REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 5 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

NDOKOLANI MALAU.....1ST ACCUSED

KITSAO KAHINDI .....2ND ACCUSED

DAMA NYAMBU MZUNGU NZOMBO.....3RD ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Gekanana for the accused persons

JUDGMENT

On 17.1.2017 at Kitengwani Market in Magogoni sub-location of Ganze, within Kilifi, the state alleges that one **Charo Ndala** was murdered jointly by the three accused persons namely **Ndokolani Malau, Kitsao Kahindi** and **Dama Nyambu Mzungu Nzombo** hereinafafter referred as the 1st, 2nd and 3rd accused respectively. All the three accused persons pleaded not guilty and were represented at the trial by Learned Counsel **Mr. Gekanana** as provided for under Article 50 (2) (h) of the Constitution. On the other hand, prosecution counsel **Ms. Sombo** prosecuted the case on behalf of the state.

In her consideration of the matter to disapprove the accused innocence under Article 50 (2) (a) of the Constitution three witnesses were called to give evidence in support of the charge. Their evidence can be summarized as follows:

PW1 – James Charo Ndala, the son to the deceased testified that on 17.1.2017 they were both within the homestead when suddenly a crowd of people numbering about ten emerged. In that group (PW1) could recognize the 1st, 2nd, 3rd accused persons and others not before court. The nature of the conversation between them was about a need for the deceased to attend a meeting at the chief's office.

Apparently, according to **PW1,** there was a demonstration of some other people. In answer to the request **(PW1)** and the deceased accompanied the ten people ostensibly to attend a formal meeting at the chief office.

The witness stated that on their way to the alleged meeting they met a large group of people numbering about thirty armed with rungus and stones. **PW1** further stated that he started hearing shouts to the effect *"That is Charo Ndala the witch"* in fear for his life, the deceased started to take flight, but was restrained by the three accused persons, followed with physical assault. The three accused persons were joined with other group of men they met on the way. PW1, not knowing what to do sought assistance from Ganze Police Station.

On arrival at the scene the deceased body was being consumed with fire which had been lit by the attackers. The body was collected by the police, and taken to Kilifi Hospital Mortuary. He denied any existence of prior grudge between the accused persons and the deceased.

On cross-examination, **(PW1)** told the court that the accused persons and their accomplices had duped them to attend a meeting at the chief office. Apparently, there was no meeting organized by the locational chief as referred to by the accused persons. It was his recollection that the 1st accused held the deceased hand, whilst the 2nd accused armed himself with a stone which he used to hit the deceased on the forehead. Before this fateful day **(PW1)** stated in court that on 6.1.2014 he attended a meeting in the chief office in which the issue of the deceased allegation of witchcraft was discussed.

The next witness **(PW2) Kavumbi Charo** the wife to the deceased told the court that on 17.1.2017 while at home with (PW1) accused persons and other men not in Court visited and demanded that the deceased do attend a meeting called by the chief. Heeding to the request, **(PW2)** confirmed that the deceased and PW1 left for the meeting. She was later to learn shortly that the deceased has been killed.

Investigations commenced in earnest as can be deduced from the evidence of **PW3 – C.I.P Raymond Kibet Malel**. According to **PW3**, information reached Ganze Police Station as a result of which he visited the scene of the murder. He found the deceased body engulfed in fire fumes. He made arrangements for it to be transported to Kilifi hospital mortuary.

In the presence of other members of the public PW3 told the Court that he took some photographs and the film was later to be processed and developed at C.I.D. Headquarters. He produced the set of photographs to document the scene as exhibits 2 (A-J).

It also transpired that **PW3** drew a sketch plan consisting of rough and fair of the scene admitted as exhibit 5 (a) (b). It was again the evidence of PW3 that following the postmortem examination, the report received showed the cause of death as cardio-respiratory failure due to severe burns. The post-mortem report was produced in court by consent of both counsels as exhibit 6.

Upon closure of the prosecution case, it was the Court's determination that accused be placed on their defence to answer the charge.

The defence case

The 1st accused gave unsworn statement denying any wrong doing in regard to the death of the deceased. He only recalled that at one time he was summoned to the chief's office and thereafter arrested for the offence he did not commit. The 2nd accused also elected to give unsworn statement. In his testimony he denied the offence of murder but confirmed going to the chief's office on 17.1.2017 to receive food ration but that event never materialized. The 3rd accused also gave unsworn statement of defence denying the offence as averred by the prosecution. In his evidence what was more significant was a meeting called at the chief's place to receive food rations but failed to take place.

That being the sum total of the evidence from both sides, it's now my task to evaluate and ascertain whether the prosecution has discharged the burden of proof of beyond reasonable doubt against the accused persons.

Analysis and Determination

The central issues that follow to be determined are three fold: First, whether the accused persons killed the deceased **Charo Ndala** on 17.1.2017 at Kitengwani market with malice aforethought. Secondly, whether the accused persons had a common intention to actively participate in the killing of the deceased. Thirdly, whether it is incumbent on the accused persons to rely on the defence of suspicion and knowledge that the deceased was a witch to escape punishment.

The state has therefore the burden under Section 107 (1) of the Evidence Act to proof the following ingredients as a whole in order for the accused persons to be convicted of murder contrary to Section 203 of the Penal Code:

(1). The death of the deceased.

(2). That his death was unlawfully caused.

(3). That in causing death the accused persons were actuated with malice aforethought.

(4). That the accused persons had a common intention and were positively identified to have committed the murder.

Towards this end the facts and evidence was brief but to the point on the commission of the offence which prematurely terminated the right to life of the deceased under Article (26) (1) of the Constitution The prosecution case depended largely on the accuracy and cogency of the evidence by PW1 and PW2 on the events of 17.1.2017 when the deceased met his death.

Part of the determination therefore by this court is whether PW1 and PW2 evidence could be believed as cogent, reliable and credible to assist the prosecution to surpass the test of proof of beyond reasonable doubt on each of the ingredients.

Accordingly, it is permissible to evaluate that evidence at this stage in line with the provisions of Section 203 of the Penal Code:

(a). The death of the deceased

In the case already heard PW1, the son and PW2 the wife of the deceased both provided that required evidence illustrative of the circumstances the deceased was killed on 17.1.2017. Similarly, the body which was taken out of the scene by PW3 was duly examined on 19.1.2017 at Kilifi District Hospital Mortuary positively identified to be that of the deceased. The testimonies of PW1, PW2 and as corroborated by the post-mortem leaves no room to doubt that **Charo Ndala** is dead.

This is what the court in **S. C. Kblai Ukabhai v State of Gujarat AIR SC 484 {1983} CRL 822** observed interalia that:

"Ordinarily the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the

manner alleged and nothing more."

In **Republic v Cheya & Another {1973} EA 500, Benson Ngunyi Nundu v R CRA 171 of 1984;** both authorities state that:

> ***"Proof of death is usually through medical evidence although it can also be proven from cogent and reliable circumstantial evidence."***

These are the forms of certainty and specifity that the prosecution has in every aspect demonstrated beyond reasonable the death of the deceased.

> **(b). At a second ingredient arising from the same evidence is the element on the finding whether the deceased death was unlawfully caused.**

The basic mechanism for regulation of any criminal conduct subject to exceptions is to be found in the case of **Bratty v Attorney General for Northern Ireland {1963} A.C. 386 where Lord Denning** stated to the effect that:

> ***"no act is punishable if it is done involuntarily, what is often called automatism, where an act is done by the muscles without any control of the maid such as spasm or reflex action or convulsion or act done by a person who is not conscious of what he is doing such as an act done by a person who is suffering from concussion or sleep walking."* (See also Textbook on Criminal Law 2nd Edition 2016 by William Musyoka) Law Africa Publishers pg 46)** Further **G. P. Fletcher (Rethinking Criminal Law, 1978)** and **H.L.A. Hart (Punishment and Responsibility 1968) 13 – 4** observed interalia:

> ***"That unlawfulness is the requirement which is excluded when what one does is justified or excusable all things considered."***

The list of grounds of justification in our Law that have been recognized fall within Section 17 of the Penal Code on self-defence and Section 208 of the Penal Code on provocation.

Though the pigeon cannot be said to be closed, so that new grounds may come up for the Law to recognize as one of the defences to excuse the cause of death.

Throughout our Criminal Law system, it is the conduct of the accused being put to test against the laid down statutory rules to infer unlawfulness of the act to attract criminal liability. A person voluntariness in murder cases is that unlawful conduct committed by the accused will to cause death or to do grievous harm which must be identified as the proximate cause of death.

It is also trite that the accused is only punished for an offence he has committed and not what is still under conception in his mind. The test on causation of death under Section 213 of the Penal Code is put more succinctly by **Snyman on Criminal Law 6th Edition {2014} (pg 88)** where he stated on the Adequate Cause Theory as follows:

> ***"According to the adequate causation theory, an act is a legal cause of a situation, if according to human experience in the criminal course of events, the act has the tendency to bring about that type of situation." The test under this provisions being the underlying principle that the death of the deceased need not be caused by the immediate act of the accused. The accused would therefore be held responsible for another person's death although his act as not the immediate or sole cause."***

In the instant case according to the prosecution evidence from PW1 and PW2 it happened that accused persons in company of ten other men went to the home demanding the deceased to attend a scheduled meeting organized by the Chief of the location. On the way to the meeting, a further group of people estimated to number about thirty armed with clubs and stones joined the first group comprising the accused persons. The accused persons in execution of their plan started to assault the deceased which was later followed with an act of setting him on fire.

A post-mortem examination conducted on 19.1.2017 revealed that the deceased suffered cut wounds on the head, scalp, brain and skull fracture. In addition, his body sustained 95% severe burns. The actual cause of death was opined to be cardio-respiratory failure due to severe burns. In the notions of both Law and popular usage there is a strong linkage between the injuries inflicted as described by PW1 and the qualifiable evidence by the pathologist in his post-mortem report produced as exhibit 6 by PW3. The current evidence by the prosecution witnesses was not rebutted by the defence, so when I weigh the significance and insignificance of both species of evidence based on the facts and the charge, there is no conflict that the deceased death was unlawfully caused.

> **(c). On a related ingredient in support of the charge of murder is proof of malice aforethought as manifested in Section 206 of the Penal Code.**

The distinction between murder and manslaughter homicides is that as defined in Section 203 the crime of murder requires malice aforethought in contrast with manslaughter under Section 202 of the Penal Code.

In deciding whether or not murder charge was committed with malice aforethought, the points of the evidence should reflect any of the following circumstances:

> ***"(a). An intention to cause the death of another.***

(b). An intention to cause grievous harm to another.

(c). Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by the offence. Whether death or grievous injury occurs or not or by a wish that it may not be caused.

(d). An intent to commit a felony ……"

In particular, the Courts have construed the provisions of Section 206 of the code pertinent to the accused person's malice aforethought. As a matter of general principles and guidelines the case of **R v Tubere s/o Ochen {1945} 12 EACA 63:**

" an adverse inference on malice aforethought can be made by considering the weapon used, the manner in which it was used, the part or parts of the body targeted, the manner it was used to inflict the injuries, and the conduct of the accused prior, during and after the commission of the crime."

So fundamental is this element that its absence renders liability for murder to end. The prosecution therefore bears the burden to proof existence of express or implied malice aforethought beyond reasonable doubt.

Based on the evidence of how the murder was committed it is sufficient for malice aforethought to be manifested when the prosecution demonstrates an intention to commit the murder. That the accused subjectively foresaw the possibility of his or her act causing death and was reckless of the result, or probable consequences of the acts were dangerous to human life and that he or she deliberately acted with conscious disregard for human life. **(See also Lara v Ryan {2006} 455 F 3D 1080 (Henry v Spearman {2018} 899 F 3D {703}).**

It would however seem from the provisions of Section 206 of the Penal Code and the interpretation that courts have given the substance of ingredient malice aforethought, it does not connote hatred or ill will towards the victim of the offence. The greater part of it is a state of mind that an accused forms before the unlawful act that causes death or grievous harm **(See also the principles in the case of Nzuki v R {1993} KLR 171.)** The Court of Appeal held that:

"Malice aforethought" is a term of art and is either an expression intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, {1957} 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, {1950} 2 KB 237."

Ernest Asami Bwire Abanga alias Onyango v R CACRA NO. 32 OF 1990, Karani & 3 others v Republic {1991} KLR 622, Peter Okoth & Another v R {1964} EA 103.

Unequivocally, the notable highlights of this case being the principle that an intention to cause death or grievous harm is the direct, natural and probable consequence of the act and the death would not have occurred without it.

Clearly, in this regard, the death of another person must be foreseeable in order to be seen natural and probable consequences of the accused persons unlawful act. Whether this requirement has been fulfilled in the instant case one has to look at the prosecution evidence that supported the charge from which the mental state necessary for the charged murder can be construed as manifesting malice aforethought.

In the context of this case, the discussion shows that the three accused persons with seven other men went to the deceased house to lure him to his death under the pretext that there was a meeting called by the area chief. On the same day he met his death he was in company of (PW1) who had accompanied him to the alleged meeting.

As noted from (PW1) while crossing a river thirty more men joined the accused persons group and severally attacked the deceased inflicting him grievous harm. Thus the plea from (PW1) to have them forgive the deceased fell on deaf ears. Although, not enough to cause death the unlawful act of assault using punches and clubs, accused persons escalated it into a deadly method of setting the deceased on fire. Thus, in **Ernest Asami Bwire Abanga alias Onyango v R CACRA NO. 32 OF 1990** as given in this case

"malice aforethought can be inferred from the manner of killing, calculated and planned to demonstrate that an accused person had an intention to kill the deceased."

Further, to construe and apply malice aforethought the Court in **Samwel Mosirigwa Mandera v R CACRA No. 59 of 1997** said that:

"A man who sets on fire a house which he knows to be occupied by human beings, not only blocks their way, but pushes their back into the burning house, can only be assumed to intend to either kill such persons or at the very least to cause them grievous bodily injury, and this would amount to malice aforethought under Section 206 (a) of the Penal Code."

In sum, every measure of evidence from that of PW1, PW2 and the medical evidence contained in the post-mortem examination report is consistent with an act done wholly with malice aforethought. To ascribe to the post-mortem not only did the deceased suffer multiple skeletal injuries to the head but strong evidence exists that his charred body was 95% burnt down. The evidence presented here constitute

express malice aforethought on the part of the perpetrators.

The other evidence from PW1, PW2 and PW3 shows that the accused persons had formed a common intention under Section 21 of the Penal Code. Popular parlance requires that the prosecution distinguishes accused persons' intention from the common intention or be able to demonstrate that one's intention is consistent with the prosecution of the common intention.

Therefore, Section 21 of the Penal Code recognizes the act being complained must be executed in furtherance of common intention. Separately and more importantly in the case of **R v Cheya {1973} EA** the Court held that:

> ***"The existence of common intention being the sole test of total responsibility, it must be proved that the common intention was and that the common act for which the accused were made to be made responsible was acted upon in furtherance of a common intention .."***

On this same doctrinal in **Rex v Kyeyane Mikaeri & Others {1941} 8 EACA 84 and Rex v Tabulayenka s/o Kirya & 3 others {1943} 10 EACA 51,** the courts observed that:

> ***"Where a mob sets upon a suspected thief and beat him to death, every person following the mob would be deemed to have formed a common intention with the rest to kill the thief, and would be liable for murder. it was stated that it is not necessary that there should have been any concerted agreement between the arrested persons prior to the attack on the so called thief."***

In the ensuing case the prosecution has been able to demonstrate through the evidence of PW1 and PW2 that on 17.1.2017 the accused persons were among a mob which visited the homestead of the deceased with an intention to prosecute common purpose jointly with others not before Court. That the purpose of which brought them together was that of inflicting fatal injuries upon the deceased for being suspected wizard.

There is no dispute as the evidence from PW1 and PW2 shows there was an agreement between the first group of ten who went for the deceased with the thirty who joined them later as they crossed the river. This is because on the second group noticing the deceased, a shouting voice reigned the air there he is **Ndala the witch**.

In this group based criminality, the role of the 1st, 2nd and 3rd accused has been clearly stated in the evidence of PW1. For example PW1 told the Court that, accused two hit the deceased with a stone on the forehead and the 1st accused held firmly into the accused as the assault went on from the assailants.

In the case of **MCA Uheffe & MCU Lifle {1995} 183 CLR 108** the Court re-emphasized and held that:

> ***"The doctrine of common intention applies where a venture undertaken by more than one person acting in concert in pursuit of a common criminal design such a venture may be described as a joint criminal enterprise. Those terms, common purpose, common design, concert, joint criminal enterprise, are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. Such a common purposes arises where a person reaches an understanding or arrangement arriving to an agreement between that person and another or others that they will commit a crime."***

In both the case for the prosecution and the defence common purpose or joint enterprise runs through the unlawful act of accused persons and their accomplices by being armed with clubs, stones and finally setting the deceased on fire.

Inspite of cogent evidence from **PW1** and **PW2** placing the accused persons at the scene of the murder no possible explanation was given by the defence to discount the version on both causation, unlawful bodily harm, malice aforethought and common intention on their part to kill the deceased.

In addition to the above observations, there is one last aspect of this case recognition evidence of the accused persons. The primary evidence against the accused persons was that of **PW1 – James Ndala.** His evidence on the actual assault is better described as that of a single i.e. identifying witness. With regard to this evidence (PW1) he knew the accused persons very well and others not before Court. There was no room for mistaken identity given the prevailing favourable conditions. In consonant with the guidelines in the case of **Abdalla Bin Wendo {1953} EACA and Roria v R {1957} EA 583** there are no gaps in the evidence of **PW1** as taken together with that of **PW2** which renders their evidence unworthy of believe and persuasion.

Looking at the facts again and in light of the evidence and particulars of the charge, I am satisfied that the prosecution has discharged the burden of proof of beyond reasonable doubt for the offence of murder against the accused persons, as contemplated in **(Woolmington v DPP {1935} AC 642).**

In the result I find each one of the accused persons guilty and do convict them jointly and severally of the offence as charged contrary to Section 203 of the Penal Code and punishable under Section 204.

Sentencing

This case once again brings to the fore the adverse effect of this deep rooted belief in witchcraft by a myriad of communities in our nation. I must confess this belief is extremely controversial and as a court I cannot claim to have a solution to the impact of this system which dates back to the creation of mankind.

I am obliged as a court to accentuate the sanctity of human life wherever the life of an individual is snatched by the evil hand of another human being. The life that we live demand that it be guaranteed and respected by Law abiding citizens. That was never the case in the circumstances affecting the accused persons.

In aggravation, the taking of the deceased's life was done in the most heinous fashion. The accused persons subjected the deceased to a protracted punishment which ended with his death on the date in question. The means employed by the accused persons was undoubtedly improper in this case. The deceased was physically assaulted before his body was engulfed in fire fumes. He sustained 95% severe burns and the cause of death was ascertained as cardio respiratory failure due to severe burns. Having been burnt alive, the deceased died a very painful death. No human being deserves to go through such, torture and degrading treatment.

It is of utmost importance that cultural and religious beliefs must respect life and must be practiced in line with the Bill of Rights. I cannot overlook the fact that an innocent life was deliberately and needlessly done to death. The accused never acted on provocation or self defence. The allegation that he was a witch was not given an opportunity to be substantiated. The accused persons usurped and derogated the duties of the traditional leaders, prosecution, judge and the executioner as well as violation the deceased fundamental rights and freedoms.

There are scattered throughout this country, local and traditional leaders whose duty is to deal with cases like the one which confronted the accused persons. The accused persons had no right to take the law into their own hands because there are not competent to handle the situation that they attempted to resolve. Article 26 of the Constitution states in part that:

> ***"Every person has the right to life guaranteed and respected. This right as protected by the constitution and in its general form from the moment of conception; shall not be arbitrarily taken away by any other person."***

In the instant case, the character and record of the accused persons and the circumstances of this particular offence are also clearly captured in my Judgment. It is a fundamental principle of Law in sentencing that punishment imposed by the trial Court against a convict should be proportionate to the gravity of the offence. The use of clubs, stones and finally setting the deceased on fire is undoubtedly a social evil. In this case, the deceased was attacked by a gang of people inspite of the fact that on the three of them managed to be arrested and indicted with the offence. This level of participation by a number of people in the commission of the murder is another aggravating feature which goes to demonstrate the planning and malice aforethought by the accused persons.

As if that was not enough, the accused persons pursued the deceased at him home and were all determined to do all at their disposal to cause death or grievous harm. All these looked at from the perspective of their mitigation paints a picture of a crime committed without any regard to preserve and protect the right to life of another human being. What ought to be the proper punishment conceivably, in **R v Sargent 60 CR App. R 74,**

> ***"the Court set the following principles to guide the Court in it's exercise of discretion while sentencing the offenders: (a). retribution, the court must reflect society's abhorrence to the offender and generally through punishment of such unlawful conduct. (b). deterrence, specific to the offender and generally to likely offenders or persons who may be minded to commit similar offences (c). prevention, to protect the public from offenders who persist in connecting crimes by separating them from society. (d). rehabilitation to engage offenders in activities designed to assist them in their reintegration into society."***

I accept the context of these principles on this issue on sentencing the accused persons. In my view, this is a case which the imposition of a death penalty could have been just and proper in terms of underlying circumstances of the offence. However, I am constrained to exercise discretion in favour of a long-term incarceration a feature which satisfies the one of the criterion on retribution and deterrence in the **Sargent case.** Accordingly, I sentence each of the accused to 45 years imprisonment.

On this and the entire Judgment accused persons have a right of appeal within 14 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF JUNE 2020

R. NYAKUNDI

JUDGE