REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 41 OF 2009

REPUBLIC

VERSUS

FRANKLINE MUGENDI MIRITI.....1ST ACCUSED

CHARLES MWAI NYAMBURA.....2ND ACCUSED

JUDGMENT

Identification of a suspect, and a positive identification at that, is central to conviction of an accused on any charge not least a charge of murder. In an offence of murder, the prosecution must not only prove the fact of death of a person but also that the death was an act or omission of another person. This is captured in **Section 203** of the Penal Code, cap. 63, which defines this offence; it states as follows:

> ***203. Murder***
>
> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

The accused here were charged this offence the particulars being that on the 14th day of July, 2009 within Solio Village Phase V in Nyeri District of the Central Province, jointly with others not before court, they murdered Ewoi Kanyaman.

They pleaded not guilty to the charge and one of the questions which, in my humble view, was central to their prosecution, was whether they were positively identified. Equally important, is the question whether indeed the manner and the fact of death of the deceased were proved as to leave no doubt that the deceased not only died but also that he died in the manner particularised in the information.

The background of the case against the accused was this: on 14th July, 2009 at about 4 P.M., Ewoi Kanyaman was with his wife, Silale Erega when a mob of about 50 people, armed with assorted crude weapons invaded them at their home at Solio ranch in Nyeri county; they attacked Ewoi Kanyaman who, in the process, sustained what turned out to be fatal injuries. He succumbed and died immediately.

Silale Erega emerged as the prosecution's key witness for the obvious reason that she was the eyewitness to her husband's brutal murder. It was her evidence that their home was in Kieni but that her husband had been employed as a security guard at Solio ranch by one Muthoga. She had only visited him briefly for some provision for the upkeep and maintenance of their twelve children back home. She had been with the deceased for two days before he was murdered.

According to Erega, the mob emerged from the bush and started cutting the deceased. She fled for her life as the gang members pursued her; however, she outpaced them and managed to escape to a nearby Administration Police camp where she reported the attack. Administration police officers accompanied her to the scene but couldn't arrest any of the attackers because they fled as soon as they saw the officers. Meanwhile, Muthoga's son, one Gitahi, summoned police officers from Naromoru police station; they came and took the body to Nanyuki District Mortuary.

On the crucial question of identification, Erega testified that she could recall the appearance of the two accused because they were not only ahead of the mob but also because they confronted her and hit her with the flat side of the pangas they were armed with. She was able to give their description to the police when she recorded her statement and, perhaps, based on that description, an identification parade was conducted at Naromoru police station from where she picked them out.

However, no parade form was either produced and none of the prosecution witnesses testified as having conducted an identification parade; thus, this bit of Erega's evidence was not corroborated.

But there was another angle to this aspect of evidence from Stanley Kiama who transported the gang to the scene. He testified that he was ordinarily in the transport business and on the material day, that is, the 14th day of July, 2009, he was at Munyu trading centre when the 2nd

accused approached him at about 11.00 AM seeking his services to transport some youth to Solio. It was his evidence that the 2nd accused is a person that he was very much familiar with since he had known him for at least five years before the incident. After negotiation and agreement on the transportation charges, he drove the 2nd accused's passengers who, in his estimation, were about 50 in number, to Solio in his vehicle described as an open Isuzu canter registered as No. KAA 820Z.

According to Kiama, the youths were armed with clubs which they had hidden in sacks. Out of curiosity, he sought to know from those that he was seated with in the driver's cabin what their mission at Solio was; they told him that they were going to collect their sheep. He dropped them about a kilometre from Solio ranch and drove back to Munyu after he was paid his fee.

Sometime later, on 18th July, 2009, he was arrested from his home by an administration police officer after it was established that he had transported the unruly and murderous mob to Solio on 14th July, 2009. He was detained at Naromoru police station and, according to police constable Richard Achuka, he was initially held as a suspect but was released after nine days in custody. The investigations officer Simon Gichohi's testimony was along the same lines but he added that it was as a result of his investigations that he came to learn that a vehicle registration No. KAA 820Z had dropped the people who killed the deceased. He traced the vehicle to Stanley Kiama Nyaguthi whom he found at Munyu trading centre and arrested him.

It would appear from Kiama's evidence that he did not know the 1st accused, or rather he did not know him as much as he knew the 2nd accused; however, according to police constable Richard Achuka, after his arrest, Kiama led him together with other police officers from Naromoru police station to the 2nd accused's home as one of the people he had driven to Solio together with other youths. And the two accused are not the only people he knew; it was his testimony that of the youths he transported to Solio, he knew at least ten of them though not by their names.

So, in spite of the doubts about the identification parade, the evidence of Kiama, at the very least, corroborates the evidence of Erega that the two accused were amongst the mob that descended on her and her husband and fatally wounded the latter on the 14th day of July, 2009. To be precise, and looking at the evidence of Kiama alongside that of Erega, Kiama's testimony affects the accused by connecting them or tending to connect them with the murder of the deceased and confirms in some material particular not only the evidence that a crime was committed but also that the accused committed it. (See **Republic versus Manilal Ishwerlal Purohit (1942)9 EACA 58,61** cited by the Court of Appeal in **Mutonyi versus Republic (1982) KLR 203 at 208**).

I must not be mistaken to be underrating the value of identification parades; indeed, they are important and in this particular case it would have been prudent, assuming a parade was conducted, for the evidence of its conduct to be proffered. However, if what was sought to be achieved, in this case the identification of the accused, is achievable through some other evidence which effectively links the accused to the crime in question, it would not matter that an identification parade was not conducted; where it is conducted in such circumstances, I dare say that it is only out of abundance of caution. In any event, if Erega's evidence of identification of the two accused persons amounts to nothing more than dock identification, it is reasonable to conclude that Kiama's evidence is corroborative in that regard; ultimately, the dock identification would not be dismissed as worthless.

It must also be remembered that evidence of identification parades, whenever it is conducted, has to be considered alongside other evidence; in other words, it is not self-sufficient. As a matter of fact, in certain instances, dock identification evidence has been preferred to that of identification parades. In **Muiruri & 2 Others versus Republic (2002) 1K.L.R 274,** two of the three appellants were subjected to two different identification parades on the same day within a space of fifteen minutes. The parades had similar parade members and involved the same identifying witnesses. The Court of Appeal held that, in these circumstances, one of the appellants was prejudiced and not much value should have been given to the identification parade in respect of this particular appellant. However, the court went further to hold that the identification parade was effectively superfluous because it found that there was sufficient identification from four witnesses; these witnesses, so held the court were examined and cross-examined on their testimony on identification of the appellant and their evidence remained consistent. The Court took into account the fact that the witnesses gave graphic accounts on what happened on the material night, and their evidence mutually corroborated each other. Although the court noted that conditions for positive identification were difficult, it still held that the appellants were positively identified because they had torches and they stayed with their victims long enough for them to observe them at close range. In coming to that conclusion, the Court effectively held that notwithstanding the flaws in the identification parade, dock identification evidence could still be upheld; in their words, the learned Judges of Appeal held; *'we do not think it can be said that all dock identification is worthless'.*

When I consider the accused's case from this legal perspective and, taking into account that the incident out of which the deceased was murdered happened in broad daylight, I am satisfied that the accused were properly and positively identified.

I am minded that in their sworn defence, the accused denied having committed the offence and put forth what would be an alibi; the 1st accused told the court that he was at his home while the 2nd accused's testimony was that he was in the course of his transport business on the material day. The 2nd accused, however admitted that he knew Kiama and that the two communicated with each other on the material day. This defence appears to me to be a mere denial and does not displace or create any doubt in Silale Erega's and Kiama's evidence that they were at the scene of crime at the material time. I am not satisfied that their alibi holds no water.

The second and perhaps the other nagging question is the fact and the cause of deceased's death. Proof of death in an offence of murder is mandatory although, ordinarily, it is not a cause for much anxiety. More often than not, a postmortem on the deceased's body will be undertaken to establish the cause of death and in the process certify the deceased's death. For this reason, pathologists or persons of the like expertise appear in court to recount their observations upon examination of the deceased's remains and express their opinion on what they think caused the deceased's death. The details of their evidence will be contained in a post-mortem report that would, subject to the rules of evidence, be accepted as part of the prosecution evidence.

The deceased's case is somehow exceptional at least to the extent that though a postmortem was conducted, the doctor who conducted it did not testify and make his findings known; his report was only marked for identification by a police officer who witnessed the postmortem but

was not produced. Apparently, the doctor was one of the four witnesses who were shut out when the state closed its case after several vain attempts to procure their attendance; several adjournments had been granted at the state's instance for this purpose. In the absence of any proof that any of these witnesses was going to attend in future, and noting that this case has been pending in court for close to eight years, this honourable court rejected further applications for adjournment and it is at this stage that the state closed its case.

Against this background, the question that arises is, in the absence of the medical officer's evidence, can this court conclude that a person was murdered and was so murdered by the unlawful act or omission of the accused persons, in which case they can therefore be said to have committed an offence under section 203 of the Penal Code? Is the trial court entitled to disregard the absence of expert medical evidence and rely on raw facts to conclude that the deceased died and died as a result of the injuries he sustained from the attack? A few previous decisions on this issue provide some clue on what may be the appropriate answers to these questions. It is apt to consider them at this point but before I do that let me first lay out what I would regard as 'raw facts.'

My reference to the facts as 'raw' is informed by the acknowledgement that they are not spiced up with the expert's observations and opinion on the fact and cause of the deceased's death. In my humble view, these facts which were uncontroverted are these: the deceased's wife eyewitness' testimony of the gruesome and fatal attack on her husband; unlike her, he was immediately immobilised to the extent that he could not escape from the wrath of the unruly mob. Also included in this category of facts is her eye witness' account of the body being taken from the scene to the mortuary from where a post-mortem was conducted, again, in her presence. I would also consider Simon Gichohi's (investigation officer's) testimony, that after he was informed of the deceased's death on the material day, he went to the scene of attack accompanied by Police inspector Langat, the then Deputy OCS of Naromoru police station and indeed found the deceased dead, with his body drenched in blood a material fact in this regard. Corporal Evelyne Makena's evidence that she accompanied the deceased's relatives to the mortuary and that they positively identified the deceased's body before the post-mortem was conducted by a Dr, Kurgat would equally be material.

At the risk of repeating myself, the pertinent question that emerges is whether this court is entitled to turn a blind eye on these facts and ignore, in particular, the fact and the manner of death of the deceased merely because neither the doctor testified nor was his post-mortem report produced in evidence.

In **Republic versus Cheya (1973) EA 500**, two accused and one Daudi Musa together with Makonde villagers were enjoying themselves in what appeared to have been a traditional dance to celebrate the circumcision of several Makonde children. Both men and women were dancing but in separate groups. Daudi was not content with dancing in his group of men; he therefore joined the women in their group but as he danced with them, he went a step further and started fondling and patting their buttocks.

The two accused took objection to Daudi's behaviour more so because he was not of the Makonde tribe; they therefore asked him to leave the women's group and dance with his fellow men in their group. Daudi declined at which point the accused forcefully attempted to remove him from the women's group and assaulted him in the process. The rest of the dancers joined the fray and started beating Daudi. He ran away but managed to hold on to one of the accused whom he, somehow, dragged to a police station. Due the injuries he had sustained, he was taken to hospital for treatment; unfortunately, he died a day or two later.

The two accused were charged with Daudi's murder in the High Court (Mfalila, Ag. J.) of Tanzania and two questions that arose in the course of their trial were whether in fact Daudi died and if so, what caused his death. As noted earlier, the fact of death and its cause are vital elements in an offence of murder and therefore there is no doubt similar questions would arise when considering whether that offence has been committed as contemplated in section 203 of the Penal Code.

Turning back to Daudi's death, the postmortem report which would have resolved these questions was ruled inadmissible because it was neither signed nor were the qualifications of whoever prepared it shown. However, the learned trial judge held that the absence of medical evidence as to the fact of death and its cause was not fatal because it was open for the prosecution to produce and rely on other evidence to establish these two facts. To this end, the learned judge relied on the evidence of eyewitnesses who saw the deceased when he was assaulted and while in hospital and subsequently saw his body after he died to find that the deceased had died and that he had died as a result of the injuries he sustained. Based on the same eyewitnesses' account he held the two accused responsible.

For reasons that are not relevant to the question at hand, he convicted the accused of the offence of assault causing actual bodily harm rather than that of murder.

Our own Court of Appeal had occasion to discuss the decision of Mfalila, J. in **Nairobi Criminal Appeal No. 171 of 1984,** reported as **Ndungu versus Republic (1985) eKLR.** In that case, the deceased was assaulted on night of January, 18, 1983 while on his way home in what appeared to have been a robbery incident. His wife who had rushed to his rescue together with a neighbour took him to Matuu Health Centre but not before they reported the incident at a nearby police station where he was issued with a P3 form. No doctor was available at the health facility at the time but all the same the deceased was given some drugs and apparently went back home. Two days later he returned to the health centre; this time round, he was given three injections and some tablets. After two weeks, he developed stomach pain and his body turned yellow. He was then taken to Thika District Hospital where he was given tablets but his condition worsened and was returned to Matuu Health Centre from where again he was referred to Machakos District hospital. He died two days later, more particularly on 3rd March, 1983.

The appellant was charged and convicted of the deceased's murder; he appealed against conviction and sentence. Just like in the Cheya case, the argument of the fact and cause of the death of the deceased revolved around the post-mortem report. In this particular case, the report was neither dated nor signed; it did not also bear the name of the medical officer who conducted the post-mortem. Inevitably, it was argued, on behalf of the appellant, that in the absence of supporting medical evidence or post-mortem report or evidence of the exact treatment the deceased received at Matuu Health Centre and at the two other hospitals, there was, in effect, no evidence to support the trial judge's finding that the deceased died as a result of the injuries he sustained. Having died 44 days after the assault, so it was argued, it could not be held reasonably that the death was related to the assault since the cause of death was not established.

The Court of Appeal accepted this argument and held as follows:

> ***Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical Officer who performs the post-mortem examination is cross-examined. Here no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the judge.***

Turning to the Cheya case to which the learned counsel for state relied for the proposition that the fact of death and its cause can be established by means other than the medical evidence and that the court is not always bound by expert opinion, the Court held that Justice Mfalila's decision was not of any help but that it ought to be restricted to what the Court described as "an exceptional situation" the particulars of which, so the court found, were not given in the judgment. In this regard the Court held that the judgment was misleading and that it would be lacking in candour if it were to conceal its unhappiness about the decision. On the pertinent question of the link between the injuries and death, the Court had this to say:

> ***The judgment in Cheya gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem report is performed and a report prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution.***
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> ***Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.***

This decision was followed and applied by the same Court in **Chengo Nickson Katama versus Republic (2015) eKLR** where the deceased died two days after the attack; however, as happened in the Ndungu case, so it was in Chengo; a report of the postmortem examination was not produced despite the fact that the postmortem was conducted. Like in the Ndungu case, the deceased had also been in several hospitals leading the court to doubt whether death could have been as a result of the injuries sustained during the attack or by other cause.

While analysing the evidence the court noted as follows:

> ***Our next consideration is failure by the prosecution to tender medical evidence regarding the death of the deceased. On record, there is evidence that following the death of the deceased, a post-mortem examination was conducted on his body on 7th February, 2011 by Dr. Otieno of Coast General Hospital and a report thereof prepared. However, attempts to introduce the same in evidence faltered on account of Dr. Otieno's failure to turn up in court severally for unexplained reasons. Therefore, the prosecution closed its case without the post-mortem report being placed on record. The effect of such an omission is that the death and the cause thereof was not established beyond reasonable doubt. The deceased did not die immediately. Indeed, he died two days later whilst undergoing treatment at Coast General Hospital where he had been transferred, as Lamu District Hospital was ill-equipped to manage his condition. It is also important to note that before being transferred to Coast General Hospital as aforesaid, he was first treated at Mokowe Health Centre and Lamu District Hospital. The treatment records from all these institutions could but were not availed. In the absence of these documents indicating the exact treatment which he received, it is not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause.***

The court then reflected on its earlier position in the Cheya case and concluded that "*the position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased*."(underlining mine).

What I gather from these decisions is that there are circumstances where death of a person may be proved without expert evidence. This is the hint I read from the Court of Appeal's pronouncement that the Cheya decision *"does not illustrate the proper application of the principle that in some cases death can be established without medical evidence."* What this statement suggests is that there exists a principle to the effect that in certain instances one does not need medical evidence to prove death except that the Cheya judgment was not the appropriate decision in which this principle was illustrated. The point was made even clearer when court proceeded to cite cases such as cardio injuries arising from stab wounds, shattered skulls or disappearance of a person as instances where the cause of death is so obvious that the absence of medical evidence or, to be specific, the post-mortem report, may not necessarily be fatal to the prosecution.

It is important to remember that the specific instances cited by the Court are not exhaustive; in other words that list does not purport to exclude other circumstances that merit consideration in determination of the question whether or not medical evidence is necessary in offences of murder. And the Court could not possibly restrict the list to specific cases because they are bound to be the sort of scenarios that, in all likelihood, would be unpredictable or unforeseen and therefore the most reasonable cause would be to determine each case based on its peculiar circumstances.

The approach taken by the Court of Appeal is what one would refer to as a common-sense approach; it is an approach which to a greater degree acknowledges the basic understanding that as much as expert opinion is necessary in certain instances, a trial judge is not so detached

from reality that he cannot see the consequences that would naturally arise from a set of uncontroverted facts or make a rational decision from such facts without the help of an expert. I suppose it is for the same reason that in law, a court is not bound by expert opinion if in its view, the criteria employed to test the accuracy of his conclusions is inapplicable to the facts before it or inconsistent, in some way, with those facts. **(See Mutonyi versus Republic (1982) KLR 204).**

Considering the case against the accused from this perspective, I am inclined to come to the conclusion that murder of the deceased is one of those cases that fall into the category of 'exceptional cases'; it is one of those cases where, in spite of the absence of the postmortem report, the deceased's death can be said, and conclusively so, to have been a natural consequence of the inexplicable attack by the accused and their cahoots on the 14th day of July, 2009.

I am very much wary of the Court of Appeal's position in the Ndungu case that even in instances where the postmortem report can be dispensed with, medical evidence of the effect of the obvious and grave injuries would still be necessary to link the death with the circumstances upon which the prosecution case is founded. I am in total agreement with this statement of the law and as a matter of law, I am bound by it.

The context in which this pronouncement was made cannot, however, be disregarded. Lest we forget, the circumstances in which the deceased in the Ndungu case was assaulted and in particular the identities of his assailants were not that apparent; further, the deceased died 44 days after the alleged assault; in between this period, he oscillated between his home and three different hospitals where he was treated either as an outpatient or inpatient. In the course of these treatments he developed complications from which he never recovered.

My understanding of the Court of Appeal's pronouncement is that in these circumstances, one could not tell with any measure of certainty whether the deceased died of the injuries he sustained or whether his death was as a result of the prescriptions he had been subjected to. I find this to be the meaning of the following statement:

> ***There was no evidence from the clinical officer at Matuu Health Centre who was said to have completed the P3 form and who, according to Anna, gave the deceased three injections and some tablets. There was no explanation of the drugs nor any evidence of the diagnosis to support the treatment. As matters stood at the conclusion of the trial in the High Court, there was no evidence to tie up the treatment at the Matuu Health Centre, at Thika District Hospital and Machakos District Hospital to the evidence of injuries. That was all the more necessary after the deceased's body began to turn yellow which condition suggested that death was due to a different illness.***

Simply put, considering the period of time between the date of the assault, the treatment the deceased received in various hospitals without any evidence of diagnosis of the ailment that he was being treated for, there was reasonable doubt whether the deceased died of the injuries he sustained when he was assaulted.

Similar circumstances obtained in the Chengo case and here the court was more categorical that in the absence of treatment records from different hospitals in which the deceased had been treated indicating the precise ailment for which the appellant had been treated, it was not possible to tell whether the death could have been as a result of the injuries or was by some other cause.

Contrast those circumstances with the present case. The deceased here was set upon by the accused with their legion of youth in the presence of his wife. She saw them attack her husband. He died instantly and soon thereafter his body was removed, not to the hospital for treatment but direct to the mortuary where, again, it was positively identified as the body of the deceased. Would there be any room to doubt the fact of death of the deceased and the cause of his death in these circumstances? I reckon not.

For the reasons I have given, I am persuaded that the deceased died as a result of the injuries he sustained from the attack.

The final question is whether malice was established. It is settled that malice aforethought is one of the ingredients of an offence of murder and it must be proved to exist before one can be convicted of this offence. It is either express or implied**. (See Woolmington v DPP [1935] AC 462). I**t is express when it is proved that there was an intention to kill unlawfully **(see Beckford v R [1988] AC 130)** and it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm **(see DPP v Smith [1961] AC 290).** It has been given statutory meaning in S**ection 206** of the **Penal Code** which prescribes circumstances under which malice aforethought may be deemed to have been established; that provision of the law states as follows:

> **206. Malice aforethought**
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> **Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**
>
> **(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;**
>
> **(d) 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.**

Having found that the deceased died out of the injuries he sustained, I am inclined to conclude that that by attacking the deceased in the manner they did, the accused had an intention to cause the death of or to do grievous harm to the deceased or were simply reckless that their acts would probably cause the death of or grievous harm to the deceased. Whichever way one looks at their actions, their intent was established and to that extent I am convinced that the prosecution proved the offence of murder as defined in section 203 of the Penal Code beyond all reasonable doubt. I therefore find the accused guilty as charged and convict them accordingly.

Dated, signed and delivered in open court this 15th March, 2019

Ngaah Jairus

JUDGE