REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 22 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KADENGE KOMBE ..... ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for State

Obaga Advocate for Accused person

JUDGMENT

The accused persons **John Kadenge Kombe, Onesmus Peter Musuko** and **Kazungu John Charo** having been charged of murder contrary to Section 203 and 204 of the Penal Code were tried by the prosecution calling the necessary evidence in support of the unlawful act and malice aforethought beyond reasonable doubt.

Briefly, it is alleged in the information that the accused persons on the 16.11.2018 at Wesa – Sub-Location, murdered **Johnson Kivuno alias Sammy.** At the time of arraignment before Court each accused pleaded not guilty. Learned Counsel **Mr. Gekanana** appeared for the 1st and 3rd accused whereas **Mr. Obaga** represented the second accused. On the other hand, the state was represented by Learned prosecution counsel **Ms. Barbara Sombo**.

The prosecutor called a total of five witnesses whose summary of evidence is hereinunder reflects as follows:

PW1 – Charo Chome, works as a wine tapper. In his testimony **(PW1)** recalled that the 1st accused came to the home of the deceased and thereafter they stepped out together. However, the deceased went missing and questions arose about his whereabouts. According to **(PW1)** an inquiry from the 1st accused showed that they had parted ways where some items identified as plastic container, a knife and a radio had been handed over to **Kajembe** by the deceased.

At that point in time **(PW1)** told the Court that a search led them to the recovery of the deceased body floating in the sea. The witness then led the police to the scene to initiate investigations on the cause of death. In cross-examination the witness stated that it emerged the first accused was the last person to be seen with the deceased. Further details came out of his evidence that the 2nd and 3rd accused are the ones who brought the recovered items of the deceased meant to be handed over to **Kajiwe.**

PW2 – George Gambo testified to the effect that on 17.11.2018 the 1st accused offered to sell a Techno mobile phone but he ended up leaving it as security in exchange of a friendly loan of Kshs.600 (six hundred). The said personal loan was to be repaid back with interest of Kshs.300 summing it up to Kshs.900 (nine hundred).

Further, **(PW2)** told the Court that before the stipulated agreed period could expire, police started to look for him in connection with the mobile phone and the on-going investigations to the murder of the deceased. With that he was to record a statement with the police explaining how he came to be in possession of the subject mobile phone. **(PW2),** was able to identify the Techno mobile phone left with him by the 1st accused as security for a loan of Kshs.600 (six hundred) repayable within two days from the date of release of the money.

PW3 – Macdonald Kithi testified that on 16.11.2018 the deceased left his home to go to Chumani to tap wine. He later received information that the deceased never returned back and this caused concern to his family who began a search and find mission. In the course of investigations, (PW3) gave evidence that it became apparent that the 1st accused was the last person seen with the deceased. He further

testified that at the material time it became clear the 1st accused had dropped some items belonging to the deceased at **Kajembe's** house. That finally the deceased body was discovered at Galana. (PW3) also confirmed to have been one of the witnesses during the postmortem examination of the deceased at Kilifi Hospital Mortuary.

PW4 – Issa Mwanongo Mwajima alias **Kajembe** testified that on 16.11.2018 while at his house the 1st accused and the deceased passed by to take some wine. Thereafter, **(PW3)** told the Court that a plastic container, radio and knife were left in his possession. In **(PW4)** evidence it did not take long before he received information that the deceased went missing from that day while in company of the 1st accused.

PW5 – No. 10018 PC. Dominic Omondi testified on the approach taken to investigate the incident the witness went on to state that it seemed clear to him the 1st accused had credible information on the death of the deceased. According to **(PW5)** one of the critical issue of his investigations was the recovery of the items left behind by the 1st accused while in company of the deceased with **(PW4) (Kajembe).** The other evidence **(PW5)** alluded to was recovery of the mobile phone offered as security with **(PW3)** for a personal loan of Kshs.600. That with the evidence from witnesses and exhibits recovered on the face of it he recovered a charge of murder against the accused persons. The evidence in so far as it relates to the prosecution case having been given the Court placed accused persons on their defence.

Defence Case

DW1 – John Kadenge gave unsworn evidence. In his testimony he denied, participating in the killing of the deceased. In substantial evidence from the accused was an acknowledgment that on 16.11.2018 they spent sometime with the deceased. It is significant too that, according to the 1st accused that they were together on the fateful day tapping wine when the deceased informed that he is bereaved. In the result the accused told the Court that the deceased left him his personal items to wit, radio, plastic container and a knife.

In addition a mobile phone as security for the loan he advanced the deceased at that time. Those are the items he took to the house of **(PW4) Kajiwe.**

According to the 1st accused from that moment the deceased disappeared and was sought to explain his whereabouts. In the course of investigations, the body of the deceased was floating at the sea. He denied any involvement with the death or any wrongful act as alleged by the prosecution. For **Onesmus Peter (DW2)** he gave sworn statement of defence. He stated that at no time he was ever involved with the death of the deceased. He further mentioned that on 16.11.2018 he took some wine in company of the 1st accused. According to him the 1st accused also had in his possession some items he identified in Court as plastic container, knife and radio stated to belong to the deceased. He denied any knowledge of the murder.

DW3 – Kazungu John elected to give unsworn statement. He stated to have been arrested on 17.12.2018 for an offence he knew nothing about nor evidence presented convicting him with its occurrence. The only other piece of evidence **(DW3)** brought to the attention of the Court was the encounter he had with the 1st accused at a wine club. That he spent sometime with them and thereafter left for **(PW4's)** house where he collected some items of the deceased.

I have appraised again the evidence by the prosecution and the defence with regard to the charge facing the accused persons contrary to Section 203 of the Penal Code. To this end, I bear in mind that the burden of proof rests upon the prosecution throughout the trial and at no time does it shift to the accused persons. That being so, its now my singular duty to consider whether the evidence received and admitted in Court is sufficient to prove the accused guilty inorder to secure a conviction and Judgment in favour of the prosecution.

Analysis and Determination

In an offence of murder contrary of Section 203 and 204 of the Penal Code. The prosecution must prove beyond reasonable doubt. The following elements:

1. ***That the deceased Johnson Kivuno is dead.***

2. ***That his death was unlawful.***

3. ***That in causing death and use of violence against the victim, the accused persons did so with malice aforethought.***

4. ***That the accused jointly participated in commission of the murder.***

It is important to reemphasize that the prosecution bears the responsibility for the burden of proof in this case as provided for under Section 107 (1) as read with Section 108 of the Evidence Act. So, strictly does the Court apply the rule on the burden of proof of beyond reasonable doubt that there is no room for mitigation to water it down in a manner inconsistent with the laid down principles. The benefit of the principles of proof of beyond reasonable resting on the prosecution and never shifts to the accused is explained in the case of **Woolmington v DPP {1935} AC 462, Ouma v R {1986} KLR 619, Sawe v R {2003} KLR 364.** By similar reasoning to the above cited cases **Lord Denning in Miller v Minister of Pensions {1947} 2 ALL ER at 372 – 374** stated as follows:

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

In a passage from Kenny's outlines of Criminal Law 16th Edition at pg 416 a distinction is evidently drawn between the standard of proof in Civil Cases with that in Criminal Cases thus:

> ***"A large minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature…….. In criminal cases the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt. When therefore the case for the prosecution is closed after sufficient evidence has been deduced to necessitate an answer from the defence, the defence need do no more than show that there is reasonable doubt as to the guilt of the accused."***

The appropriate procedure for evaluating whether the threshold of a case proven beyond reasonable doubt against an accused person was stated in **Abdul Ngobi v Uganda S. C. CR Appeal No. 10 of 1991** where the Court expressed itself as follows:

> ***"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weakness of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised reasonable doubt. If the defence has successfully done so, the accused must be acquitted, but if the defence has not raised a doubt, that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged."***

The Law therefore on the burden of proof is now in a creditable state. Thanks to the above decisions and others which have stood the test of time. This Court will therefore examine the evidence under this canonical principle to establish whether that burden of proof of beyond reasonable doubt has been discharged against each of the accused on the question of how the deceased met his death. Pursuant to the evidence and the offence of murder allegedly committed by the accused persons in my summing up its all based on circumstantial evidence. In a Plethora of classical cases the broader framework formulation on the combined strands of circumstantial evidence reveals the following for example in **Omar Mzungu Chimera v R CR Appeal No. 56 of 1998** a close reading of it reflects the following:

"It is settled that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

> ***(1). The circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established.***
>
> ***(2). Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.***
>
> ***(3). The circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within the human probability, the crime was committed by the accused and none else."***

Similarly, in **R v Kipkering Arap Koske & 2 others {1949} EACA 135, Simon Musoke v R {1958} EA71,** the Court held:

> ***"In order to justify, a conviction on circumstantial evidence the inference of guilt; the inculpatory facts must be incomplete with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts, which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused." (*See also Abanga alias Onyango v R CR Appeal No. 32 of 1990 (UR).**

From these passages the Court now considers whether the prosecution case was brought within the ambit of circumstantial evidence to proof the ingredients of the offence.

Ingredient (1) Death of the deceased

In deciding whether the deceased is dead, I have borne in mind the evidence of **(PW1), (PW2), (PW3), (PW4)** and **(PW5)** all confirming that the deceased body which went missing was recovered floating at Indian Ocean. In the post-mortem examination report by **Dr. Lorraine** dated 22.11.2018 the deceased was positively identified by **(PW3) Macdonald Kithi**. In respect to this and on the contents captured in the post-mortem the deceased **Johnson Kivuno** is dead. As opined by the pathologist the cause of death was Asphyxia. I am satisfied that the prosecution has proved reasonable doubt this ingredient through medical evidence as stated in **Rex v Sirasi {1936} 3 EACA, Republic v Cheya & Another {1973} EA 500.**

Ingredient (2)

That the death of the deceased was unlawfully caused.

A case as to whether the offence alleged is murder or any other homicide has to be considered based on the evidence adduced by the prosecution. It is necessary to establish whether the act or omission of the accused against the deceased was unlawful. In this regard the unlawful act must be one such that is foreseeable to cause death or to do grievous harm to the victim.

The decision in **R v Busambiza s/o Wesonga {1948} 15 EACA 65** is consistent with the general principle that:

> ***"Every homicide is presumed to be unlawful unless circumstances show that its excusable."***

Indeed, in looking at the evidence of **(PW1), (PW2)** and **(PW3)** the deceased prior to the date he went missing on 16.11.2018 he was

presumably in good health. However, the evidence by **Dr. Lorraine** in her post-mortem examination dated 20.11.2018 shows that the deceased suffered injuries to the neck and cervical spine.

Further in the instant case, it was the evidence of **(PW1) – (PW5)** that the deceased body was recovered at the Indian Ocean. Even though the prosecution relied wholly on circumstantial evidence its sufficient to discharge the burden of proof to prove that the deceased death was unlawfully caused.

(3). The third ingredient to be considered is that of malice aforethought

In adapting an inference whether the prosecution in their evidence has discharged the burden of proof. The strictures of Section 206 of the Penal Code has to be adhered to; which phrase briefly as follows as:

> ***"An intention to cause death of any person, whether such person is the one actually killed or not. An intention to cause grievous harm to another knowledge that the act or omission causing death will probably cause death of a person, whether that person is the one killed or not, though such knowledge is accompanied by indifference whether death is caused or not by a wish that it may be caused."***

Courts in Kenya and their jurisdictions appear to be in agreement with the specifics on manifestation of existence on malice aforethought. In this regard, I rely on the *locus classicus* case of **R v Tubere s/o Ochen {1945} 12 EACA, Ogeto v R {2004} 2KLR, Ernest Asami Bwire Abanga alias Onyango v R CACRA No. 32 of 1990, Karani v R {1991} 622.** These cases illustrate how Courts go about construing malice aforethought from the set of facts in the charge sheet and corresponding evidence by the prosecution.

The real import of the causal consideration constitutes the following:

(a). The nature of the weapon whether lethal or non-lethal and how it is used against the victim. The part of the body targeted by the accused and its respective vulnerability. Whether the weapon used inflicted multiple brutal injuries calculated to cause death or to do grievous harm. It is also worth stressing again that the conduct of the accused before, during and after attack should not escape scrutiny.

Guided by the above approach, I will make a contextual analysis of Section 206 of the Penal Code within the entire evidence tendered by the prosecution. It is clear from the evidence of **(PW1), (PW2), (PW3), (PW4)** and **(PW5)** that points to the deceased enjoying his right to life as provided for under Article 26 of the Constitution. The prosecution evidence and that of the 1st accused person are in agreement as to the status of the well-being of the deceased on 16.11.2018.

However, when one looks the aftermath of the fateful day of 16.11.2018, it is also clear that the deceased suddenly disappeared from his home and the suburban area where he tapped wine. Finally, the deceased body was recovered at the Indian Ocean with injuries to the neck and cervical spine. The actual post-mortem examination by **Dr. Lorraine** opined that he died out of Asyphxia. Granted those facts one cannot dispute that the circumstances of the death of the deceased were accidental or natural. The additional fact of even having his body thrown into the Indian Ocean means that the person who did it engaged in an unlawful act directed against the deceased accompanied with malice aforethought.

In my view, I find that the prosecution has sufficiently proved that the deceased died unlawfully with an underlying ingredient of malice aforethought.

A dispensation of this case would not be complete without a discussion on a further ingredient on identification of the accused.

That being so the vital question is to be answered by taking cognizant of the principles set out in **R v Turnbull {1976} 3 ALL ER 549, Abdalla Bin Wendo v R 20 EACA 166 – at 168** The Court of Appeal in **Cleophas Otieno Wamunga v R CR Appeal No. 20 of 1989** interalia held as follows on identification evidence as a whole:

> ***"What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in Criminal Cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

By way of the prosecution evidence, it is the quality of the probative value in the disposition that is the crucial factor to determine whether accused persons were positively identified as alleged by the witnesses. Two or three items call for consideration as possible answers to that question on identification. The first item speaks to the quality and to the objective truth of what (**PW1) Charo Chome, (PW2) George Gambo** and **(PW4) Issa Mwaningo** said in their statement before Court which could provide reliability on the issue of identification.

According to the details of the description by (PW1), the 1st accused was the last person to be seen with the deceased on 16.11.2018. The second piece of evidence proffered to confer reliability on identification of the 1st accused came from **PW2 – George Gambo** with regard to a mobile phone offered as security by the 1st accused for a personal loan of Kshs.600 repayable in two days with interest.

The circumstances in which the 1st accused came into possession of the mobile phone allegedly owned by the deceased a day after his disappearance became significant. That he may have had a hand or seen the one who, killed the deceased.

Thirdly, the effect on the prosecution's reliability as to the identity of the killer is starkly illustrated by considering the aspect of **(PW3) Issa Mwanongo** statement of evidence. The witness gave an overview to further built on circumstantial evidence as regards the deceased property earlier on identified to be plastic container, a knife and a radio left in his custody for temporary storage.

At his trial the 1st accused denied any participation in the killing of the deceased. According to the 1st accused, in the course of their tapping wine a request came from the deceased that he was leaving to go and attend some burial. This necessitated the deceased to hand over his tools of trade, a radio and mobile phone in his custody, with instructions that they be taken to Kajiwe. He also pointed out that the deceased asked to be advanced some money in exchange of the mobile phone. That is how he came into possession of the mobile phone.

The case here against the accused persons depends to a significant degree on the correctness of one or more visual identification of the prosecution witnesses. The evidence of each individual witness i.e. **(PW1), (PW2)** and **(PW4)** should be regarded as material to implicate the 1st accused person in the death of the deceased. I have evaluated significance and benefit to be drawn from **(PW1), (PW2)** and **(PW4)** identification evidence.

In my view, the nature of the relationship between the witnesses and the 1st accused should be accepted as reliable rather than mistaken. Secondly, the opportunity the witnesses had to observe the 1st accused as the last person seen with the deceased. In that context the doctrine of recent possession applies to the charge against the 1st accused the Court of Appeal in **Isaac Nganga Kahiga alias Peter Nganga Kahiga v R CR Appeal No. 272 of 2005** held that:

> ***"the doctrine as based on the following elements***:
>
> ***(1). Proof of possession.***
>
> ***(2). The property was found with the suspect.***
>
> ***(3). That the property is positively the property of the complainant.***
>
> ***(4). That the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant.***
>
> ***(5). Proof as to time***
>
> ***as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

In the circumstances of this case it has been proved from the evidence of **(PW1), (PW2), (PW3)** and **(PW4)** on 16.11.2018 the plastic container, radio, knife and a mobile phone were stolen from the deceased apparently immediately after his death. These items were found in the possession of the 1st accused. The mobile phone had been offered as security against a friendly loan of Kshs.600 to **(PW4).** The second feature of evidence proven by the prosecution is on possession of items known to belong to the deceased.

Indeed, it is not difficult to arrive at a conclusion that the 1st accused do not immediately obtain possession of the questionable goods. Apart from giving an explanation of the circumstances in which those goods came into his possession, he could do more by telling the Court who violently attacked the deceased.

That unexplained recent possession of stolen goods standing alone also warrants an inference of guilt of committing a felony of robbery and at the time fatally injured the deceased. Obviously, I am satisfied beyond reasonable doubt on all the evidence taken together, in this case there is no dispute that 1st accused person has been placed at the scene of the crime which occurred on 16.11.2018. This is in contrast with the prosecution case on identification against the second and third accused persons. The prosecution case as earlier stated dependent wholly on circumstantial evidence that the accused persons on 16.11.2018 jointly murdered the deceased. The quality of identification evidence rendered by **(PW1), (PW2)** and **(PW4)** was inadequate taking the guidelines in **Turnbull principles**; and the weakness of the evidence as to identification of the 2nd and 3rd accused persons.

In my view, the identification evidence never went far enough in establishing a link, a connecting factor between the 2nd and 3rd accused persons and the offence they faced at the trial. At the end of the day, I am satisfied that the prosecution has discharged the burden of proof of beyond reasonable doubt for the finding of guilty and conviction for the offence of murder contrary to Section 203 and 204 of the Penal Code against the 1st accused person.

To the contrary, I find that there is lack of sufficient evidence for the state to have charged and prosecuted the 2nd and 3rd accused persons jointly with the 1st accused. A failure by the state to mount sufficient primafacie evidence for a verdict of guilty and conviction at the close of its case justifies the two accused persons to be acquitted unless otherwise lawfully held.

The gist of the matter herein is that as opposed to the circumstances prevailing in favour of the 2nd and 3rd accused, the evidence led against the 1st accused when juxtaposed with forensic evidence as already determined calls for Section 204 of the Penal Code on sentence to apply balancing adequately the interest of the victim and public interest in a trial.

Sentence

Under our criminal justice system before imposing any sentence a Court is under an obligation to afford the convict or his counsel to address the Court on mitigation. The prosecution counsel will also speak on issues touching on the ultimate sentence to be passed against the convict. This sentencing hearing was not different. The convict personally presented his mitigation raising the following factors: That he is a first offender and therefore remorseful for the offence convicted against the deceased. He sought forgiveness and mercy of the Court to be extended to him with regard to appropriate sentence.

In this case, I have taken into account the seriousness of the offence, combination of the circumstances in which the convict committed the offence in considering the sentence the Court must factor in the period served in remand custody (pursuant to Section 333 (2) of the Criminal Procedure Code) and give credit to the sum total of the tenor imprisonment apportioned as punishment for the offence.

It is important therefore to note that the convict persons has no previous conviction and also Section 333 (2) of the Code may not be applicable for him in setting the minimum sentence.

Having reviewed the evidence, this was a murder committed involving substantial degree of malice aforethought. The deceased was a person known to the convict as a fellow fisherman, hence there was some level of trust and cordial relationship. The concealment of the body of the deceased immediately after committing the heinous act of murder weighs against the convict conduct after the unlawful killing.

Therefore, in accordance to the principles in **Francis Muruatetu v R {2017} eKLR** and Section 204 of the Penal Code, I sentence the convict to 35 years imprisonment.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE