



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC NO. 7 OF 2017

FORMERLY MACHAKOS HCCRC. 02 OF 2017

REPUBLIC..... PROSECUTOR

-VERSUS-

SUNZA MAKAU..... ACCUSED

JUDGMENT

1. **Sunza Makau** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap.63), Laws of Kenya. The particulars are that the accused on the 1st day of January 2017 at Yikita village, Ngwata location in Kibwezi district within Makueni county murdered Mulinge Wambua.
2. He pleaded not guilty to the charge and the case proceeded to full hearing with the prosecution calling ten (10) witnesses. The accused gave a sworn testimony for his defence without calling any witness.
3. **Pw1 Ambrose Mulinge Wambua** is the deceased's son. He testified that on 1st January 2017 at 8:00 pm he was home when he heard his father come home singing and he knew he was drunk. Present with him was his mother (Pw2), siblings and a visitor Ngalange (Pw4). The deceased called him and he went to the gate where he found him.
4. He held his hand and as he talked to him a probox car appeared and stopped on the road which passes their gate. A person came out of that car which had lights on, both inside and outside. The person who wore a tee shirt with black and white stripes walked upto where he was with the deceased.
5. The person held his father and led him to the car. He asked whether they knew him and he said no. He pulled the deceased back as the person pulled him. At that point his mother (Pw2), Mutua (brother) and Stephen Mulwa (uncle) came to the scene and found them struggling. The person again asked if they knew him. He told them he was Mbarire a police officer, he was just doing his work. He informed them of two other vehicles coming to collect people.
6. The deceased was forced into the rear side of the car which was thereafter locked. Pw1 who was inside the car came out. The person threatened to shoot them though he never saw any gun. Pw2 then told him, "*unasema wewe ni Mbarire na tunakujua?*" the person drove away with the deceased. Pw4 who was present said, "*Mbona huyu anaka Sunza?*" Pw2 said the same thing.
7. They then left on Pw4's motorbike following the probox car. The motorbike stopped midway and they could not move. Pw4 took off with the motorbike alone while Pw1 followed on foot with his uncle and Mutua his brother. After a one kilometer distance they found the deceased's body on the road. Pw4 was present and he told them he had found the person with the car beating the deceased. They had fought and the person left his tee-shirt and phone, which were lying next to the body. He saw blood oozing from the back of the deceased's head.
8. He identified the tee-shirt (EXB1) and phone. He said they could see a motor vehicle headed to Yakitaa and so the uncle called the market security person called Mr. Kyalo and asked him to block the car. An ambulance also came, and they were carried to the market. Police came and took away the car and its driver who had no shirt. He identified the white probox by the registration number KBV only. The tee-shirt (EXB1), phone and bundle of photos were marked for identification.
9. In cross examination by Mr. Mulei for the accused he said he never saw any injuries on the deceased when he found him at the gate. He explained that he identified the motor vehicle when it passed them at the scene where his father lay dead. He saw the driver as his window had been drawn and the rear and frontal lights were on. That the person who took the father had clothes. i.e. a black trouser and a tee-shirt with black and white stripes. However the one who came a second time had no clothes on.
10. He identified the tee-shirt in court to have yellow, brown and navy blue stripes. The phone they got was safaricom black and it had a line

and was working, but the one in court was a Samsung. He identified the accused as the person he saw at the gate, scene of death, market centre and he went with him to the police station.

11. **Pw2 Francisca Mueni Mulei** is the wife of the deceased and Pw1's mother. She said on the said date she heard the deceased singing at the gate and Pw1 went there. A while later, she heard people speak in Kiswahili and she went to the gate. She found the deceased in the car, while the owner was outside. He asked her if she knew him and she said "No". He introduced himself as Cpl Mbarire. The motor vehicle lights were on so she saw him well. He had a belly like Mbarire but he was not Mbarire. The man even threatened to shoot them. At that point his brother-in-law Stephen Mulwa arrived there.

12. When the man went to the car he laughed and she saw his lower jaw had gaps with 2-3 teeth missing. She remembered that the man used to sell vegetables. Pw4 came and addressed him as Sunza. She remained behind as Pw4 and others followed the vehicle. When she walked back to the house she called Mbarire and he told her he was at the Machakos junction. She told him somebody had taken away her husband pretending to be him. He asked for the motor vehicle registration number.

13. She went to the gate and saw a motor vehicle coming and she blocked it using pieces of wood. The motor vehicle came and turned back very fast. Later she went on foot following the direction Pw4 had taken. After a kilometer she found them with the deceased's body. They were later taken to Yakitaa in an ambulance where they found the suspect probox detained.

14. Sunza was in the car calling Mbarire and he was lying down without a shirt. He was arrested and taken to the station. She also said the tee-shirt Sunza had when taking the deceased had green and black stripes, but the shirt (EXB1) had no green stripes. She identified the accused as Sunza.

15. In cross examination she said she had seen Mbarire twice at Yakitaa arresting people. She used to see him with a probox and also on foot. He did not know her and none had the other's contacts. She got his number after the deceased's death. She tried to explain how Mbarire was tall with a pot belly while the accused did not have these.

16. She however said the accused had no belly, but at the gate everything about him was like Mbarire until he laughed and she saw the missing teeth. She said EXB1 was not the same as what accused wore on that day. She further said at the scene they only found the body and nothing else.

17. **Pw3 Joseph Kyalo Nguli** of community policing Yakitaa was about to close his business on 1st January 2017 at 9:00 pm when he received a call from Stephen Mulwa Nzoya. He told him of a probox which had caused an accident at Mailu's place and asked him to mobilize people to stop the motor vehicle and he did that. A motor vehicle came and they stopped it.

18. He had not been given any registration number of the vehicle, but he knew it when it came. Its driver is his friend who told them he had been robbed of his shirt. They detained the driver Makau Sunza. He called officer Mbarire who told him he was at the junction going home. The accused was later taken away by the police.

19. Mbarire was among the officers who came to take away the accused. They went to the scene and saw blood by the roadside. The accused had no shirt and there was no shirt at the scene. They went for Pw4 whom they took from his home. He identified the motor vehicle KBV 869U.

20. In cross examination he said whoever called him to stop a motor vehicle did not give him its registration number, so he stopped any vehicle from that direction. He said he knew accused before arrest but he asked him his name for others to know. There had been talk of there having been an accident.

21. **Pw4 Ngalange Kitoo** had been with the deceased on 1st January 2017 from 8:00 am working at Liani on Nzei Mutinda's shop. At 4:00 pm he went with the deceased at Yakitaa market and got into Kisiyili bar, where he bought two mugs of alcohol. He left the deceased there and went home.

22. Later he went to the deceased's home to prepare for the next day's work. He arrived there at 7:00 pm and found Pw2 and the children. At 8:30 pm – 9:30 pm he heard the deceased arrive while singing. Pw2 and the children went to the gate but as he approached the gate a car drove off and asked the children what was happening. It was his evidence that it was not dark that night.

23. They told him that Mbarire (*police officer*) had carried the deceased. The motor vehicle went to Yindundu side. He drove his motorbike carrying two others. They reached where the road was bad and the rest alighted and he rode alone pursuing the motor vehicle. He later found a motor vehicle with inside lights on but the outside lights were off. He left his motorbike and walked to the car and found a person beating somebody who was lying down.

24. He held the person's tee-shirt and the person hit and broke his right wrist with an object. He removed the person's tee-shirt, dropped it and ran away. He met the other two he had left behind and they went back to the scene where they found the deceased, the tee-shirt, and phone. He was not sure if the tee-shirt (EXB1) was the one he saw at the scene. The deceased was by the roadside.

25. The car he saw was a white probox while the person he saw looked like Mbarire though when they struggled it was dark and he did not see well to identify him. He was treated on 2nd January 2017.

26. In cross examination he said he did not identify the car which carried the deceased. He stated that the motor vehicle he found where the deceased was being beaten was a white probox but he could not identify it further. He did not see the driver of the car, and he did not identify the attacker, the phone nor the tee-shirt at the scene.

27. He confirmed that at the gate he was told it was Mbarire who is big bodied man who took the deceased with the car. When he recorded his statement he was beaten by the police because he did not go to identify the phone. Further he was beaten to write the statement the way the police officer wanted. He was therefore forced to record a statement.

28. In re-examination he said he was beaten by the police because he could not identify the colour of the recovered phone.

29. **Pw5 Stephen Mulwa Nzoya** is the deceased's brother. On the date of incident his family had a party at home and on hearing noises at his brother's gate he went there and saw Pw4 and the deceased was talking to the driver of the probox. Present was Pw2 among others.

He saw the accused in the car and thought it was Mbarire. The accused told him he was Mbarire and he was taking the deceased to the D.O as he makes noise at night. As he drove off Pw4 arrived. It is his evidence that the motor vehicle that passed there was either the probox of Mbarire or of the vegetable owner. As the person drove off Pw2 said "huyu ni kama Sunza".

30. They left on Pw4's motorbike but later they allowed Pw4 to go alone because of the bad road. At a sharp corner he saw lights of a motor bike, tee shirt and phone. He was with Pw1, Pw4 and deceased, when a motor vehicle came and stopped. He asked the accused why he had done that to his brother and the accused drove off. He spoke to Mbarire on phone and also called Kyalo Nzuki and told him to ensure the said motor vehicle is detained.

31. Later Mbarire came with other officers, at the scene and they found the probox KBV with a topless driver. The body was taken away. He further states that he saw the number plate KBV 869U at the deceased's gate as the motor vehicle drove away. He did not know the accused before this incident.

32. In cross examination he said that as he walked to the scene he called and was told the accused was drinking in a club in Yikitaa. That Pw2 and Pw4 doubted whether it was the accused in the car. Theirs was suspicion as they were not sure. He confirmed that he did not attend any parade to identify any suspect. Pw4 told them the person he found assaulting the deceased was the accused. He appeared not sure whether he talked to Mbarire or not.

33. **Pw6 Nthoki Muthoni** is the owner of the probox car that the accused was driving. He testified that on 1st January 2017 the accused went to his farm at noon to collect vegetables and he never returned. The next day he received a report he had been arrested. On 3rd January 2017 he was informed by Cpl Mbarire that the accused had been arrested on a murder charge. He found vegetables in the car and he was also able to identify the brown tee-shirt (EXB1) the accused wore that day, plus his car and logbook. He said he never found any blood stains in his car.

34. In cross examination he appeared not sure if the tee shirt (EXB1) is what the accused had on that date of incident. He said the body structure of the accused and Mbarire was different. He did not find blood stains in his car nor anything to show there was a fracas in the car.

35. **Pw7 No.235523 C.I Christine** was deputy OCS Kibwezi police station. She was called by Cpl Mbarire of Ulinzi police post informing her of a murder case at Kyumoni area. She went to the scene with the driver and crime standby. This was on 2nd January 2017 at 2:00 am. At Kyumoni market they found an ambulance and probox as directed by Mbarire who was at the scene. The accused was inside the probox. They went to the scene where they found footmarks and drag marks. The deceased had a bruise on his leg and injury at the back of the head.

36. In cross examination she said at the time of incident Cpl Mbarire had a white probox similar to the one the accused had. There were several proboxes in the area. Cpl Mbarire was in charge of Ulinzi police post and used to do patrols at night. According to the family members the deceased was drunk and was even shouting at the gate.

37. **Pw8 Dr. Dorcas Kavulu** a medical doctor at Makindu hospital carried out the postmortem on the deceased's body. The body had several injuries among them head injuries. The cause of death was severe head injuries. She produced the report as EXB 9.

38. **Pw9 Ruth Wangari Kahu** a government analyst received an exhibit memo from No. 831325 P.C Daniel M. Mwirigi of CID Kibwezi with the following items:

- Blood swab in a clear plastic casing of Wambua Mulinge (deceased).
- Cotton wool swab in a khaki envelop from motor vehicle KBV 896U
- Accused's blood sample on soapstick in a clear plastic casing was submitted later.

After examination she found the cotton swab to have been slightly stained with blood but did not generate any DNA. The accused and deceased's blood DNA was tabulated at the end of the report which she produced as EXB9.

39. **Pw10 No. 83125 Pc Daniel Mwirigi** is the investigating officer herein. He gave a summary of the information he received from the witnesses. He said there was blood visible on the vehicle's windscreen when photos (EXB 3a -e) were taken. He produced a certificate for the photos (EXB3f) and the accused's driving license (EXB7). He said the accused and deceased had been drinking together. He did not establish the cause of the incident.

40. He admitted that Cpl Mbarire owned a probox and he could arrest somebody found to be drunk and disorderly. He did not however conduct any identification parade, for the witness to pick the suspect. He found no panga in the vehicle and he did not establish whether the accused was drunk or not. He said he was given accused's phone.

41. He confirmed that Cpl Mbarire and the accused look alike and one can confuse them. He said the blood stains were on the right side of the windscreen.

42. In his sworn defence the accused denied the charge against him. He said on 1st January 2017 at 6:00 am he left home for the farm in Ardhi Salama. He worked upto 6:00pm. The land belongs to Pw6 (*his boss*). He had 1 ½ bags of sukuma which he placed in the probox KVB 869 U (white) belonging to Pw6. He stopped at Salama where he took two bottles of guinness. At 8:00 pm he left the club but got a puncture after doing two kilometres.

43. He drove slowly to Yakitaa market from where he sought assistance. He saw people come to where he was and say “*this is Mbarire.*” He was hit by over ten people and he fell. He had worn a brown jacket, brown tee shirt with blue and cream stripes and a brown trouser. His Samsung phone and car keys were in the jacket. As he lay down being beaten, he kept shouting his name “Sunza”.

44. They stopped beating him and he told them his name, but not all believed him. They called the police and he entered the motor vehicle and lay down. Police came at 3:30 am and handcuffed him. Inside the police vehicle he found a man lying on the floor. He heard that Mbarire had knocked down the dead man. He denied knowing the deceased nor Pw2. He denied introducing himself as Cpl Mbarire whom he does not even know.

45. In cross examination he said EXB1 was the tee-shirt he wore that on the day in issue. On 1st January 2017 he did not return the vehicle to Pw6 his boss and there was no reason for him to call him as he was still working.

46. Both counsel filed written submissions. Mrs. Anne Penny Gakumu for the prosecution submits that the charge of murder was proved against the accused person in all the material ingredients. She contends that the fact and cause of death was proved by **Dr. Dorcas Kavulu (Pw8)** who produced the postmortem report.

47. On whether the accused is the person who killed the deceased counsel has referred to all that was stated in evidence by Pw1-Pw6. It's her submission that the accused was identified at the gate of the deceased by Pw1 and Pw2. He was further found by Pw4 beating the deceased and he drove off leaving his shirt behind. He was intercepted by Pw3 who found him shirtless. Further that Pw5 identified the accused when he drove back the vehicle towards them.

48. Counsel has also submitted that the accused's employer had confirmed that accused had left with his motor vehicle on 1st January 2017 at noon and not at 6:00 am as stated by the accused. He also identified the clothes worn by the accused on that material day. She adds that there was sufficient light from the said motor vehicle which enabled the witnesses to identify him.

49. Counsel further submits that the accused's actions of impersonating a police officer and driving away with the deceased and further being seen by Pw4 assaulting the deceased confirmed malice aforethought. She relies on the case of **Republic –vs- Samuel Mungai Chege 2019 eKLR (Kajiado High court)** where Nyakundi J. quoted the case of **Woolmington –vs- DPP 1935 A.C;** and **Miller –vs- Minister of Pensions 1947 2 ALL ER 372** where Lord Denning stated this:

“The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof of beyond reasonable doubt does not mean beyond shadow of doubt”

It's her submission that the circumstances in the instant case are the same as those in the above cases.

50. The firm of O.N Makau and Mulei filed submissions on behalf of the accused. It is submitted that the prosecution failed to prove its case to the required standard. Reference has been made to the case of **Moses Nato Raphael –vs- Republic (2015) eKLR** in which was cited the case of **Woolmington –vs- DPP (1935) A.C 462** where the court stated thus:

Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt, to whittle it down can be entertained.”

51. The fact of death is not disputed by the defence. On whether the accused killed the deceased counsel submits that this issue squarely deals with identification, which was not properly done. Referring to Pw1's evidence he submits that the person who took his father introduced himself as Cpl Mbarire and he (Pw1) did not capture the motor vehicle's registration number. On Pw2's evidence he submits that she believed that the person who took the deceased was Cpl Mbarire whom she had seen once.

52. According to Pw2 there were similarities between Cpl Mbarire and the accused. He further submits that Pw5's evidence was similar to that of Pw1 and Pw2 as far as identification of the perpetrator is concerned. Blood samples taken to the government chemist did not generate a DNA in respect to the identification of the assailant.

53. Referring to the evidence of Pw10 the investigating officer, counsel submits that there was a need for an identification parade to be conducted in this case due to the similarities between the accused and Cpl Mbarire. He has cited the cases of **Kinyanjui and 2 Others –vs- Republic (1989) KLR 60;** **Donald Atemia Sipendi –vs- Republic (2019) eKLR** where the purpose and evaluation of an identification testimony was dealt with. He observes that the evidence of the eye witnesses did not meet the criteria set out in the above cases.

54. On whether the death was caused with malice aforethought counsel submits that the prosecution did not create any nexus between the accused and the offence of murder, or the accused and the deceased.

Analysis and determination

55. The accused is facing a charge of **murder** which is defined under section 203 of the Penal Code as:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

56. Malice aforethought which is an ingredient in a charge of murder is defined under section 206 of the Penal Code as:

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

57. From the two above definitions it is clear that for a charge of murder to be established the following ingredients must be proved:

- i. The fact and cause of death.
- ii. That the unlawful act of omission or commission of the accused led to the death of the deceased (*actus reus*)
- iii. That the act leading to the death was accompanied by malice aforethought/intention (*mens rea*)

58. The prosecution has in every criminal case, murder included the duty to prove its case beyond reasonable doubt.

59. Section 107(1) of the Evidence Act provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

60. In the case of **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372 – 373 Lord Denning** stated this:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable, but nothing short of that will suffice.”

61. Bearing in mind the definition above and the underlying principle of proof beyond reasonable doubt in criminal cases I now wish to analyse the evidence adduced before this court.

(i) The fact and cause of death

62. There is no dispute as to the fact and cause of death from the evidence before this court. The witnesses Pw1 – Pw5 all confirmed seeing the deceased’s body. The same was identified by **Pw2 Francisca Mueni Mulei** and **Pw5 Stephen Mulwa Nzoya** who are wife and brother of the deceased respectively.

63. **Pw8 Dr. Dorcas Kavulu** who conducted the postmortem found the deceased’s body to have had several bruises, hematoma in the lungs, brain edema and subdural hematoma. The cause of death was head injury arising from blunt trauma.

(ii) That the unlawful act of omission or commission of the accused led to the death of the deceased (*actus reus*)

64. This incident occurred at night. The deceased had been picked from his gate soon after he arrived there with a lot of singing. Pw1 (the son) had heard him singing as he approached the gate. As Pw1 left with the deceased a white probbox car appeared and it only had the driver. The driver wearing a tee-shirt which had black and white stripes (EXB1) walked to them and held the deceased and led him to the car. Pw1 pulled the deceased back as the driver pulled at him. The commotion attracted pw2 who came to the scene together with Pw5 and Mutua. Up to this point Pw1 did not know who this driver was.

65. Upon the arrival of the other three people and according to Pw1, the accused asked if they knew him. He told him he is Mbarire from the police station and he was doing his work with two other vehicles coming to collect people and he threatened to shoot them. After he drove away with the deceased, Pw2 commented saying “unasema wewe ni Mbarire na tunakujua?” According to Pw1, Pw4 who was present and

had found accused in the car said “mbona huyu anakaa Sunza”. Pw2 also said so. Pw1 explained that they were able to see what was happening with the help of the car lights which were on.

66. Pw2 is the deceased’s wife and she said when she arrived at the gate she found her husband inside the probox, while the owner of the probox was outside. She asked who he was and he said he is Cpl Mbarire. When they talked she said she knew Mbarire and the probox owner was not Mbarire. She went on to say that the probox owner had a pot belly like Mbarire. She had seen Mbarire once and she saw that this man was Mbarire. He told her to let him do his work. At that point Pw5 arrived and said he wanted to go with his brother and “Mbarire” threatened to shoot.

67. It was then that “Mbarire” entered the probox and laughed. That’s when she saw gaps in his lower jaw and identified him as Sunza the vegetable seller. Pw4 then came and Pw2 heard him ask the probox owner, saying:

“Sunza where are you taking him?”

68. On the other hand **Pw4 Ngalange Kitoo** confirmed he had in the late afternoon gone drinking with the deceased after work. He left him there as he went to his home. He later went to the deceased’s home arriving there at 7:30 pm. Between 8:30 – 9:30 pm he heard the deceased arrive singing. His wife (Pw2) and children went to the gate. This is what he says at page 29 – 30 of the typed proceedings:

“I went to the gate while near the gate a car drove off. It was not dark. I saw it drive off. I asked his children what was happening. They said Mbarire (police officer) has carried Wambua. I took my motor cycle and we said we follow it.”

69. Pw5 said when he went to the gate he found the deceased inside a stationary vehicle and talking to its driver. There was moonlight and the dashboard light was on so he saw the driver who is the accused. This is what this witness states at page 33 in his evidence in chief:

“I did not know Mbarire. I saw accused in the car. By the time I saw him, I thought it is Mbarire. He told me he was Mbarire ... As he drove off Pw4 arrived. The motor vehicle which passes there was either probox of Mbarire and another one of vegetable owner accused. When the motor vehicle was driving off deceased’s wife said “huyu ni kama Sunza”.

70. So far this is the evidence in respect to the identification at the deceased’s gate. **Pw10 No. 83125 P.C Daniel Mwirigi** confirmed to the court that the name Mbarire was not fiction. There was an officer called Cpl Mbarire who was incharge of Ulinzi patrol base. It was also confirmed that Cpl Mbarire owns a white probox and he used to do patrols. Pw10 did not see the need of investigating Cpl Mbarire for obvious reasons.

71. Pw1 and Pw2 alleged that Pw4 had made pronouncements at the deceased’s gate to the effect that the man in the probox who took away the deceased was Sunza the accused. However Pw4 and Pw5 have categorically stated that at the time Pw4 was arriving at the said gate, the probox was leaving. He therefore did not get any chance to witness what transpired at gate. So on this point Pw1 and Pw2 lied to the court.

72. The evidence of Pw1 shows that the person who took away his father was not known to him prior to this incident. However he heard him say he was Mbarire a police security from the police station. On the other hand Pw2’s evidence is not very clear as to the person she saw on this night. At some point she says it was Mbarire because of the pot belly and voice. Later she says from the gaps in the mouth it was Sunza the accused. She said in examination in chief she had seen Mbarire only once. However in cross examination she says at page 22:

“I knew Mbarire as I had seen him twice at Yikita arresting people Yikita (sic). I used to see him with probox one time on foot. I saw him with probox ... I used to see Mbarire before incident as he used to use probox”.

73. From the evidence of this witness even in re-examination what made her know that the probox driver was not Mbarire were the missing teeth in his lower jaw. That therefore was the identifying mark. Did the witness confirm to the court this by asking the accused to open his mouth for the court to confirm what she was saying? I see nothing to that effect on the record to convince me that was the identifying mark. The prosecution did not pursue that either.

74. Identification by Pw5 is also not clear. From his evidence in chief and what I have quoted at paragraph 59 he blows hot and cold. Did he know Mbarire prior to this incident or not? He even said the probox could be Mbarire’s or the accused’s so he was not sure. The question that begs an answer is at what point he knew it was the accused, and not Cpl Mbarire.

75. In the case of **James Murigu Karumba –vs- Republic (2016) eKLR** the Court of Appeal held thus in regard to the evidence of identification:

*“It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In **Wamunga –vs- Republic (1989) KLR 424** this court held at page 426 that;*

“Where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

76. Besides talking about Cpl Mbarire and Sunza the witnesses have talked about a white probox car at the deceased’s gate. None of the witnesses Pw1, Pw2 and Pw5 identified the motor vehicle in issue by its registration number. All these witnesses only identified the probox after it had been impounded and from the photos produced in court as EXB3.

77. Pw3 is the one who detained the motor vehicle KBV 896U probox belonging to **Pw6 Nthoki Muthoni** and driven by the accused. He blocked and detained this vehicle on instructions of Pw5. The instructions were to the effect that “there was a probox which had caused an accident at Mailus’ place.” He was not given the registration number of the vehicle or even the name of the driver yet Pw5 claimed to have known the vehicle and the driver.

78. According to Pw3 he identified the motor vehicle when it came. This is what he stated at page 25:

“I identified the motor vehicle when it came. When I came I knew it motor vehicle KBV 869U. I knew the same. The driver is my friend I removed ignition (sic) and he came out and said he met people who robbed shirt (sic). He did not have shirt. He said he was robbed shirt (sic) and the phone.

79. In cross examination he said having not been given the name of the driver nor the registration number of the vehicle he stopped any vehicle from that direction. He did not say how many vehicles he had left to pass before landing on this one. Secondly if the report was that the probox had caused an accident then how was that connected with what allegedly happened at the accused’s gate? Was such an accident ever reported and who is Mailu at whose place the accident had occurred?

80. Pw4 who drove his motorbike to rescue his friend (*deceased*) testified that he reached a place and found a motor vehicle with inside lights on while the outside ones were off. He walked to the motor vehicle and found a person beating a person who was down and he held the person’s tee-shirt. The person hit his right wrist and it broke. He managed to remove the person’s tee-shirt which he dropped and took off. He returned to the scene with Pw1 and Pw5 and found the deceased, tee shirt and phone while the deceased was unconscious.

81. In cross examination he said he never identified the driver of the probox at the deceased’s gate and the one at the place he found the deceased being beaten. He did not identify the phone nor the tee shirt. He further said the person he found beating the deceased had a big body and was tall like Mbarire. He added that he was beaten by the police as he recorded his statement because he was not writing what the police wanted him to say. He was therefore forced to record a statement. What was this that the police wanted him to record?

82. In his sworn defence the accused stated that Pw6 was his employer and the motor vehicle KBV 869U belonged to him. That he had the motor vehicle that evening after farming activities. After taking a few bottles of alcohol he went to the market to see how to have a puncture on his motor vehicle attended to when he was attacked by people baying for Mbarire’s blood. He was stripped off his clothes and left with trousers only and he confirmed that EXB1 was his tee-shirt.

83. Pw1 and Pw5 testified that Pw4 had identified the accused as the person whom he found beating the deceased person. Pw4 completely denied identifying anyone whether at the deceased’s gate or at the scene of the beating. Pw1 also claims to have identified the accused in his probox as he drove back to the scene when they were there with Pw4 and Pw5. His evidence does not have the support of the evidence of Pw4 and Pw5.

84. From what I have set out above there is no doubt that there are several omissions, contradictions and inconsistencies in this case. The Court of Appeal in the case of **Eric Onyango Odeng –vs- Republic (2014) eKLR** stated this of such a scenario:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse the contradictory evidence and determine which version of the evidence on the basis of judicial reason it prefers”

85. I have taken time to bring out the omissions, contradictions and inconsistencies in the evidence of the witnesses. The one thing that clearly comes out is the featuring of Cpl Mbarire, who had a white probox similar to what was at the deceased’s gate on the material night. Cpl Mbarire being the incharge of Ulinzi patrol base used to do patrols and arrest people and was well known by the residents. He was clearly mentioned by Pw1, Pw2 and Pw5 before they changed their story.

86. No action was taken in respect of this and Cpl Mbarire even participated in the initial investigation. Pw10 boldly said he did not investigate Cpl Mbarire as he did not see the need as he relied on the evidence of the witnesses. This is in spite of Cpl Mbarire having been adversely mentioned by the same witnesses and even saying this in re-examination at page 54:

“Accused and Cpl Mbarire look alike. One can confuse them”.

87. The evidence of Pw4 is that he was beaten by the police and forced to record a statement. The reason for the beating was that he was not recording what the police wanted him to record. After considering the contradictions and inconsistencies herein it becomes very clear what the police wanted him to record ... To record things he had not seen or known about so that Cpl Mbarire is cushioned. Its so clear from this evidence.

88. In the circumstances of this case an identification parade would have been the best step to take. Since Cpl Mbarire and the accused had been adversely mentioned both of them should have been subjected to properly organized identification parades. The witnesses would have gotten an opportunity to pick whoever they had seen pick the deceased person from his gate.

89. The mere fact that Pw2 and Pw5 called Cpl Mbarire and he told them separately that he was at Machakos junction did not clear him of the suspicion. There was no call data produced in court to show exactly where Cpl Mbarire was at the time of incident.

90. It was also not proper for Pw3 to act without proper information in impounding the motor vehicle KBV 869U. He said he had allowed other vehicles to pass. Pw6 is not the only person who owned a white probox in the area as has been stated by witnesses. Without proper

evidence being tabled before this court it may not be safe to find that the person who appeared at the deceased's gate was the accused. It could be him or Cpl Mbarire.

91. I find this case to be that of mistaken identity. It creates a doubt in my mind as to the guilt of the accused person. He will benefit from that doubt. For my part I find him not guilty and acquit of the charge of murder contrary to section 203 of the Penal Code. Accused to be released, unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 13th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge