anyango and Jairus Masoma** malice aforethought as defined under Section 206 (a) (b) of the Penal Code is manifested to the facts of this case.

The action of the accused persons acting in concert to inflict grievous harm that did endanger his life showed intention to cause death. All formulations of malice aforethought in this case have been proved beyond reasonable doubt that the accused intended to kill or do serious harm to the deceased. It matters not if their motive was as evidence demonstrated that he practiced witchcraft.

**d). Placing the accused at the scene**

As correctly pointed out by the prosecution evidence this instant case involves purely circumstantial evidence. The test of what constitutes circumstantial evidence for it to be correctly applied has been discussed although in the case of **Abang** alias **Onyango v R CR Appeal No. 32 of 1990, Sawe v R 2005 eKLR** where the court held that where the only evidence against an accused person is circumstantial evidence the following test must be satisfied

i. ***The circumstances from which an inference of guilt is single to be drawn, must be cogently and firmly established.***
ii. ***Those circumstances should be of a definite unerringly pointing towards guilt of the accused.***
iii. ***The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."***

Applying the above principles to this case, there is evidence that was deposed by PW 2 that on 16.3.2014 **Sirya Kalale**, 1st accused and **Kibao Sirya,** 2nd accused quarreled and at the same time assaulted the deceased. According to PW 2 he stated that the deceased went to the home of another village elder **Chief Mwarabu** who testified as PW 6. As regards to PW 6 testimony he confirmed receiving the deceased, **Sirya Kalale**, the 1st accused one Raina, not before court and PW 2.

After a brief discussion, it emerged that the deceased life was in danger based on the allegations of witchcraft from his family members. However, it was agreed that the matter be reported to the police in the meantime the deceased was to spend a night at the 1st accused house. At the same time on 16.3.2014 PW 3 confirmed that before they could inter the body of **Sinaraha** a quarrel between the 3rd accused **Kahindi Kenga**, and the 4th accused **Katana Kenga** and the deceased took place.

However, as a result of the elders intervention calm was restored until the end of the burial ceremony. There was also the evidence of PW 4 which confirmed, a creating disturbance between the **3rd, 4th accused** and the deceased during the burial rites of their sibling's **Sinaraha**. This was also corroborated by **PW 5 Francis Charo**.

Further accused version starting with **Sirya Kalale** he denied any involvement in the killing of the deceased. He stated part of the 16.3.2014 he spent at Malindi hospital and when he travelled back the deceased person was also at the homestead. Further evidence by DW 1 was that in view of the threats to the deceased life together with the 2nd accused they decided to escort him to PW 2 house for safety and security. However, according to DW 1 it was decided by PW 2 that they go back with the deceased as the police will handle the rest of the complaint later the following day.

According to **DW 1** and also **DW 2** on their way home the deceased excused himself to step aside to answer a call of nature but never to return. That is the last time they saw the deceased alive.

The 1st and 2nd accused further stated in their defence that they decided to proceed home without the deceased. It was only the following morning they heard that the deceased had been found dead with multiple injuries.

As for the defence by **DW 3** he denied the act of being part of the people who killed his father. It was his statement of defence that the whole day and night he kept vigil at the home of where the burial rites were being conducted. That is when he learnt of the death of the deceased. Likewise, DW 4 denied seeing the deceased that night of the 16.3.2014 where they spent a night with the rest of the family members. In addition to **DW 3 and DW 4** it was further the evidence of DW 5 and DW 6 that the deceased was not at home of **Sinaraha** where they happened to have spent the night. What their evidence did was to buttress the alibi defence by **DW 3 and DW 4** respectively.

From the above review the circumstances which emerged and taken note of by this court are as follows:

The deceased was at the home where a family member **Sinaraha** was being buried on the 16.3.2014. On the material day as confirmed by PW 2, PW 3, PW 4, PW 5 and PW 6 the accused persons at different times in the course of that day started a quarrel with the deceased on an allegation that he had bewitched **Sinaraha.** Besides the two accused PW 2 confirmed to the court that there were many other people he could not positively identify. Immediately PW 2 rescued the deceased they travelled together to home but again the 1st accused, 2nd accused followed from behind closely. Thereafter, a short discussion between PW 2, PW 6, the 1st accused and 2nd accused it was agreed that the deceased go back home in company of the two accused persons, to await police action.

That evening of 16.3.2014 on or about 9.30 – 10.00 p.m. the deceased, 1st accused and 2nd accused left PW 6 home. The deceased was alive only fearing of his life and safety due to prior allegations on witchcraft.

The 1st accused and 2nd accused admittedly left with the deceased from home of PW 6. That they were to secure his safety to await police action. As pointed out by the 1st and 2nd accused in their evidence, the deceased excused himself to answer the call of nature but they did not set the need of waiting for him to come back. DW 1 and DW 2 are categorical in their testimony that they parted ways without knowing the whereabouts of the deceased. In a proper case this was an old monger 75 years; he had excused himself at around 10.00 p.m. in the night to answer a call of nature and yet nobody cared to find out why it had taken him longer than usual to turn up and proceed with the journey home. In my view, there is but a common intention to be inferred from the circumstances of this case between the two accused persons giving rise to a conclusive inference of a joint enterprise to prosecute the offence of murder against the deceased.

The well-known rule governing circumstantial evidence applicable is the last seen concept. The Nigerian Court in the case of **Stephen Haruna v A. G. 2010, ILAW/CA/86/C 2009** stated as follows:

***"The doctrine of last seen means that the Law presumes that the person last seen with a deceased bears full responsibility for***

***his death. Thus while an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstances. In the absence of a satisfactory explanation a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."***

The Learned **Judges Omolo, Shah and Bosire JJA** in **Ndingiri v R 2001:**

> ***"affirmed the conviction of an appellant for murder upon circumstantial evidence that he was the last person to be seen with the deceased and the deceased's body was later retrieved from the appellant's latrine."***

In **Uganda v Akina Ajok 1974 H.C. B 176** quoting the passage from **R v Taylor 1928 21 CR Appeal R. 20**, the court asserted as follows:

> ***"Circumstantial evidence is very often the best evidence. It is evidence by surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics."***

In my view going by the above principles and evidence on record Section (111) of the Evidence Act placed the burden on the accused persons to give an explanation of how the deceased just left to attend a call of nature only to mysteriously disappear from their midst without being traced alive but dead. In a twist of events beyond human understanding the accused were also to learn of the deceased death from passers by who came in contact with the body of the deceased. Invariably in my view this last conduct by the accused corroborates the state of affairs which existed all along between the accused persons and the deceased.

Having find the 1st and 2nd accused responsible for the death of the deceased is there a distinction that can be logically drawn between their conduct and that of the 3rd and 4th accused. I would not depart from the general principles Iaid down in **Emese Abang** alias **Onyango (supra)** on circumstantial evidence to place the 1st and 2nd accused at the scene of the murder.

What about the 3rd and 4th accused persons? As for the 3rd and 4th accused, the prosecution tendered circumstantial evidence. On 16.3.2014, the 3rd and 4th accused confronted the deceased father with an allegation of witchcraft against **Sinaraha** when they were just interning the body to the grave. The quarrel and shoves at the deceased caused commotion to the mourners. See the testimony of (PW 3). This was communicated by the testimony of PW 4. PW 5 further confirmed that at the time in the course of the burial the 4th accused came forcing that he wanted to attack the deceased because of killing **(Sinaraha).**

I bear in mind that the test required to prove the case against the accused persons is that of beyond reasonable doubt **(See Miller v Minister of pensions [1947] 2ALL ER 372).**

From the evidence tendered by the prosecution the two accused persons are an affiliate with their co-conspirators the 1st and 2nd accused person. The whole issue in this case is whether the provisions of Section 21 of the Penal Code does apply to the facts of this case it provides that:

> ***"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 purpose that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

In **Rex v Tabula Yenka s/o Kirya and 3 others [1943] 10 EACA 51** the court held:

> ***"To constitute a common intention to prosecute an unlawful purpose – it is not necessary that there should have been any consented agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to dissociate himself from the assault."***

In a more recent case of **Njoroge v R [1983] KLR 197** the court observed:

> ***"If several persons commit for an unlawful purpose, aware of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abated or not provided that the death was caused by that of someone of the party in the course of his endeavors to effect the common assault of the assembly. Their common intention may be inferred from their present, their actions and the omission of either of them to associate himself from the assault."***

In this case there is evidence from the early hours of the day involvement of two or more persons issuing threats to the deceased. It is presumed under Section 119 that the person duly identified as accused formed a common intention to prosecute an unlawful purpose of killing the deceased under the guise that he was involved in the death of **Sinaraha** by use of witchcraft. Section 21 uses the phrases each of them is deemed to have committed the offence.

In answer to circumstantial evidence, the accused persons made admissions under Section 17 of the Evidence Act for purpose of the proceedings they relate to the matters in issue. The effect of the statement by the accused that on the material day they were with the deceased who excused himself to go and answer a call of nature but never to return.

This formal admission stands to qualify the last theory that they were the last people to be with the deceased before he met his death. The accused formal admissions are as explained in the persuasive case of **Kwea More v The State [1983] BLK** constraining the provisions of

Section 129 of the Criminal Procedure Code with similar provisions with Section 17 of the Evidence Act stated as follows:

> ***"A court is entitled to take into account every admission by an accused person whether extra-judicial in court, not for the purpose of dispensing with proof that the crime charged has been committed but as evidence tendering to support the state case."***

From the evidence available, I am satisfied that the accused person killed the deceased by sustained unlawful assault with malice aforethought to proof the offence of murder contrary to Section 203 of Penal Code. I find each of the accused guilty and do convict each of them in accordance to the Law.

**Sentencing**

In sentencing the concern the court has taken into account the aggravating and mitigation factors.

**Aggravating factors**

The death of the deceased was hatched and planned in the background of allegations that he practices witchcraft.

The heinous nature of the killing was cruel in circumstances shown that the convict's actions cared less to preserve and protect the right to life under Article 26 of the Constitution. The alarming burgeoning in the commission of murder offences of the kind in this particular case under the excuse or guise of witchcraft within Kilifi County is alarming.

This criminality threatens and continuous to threats the right to life of every residence of this county. All what one needs is to brand his or her victim witch and even without any reasonable become arrangements are made to terminate the life prematurely. The mitigation that the convict had no significant history of prior criminal activity as a father is of little weight.

Secondly, that the first accused is of advanced age is also a negative factor, for illusive he did not disassociate him from the final enterprise of killing the deceased.

The deceased was killed in cold, and calculated plan without any pressure or moral justification. The deceased went through mental anguish and torture before his final demise, this was all under the inexcusable mistake. That he proclaimed witchcraft against one **Sinaraha** in all these aggravating factors stated out against any mitigation or past antecedents.

Accordingly, I apply the **Muruatetu Francis** to sentence each of the convict to a term imprisonment of thirty (30) years imprisonment.

14 days Right of appeal.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF FEBRUARY, 2020.**

**.....**

**R. NYAKUNDI**

**JUDGE**