REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 16 OF 2018

REPUBLIC ..... PROSECUTOR

VERSUS

MOSES JUMAA KITSAO ..... 1ST ACCUSED

SAFARI KITSAO KADENGE ..... 2ND ACCUSED

CHARO SWALEH KITSAO .....3RD ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Michira for the accused persons

JUDGMENT

The accused persons namely **Moses Jumaa Kitsao, Safari Kitsao Kadenge** and **Charo Swaleh Kitsao** are jointly charged with the offence of murder contrary to Section 203 of the Penal Code as punishable under Section 204 of the Code. It was alleged that on 4.10.2018 at Mikamini Village, in Bamba Division, Ganze Sub-County within Kilfi County, they jointly murdered **Karisa Charo Hare.** Each of the accused pleaded not guilty and on record to prosecute their defence was Learned Counsel **Mr. Michira** whereas **Ms. Sombo** appeared on behalf of the state. In support of the charge five witnesses were summoned as discussed herein below.

PW1 – Karisa on oath stated that on 3.10.2019 the deceased complained of the accused persons having illegally entered into his farm by ploughing it with oxen without his consent. Later on, the same day PW1 told the Court that he heard screams from the house of the deceased and confirmed reports of an arson. The deceased had also gone to the police station to report a case of trespass to his land and burning of the homestead. As this inquiry was going on by the police it happened that on or about 1 a.m., the deceased was attacked and killed.

In cross-examination, the witness told the Court that his house is about 200 meters away with that of the deceased. He also stated that by the time he rushed to the scene he was not able to identify the suspect who torched the house.

PW2 – Kanzu Kitsao a brother to the deceased testified that on 4.4.2018 he received information that some people had burnt the house of the deceased. Further to this report PW2 travelled to the scene where he met the deceased who complained that the accused persons were the ones who committed the offence. Shortly after PW2 saw the accused emerge from a nearby path entering the compound and simultaneously assaulted the deceased. According to PW2, this happened as the 1st accused pushed the deceased to the ground, taking up the same chair, the second accused used it to hit him. As for the third accused he armed himself with a stone which he used to inflict further harm.

PW3 – Jackson Katana testified as a neighbor to the deceased. In his evidence on the fateful day his attention was drawn to the screams from the deceased house. On arrival he found the 2nd and 3rd accused seated next to the deceased who had already suffered physical injuries. He took a step of informing the clan elder.

PW4 – PC Boniface Amukata gave evidence that on 4.10.2018 while acting on a murder report booked at Bamba Police Station he managed to visit the scene. On his way, he met the accused persons who admitted being involved with the murder. He therefore effected arrest and proceeded back to the scene. It is at that scene he recovered a chair produced as a murder weapon used to inflict part of the fatal injuries sustained by the deceased.

PW5 – Senior Sergeant Martin Wanjala from Bamba Police station also gave evidence explaining the nature of investigations carried out with regard to the arson and fatal attack against the deceased. He drew the sketch plan of the scene, took inventory of the exhibits, photographed the scene which were later to be processed and developed at the forensic laboratory. He arranged for the post-mortem

examination of the deceased body and recording of witness statements. In his recommendations, the accused persons were found to be culpable in both the arson and killing of the deceased.

At the close of the prosecution case, accused persons were placed on their defence. As for the **first accused**, he narrated on how he spent most of the hours of the day taking alcohol. When he left for home a quarrel ensued between the deceased and the second accused. In the struggle, the deceased fell into the ground sustaining bodily harm. In cross-examination, 1st accused attributed the fight to a land dispute which had remained unresolved.

DW2 – Safari Kitsao on his part acknowledged that on the 3.10.2018, the deceased house was burnt down and the following day on 4.10.2018 there was a fight which occurred involving the 3rd accused. According to DW2, it was at that time the 3rd accused armed himself with a chair to inflict the fatal injuries. Thereafter, the incident was reported to the police which resulted in his arrest.

DW3 – Charo Swaleh Kitsao testified that he had fought with the deceased over a land dispute. It was at that struggle the deceased fell down hitting an object which inflicted the aforesaid injuries in the post-mortem. The accused denied the offence of killing the deceased.

Analysis and Determination

The present case raises the question of threshold under Section 203 of the Penal Code which comprises the following elements to be proven by the state beyond reasonable doubt.

1. ***The victim's death.***
2. ***That the cause of death being unlawful.***
3. ***That the perpetrators were actuated with malice aforethought.***
4. ***That being a joint venture common intention can be inferred in both the mensrea and actus reus.***
5. ***That in respect to identification each of the accused happened to be at the scene of the crime.***

Looked at from a legal perspective the onus on the prosecution is to prove the case beyond reasonable doubt **(See Woolmington v DPP {1935} AC 462).**

The import of this is that the prosecution bears the responsibility to adduce evidence to proof all the allegations in the charge sheet, for the Court to make any findings in their favour (See Section 107 (1) of the Evidence Act). This is the cardinal principle that will apply to the present case.

(a). The death of the deceased

According to PW1, PW2, PW3 the deceased happened to be attacked on 4.10.2018 at his homestead. One of the deceased neighbor **(PW2)** saw the house burning on 3.10.2018 and on the 4.10.2018 an attack against the deceased. At some point he was taken to the hospital. The post-mortem report by **Dr. Bachu** dated 11.10.2018 opined that the deceased died and apparently from injuries to the right intracranial brain herniation and head trauma. From the facts its evident the deceased is dead.

(b). Whether the death of the deceased was unlawfully caused

Under Section 203 of the Penal Code, a person commits an offence of murder directly or indirectly by any means and causes the death of another by an unlawful act. The validity of this ingredient connotes a negligent act or willful and voluntary act in which the death of a human being occurs to extinguish his or her right of life without any excuse or justification, as provided for under Article 26 of the Constitution. The threshold to be met by the state is to show that the accused person through an unlawful act did something they knew was likely to cause the death of the deceased.

From the version of the Prosecution witness (PW2 and PW3) there is substantial degree of blameworthiness on the part of the accused persons. Their evidence establishes that the acts of assault came from the accused persons who used a stone and a chair to inflict bodily harm. As deduced from the post-mortem report by **Dr. Bachu,** the nature of the injuries came to be regarded as the substantial and integral cause of the death. Overall the state has demonstrated the nature of injuries concentrated to the parietal-temporal and occipital region of the scalp. That alone manifests an unlawful occurrence.

In the case at bar **G. Williams in his text book of Criminal Law (2nd Edition{1983}** the following observation was made:

> ***"When one has settled the question of but–for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition, is not a test of causation, but a moral reaction. The question is whether, the result can fairly be said to be imputable to the defendant. If the term 'cause' must be used, it can best be distinguished in this meaning as the imputable or responsible or blamable cause, to indicate value Judgment involved. The word imputable is here chosen as best representative idea. The proper standard of causation expresses an element of fault that is in Law sufficient."***

Further, in the present case it has been stated by **PW2** that the accused persons arrived in his house and were engaged in a physical

altercation which was escalated by using stones and a chair to inflict the bodily harm. These injuries were confirmed in the post-mortem report of the 11.10.2018. The state narrative as to the attack having occurred was also given credence in the testimony of the accused persons. In answer to this issue the **1st accused** singled the fight to be between the deceased and the **2nd accused**. When it came to the **2nd accused** turn of events, he shifted blame to the 3rd accused as contributing to the injuries suffered by the deceased. On this the **3rd accused** evidence pointed to the fall of the deceased over an object in the ground which inflicted harm and not directly on any unlawful act of assault as alleged by **PW2**. Looked at as a whole **PW2** and **PW4** evidence does connect the accused persons with the crime of grievous harm as defined under Section 4 of the Penal Code. It should be noted that the underlying injuries remained to be the distinctive proximate cause of a kind that predominantly caused the death of the deceased.

As indicated above the evidence given by the prosecution witnesses in respect of the matters in issue is in consonance with the criteria on corroboration. In the case of **Mutonyi v Republic {1982} KLR 203** the Court held that:

> ***"The term corroborative evidence refers to statements affecting the accused by connecting him or tending to connect him with the crime, confirming in some material particular, not only the evidence that the crime has been committed, but also that the accused committed it."***

As **Lord Reid** stated on the concept of corroboration in **R v Kelborne 1973 AC 729:**

> ***"When in the ordinary affairs of life, one is doubtful whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances fits in, the more one is inclined to believe it, or lesser extent by other statements or circumstances with which it fits in."***

One of the most important characteristics on corroboration evidence is the aspect that it is not necessary for each species of evidence tendered as corroborate independently to implicate the accused, without regard to other existing evidence. It is however, necessary to emphasize the question on provocation pursuant to the provisions in Section 207 and 208 of the Penal Code which apparently is deducible from the defence evidence in answer to the charge.

The code defines

> ***"the term provocation to mean and include, except hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master and servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered."*** *(emphasis mine)*

In **R v Whitefield 63 CR Appeal R 39 Lord Goddard C. J.** explained. The ramifications of the term provocation to be:

> ***"Provocation is some act, or series of acts, done or words spoken, by the dead man to the accused which would cause in any reasonable person, and actually cases in the accused, a sudden and temperating loss of self-control, rendering the accused subject to passion as to make him or her at the moment not master of his mind."***

Further, the dictum in the case of **R v Smith {1991} 1 CR App R 256** is of relevance to these arguments advanced in this trial where the Court stated thus:

> ***"First it requires that the accused should have killed while he had lost his self-control and that something should have caused him to lose his self-control. Secondly, the fact that something caused him lose self-control is not enough. The Law expects people to exercise self-control over their emotions. A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. The jury just thinks that the circumstances were such as to make the loss of self-control excusable to reduce the gravity of the offence from murder to manslaughter. This is entirely a question for the jury. In deciding what should come, as a sufficient excuse, they have to apply when they consider to be appropriate standards of behavior on the one hand making allowance for human nature and the power of emotions but, on the other, not allowing someone to rely upon his own violent disposition. In applying these standards of behavior, the jury represents the criminality and decides what degree of self-control everyone is entitled to expect his fellow citizens will exercise in society today."***

What is important, therefore is an examination of the term provocation as it goes hand in hand with the defence of self-defence under 17 of the Penal Code.

The Court of Appeal for Eastern Africa in **Selumani v R {1963} EA 442** made it clear as to what constitutes self-defence as follows:

> ***"If a person against whom a forcible and violent felony is being alleged repels force by force and in so doing kills the attacker, the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious it would appear that in such a case, there is no duty to retreat, though no doubt questions of opportunity or a violence or disengagement would be relevant to the question of reasonable necessity for the killing."***

Turning to the question of whether the accused persons have brought themselves within the terms of Section 17 of the Penal Code, the question may best be considered in line with the principles in the case of **Oloo S/o G91 v R {1960} E.A 86** where the Court with approval cited the dictum in the case of **Chan Kau v R (2) {1955} 2 W. L. R. 192** when the Court concluded that:

"In cases where the evidence discloses a possible defence of self-defence, the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any defence, from that of insanity."

On the evidence before me it has been shown by the prosecution witness (PW1) that the accused earlier on did trespass into the deceased land where he commenced ploughing without consent. This incident was followed with a complaint to the police station. It did not take long before even police action, it emerged that the deceased house was burnt down apparently by the accused persons. Thereafter, as seen from the evidence of (PW3) accused persons forcibly entered the homestead of the deceased without any provocation executed the murder. There is no evidence to demonstrate that the accused persons were under attack or imminent danger from the deceased. The deceased did nothing to provoke the wrath of the accused persons.

On that account alone, I decline to admit the defence on provocation and defence of self to entitle the charge being reduced to manslaughter or eventual acquittal of the accused persons.

This is a case where the events as given by the prosecution witnesses paint a picture of an arson of the deceased house, followed with serious infliction of bodily harm, turning ordinary instruments like, a chair and stones with dangerous weapons to inflict grievous harm. The view which I found favourable is the fact that the actual violence meted against the deceased did not happen under the scope of provocation or retaliation in self-defence. The next angle prescribed by the prosecution witnesses instils on the doctrine of common intention.

In this case weighing the evidence, I am satisfied that the death of the deceased was unlawfully caused by the accused persons with a common intention to prosecute the murder whose sole objective was to cause death.

(c). In deciding whether the accused persons could be held responsible for murder contrary to Section 203 of the Penal Code, malice aforethought must be proved beyond reasonable doubt.

The element of malice aforethought is key as defined under Section 206 of the Penal Code. It is clear from the reading of Section 206 the test expressed is the focus on ***"an intention to cause the death of another or to do grievous harm."*** The increased degree of participation is on, ***"the knowledge aspect that the act of omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not, accompanied by indifference whether death or grievous harm occurs or not or by wish that a may not be caused."***

The general principle underlying a murder charge is the finding on malice aforethought that resulted in the death of the deceased. The principle of Law embodied by **Gordon in "Subjective and objective mensrea {1975} 17 CRIM L quarterly 355** stated:

"What is important in the context of proof of mensrea is that certain objective descriptions of actions are in themselves descriptions of intentional actions, so that once the crown has proved what happened they have established their case, and need not go on to prove separately, the existence of some particular event or condition in the agents mind. In these cases proof of the external behavior is proof that he was acting intentionally, his only defence, of course he can show he was a voluntary agent, as to show the objective description offered by the crown's incorrect, by producing witnesses who described as an accident what the crown witnesses described as intentional by showing e.g that he did not push the victim but accidentally fell against him."

Admittedly under this Section in **Tubere S/o Ochen v R {1945} 12 EACA 63:**

"malice aforethought can be inferred where the circumstances and evidence show the nature of the weapon used to commit the murder, during or at that time the manner it was used, the gravity of the injuries inflicted and the death ensues as a consequences and the conduct of the accused persons."

In **R v Villan Court 1987 2 SCR Forest L. J.** held that:

"The principles of fundamental justice requires a mensrea reflecting the particular nature of that crime namely one referable to causing death. In addition to the intention to cause death, this can include, a closely related intention such as intention to cause bodily harm likely to result in death combined with recklessness as to that result."

The above definition, in the case of **Nzuki v R {1993} KLR** malice aforethought has been defined in the following language:

"(i). The intention to cause death.

(ii). The intention to cause grievous bodily harm.

(iii). Where the accused knows that there is a serious risk that death or grievous harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the results of those acts.

It does not matter in such circumstances whether the accused abires those consequences; to ensue or not and none of these cases does it matter, that the act and the intention were aimed at a potential victim other than the one who succumbed"

That being the case closely related to malice aforethought of the accused involvement with the death of the deceased person is for the Court

to establish common intention under Section 21 of the Penal Code pursuant to this Section when a criminal act is done by several accused persons, ***"in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."***

In **PP v Too Ying Sheong {1998} SGHC 286** the Court while addressing the doctrinal of common intention in Section 34 admittedly constituting similar definition with our Section 21 of the Penal Code **Rajah JA** stated as follows on the elements of criminal culpability on common intention to be:

> ***"(a). A criminal act***
>
> ***(b). Participation in the doing of the act***
>
> ***(c). Common intention between the parties with respect to the element of participation, there are two critical questions, first, did the accused have to be present at the scene of the crime, and secondly, in twin crime situations, did the accused have to be present and participating in the secondary crime. It should be a question of fact in each case whether the accused had participated to a sufficient degree such that he is deemed to be as blameworthy as the primary offender."***

In **John v R {1980} 143 CLR 108** the Court observed that:

> ***"The object of the doctrine of common purpose is to fix the complicity for the crime committed by the perpetrators, those persons who enavaged, aided or assisted him, whether they be accessories or principal's. In addition in*** **McAuliffe & McAuliffe {1995} 183 CLR 108** ***the Court stated:***
>
> ***"The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design, concert joint criminal enterprise to rob or assault or murder the victims of crime. In the case against the accused, it meets the threshold of the common unlawful enterprise."***

The question is whether the evidence taken together demonstrates sufficiently at intent to cause death of the deceased and the contemplated crime, preparation and commencement of execution was accompanied with a common intention of the accused persons.

In my view it appears from the evidence of **(PW2)** and **(PW4)** the accused had conspired together to commit the murder against the deceased. It was observed that prior to the violent attack, the deceased complained of trespass and ploughing of his land without consent. After having made this complaint the arsonists proceeded to set on fire the house occupied by the deceased. As the deceased was coming to terms with the burning of his house and seeking police assistance a few seconds later the accused persons emerged and went after the deceased pursuing him with violent attacks. It was at that moment the deceased was hit with a chair and stones occasioning multiple injuries.

As a result of the assault, the deceased was killed. In this case, the real evidence on common intention consists the voluntary acts done by each of the accused in furtherance of a criminal intent in the offence of murder contrary to Section 203 of the Penal Code.

To my mind there was a concerted plot formed by the accused agreed to inflict grievous harm against the deceased. It is a paramount principle in **Tubere case (supra)** that when an accused person appears to have armed himself with a dangerous weapon or converts one though not ordinarily considered dangerous, but uses it to inflict multiple injuries on the vulnerable parts of another human being and as a consequence death ensues malice aforethought can be inferred.

In my opinion therefore with respect to this case the evidence discloses that the deceased cause of death was injury to the right intracranial bleeding, brain hermitian resulting from head trauma. The violent assault resulted in the death of the deceased. It is also inescapable that three accused persons formed a common intention to prosecute the unlawful purpose and assist each other to execute the murder.

Consequences of it which were foreseeable prior, during and after the death of the deceased. There is no doubt that the mere differences given by the accused persons by their defence as to who bears greatest responsibility in the death of deceased did not acquit them from the provisions of Section 21 of the Penal Code on common intention and malice aforethought in Section 206 of the Code.

I accept the evidence by the prosecution and decline to be persuaded that the crime of murder associated with the death of the deceased occurred in the circumstances explained by the accused persons.

The fundamental question of the relationship between the existence of the basic element of mensrea and actus reus to a crime has been addressed by the prosecution.

The other piece of evidence relied on by the prosecution was on recognition of the accused persons and placing them at the scene. As regards the issue of the identification of the accused, I place reliance on the very helpful dicta of **Widgery C. J.** in **Turnbull v R {1977} 1 QB 224** where he held as follows:

> ***"In our Judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused special need for caution before convicting in reliance of correctness of the identification is necessary, the Court should warn itself of the possibilities that a mistaken witness could be mistaken. The Court should further exonient closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway? Had the witness ever seen the accused before? How often? If occasionally, had he any special poison for …… the accused? How long time***

elapsed between the original observation and subsequent identification to the police …… Recognition might be more reliable than identification of a stranger, but even then, the Court should remind itself that mistakes in recognition of close relatives and friends have been made sometimes"

On evaluation of the evidence of **(PW2)** and **(PW3)** the accused persons were previously known to the witnesses. The degree of familiarity of the accused persons by the witnesses is not questionable. Upon full consideration of the matter and to this added the position taken by the defence the Court can strongly find the circumstances of the identification to be of good quality. Why do I say so, the regularity and familiarity engagement between the accused, the deceased with that of **(PW1), (PW2)** and **(PW3).** I am fully convinced that the accused persons were adequately seen and identified in proper broad day- light. It is not therefore disputed that the witnesses were accurate in this identification.

The onus therefore on the prosecution to prove the charge of murder beyond reasonable doubt that they jointly committed the offence contrary to Section 203 of the Penal Code has been discharged withot iota of doubt. The significance of this finding in terms of Section 203 of the Penal Code as a whole is that each of the accused is guilty and without doubt negates any defences that each gave as an attempt to exonerate them of the offence.

Verdict on Sentence

The salutary submissions by the convicts is that the Court should be mindful and consider a non-custodial sentence. In response the Senior Prosecution counsel urged the Court to take into account the gravity of the offence in which the deceased was killed with malice aforethought.

The common thread running through our jurisprudence in sentencing convicts for murder cases is allowed to the **Supreme Court decision in Francis Muruatetu v R {2017} eKLR.** The Court in construing the mandatory nature of the provisions in terms of Section 204 of the Penal Code ruled that the mandatory death sentence for murder is unconstitutional. The import of it was to ensure trial Courts leveraged discretion in imposing sentence dependent upon the peculiar facts and circumstances of the case. The determination of sentence has become very crucial since the decision in **Muruatetu case**.

In the instant case due to the Covid – 19 pandemic, there are certain aspects of the convicts which remained scanty, for the simple reason that the probation officer was not able to access the victim for further input. Therefore, the convicts past history and personal circumstances at the time and after the offence may not be captured in this verdict.

On analysis of the case from the Judgment, it shows the convicts executed the murder in a manner which runs contrary to Article 26 of the Constitution on the right to life. In terms of the harm caused, there is ample evidence of premeditation and use of brutal violence initially involving burning of the deceased house and thereafter deliberate unlawful acts targeted at the deceased. The convicts in this case have failed to acknowledge the offence with no efforts of reparation. The convicts were well known local residents to the family of the deceased. They however seemed to careless and intentionally acted without provocation to execute unmuted violence against the deceased. There are no mitigating factors in relation with the immediate circumstances of the offence.

From my observations, the aggravating factors stand out as against the mitigation offered by the convicts. In considering an appropriate sentence, I bear in mind these aggravating factors on the seriousness of the offence and the harm caused to the victims family of unlawfully losing one of their own which the convicts could have avoided.

There are no factors to induce reduction of culpability of the convicts. This Court establishes that the offence of murder against the deceased was dangerously and wantonly committed. Part of the Courts responsibility is to channel its discretion to pass sentence which punishes crime and the criminality of the convicts.

Accordingly, I sentence each of the accused to thirty five (35) years imprisonment with effect from 16.10.2018. It is so ordered.

14 days Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state

2. Mr. Michira for the accused persons