REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 9 OF 2016

REPUBLIC..PROSECUTOR

VERSUS

JOHN KIMANZI MOINGO.......................1ST ACCUSED

JAMES OTIENO OCHIENG.....................2ND ACCUSED

CORAM: Hon. Justice R. Nyakundi - J

Mr. Itaya for the 1st accused

Mr. Nyangaya for the 2nd accused

Mr. Akula for the State

JUDGEMENT

The two accused persons are charged jointly with the offence of murder contrary to section 203 as read together with Section 204 of the Penal Code Cap 63 of the laws of Kenya. The brief particulars of the charge are that on the night of 20th and 21st day of February, 2013 in Rangau Village within Kajiado county with others not before court they jointly murdered Paul Njiri. Each of the accused denied the charge. Mr. Itaya and Mr. Nyangaya counsels represented the 1st and 2nd accused respectively. At the trial the state called twelve witnesses in support of the offence.

Summary of Evidence by the prosecution

Mr. Harrison Mutisya Kyalo (PW1) testified as an administrator at Konoinua community which owned Kisima Farm where the accused and the deceased worked as employees. His evidence was as follows: That on the farm which is about seven kilometers from Ongata Rongai they kept some goats and sheep. On 20th February, 2013 he received a telephone call from the 2nd accused that the goats and the sheep have gone missing. He therefore instructed accused persons that the matter be reported to the police. In the course pw1 deposed that they exchanged a series of telephone conversations with the accused persons on ways and means of tracing the animals. Harrison Mutisya further testified that he gave the accused persons and the deceased time to search and find whereabouts of the livestock. After one week there was no positive report whether any one has seen or spotted the animals. That is when the board of directors to the organization decided to sermon the two accused persons for further inquiry. This was more so because the deceased had not been seen at the farm.

PW1 gave evidence that he summoned other members of staff who included **PW3 – George Karanja** to a meeting which resolved that the matter be reported to the police at Ole Kasasi Station.

According to Pw1 in company of the police officers, and pw3, the 1st accused showed them the location comprising of a grave where the body of the deceased was buried. It was Pw1 testimony that armed with such a crucial information they made arrangements to have the exhumation of the body on 8th August, 2013 in the presence of the Chief Government Pathologist Johnson Oduor who testified as Pw8. According to Dr. Johnson Oduor the follow up postmortem examination carried out on the body of the deceased showed injuries to the frontal base of the skull. In the said postmortem produced in evidence as exhibit 6 the cause of death of the deceased was as a result of head injury due to blunt trauma.

Mr. Abraham Thuo (PW2) testified that he is a Pastor at Life in Christ Fellowship Church which has its location next to Kisima Farm. On the fateful day which he recalled to be between Mid-February – March 2013 he was at his house which neighbours Kisima Farm. He heard someone calling in Swahili language in reference to him "***pastor, Pastor wananiua"*** According to Abraham Thuo – the distressful voice caught his attention and caused him to leave his house for the scene.

On arrival he gave evidence that he observed the two accused persons who were not known to him holding both hands of the deceased. He further stated that the deceased was being dragged towards the side of their compound. After inquiring from the two accused persons he was made to understand that the deceased was the cause of the missing livestock which their bosses continue blaming them for the loss.

As pastor Thuo held a conversation with the accused persons he was able to notice that the deceased had suffered injuries to the forehead. It was at this juncture he pleaded with them not to continue assaulting the deceased. After that they proceeded towards the farm as he returned back to his residence. Thereafter he told the court that he met the 1st accused who informed him that the deceased went missing and the goats have not been recovered. Mr. Abraham Thuo further stated that he confirmed seeing the two accused persons in the farm including more often to the 1st accused who was also a member of his church. In his testimony Abraham Thuo gave evidence that he was to learn later that the deceased body had been found buried within Kisima Farm. Further Abraham Thuo testified that is when was asked by the police to assist in the investigations on the disappearance of the deceased. That is how he came to record a statement with the police.

Under cross examination by counsel for the 1st accused Mr. Thuo stated that he did not witness the initial beating of the deceased. However, stated that at the time he saw him with some injuries to the head. As to what time and date the incident occurred, he denied remembering the specifics save that it was between 20th February - 1st March 2013.

In respect to the second accused Mr. Thuo described his clothing on the material day to be a T-Shirt, Green/white in colour and a brownish – trouser, while the deceased wore a black/Navy kind of trouser. He further confirmed that what he managed to see was the dragging of the deceased by the accused persons. Further on close observation the deceased had injuries which the accused told him were self-inflicted against a fencing post. Mr. Thuo further confirmed to the learned counsel that as the deceased was being dragged by the two accused persons he kept calling his name and mentioning the assault which was still ongoing. In his testimony Mr. Thuo did not bother to pursue the matter against the accused persons nor make any attempts to separate them from the persistent assault to inflict harm upon the deceased.

PW3 George Peter Karanja testified as the official driver with Konoinua Community Organization. In his evidence the two accused persons worked for the organization and were based at Kisima Farm together with the deceased. PW3 further told the court that he learnt of the missing goats and sheep from the farm under the care of the accused persons and the deceased. Pw3 also stated that the management of Konoinua community began the process of searching for the whereabouts of the livestock within the area. PW3 further gave evidence that in the course of his duties he received information from pw1 that the accused persons have been under interrogation in regard to the missing livestock and also the disappearance of the deceased. It was on this basis that pw3 stated that he accompanied PW1, police officers and the Government Pathologist to the scene where the body of the deceased was being exhumed. PW3 confirmed knowing the accused persons as employees within the farm under the management of Konoinua Community Organization.

PW4 CPL Johanna Tanui testified as a Scenes of Crime Officer attached to Ongata Rongai Police Station. Detective Tanui stated that on 8th August, 213 in company of PW1, PW3, PW8 and the accused persons he visited Kisima Farm where he witnessed the exhumation of the remains of the deceased. Detective Tanui testified that he performed his routine duties of documenting the scene by taking various photographs. In his evidence the various photographs and certificate processed and prepared under his hand and authority were admitted in evidence in support of the prosecution case. The set of 22 photographs capturing the scene and certificate were admitted as exhibit 1(a) and (b) respectively.

PW5 Cpl Charles Charagu police detective attached to ole Kasasi police post in 2013 testified that while at the post he received a report from pw3 in regard to the confession of the 1st accused in connection with the death of the deceased. According to pw5 this information caused him to make arrangements for pw3 and other people of concern to visit the scene in order to verify the confession statement by the 1 st accused. On arrival at the scene pw5 told the court that they were shown the site of the grave in which the body of the deceased was allegedly buried. He then prepared a brief for his superiors for further action to be taken on the matter.

PW6 Kingsford Nyagah testified as the officer who was requested to record a charge and cautionary statement from the second accused. As a standard measure pw6 gave evidence that he complied with the provisions on Out of Court confession rules 2009. This he did by asking the 2nd accused whether he has been beaten, threatened, coerced or harassed prior to the time he was to record a statement. PW6 further stated that he explained the rights to the accused to remain silent and also right to legal representation. In answer to the statement PW6 testified that the 1st accused denied any knowledge on the killing of the deceased. PW6 further told the court that he recorded a statement from the second accused who gave a sequence of events since the report on the missing goats surfaced. It is in the charge and cautionary statement that pw6 gave evidence that the 2nd accused assigned the responsibility of looking for the goats to the deceased. That the conditions issued by their employer was either they produce the goats or be taken to court. That is when according to the pw6 evidence the accused recorded the statement indicating that the deceased decided to leave the farm. In the presence of 2nd accused he signed each page of the recorded statement followed by him countersigning together with the appropriate certificate as evidence on the charge and caution statement to be adduced in court. The sets of the charge and caution statement was admitted as exhibits 4(a) and 4(b).

The second witness the state summoned in connection with the recording of the charge and caution statement was **PW7 SSP Benson Kasyoki.** PW7 testified that prior to the recording of the charge and caution statement from the 1st accused he took him through the requirements/conditions precedent as provided for under Out of Court Confessions Rules 2009. Upon complying with the Rules PW7 told the court that the 1st accused voluntarily agreed to record the statement which he signed as evidence by endorsing its contents. The gist of the statements from the 1st accused as per PW7 testimony was to the effect that when they could not trace the goats and sheep they put pressure on the deceased. What transpired was to coerce him to give information so that they would find something to report to the immediate boss PW1.

According to PW7 the 1st accused blamed the 2nd accused for what befell the deceased as the principal perpetrator. That according to PW7 the deceased was assaulted and thereafter locked in the store for the night. In the morning they went to same store only to find him groaning in pain and bleeding from the nose. In his testimony PW7 asserted that the 1st accused denied that he participated in any way in inflicting injuries against the deceased but appeared to point a finger to the 2nd accused. The charge and cautionary statement so recorded by PW7

from the 1st accused was produced and admitted in evidence as exhibit 5.

PW9 - PC Stephen Manyiego a police officer attached to Ongata Rongai Police Station stated that on the 5th August, 203 he participated as a witness when the second accused recorded a charge and caution statement before pw6 Kingsford Nyagah. According to pw9 there were no peculiar circumstances. He further stated that upon completion of recording the statement from the second accused pw6 prepared the certificate which was dully signed by the accused and subsequently countersigned by him as a witness. He was able to identify the cautionary statement and the endorsement of his signature.

PW10 CPL Fredrick Ole Kamwaro who was one of the Investigating Officer told the court that after the preliminary investigations and admission by the 1st accused they proceeded to the scene in company of PW1, PW3, PW4, PW5, PW6 and PW8 to witness the exhumation of the remains of the deceased. According to pw10 the pathologist pw8 proceeded to the city mortuary where a postmortem examination was carried out resulting in the postmortem report exhibit 6. As an investigating officer armed with prima facie evidence on the cause of death he recommended a charge of murder of the two accused persons.

As an Investigator PW10 further testified the circumstantial evidence put together showed that accused persons participated in inflicting the injuries which eventually killed the deceased. PW10 also gave evidence that the recovery of the body in a grave within the compound at Kisima Farm was through information availed by the 1st accused. That in PW10 testimony the body was exhumed and a post mortem conducted by Dr. Johansson Oduor. The post mortem report issued and filled by PW8 positively demonstrated the injuries suffered by the deceased.

PW11 – was **PC Douglas Chege** whose testimony was in respect of his role as a witness in attendance when pw7 was to administer a charge and cautionary statement against the 1st accused person. According to pw11 this was manifested on grounds that the 1st accused on arrival at office to PW7 had no legal counsel nor relative to attend the recording of the statement as mandated by law. It was the testimony of pw11 that PW7 explained the rights available to the accused when recording a charge and cautionary statement. According to PW11, the 1st accused agreed to self-record the charge and cautionary statement. PW11 further acknowledged witnessing the statement by endorsing his signature to the statement.

PW12 Cpl. John Namuso testimony was substantially in line with that of PW5, PW9 and PW10 on the nature of investigations carried out and subsequent indictment of the two accused persons. PW12 testimony alluded to the motive of the offence to be the missing of goats and sheep placed under the care of the accused persons. According to PW12 there was mounting pressure from management of Konoinua community organization to have the accused provide information as to the mysterious disappearance of the livestock from the farm. In a way to deal with the issue PW12 told this court that the accused persons turned against the deceased who was alleged to be the shepherd to either produce the livestock or face the consequences. PW12 stated that it is through the intelligence information gathered which led to the accused persons being suspected as having a hand in the disappearance of the deceased. In further evidence by pw12 the two accused persons were later to give credible information to unmask the death of the deceased.

As eventually the information was to be verified a court order of exhumation was sought which established that the deceased body had been buried at the farm he stayed with the accused persons. In reference to the exhumation PW12 produced before court a certificate of exhumation dated 8th August 2013 and the mental assessment report for both accused as exhibit 8(a) and (b) respectively. In summary pw12 armed with background profile of the offence and subsequent events that followed he was of the firm view that the accused persons be arraigned before court in respect to the death of the deceased.

Defence Case

At the close of the prosecution case the accused persons were placed on their defence. The 1st accused elected to give a sworn testimony. He testified that on or about 21/2/2013 the goats and sheep in the farm where he worked were missing. The deceased who was the shepherd went to his house to seek assistance from him on what they could do together on this matter. The accused further testified that he thought it wise to report to the second accused who was their supervisor at the farm. After some lapse of time there was no recovery of the livestock only to receive a telephone call from PW1 to report at the headquarters with immediate effect. Prior to that telephone call the accused told this court that they agreed with the second accused to pursue the deceased with a view to obtain any information he may have on the issue. That is when they decided to apprehend the deceased for some interrogation.

Under cross-examination by the prosecution counsel the accused confirmed that Pastor Abrahm Thuo PW2 found them when they had arrested the deceased to extract any information as to the missing livestock. He denied any acts of assault or physical harm against the deceased. He denied any involvement to any allegations of injuries or death of the deceased.

Further in his defence the 1st accused submitted evidence from Dr. Peter Ndegwa, a pathologist with the department of Medical Forensic Legal Services. His testimony was aimed at supporting his defence however its admissibility was objected to by the prosecution for reason that Dr. Ndegwa was not part of the medical doctor who examined and prepared the postmortem report. In respect to this issue the court upheld the objection by the prosecution counsel.

The accused further testified that in the meantime he put pressure on the deceased to deliver on the recovery of the livestock. According to the accused that is when deceased started running away through a barbed wire to escape from the compound. That is how he sustained injuries to the head and eyes. The accused attributed this to a struggle between him and the deceased as he restrained him from taking flight before recovery of the livestock. The accused also made reference to PW2 testimony regarding the screams from the deceased. In his defence the accused stated that the injuries seen on the deceased by PW2 were as a result of the barbed wire and not due to the assault as alleged by the prosecution witnesses.

Further, the accused deposed that the deceased from that moment was never to be seen. This matter later became a police case in which

investigations as to his disappearance were commenced. He denied volunteering any confession statement on the alleged offence to the police.

He also stated that he met the 2nd accused person already in police custody. According to his evidence he learnt of the issue of the deceased body being buried within Kisima Farm from the 2nd accused

On behalf of the 1st accused Mr. Itaya Advocate submitted that the prosecution has not established the elements of the offence contrary to section 203 of the Penal Code. Counsel argued the only narrative the state relied upon is the testimony of PW2 Pastor Abraham who alleged he saw the deceased with the accused persons. Counsel further submitted that the fact he saw the deceased bleeding is not by itself nor sufficient to prove that he died from those injuries. Secondly, Counsel submitted that the prosecution failed to conduct a DNA analysis to establish the identity of the deceased given the circumstances that there was no known relative who identified the remains.

Defence by the 2nd Accused

James Otieno testified on his defence where he denied the evidence adduced by the prosecution implicating him in any way with the offence of murder of the deceased. Mr. Otieno admitted the fact that he was a supervisor at Kisima Farm where he also lived with the deceased and the 1st accused. It was his testimony that on or about 22nd February, 2013 he got information from the 1st accused that some of the goats kept within the compound had gone missing. Mr. Otieno further testified that as a supervisor he was under a duty from Pw1 and management to trace the livestock. That is how he came to discuss the matter with the deceased. Mr. Otieno told the court that it was in the course of interrogating the deceased on the missing goats that he attempted to flee through the barbed fence when he knocked himself against the wire. Mr. Otieno denied assaulting the deceased as stated by PW2. He stated that he continued talking with Pw1 on the basis that the goats and the deceased would be traced. Instead Mr. Otieno testified that he was to be arrested by the police on allegations that he had participated in killing the deceased an offence he completely denies his involvement.

Mr. Nyangaya for the 2nd accused submitted that the burden of proving all the ingredients of the offence rests with the prosecution. He argued and submitted that PW1 – PW12 evidence failed to prove the death of the deceased, his positive identity and the involvement of the 2nd accused person. Counsel observed that under section 206 of the Penal Code elements on malice aforethought or pre-meditation must be proved as a key element of the offence of murder. Counsel highlighted the evidence by the pathologist PW8 Dr. Oduor who was not able to tell exactly from which race the exhumed skeleton is attributable to in absence of any known relative present at the post mortem procedure.

He also took issue with the fact that the pathologist could not tell whether the remains was that of a female or male person. In addition, Counsel submitted and advanced the argument that the pathologist failed even to estimate the age of the skeleton exhumed for the court to draw an inference with the rest of evidence adduced from the prosecution witnesses. Counsel firmly contended that there was no proper evidence on identification of the skeleton remains to be that of Paul Njiri. He also joined in the submissions by Mr. Itaya for the accused that a DNA analysis would have settled the issue of identification. Pertaining to the threshold on circumstantial evidence Counsel relied on the cases of **Republic Versus Kipkering Arap Koske 1949 EACA 135** and **Sawe Versus Republic 2003 EKLR Republic Versus James Obungo Abel 2017 eKLR**. Counsel therefore urged the court to acquit the accused persons as the evidence against them borders on suspicion.

Mr. Akula for the state in reply submitted that the twelve witnesses summoned in support of the prosecution case proved the charge of murder beyond reasonable doubt. Counsel invited the court to note that the deceased was an orphan with no known parents or siblings and that is how he ended up at Konoinua community. The DNA analysis demanded of the state on the deceased body could not have been possible without samples from close relatives/or parents.

On the ingredient of malice aforethought Counsel relied on the evidence of PW2, the post mortem report PW8 and specific circumstances in respect to this case. He cited the provisions of section 206 of the Penal Code and the following cases **Republic Versus Godfrey Ngotho Mutiso 2008 eKLR, Morris Aluoch Versus Republic CR Appeal No. 47 of 1996. REX Versus Tubere S/O Ochen 1945 12 EACA 63. James Masumo Mbatha Versus Republic 2005 EKLR. Republic Versus Daniel Anyango 2005 eKLR.**

Further, Counsel submitted on the issue of motive being the missing goats and sheep under the care of the deceased. Counsel cited the case of **Libambula Versus Republic 2003 KLR 683** to infer motive that made the accused to hatch the plan to kill the deceased. Therefore, argued Counsel given the circumstances and the guiding principles on circumstantial evidence in the case of **Mwangi & Another Versus Republic 2004 2KLR** he invited the court to find that all ingredients of the offence are present to prove the charge of murder beyond reasonable doubt.

Analysis and Determination

On my part I have given due consideration of the evidence in totality, the submissions by both Counsel and cited authorities on the law in respect to the offence under section 203 of the Penal Code.

The question I ask myself is whether in all these the prosecutions has discharged the burden of proof beyond reasonable doubt against the accused persons?

In view of the nature of the case I propose to deal with each ingredient of the offence. To start with us of is to set out the doctrine on the standard of proof in Criminal Cases. Section 107 (1) of the evidence Act Cap 80 of the Laws of Kenya provides as follows:

> ***"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist"***

It is trite law that the burden of proof in any criminal proceedings such as the one facing the accused lies squarely with the state. The prosecution on behalf of the state has to adduce such evidence to discharge that burden. This is in line with the constitutional provisions under Article 50 2(a) which states that: ***"Every accused person is to be presumed innocent until the contrary is proved".*** To prove the contrary rests with the state.

The question on the standard proof in criminal matters was succinctly articulated by none other than Lord Denning in the case of ***Miller Versus Minister of Pensions 1947 2 ALL ER 372-373*** where he stated:

> ***"That degree is well settled. It needs 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 doubt but nothing short of that will suffice***"

From the above legal proposition proof of beyond reasonable doubt does not mean proof beyond iota of doubt nor is it proof to the hilt as stated by ***Lord Sankey in the case of Woolmington v DPP 1935 AC 462***

> ***"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"***

Going by the above principles it connotes the prosecution evidence which is of a convincing character to prove with certainty existence of a fact with no notion of alternatives. If there is doubt regarding the existence or non-existence of facts as provided for in section 107(1) of the Evidence Act with respect of the elements of the offence accused persons are to be discharged of any wrong doing.

That is the position the prosecution case would be tested and measured whether their case met the legal threshold. Section 203 of the Penal code under which the accused persons are charged defines murder as ***"Any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder."*** As stated in the case of **Republic Versus Andrew Omwenga 2009 EKLR**:

> ***"It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three main ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction"*** They are: (a)**The death of the deceased and the cause of death, (b)That the accused committed the unlawful act which caused the death of the deceased. (c)That the accused had malice aforethought."**

It is against this background that the evidence adduced by the prosecution would be applied to the facts of this case. In doing so a synopsis of each singular element is appropriate.

(a) Death of the deceased:

As stated in the case of **Rex Versus Munoya s/o Munyenye 1942 9 EACA**, death is at the heart of the offence of murder contrary to section 203 of the Penal Code. The prosecution must render evidence that of death of the deceased positively identified, causation and the circumstances in which it happened. In our jurisdiction the death of a deceased person is proved through medical evidence or by circumstantial evidence. In the case of **Kireweru Versus Republic 1968 EA** the court held interalia as follows:

> ***"That prove of death by circumstantial evidence must be such as to compel the inference of death and must be such as to be in consistent with any theory of the alleged deceased being alive." (See also Republic Versus Samson Kenel and Others in CR. Appeal No. 33 of 2004) on the legal proposition of circumstantial evidence which does not sufficiently establish the facts beyond reasonable doubt."***

In so far as this element of the offence is concerned this court received evidence from PW1 who stated that deceased used to work at Rangau Farm with the accused persons. He was last seen alive by PW2 Abraham Thuo on or about mid-February, 203 being assaulted by the accused persons. The body of the deceased was exhumed within the compound of Rangau Farm where he worked and stayed. Mr. Nyangaya contested the identity of the deceased body as that of Paul Njiri. He based his arguments on the fact that what was exhumed were just remains supposedly of a human being but in absence of DNA the element is not proved.

While evaluating the evidence of PW 2- Abraham Thuo, it showed that the accused persons were the last persons seen with the deceased. According to PW2 the accused persons had been assaulting the deceased before he screamed calling for help. The deceased was never to be seen alive until the exhumation of his body at the same farm. It had been sometime before the deceased body was discovered buried in a grave within the compound where he lived. The circumstantial evidence as to the death of the deceased is so cogent and reliable that outweighs any other hypothesis as to whose skeleton was retrieved from the grave. The chain of events from mid-February 2013 when pw2 saw the deceased and the accused persons up to the 8th August, 2013 when the exhumation took place has not been broken by any other intervening factors.

The post mortem report revealed in evidence by the pathologist Dr. Oduor (PW8) exhumed remains was that of a human being. It is significant to take note that Rangau Farm occupancy consisted of accused persons and the deceased as stated in evidence by PW1. The deceased was one such orphan which Kinonuia community maintained and cared for during his lifetime. The deceased had gone missing since mid-February 2013 until the mystery of his disappearance was unraveled and his remains exhumed from the very farm he spent most of his life. From the above the prosecution has advanced both the medical and circumstantial evidence to proof the death of the deceased. Unfortunately for the learned counsel Mr. Nyangaya, at the expiry of time within which the deceased was to have been found expired due to the concealment by the accused person.

In the situations above, undoubtedly section 119 of Evidence Act applies to the facts of this case to discharge the burden of proof that the skeleton exhumed was that of Paul Njiri.

(b) The second element is that of unlawful act of omission or commission.

The general principles of criminal responsibility constitute elements of *Mensrea* and *Actus Reus*. The *actus reus* is usually the unlawful act by an offender which occasioned the harm or commission of the offence. The prosecution is therefore under a duty in law to prove beyond reasonable doubt that the act or acts of the accused in causing death are unlawful. The constitution of Kenya 2010 under Article 26 provides that every person has a Right to Life. Under Subsection 3(a) ***"A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law***".

The substance of this principle falls within the ambit of the decision in the case of ***Guzambizi s/o Wesonga 1948 15 EACA 65*** *that* all homicides are presumed unlawful unless excusable by law either through natural death, self defence, property or in defence of a third party under imminent danger. Therefore, death within our borders is considered unlawful unless excusable by law either it occurred naturally, accidentally, in defence of self or property and or in any of the above exceptions when an accused person brings himself within the provisions of section 17 of the Penal Code.

Once the prosecution has presented evidence on unlawfulness of the death and identified the offender, the burden to rebut such circumstances under section 111 of the evidence Act shifts to such a person. The history of the *actus reus* in this case begins with the disappearance of goats and sheep kept at Rangau Farm.

The deceased was the shepherd who looked after the livestock under the supervision of the second accused. The management of Kinoinua community as evidenced by the testimony of PW1 came to know of the missing of goats and sheep from the accused. According to PW1 a demand notice was issued to the 1st, 2nd accused and the deceased to do what it takes in their power to search and recover the livestock.

It is indisputable that this did put pressure on the accused to transfer the same with equal force to the deceased as the shepherd. The breaking point of the pressure exerted upon the accused can be deduced from the testimony of PW2 – Abraham Thuo. On account of PW2 evidence he is a neighbour to Rangau Farm. PW2 told the court that he was able to see and identify three men involved in a fight. In particular, PW2 stated that the two accused persons were assaulting the deceased. His close observation was that the deceased had already suffered bodily harm which he intervened by cautioning the accused to stop further beatings. That was the last time the deceased was seen alive as properly documented from PW2 evidence. What followed after many months was a mystery as to his whereabouts together with the livestock placed under his control. As inferred from the testimony of **PW1, PW3, PW4, PW5, PW9, PW10, PW12** and **PW8** the remains of the deceased were to be exhumed in a grave within Rangau farm on information given by the accused persons. It is this same farm where pw2 saw him last alive crying for help from the beatings of the accused persons before court.

Turning to the incriminating evidence the prosecution produced the post mortem report prepared by Dr. Oduor PW8. On examination PW8 came to a conclusion that the cause of death was head injury due to blunt trauma. That confirms that the deceased died of unlawful acts of assault. In the circumstances of this case I hold that the accused persons engaged in unlawful and dangerous act which culminated in causing the death of the deceased. The test of such acts was articulated in the case of ***DPP Versus Newbury and another 1976 2 ALL ER 365*** where the court held *interalia* that: ***"Where death results from an unlawful act directed against the person involving a considerable risk of injury but which no reasonable man could fore see as likely to cause death or grievous harm."***

The test was further adopted by the court of Appeal in the case of **Joash Wandanda Okwiri Versus Republic CR. Appeal No. 83 of 1984** where the Justices said the following:

> ***"That an act is dangerous in the sense that a sober and reasonable person would inevitably recognize that it carried some risk of harm and in fact, that it caused death.*** (See also a book on Criminal Law by ***William Musyoka Reprint 2016 (Law Africa publishing at page 331).***

From the evidence an inference can be drawn that the missing goats and sheep under the care of the deceased triggered the unlawful act of assault by the accused. It is permissible to conclude that based on proven facts the accused to engage in this attack to extract information on the whereabouts of the livestock so that they can exonerate themselves from liability before PW1.

It is therefore relevant to also bank on motive as one of the key elements why the deceased had to be assaulted. In the case of **Libambula versus Republic 2003 KLR** the court of Appeal addressed the issue as follows:

> ***"We may pause, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. (See sections of the evidence act cap 80 laws of Kenya). Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence motive of course, may be drawn from the facts, though proof of it is not essential to prove a fact".***

Proof of motive adds to the weight and value of the evidence adduced by the prosecution witness (PW1). That the accused persons were actuated by a particular motive to assault and falsely kill the deceased.

As deduced from the events of Mid-February 2013 when PW2 saw the deceased in the company of the accused persons and the emerging evidence on 8thAugust 2013. The only rational inference that an accumulation of details obscures the point that accused persons are entitled to the benefit of any doubt. I therefore find that the deceased did not die out of natural causes as stated by the accused persons. It is clear that the struggle/fight seen by pw2 between the accused and the deceased escalated into infliction of serious harm which caused the death of the deceased. I am satisfied that on this element the prosecution has discharged the burden of proof beyond reasonable doubt.

(c) The final element to be considered is that of malice aforethought.

What is malice aforethought? Malice aforethought describes the mensrea or mental element of the offence of murder contrary to Section 203 of the Penal Code. This is a term that imports a notion of culpability or moral blameworthiness on the part of the offender. The circumstances that lead to an inference of a malice aforethought are defined under section 206 of the penal code as follows:

> ***"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 intention 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."**

It is trite that for the offence of murder the court or tribunal must be satisfied beyond reasonable doubt that it was committed with malice aforethought. In making a determination whether the case falls under section 202 or 203 of the penal code all what the courts are being asked to do is to weigh the facts of the case to distinguish the offence of murder with that of manslaughter. The provisions of section 206 of the Penal Code and the jurisprudence developed over time has grounded circumstances on manifestation of malice aforethought. The courts faced with interpretation of section 206 has laid down guiding principles in various decisions to establish malice aforethought in each particular case. In the landmark case of **REX V Tubere s/o Ochen 1945 12 EACA 63** the court held as follows on this issue:

> ***"That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it was used, the part of the body injured, the conduct of the accused before, during and after the murder."***

In response to this ingredient, the court in the case of **Republic Versus Godfrey Ngotho Mutiso 2008 eKLR, Morris AluochVersus Republic CR Appeal No. 47** of **1996 James Masumo Mbatha Versus Republic 2015 EKLR** summed up the law by making reference to the gravity of the injuries and how they were inflicted and by which weapon before, during and after the offence to infer manifestation on malice aforethought.

If the answer to the above is yes, then the prosecution would have proved beyond reasonable doubt the ingredient of malice aforethought. Unless the extent and the manner in which the murder was committed brings the facts of the case within the purview of section 202 of the Penal Code.

In the instant case the issue from the time PW2 saw the accused assaulting the deceased, the sole witness placed the accused at the scene of the crime. The incident took place at Rangau Farm where both the deceased and the accused persons worked. What happened from that moment was never to be known until the exhumation of the body under the voluntary information provided by the 1st accused. The body recovered was subjected to post mortem examination by PW8. In his considered opinion the deceased had sustained severe head injury due to blunt trauma. That evidence taken together with PW2 testimony corroborates the deceased death was due to physical harm. The perpetrators who inflicted harm were positively identified by PW2 who had the opportunity to engage in a conversation with the accused persons and the deceased.

PW2 was under the mistaken belief that his plea to the accused persons not to continue assaulting the deceased was received positively. To him it remained an act of assault until when police sought his statement on the matter about the deceased.

There is humble evidence from PW1, PW3, PW4, PW5, PW6, PW7. From which to draw a reasonable inference that the accused persons are the ones who buried the body at the grave where it was exhumed. The prosecution evidence by PW2 is cogent and credible that the deceased was assaulted by the accused persons prior to his death. As if that was not enough his body was secretly buried to conceal the death from any other third party. It also emerged from the prosecution case from the two accused persons led to recovery of the body in a grave located at Rangau Farm.

This to me was a common enterprise executed by the accused persons jointly and severally in committing the offence. In support of this I rely on the provisions of section 21 of the Penal Code which provides:

“Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its circumstances were a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.

In the case of **Njoroge Versus Republic 1983 KLR 197** the court held as follows on the principle of common intention:

> ***“If several persons combine for an unlawful purpose and one of them in the persecution of it kills a man, it is murder in all who are present whether they actually aided or abated or not provided that the death was caused by all of someone of the party in the course of his endeavors to effect the common object of assembly”***

Similarly, as regards the cause of death the evidence on record sufficiently proves that the deceased died from blunt injuries to the head. There is direct evidence from PW2 on the deceased and accused being together. The deceased cried for help from the pastor (in the following call “**Pastor Wananiua**. The inference is that the deceased was facing imminent danger from the unlawful acts of the accused persons. The extent of the injuries was not known to PW2 at that time when he went to intervene. Again, PW8 who carried out the post mortem examination on the body of the deceased opined the cause of death to be the head injury.

My attention was drawn to the evidence of pw6 on the charge and cautionary statement dated 7th August, 2013 adduced from the 2nd accused person and admitted in evidence as exhibit 4(a) and (b). Further the prosecution evidence from pw7 who admitted a charge and cautionary statement from the 1st accused person which was admitted as exhibit5. The charge and cautionary statement by the 1st accused tallied as to the respective role played by each of the accused from the time PW2 saw them with the deceased. In the statement by the 1st accused notwithstanding the denial of any role played he principally blames the 2nd accused for the continuance acts of assault in which the deceased succumbed to death. In his self-recorded statement, the 1st accused implicates the 2nd accused as the master mind behind the murder and in a way exonerates himself from the injuries suffered by the deceased. There is consistency from the evidence of PW1 and PW2 that the accused and the deceased lived together at Rangau Farm. It is this same farm PW2 saw the deceased being beaten by the two accused persons whom he positively identified in court. There is a common inference of the two accused persons referring to the deceased person taking flight from the farm and subsequent restraining him from leaving. Both of the accused had an interest in the recovery of the goats and sheep.

The genesis of the attack is known to be the missing goats and sheep. There is no other evidence to break the chain that from that fateful day when PW2 saw the deceased alive. For the deceased to succumb to the injuries the action of the accused must have been clearly violent and used excessive force. The outcome was the death of the deceased. The accused defence and their respective submissions did not rebut any of the elements of the prosecution case, on last seen theory and subsequent exhumation of the body.

While I have considered the statement under inquiry as recorded by the 1st accused sets out the frame on how the deceased met his death. The provision of law was well stated in the case of ***Anyumba S/O Omato and Charo Nyakong v. Republic 1953 EACA 218*** where the court held interalia that under Section 32(1) of the evidence Act ***a confession by a co-accused may be taken into consideration as against the accused and the substantive question is each case is what weight can properly be given to it***.

The statement recorded by the 1st accused does not offend Section 26 of the Evidence Act it was recorded in compliance with Section 25A of the Act as supported by the testimony of pw7 an officer above the rank of a Chief Inspector of Police. I would observe that in this case there is corroboration of the facts stated by the 1st accused in his statement against the 2nd accused. Furthermore, PW2 stated that the accused persons continued to drag and assault the deceased as it appeared from his screams. The nature of the injuries which eventually caused death are as tabulated in the postmortem of pw8.

The 2nd accused did not rebut the allegations levelled against him by the 1st accused. The doctor’s evidence clearly shows that the wounds inflicted were caused by a brunt object with some force. As emphasized by the 1st accused though the murder weapon was not recovered the injuries inflicted are consistent with the piece of wood mentioned in his statement. The respective contents of the charge and cautionary statement by the 1st accused is therefore admissible in evidence as against him and the 2nd accused.

This is not a case where merely PW2 saw the accused persons and the deceased together. There is cogent evidence that at the time they were assaulting the deceased. In the instant case the last seen narrative by PW2 and exhumation of the body and behest of the accused persons’ sets in motion, circumstances which lead to an appropriate inference by this court that no third person murdered the deceased except the accused persons. I have scanned the charge and cautionary statement by accused 1 it’s a statement which was made voluntary and out of free will. It does support with clarity to the other chain of circumstantial evidence adduced by the prosecution witnesses.

On my part I find no fatal defects in the manner the statement was recorded by the 1st accused to render it inadmissible.

In the case of ***Gopa and others v the Queen 20 EACA at page 318*** the court took this approach on the admissibility of a statement against a co-accused where it held as follows:

> “***The confession of a co-accused is intended to be used to corroborate and even to supplement the evidence in those exceptional cases in which, without its aid, the other evidence falls short by a very narrow margin of that standard of proof which is required for a conviction. There must be basis of the subsistence evidence to which a confession or substance may be added. If there is substantial evidence against the accused and there remains some implying doubt, the confession may be taken into account to set the little doubt at rest”***

As at the time of the attack on the deceased there is no evidence that the 1st accused was just a bystander to the unlawful acts of the co-accused. There was consistency of a common intention and joint enterprise making them jointly liable for the offence of murder. A reading

of all the evidence including the alleged cautionary statement from the 1st accused leaves this court with no reasonable doubt that it could be the true account of what took place on the night of 20th and 21st February, 2013.

In my approach the case for the prosecution as it stands on circumstantial evidence shows that the facts explainable goes to one logical inference that accused persons jointly and actively participated in the murder of the deceased Paul Njiri. The different pathways taken by the accused in their defence has not been able to exonerate them from culpability and liability for the charge of murder as preferred by state. In my view I safely reject each of their respective defences.

I am satisfied that the accused persons avoided specifically to answer to any material facts within their own knowledge as to where the deceased went with effect from 20th February 2013 as provided for under Section 111 and 119 of Evidence Act. The violence used against the deceased was in furtherance of an intention to kill or do grievous harm. In the definition of malice aforethought under section 206 (a) and (b) of the Penal Code the Prosecution evidence has met the requirements of the code. In the execution of the murder by the accused persons' medical reports on mental fitness sufficiently precludes any evidence that they suffered from any infirmity not to appreciate the wrongfulness of their acts or inability to conform their behavior to the requirement of the law.

Whatever omission or breach the deceased may have committed as a shepherd of the livestock could not have warranted the heinous, cruel and depraved nature of the crime committed against the deceased.

One of the key building blocks of evidence that permeates this case is circumstantial evidence. Those principles were set out in the case of **GMI v Republic [2013] eKLR** which echoes the locus classicus case of **Republic v Kipkering Arap Koske & another, 16 EACA 135…** In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of **Musoke v Republic [1958] EA 715** citing with approval **Teper v Republic [1952] AL 480**, thus:

> ***"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

As conveyed in the analysis of the evidence above there is firm and consistent evidence from PW1, PW2, PW3, PW6, PW7, PW10 and PW12 for the accused persons to be placed at the scene of the crime. The accused persons and the deceased were admittedly in an altercation prior to his death. There is credible and cogent circumstantial evidence that after the killing accused persons did not stop there but secretly dug a grave and buried the deceased. His absence remained to be treated as a missing person in contrast with the evidence that the accused persons had knowledge of his whereabouts.

I am of the view that the testimony of the accused persons failed to weaken or destroy the inference of guilty on their part from the overwhelming circumstantial evidence from the prosecution witnesses. It is also my finding that the accused persons in causing death did so with malice aforethought with an intention to have the body of the deceased completely decompose without any traces of identity.

In those circumstance I am satisfied that the burden of proof for the offence of murder contrary to section 203 as punishable under Section 204 of the Penal Code has been properly discharged in this case beyond reasonable doubts. Accordingly, I convict the accused persons pursuant to the provisions section 203 of the Penal Code.

Sentencing hearings and verdict

John Kimanzi Moingo and James Otieno Ochieng after full trial you have been found guilty and convicted of the offence of murder contrary to Section 203 of the Penal Code. I thereof sentence you of the offence. It was alleged by the state that the two of you and the deceased lived and worked at Rangau Farm under the management of Konoinua Community organization. In the farm besides farming there is also livestock keeping of goats and sheep. According to the prosecution evidence from the administrator one Harrison Ochiya, it was reported in early February, 2013 that some of the goats and sheep had gone missing. As agents and employees of Konoinua Company you were tasked to search and recover the livestock. This apparently never bore fruits. What transpired was for the two of you to put pressure on the shepherd herein identified as the deceased to either produce or show the whereabouts of the goats or face your wrath.

This coercion and intimidation came to be reflected when pastor Abraham Thuo – PW2 a neighbour to Rangau Farm saw you assaulting the deceased. The deceased was never to be seen alive from that day forward. The missing of the deceased from the farm and prior disappearance of the goats and sheep was a matter under active investigation by the police. The facts of the case taken together with the twelve witnesses for the state and your defence supported an inference in which this court entered verdict of guilty and conviction. This is the offence I am about to pass sentence.

Mitigation

Mr. Itaya for the 1st accused

Mr. Itaya submitted that you are a first offender and also an orphan. Further you are barely 28 years old and married to one Lucy Wambui and blessed with one child. Mr. Itaya urged this court to take into account the favourable pre-sentence report to consider a non-custodial sentence.

Mr. Nyangaya in mitigation for the 2nd accused

The second accused is a young man aged about 35 years old married and blessed with two young children under the age of 15 years old.

These young children need the care and support of the accused who is the main bread winner. The accused as seen from the pre-sentence report is said to be of good character and behavior both to his family and the community. Mr. Nyangaya further asked the court to factor in the aspect that the accused is remorseful and regrets the offence. As such he prayed for leniency and probably a non-custodial sentence.

Mr. Akula Submissions on behalf of the state

This court should take into account the gravity factors that committed the death of the deceased. However, he confirmed that he has no previous record of any of the accused persons. In his petition Mr. Akula submitted that the objects of crime law is to punish crime and consequently he prayed for death penalty.

I have considered the mitigation, pre-sentence report and remarks by the senior prosecution counsel for the state. The offence of which you have been convicted falls within the death penalty as provided for under Section 204 of the penal code. What has changed pursuant to the Supreme Court decision in the case of ***Francis Karioko Muruatetu & Another v Republic 2017 eKLR*** is out lawing the mandatory nature of the sentence as earlier enacted by parliament. Unlike in the past mandatory death sentence which takes away the courts discretion in sentencing under Section 204 of the penal code is therefore unconstitutional. However, it is the important to point out that death sentence is still lawful to be passed against any offender exceptional circumstances of each case.

The starting point for me in this case is the constitutional right to life provided for under Article 26 of the constitution. The same Article emphasizes that a person shall not be deprived of life intentionally except to the extreme authorized by this constitution or any other written law. In your case both counsels have favourably submitted on mitigating features like intention, lack of premeditation, the number of years the case has taken to complete, your good character, remorse and regret for the offence, your age and role as breadwinners for your respective families.

However, there are aggravating factors in this case: The violent behavior perpetuated against the deceased considering you shared a common bond as orphans at Konoinua community.

The disagreement on the missing goats and sheep which was instrumental in conceptualizing acts of violence committed against the deceased were found to have been impulsive but ended up in rage associated with fatal injuries. On this offence, the manner of killing was outrageously and wrongfully executed when you deliberately locked the deceased in a store without any duty of care that he deserved medication and other basic necessities. The unlawful confinement after bodily harm to the vulnerable part of the body was intended to kill or maim he deceased. There is also gross breach of trust on your part against the deceased whom you had known as co-worker at the farm for quite some time. The element of tragic ivory which manifests malice aforethought was the fact that you concealed the murder or your own selfish interest and went ahead to a great extent to secretly bury the body within the compound where you both lived. There is therefore a mismatch from the personal and community circumstances captured by the probation officer and the malice exhibited in execution of the murder against your fellow co-worker.

From the facts of the case on account of the prosecution evidence this was one of the coldest blooded murder in which the deceased was killed and his remains buried without the knowledge of the employer or anyone else within the community. Your conduct and behavior having enjoyed the humane coupled with hospitality from the Konoinua community places this death to be one of the rarest all cumulative factors taken into account.

In sentencing you for this offence the supreme Court in **Muruatetu v Republic 2017 eKLR** did express views that mandatory death sentence in terms of section 204 is circumstantial. In view of this decision it is contended by the law that an award of sentence for the offence of murder be considered in the context of discretion but bearing in mind various factors to determine that an accused person is to be punished with death penalty or any other appropriate sentence.

In your case there are numerous factors that I have outlined above which imperatively places the facts of this case within the category for offence committed under extenuating circumstances. The gravity and brutality of the offence remains the common thread of your actions.

In considering the appropriate sentence, I would have no hesitation to impose the maximum penalty of death sentence. However, in tangible terms, the absence by the executive to have death row inmates executed after completing the appeal process remains in the realm of the unknown. The execution of death penalty has therefore experienced acquiesced moratorium for over 30 years now where its effectively void and death row inmates' sentences commuted into correctional facilities to serve life imprisonment. There is no indication that the country is ready to resume execution of capital punishment against any of the offenders in the near future. The maximum sentence for the offence of murder as provided for in section 204 of the Penal Code would not be available for you in view of the position I take in this matter.

As stated in our sentencing policy guidelines there are various factors to be considered in determining the appropriate sentence: Rehabilitation and reform of the offender, deterrence which provides the public some level of protection, retribution which aims to fulfil the aspiration of criminal law to punish crime. After weighing the aggravating and mitigating factors and in consonant with the principle in **Muruatetu Case** the approach I take is that of punishing this crime by imposing a sentence of life imprisonment against each one of you under section 204 of the Penal Code. *14 days right of appeal granted.*

Dated Signed and delivered in open court at Kajiado this 25th day of June, 2018.

………………………….

R. NYAKUNDI

JUDGE