REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 17 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MARY WANGUI MAKUMI.....1ST ACCUSED

EZOEKE SUNDAY JEREMIAH.....2ND ACCUSED

CORAM: Hon. Justice R. Nyakundi

Meroka for the State

Mr. Naikuni for the 1st accused person

Mr. Itaya for the 2nd accused person

JUDGMENT

The two accused persons **Mary Wangui Makumi** and **Ezoeke Sunday Jeremiah** were jointly charged with murder contrary to Section 203 of the Penal Code and punishable under Section 204 of the Penal Code. The particulars of the charge are that on the night of 8th August 2017 and the wee hours of the morning of 9th August 2017 at Dawat Apartments within Ongata Rongai Township, in Kajiado County jointly with others not before court murdered **Joseph Nganga Mwangi.**

As the accused persons pleaded not guilty, it became the duty of the prosecution under Section 107 (1) of the Evidence Act to establish their guilt for Judgment on conviction to be obtained in its favour.

In this regard the prosecution summoned fourteen (14) witnesses and in addition produced a bundle of exhibits including documentary evidence. I can only set down briefly the evidence by each of the witness to demonstrate whether the nature and its characteristics discharged the burden of proof beyond reasonable doubt against the accused persons.

PW1 Sgt George Odhiambo testified as police detective attached to Ongata Rongai Police Station carrying out duties of scenes of crime. In his statement following the murder report recorded at the police station he received instructions to visit the scene in order to document it by way of taking photographs. The set of photographs taken representative of the house where the murder is stated to have occurred, the blood stains scene, including blankets, shoe marks and injuries suffered by the deceased were admitted in evidence as **exhibit 1(A)** and the accompanying report as **exhibit 1(B).**

PW2 – Elizabeth Nyambura Mwangi, the sister to the deceased testified that on 9.8.2017 she received information on the events of the tragic death of her brother who stayed alone at Dawal Apartments. It was during her visit to the apartment she noticed that the deceased had been physically assaulted by the sheer presence of blood stained premises and other materials where the attack took place.

Further, evidence by PW2 was to the effect that she attended the post mortem examination at the city mortuary. It was also her testimony, that she was able to observe that the deceased had sustained injuries to the head, chin and neck.

PW3 – Justus Odeda, who is a practicing advocate of the High Court and a resident of Dawat Apartments testified that in the night of 8th and the wee hours of 9th August 2017 while leaving for work he heard a faint cry from the deceased's apartment. According to PW3, he passed through the apartment only to notice a naked body lying in a pool of blood and the door to his apartment remained open. In the ensuring events PW3 told the court that he decided to report the matter to Ongata Rongai Police Station while at the same time inquiring from the night security guards at the apartments whether they are aware of the murder in the deceased house. That is when the security guard acknowledged that he saw some men come out of the premises carrying some clothes, but did not seem to have positively identified them in

any way.

PW4 Peter Momanyi, testified as the caretaker of Dawal Apartments where the murder is alleged to have occurred. As the caretaker PW4 acknowledged that the deceased had prior to his death rented apartment – D3. In his statement to the court PW4 visited the scene on receipt of the report from the night watchmen. At the scene, PW4 was to notice the fatally injured body of the deceased lying in a pool of blood within the house. PW4 told the court that he was to work with the police already at the scene to have the body removed out of the scene and at the same commence police action. He also alluded to a shoe mark at the wall of the room where the deceased body was found as evidence that the assailant had placed his leg against the wall during the attack.

PW5 – Abbas Shabbir testified as the employer to **Ezoeke Sunday Jeremiah** where he worked as a glass cutter in his hardware shop located at Ongata Rongai. PW5 confirmed that the accused as a casual labourer reported to work almost on a daily basis save that he did not recollect whether he engaged him on the 8th/9th August 2017. He also denied ever knowing his residence in the course of the time he worked at the hardware.

PW6 Jared Omanga, an estate management agent gave evidence that on 27.6.2017 he entered into a lease agreement with the deceased with regard to Apartment D3 at Dawat Apartments for a monthly rent of Kshs.13,000/=. He produced the lease agreement as **exhibit 4** to demonstrate that the deceased was a legal tenant at Dawat property.

PW7 – George Solomon, a mobile phone technician testified that on or around February 2017 on a date he could not remember he had attended to the accused in company of the first accused as a customer in need of phone repair services.

In his testimony, the mobile phone model Samsung was assessed for repair but not repairable and after two days accused came and collected it from the workshop. While he thought that was the end of his engagement with the accused, on 4.12.2017 accused in company of police officers from Ongata Rongai went to his premises inquiring about the same phone. That is when he reminded the accused that he had collected the mobile phone in view that it was not repairable.

According to PW7 evidence, the mobile phone taken to his workshop for repairs was identified as a Samsung and not Lenovo.

PW8 – Nicholas Kioko, a watchman attached to Dawat Apartments testified as the one on duty on the night of 8th/9th August 2017, where he patrolled the entire premises. In his testimony, the apartment had only two tenants as the rest travelled to their respective homes to participate in the national elections.

According to PW8, the whole night there was no major incident except some commotion from the apartment occupied by the deceased. When he went to check, he did not notice anything unusual; to warrant a security concern. He also confirmed that during the night with effect from 7.00 p.m. to the early hours of 6.00 a.m he neither saw any person come into the property or exit out until he handed over duty to the day watchman. This incident was brought to his attention, in the course of the day by the day watchman, that the tenant to D3 had been found murdered in his apartment. He was therefore, called in to record his statement on the events of the previous night.

PW9 – Francis Mosweto, testified as the managing director with Hi tech security company which entered into a contract to secure Dawal Apartments. He said that he learnt of the murder of the deceased on the 9th August 2017 through a telephone call made by PW8.

PW10 – Elizabeth Onyiego, an analyst with the Government Chemist testified as to the Forensic examination carried out in respect of nail clippings, rectal swab, blood sample of the deceased and buccal swab of the accused **Ezoeke Sunday Jeremiah.**

The DNA profile from the samples taken of the deceased generated a matching DNA with that of the accused. There were no findings made with regard to the Buccal swab of the accused with any DNA profile of the deceased. The analyst report was produced as **exhibit 6.**

PW11 – Grace Muthoni, testified as the mother of the 1st accused confirming that with effect from 7th August 2017 she had travelled to their rural home at Molo – Nakuru County for the purpose of participating as a voter in the national elections on 8th August 2017.

PW11, further told the court that the 1st accused stayed at home and was later to be joined by her boyfriend the second accused on 8th August 2017. According to PW11, the accused persons left Molo after the elections for Nairobi on 11th August 2017. What was to follow on 2nd December 2017 was a report that they have been arrested as suspects for the offence of murder. In conjunction with PW11 testimony was the evidence of her son **PW12 – David Kimani**.

His evidence was majorly, an affirmation of the contents of PW11 evidence that they had hosted the 1st accused from the 7th August 2017 and as joined thereafter by the 2nd accused on 9th August 2017. He also testified that the two accused persons left for Nairobi on 11th August 2017.

PW13 – Sgt Issac Ruto, a liaison officer attached to Safaricom gave evidence with regard to mobile phone data referred as 0722-763793 registered in the name of **Joseph Mwangi**, the deceased.

PW13 further stated that from the mobile data extract the deceased mobile phone was in active communication with mobile phone number 0798-987088 on the 8th August 2017 throughout the 9th August 2017. In cross-examination PW13 gave an explanation that he did not manage to extract data as to the registration details of sim card number 0798-987088.

In further reference to the call data, PW13 told the court that the 1st accused sim card number 0798-886619 seemed to have been paired with

the device Lenovo initially hosting, the deceased sim card number 0722-763793; and used to make calls on 11th August 2017. He produced the report as exhibit 8(a), (b) and (c) respectively.

PW14 – PC Joseph Mutonya Jonathan, the investigating officer confirmed the nature of investigations carried out which revealed that prior to the deceased death, there was a struggle at the scene. Further, PW14 told the court purely based on circumstantial evidence several witnesses were interviewed to lay a basis against the indictment of the accused persons. The significant features of PW14 evidence comprises of the phone call data and the shoe-markings found at the wall where the deceased was alleged to have been attacked, sustaining fatal injuries. He therefore, formed the view of the murder that the pieces of evidence on the shoe found with the 2nd accused and mobile phone device in possession of the 1st accused did establish sufficient evidence against the accused persons. He also produced the post mortem report as **exhibit 9** in concurrence with the defence counsels.

From the post mortem the deceased had suffered multiple stab-wounds at the upper and lower limbs. The pathologist Dr. Mutuni found the opinion that the case of death was exsanguination due to multiple stab-wounds to the abdomen.

After the close of the prosecution case, the 1st accused person elected to give evidence on oath where she denied any knowledge about the death of the deceased. The accused alluded to her relationship with the 2nd accused as a boyfriend with whom they cohabited together at Ongata Rongai.

The salient features of her defence was that on 11th August 2017, the 2nd accused person bought her Lenovo phone which she started using almost immediately. In her testimony, this same phone became a subject of investigations when called upon by the police to explain the circumstances of ownership.

As to the charge of murder, the 1st accused told the court that the alleged dates specified as the period when the deceased was killed she was away in her rural home from 7th August to 8th August 2017. The accused went further to explain that there was no way she could be at the scene on the night of 8th August 2017 given the distance between Molo-Nakuru County and Ongata Rongai – Kajiado County.

That being so the accused therefore relied on the alibi defence to rebut prosecution evidence that she was one of the perpetrators of the crime.

DW2 – Ezoeke Sunday Jeremiah gave evidence approving the statement of defence made by the 1st accused. Meanwhile, the accused gave evidence that on 8th August 2017 he left for Nakuru to join the 1st accused at her home in Molo. However, on reaching Nakuru he was forced to spend a night in a hotel because he did not make it in time to reach his destination in Molo. The 2nd accused gave the reason of not arriving the same day being transport hitch and lack of knowledge of the distance.

The following morning, he made it to Molo where he happened to spend time with the family at Molo until 11th August 2017 when he travelled back to Ongata – Rongai in company of the 1st accused. The accused also did allude to the evidence regarding the Lenovo phone which was found in possession of the 1st accused. The accused gave evidence that indeed he found someone hawking the phone which he decided to purchase for the benefit of the 1st accused as her previous phone had mechanical defects. That he had no reason to suspect that the mobile phone had been stolen from the deceased. The accused therefore denied the elements of the offence as portrayed to by the prosecution witnesses, that he participated in the killing of the deceased by mere possession of Lenovo phone in custody of the 1st accused.

At the close of the entire trial, the principal prosecution counsel **Mr. Meroka** and **Mr. Itaya** for the 1st accused and **Mr. Naikuni** for the 2nd accused filed written submissions on the various issues which emerged from both sides of the case.

Arising out of this, I do not find it necessary to go through the entire narration. It would suffice that their legal propositions be encapsulated in the final decision as appreciated by this court on the evidence so far rendered by the prosecution.

I say so because the burden of proof in a charge of this nature facing the accused persons is vested with the prosecution to prove each elements beyond reasonable doubt.

Analysis and determination

It is sufficient for the prosecution to secure a conviction for murder contrary to Section 203 of the Penal Code; If the evidence clearly establishes the unlawful and intentional killing of another human being in the sense that there was malice aforethought in the act which caused the death.

Further, as a trial court, I am duty bound to consider not only the prosecution case but any possible defences that may have been specifically raised by the accused persons in rebuttal to the charge; Depending on the circumstances of this case. Its trite that a conviction for murder herein is only sustainable where the prosecution proves the following elements:

(a). Positive evidence that the deceased Joseph Nganga Mwangi died on the night of 8th/9th August 2017.

(b). That the accused persons on committing the murder did so through an unlawful act of omission and such bodily injuries inflicted caused the death of the deceased.

(c). That in causing death, it was deliberate and intentional killing within the provisions of Section 206 of the Penal Code.

(d). Finally, the accused persons must be positively identified by connecting them with the offence of killing the deceased.

The prosecution evidence against the accused persons would be tested with certainty under the principles elucidated in the persuasive authorities of **Woolmington v DPP AC 155 and Miller v Minister of Pensions {1942} 2 ALL ER, Rex v Isnaili Epuku S10 Achieni {1934} IEACA, R v Gachanja {2001} IKLR 428** The principles behind all these authorities is that the prosecution must prove either by direct or by such circumstantial evidence that leaves no doubt that it discharged the burden of proof on any given issue of the offence outlined above beyond reasonable doubt.

It is trite that even where the accused person raises the criminal defences of provocation, alibi, self-defence, the burden of proof does not shift to the accused as the accused assumes no burden in respect of the charge or the defence tendered in answer to the charge.

In **Kioko v R {1983} KLR 289,** the Court of Appeal held that:

> ***"The Law does not require the accused to prove his innocence and therefore it is erroneous for a court to refer to certain acts and omissions of the accused as being inconsistent with his innocence."***

It must also be emphasized in this case that the credence of the prosecution case is based on the provisions of Section 21 of the Penal Code on joint offenders. First, in order to succeed to secure a conviction against the accused persons, it would be incumbent upon the prosecution to prove that they had formed a common intention to prosecute an unlawful purpose together.

Secondly, that in furtherance of the unlawful act and malice aforethought, the accused designed and acted in concert in circumstances that contributed to the death of the deceased.

Thirdly, that the joints acts of omission and malice was the probable consequence that caused the death of the deceased. See the principles in **Likishon Ole Sangare alias Lakamudo Ole Sangare v R {1956} 23 EACA 626, Karani and 3 others v R {1991} KLR 622.** In **Wanjiru s/o Wamerio and another v R {1955} 22 EACA 521** – The court said interalia that:

> ***"Common intention generally implies a premeditated plan, although the common intention can also develop in the course of events even if it was not present at the beginning."***

I now turn to the important question whether the prosecution discharged every ingredients of the offence capable of securing a conviction of the accused as stated in the charge sheet.

(a). The death of the deceased

The factor of death of another human being through an unlawful act is one of the critical elements in terms of Section 203 of the Penal Code.

The particulars of which must be proved by either direct or circumstantial evidence. According to the legal proposition in the case of **R v Cheya and another {1973} EA 500:**

> ***"proof of death of the victim of murder is best proved by way of a post mortem report or through any other medical evidence."***

I should also point out that circumstantial as to the precise death of the deceased on a charge of murder is also admissible. So far as circumstantial evidence is concerned, it may be dependent upon identification by close family members who can attest to the fact of death.

On this ingredient, the set evidence of **PW2, Elizabeth Nyambura**, a sister to the deceased credibly did identify the deceased to the pathologist at the city mortuary during the post mortem examination. The findings of the post mortem produced as **exhibit 9** confirms that the person duly named as **Joseph Nganga Mwangi** who had sustained severe bodily injuries succumbed to death on 9th August 2017.

PW1 – George Odhiambo, the scenes of crime officer did visit the scene to document all aspects in respect of the murder incident. In his photographic points and report admitted in evidence remains consistent of the human body found at the scene and the one personally identified by PW2.

Although, the accused persons did not seem to know the deceased, in the same vein it has not been disputed that the charge against them is about the death of a human being by the name **Joseph Nganga Mwangi.** Respectfully, the prosecution has proved beyond reasonable doubt the death of the deceased.

(b). The unlawful act of omission which causes death

The principles governing causation of death are set out under Section 213 of the Penal Code closely related to this is the onus upon the prosecution to proof that the alleged death of the deceased was as a result of an act of the accused which is a connecting factor with the death of the deceased.

The prosecution has the residual responsibility to satisfy the court that the inflictions and severity of the injuries found on the deceased body and substantially contribute to the proximate cause to the death.

In determining whether the unlawful act was sufficient to cause the death of the deceased, the court is called upon to consider all the surrounding circumstances.

Thus it must be emphasized that under Article 26 on right to life of the constitution all homicide are considered unlawful unless excusable under any written law or does occur in any of the circumstances provided in the same law, i.e. in defence of self, or property, natural causes or by accident. Suffices to say in this case, the deceased died on the spot at Dawal Apartments.

From the evidence of PW1, PW2, PW3, PW4 and PW9 there is overwhelming circumstantial evidence that the deceased body was found lying in a pool of blood in his house.

The autopsy conducted by **Dr. Muturi** on 11.8.2017 at the city mortuary detailed findings on examination of cut wounds of multiple and severe nature to the upper and part of lower limbs. The facts appear to present a picture that the deceased suffered gruesome and ostensibly serious harm to most parts of his body.

The attack on the deceased was brutal, and no evidence has been led that it was justified or excusable in the circumstances. In absence of any qualification or mitigation by extenuating circumstances the inference I draw is that the unlawful act which caused the death of the deceased was dangerous and foreseeable to clearly bring the charge within the provisions of Section 203 of the Penal Code.

Therefore, the prosecution has discharged the burden of proving that the death of the deceased was unlawful.

> **(c). The third issue is whether taken in conjunction with element No. 1and No. 2 the prosecution evidence proved beyond reasonable doubt that in death of the deceased the necessary element of malice aforethought was proved to the required standard.**

Malice aforethought as defined under Section 206 of the Penal Code is deemed to be established by evidence, proving any one or more of the following circumstances:

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

The ingredient of malice aforethought is what distinguishes murder with other homicides like manslaughter. The inferential circumstances to be relied upon by the prosecution is an evidential burden to be discharged beyond reasonable doubt.

It is therefore necessary to look into the application of Section 206 of the Penal Code as stipulated in various decisions of the court. In the persuasive case of **Sopha v The Republic {2012} SLR, 296** held as follows on knowledge that the act or omission will cause death:

> ***"Knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence that set out to commit, in such circumstances proof of the requisite intention on the part of the perpetrators which may be an element of the other second offence, need not be proved and proof of knowledge would suffice."***

The knowledge element in this context connotes the state of mind that the accused himself knew that death would result from his or her unlawful action. In the case of **S v Bradstand {1977} (1) PH 460 (A)** the court expressed itself as follows that:

> ***"The court should guard against proceeding too readily from might to have foreseen to must have foreseen and hence to, by necessary inference in fact foresaw, the possible consequences of the conduct required into. The several thought processes attributed to an accused must be established beyond reasonable doubt, having due regard to the particular circumstances which allowed the conduct being enquired into."***

The attendant to the application of *mensrea* in Kenyan Criminal Justice System for the offence of murder is a kin to the test in **Rex v Tubere s/o Ochen {1945} 12 EACA 63**, where the court held that:

> ***"It is the duty of the court to consider the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused prior, during and after forms part of other factors to draw an inference of malice aforethought."***

An important consideration in evaluating the weight to be attached to *mensrea* as a prerequisite for the offence of murder was stated in, the case of **Ibikunde v State {2005} INWLR 387** the court held that *mensrea* can be likened to malice aforethought implicating the accused in the commission of the offence if the facts discloses the following:

> ***"Pre-determination to commit an act without legal justification or excuse; it is the intentional doing of an unlawful act which***

was determined upon before it was executed; it is an intent at the time of killing willfully to act in a callous and wanton disregard of the consequences to human life."

For purposes of the offence of murder and manifestation of malice aforethought, the extent to which the deceased has been injured and the cogency of it or otherwise is prima facie evidence against the accused that the unlawful act of assault was accompanied with malice aforethought.

The Court of Appeal in the case of **James Mbacha v R {2015} eKLR** stated in regard to this element on malice under Section 206 of the Penal Code as follows:

"In the present case, the sheer force of the wounds on the deceased are indicative of malice aforethought. Phyllis had a cut in the head region, which extended to the skull bones and exposed her brain. In addition, she suffered a deep cut in her right hand with a fracture of the right hand. She also had cuts on her legs and suffered burns. Everlyn Nyamai had deep cuts which extended to the brain and Elijah Kasyoki had deep cuts on his skull which also extended to the brain, surely in inflicting these wounds on the deceased the applicant intended to cause them fatal harm."

See also **Ernest Aswani Bwire Abanga alias Onyango v R CACRA No. 32 of 1990.** With this in mind, I have therefore to consider whether malice aforethought can be inferred from the circumstances surrounding the death of the deceased.

To start with, the detailed medical evidence by **Dr. Muturi** who conducted a post mortem examination on the deceased body is vital to prove that the deceased death was as a result of multiple cut wounds inflicted on 8th/9th August 2017. **Dr. Muturi** established that the cause of death was exsanguination to the abdominal mesentery which were severed. The degree of injuries inflicted as documented in the post mortem caused the residual effect leading to the deceased death. Though the murder weapon was not recovered. **Dr. Muturi's** examination shows the state of infliction of stab wounds which were extensive in nature. This suggests and manifests that the assailant had continually and persistently attacked the deceased with an intention to cause death or to do grievous harm.

PW1, PW2, PW3 and PW14 on visit to the scene saw the body lying in a pool of blood. There is absolutely nothing to suggest that the perpetrators in killing the deceased acted in self defence or provocation.

The vicious assault and subsequent death is consistent for this court to draw an inference indictment of malicious intent to cause the death of the deceased.

In my view, it becomes quite safe to accept circumstantial evidence in regard to the element of malice aforethought beyond reasonable doubt in terms of Section 206 (a) (b) of the Penal Code.

At the heart of all these evaluation of the evidence is whether even on the acceptance of element (1) (2) and (3) above, the prosecution has discharged the burden of proof on identification and placing the perpetrators at the scene.

In order to secure a conviction its sufficient that prosecution prove the element of identification in respect of the accused persons beyond reasonable doubt that they committed the crime charged. In the case of **Woolmington v DPP {1935} AC 462, Miller v Minister of Pensions {1947} 2 ALL ER 372,** the standard of proof for the ingredients of the offence is beyond reasonable doubt. The question which ought to be answered is whether the accused were positively identified as the perpetrators of the murder.

The test and guiding principles for consideration on identification of accused persons have been laid down in **Abdalla bin Wendo & Another v R 20 EACA 168**. Besides identification, the other tangent of this cluster is as set out in the case of **Anjononi & others v R {1980} KLR 54 AND Mbelle v R {1984} KLR 626** on guidelines with regard to the evidence of visual and voice recognition.

From the guidelines, identification or recognition of an accused person must be achieved with reasonable certainty to connect him or her with the crime. So as to emphasis the critical importance of this element. Lord Gardner L. C. said in the course of the debate on **Section 4 of the Criminal Appeal Act {1996} of the United Kingdom**

"which is designed to widen the power of the court to interfere with verdicts. There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten, if there are as many as ten, it is in a question of identity."

In the instant case, the rule on identification or recognition as spelt out and enumerated in the above cases. In the summary of the prosecution evidence is built on circumstantial evidence of the shoe markings in possession of the 2nd accused person and Lenovo mobile phone in possession of the 1st accused.

The Law on application of circumstantial evidence is well settled in our criminal jurisprudence as Learned Justices of the Court of Appeal held as follows in the case of **Musili Tulo v R {2014} eKLR**

"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as out normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

(i). The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established .

(ii). Those circumstances should be of a definite tendency <u>unerringly pointing towards guilt of the accused.</u>

(iii). The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability <u>the crime was committed by the accused and none else.</u>

Those principles were set out in the case of GMI v Republic {2013} eKLR which echoes the locus classicus case of R v Kipkering Arap Koske & Another, 16 EACA 135 …. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke v R {1958} EA 715 citing with approval Teper v R {1952} AL 480 thus:

"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that <u>there are no other co-existing circumstances which would weaken or destroy the inference."</u>

In the instant case from the perspective of the prosecution, its alleged that the 1st accused was found in possession of a Lenovo mobile phone two days after the murder of the deceased. The Court of Appeal in the Judgment anchored in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v R CR Appeal No. 272 of 2005** held

"…….It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

In the circumstances, the burden to disapprove the evidence that the mobile phone possession did not flow from the murder of the deceased, the 1st accused was required under Section 111 of the Evidence Act to offer explanation under these provisions. The Law provides as follows:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the Law creating the offence with which, he is charged and the burden of proving any fact especially within the knowledge of such a person is upon him."

The 1st accused person was found in recent possession of a mobile phone a factor which must have suggested strongly to the prosecution side that the accused was part of the perpetrators who killed the deceased. This was informed by the concise evidence of the investigating officer (PW14) and the call data from Safaricom as extracted by PW13.

The most important material about this evidence is the fact that PW13 told the court that the 1st accused sim card was allegedly in use with the disputed device Lenovo mobile phone on 11th August 2017. That is approximately two days after the murder of the deceased on the night of 8th/9th August 2017. Thus in an aspect of the critical doctrine of recent possession the court in the case of **Stephen Njenga Mukiria & Another v R Criminal Appeal No. 175 of 2003,** it was held as follows:

"The burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the time of the loss, to the time the accused was found with it was, from the nature of the items and the circumstances of the case recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver….. See Maingi v Republic {1989} KLR 221."

Based on the above principles, it is clearly shown in the summary of evidence of the statement of the 1st accused that she was bought the mobile phone as a gift by the 2nd accused person. The 1st accused went further to state that on the particularized dates of the offence, she was not within the vicinity or locality of the crime scene but she had joined her family in Molo to participate in the national elections of 8th August 2017. The relevance of her evidence was also supported with that of her mother, (PW11) and her brother who testified as PW12. What is important to note is the substance and credence of the evidence by the 1st accused as corroborated by PW11 and PW12. Whilst at some point it can be said that their evidence may be a manipulation by persons who have an interest in the accused being exonerated from culpability, by and large in due care and appraisal of the evidence I find no reason to fault it.

It becomes the duty of this court to assess the various aspects and grounds upon which the accused persons travelled to Molo whilst at the same time the prosecution implicates them with a crime committed in Ongata Rongai.

In so far as the alibi defence is concerned, the accused person did supply enough particulars through which their movements could be ascertained. There was no further evidence called by the prosecution to discharge the evidential onus placed on them to controvert the testimonies of PW11, PW12 and the defences by the respective accused persons.

The statements of defence of alibi in their evidence sufficiently satisfied the requirements of the Law that between 7.8.2017 and part of 11.8.2017 1st accused was not within Ongata Rongai. In the same breadth, the 2nd accused gave a chronology of events that in the same way,

he left Nairobi on the 8th August 2017 destined for Molo to visit the in laws to wit PW11 and PW12. However, he did not manage to arrive the same day due to transport challenges, but he too was able to join the 1st accused and her family on the 9th August 2017. So there it is the accused persons stayed in Molo until the 11th August 2017 when they stated to have returned back to Ongata Rongai. In the case of **Yanoir & Another v The State {1965} N.M.L.R** the court took the following approach on alibi defence and stated as follows:

> ***"On the defence of alibi the Law is that the Jury should be directed that they should not disregard evidence of alibi unless there is stronger evidence against it."*** See **Chadwick {1917} 12 CR Appeal 247**: "***Therefore while the onus is on the prosecution to prove the charge against an accused person, the latter has, however, the duty of bringing the evidence on which he relies for his defence of alibi, when such evidence has been adduced, the court should place a decision on the question whether the evidence in support of the case for the prosecution is stronger than that produced in support of the alibi, the accused must be acquitted."*** See **R v Johnson 46 CR Appeal R 55 {1961}, 3 ALL ER 96 Leonard Asenath v R {1957} EA 206, Wangombe v R {1980} KLR 149.**

Consequently, its inescapable to state at no time between trial and defence case that the accused persons assume any onus requiring prove of his or her alibi defence. Taken together to establish the guilt of an accused person is the duty for the prosecution to offer evidence in respect of the charge beyond reasonable doubt.

It is also indisputable that the accused persons even have a constitutional right to remain silent should the trial court proceed to call for her or his defence. The objective is founded under the constitutional doctrine under Article 50 (2) (a) that the accused is entitled to a right on presumption of innocence unless the contrary is proved by the state. Failure to give a response to allegations raised in the prosecution case should never be treated as an admission of the charge.

Secondly, on the piece of evidence on recent possession of a mobile phone, the accused reliance on Section 111 of the Evidence Act and the testimony by the 2nd accused person buttresses the misconceived position taken by PW13 and PW14 that permitted them to treat her as a suspect for murder.

The outline factors which ought to be taken into account is the accused's alibi defence and prima facie evidence by the 2nd accused as a bonafide purchaser for value. The applicability of the prosecution evidence to proof the charge against the 1st accused person has been watered down for failure to place her at the scene of the murder. The absence of identification or recognition evidence is fatal to the prosecution case.

As for the 2nd accused the incident took place at night and visibility was poor. The night watchman PW8 who was on duty between the 8th/9th August 2017 was categorical that there was nobody who sought permission to enter the compound at Dawat Apartments, save that he saw an unknown person exiting the compound. Again by way of contrast with other cases of this nature, the watchman never pursued the suspect nor did he raise the alarm. The court was not told how far he went to protect the tenants and property of his employer.

PW8, gave a description of the events on that particular night and none of it implicated the 2nd accused as being at the scene of the crime. The 2nd accused person as a suspect of the murder came from **PW1 (Odhiambo)** scenes of crime officer and **PW14 (PC Joseph Jonathan)** which was in respect of the shoe recovered and the known mobile Lenovo recovered with the 1st accused.

First with regard to the shoe, the velacity or otherwise of the evidence on the shoe markings impressions at the wall and recovered shoe with the accused is such that it never satisfied the test of beyond reasonable doubt. This court admitting the materiality and relevance of such evidence puts the risk of presuming that the 2nd accused shoe is the only such shoe within Ongata Rongai or Nairobi metropolis to sufficiently back up the prosecution case. The prescribed shoe from my observation is just a pair of shoe like any other, which I can be sourced by any person as to its worth of protecting the feet.

While it may be said that the shoe impressions disclose some probative value to positively identify the 2nd accused, the significant of it applied with the totality of the evidence remains suspicious in every way scintilla evidence received without discharging the burden of proof of beyond reasonable doubt.

Secondly, the accused defence of alibi that on the 8th to 11th August 2017 he had travelled to Molo to visit the family of the 1st accused remains uncontroverted.

I reiterate the principle in circumstantial evidence illustrated elsewhere in this analysis, that its trite that in a case depending exclusively upon circumstantial evidence, the court must, before a verdict on conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

The totality of the prosecution evidence weighed with that of the defence shows that notwithstanding the gallant attempt by **Mr. Meroka** to save the prosecution case, I hold a strong view that the charge is not sustainable. Its against the weight of evidence I find that the prosecution has failed to discharge the burden of proof of beyond reasonable doubt to prove all the elements of the offence of murder contrary to Section 203 of the Penal Code.

In that case, the benefit of doubt be and is hereby resolved in favour of the accused persons by quashing the charge and particulars alleged to in support. Accordingly, each of the accused is to be set free and be at liberty unless otherwise lawfully held.

It is so ordered.

Judgment, written, signed by me on this 4th day of February 2020.

.....

R. NYAKUNDI

JUDGE

DELIVERED IN OPEN COURT AT KAJIADO THIS 21ST DAY OF FEBRUARY 2020

.....

CHACHA MWITA

JUDGE