



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO 32 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JAMES SIOYI KIPKANIA.....1ST ACCUSED

GEOFFREY MAKANA NYAUNDI.....2ND ACCUSED

JUDGMENT

1. **James Sioyi Kipkania** (hereafter the 1st Accused) and **Geoffrey Makana Nyaundi** (hereafter the 2nd Accused) were jointly charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars in the Information are that on the night of 19th and 20th July 2013 at Kagaa area Kiambu County, jointly with others not before the court, they murdered **Bernard Irungu Kirubi** (hereafter the deceased). The accused persons denied the charges and were both represented by Mr. Nyakundi.

2. The prosecution case was as follows. The deceased was a brother to **Michael Mathenge Kirubi (PW2)** and **Sebastian Chege Kirubi**, among others. Apparently, the deceased lived and carried on some business ventures in Kayole area, and also had some dealings with the two accused persons, starting in 2013. Sometime in mid-July 2013, the 1st Accused complained to **PW2** that the deceased had failed to pay him money owed in respect of some business deal. **PW2** intervened by meeting the two parties who squabbled over the alleged debt. Earlier **PW2** had sent some KShs.9000/= to the 1st Accused. The money was allegedly given to him by the deceased for onward transmission to the 1st Accused. It appears that the 1st Accused and the deceased thereafter resumed relations.

3. On the evening of 19th July 2013, at the request of deceased, **PW2** drove the deceased's vehicle **KAS** or **KAX 972s** from Kayole to Ruai where the deceased was, arriving early in night. The deceased informed **PW2** that he had some business at Thika with persons the witness discovered later were the two Accused persons. Hence the duo drove to Thika. Upon arrival, the deceased placed a call to the 1st Accused who came after a few minutes in the company of the 2nd Accused. The four men then proceeded to a restaurant/bar christened "Image Pub". After a while, the deceased and the Accused persons left the pub using the deceased's vehicle, ostensibly to pick up some person at 1.00 a.m. **PW2** stayed behind awaiting the deceased. He moved to a pub called Rwambogo for a drink.

4. About 2 hours later the 1st Accused allegedly called **PW2** and informed him that the deceased had stolen some KShs.200,000/= from the two accused, and that they intended to kill him and set his car on fire. **PW2** attempted to negotiate with the 1st Accused to no avail. At about the same time, a neighbour to the deceased, **Patrick Mburu Kimani (PW3)** received a similar call. The call was allegedly made from the telephone line registered to the deceased. The witness identified the voice of the caller as the 2nd Accused whom he knew as "Jeff" as he had met him and his co-Accused through the deceased.

5. The deceased was not seen alive again but his vehicle was found abandoned by Flying Squad Officers from Makuyu, including **PC Isaiah Wanyama (PW5)** early on the morning of 20th July 2013. It was parked by the roadside, a few kilometres from Kenol area. Meanwhile **PW2** and other relatives mounted a search for the deceased. At about 9.30 a.m. on 20th July 2013, Makongeni Police Station at Thika received a report of a body discovered lying at Kabuku farm from **Ngati AP Post**. **CPL John Ngunga (PW6)** accompanied **IP Wanjala** and others to the scene and after it was documented, removed the body.

6. The family of the deceased were notified on 23/7/13. They identified the body as that of the deceased. Post mortem examination was carried out by **Dr. Eunice Mugweru (PW1)** on the next day. She concluded that the cause of death was severe head injury secondary to blunt force trauma. Police commenced investigations which led to the arrest of the Accused persons in January 2014. Subsequently an

identification parade was conducted by **CIP Samuel Mbaabu (PW9)** on 2nd January 2014 at the request of **PC Fycosam Muthui Mbelenge (PW10)**. It is alleged that during the said parade a cousin to the deceased, one **Titus Mwai Kiruga (PW8)** identified the two Accused as persons he had seen in the company of the deceased on 19th July 2019 at Kayole. Police obtained call data from the telephone service providers in respect of the two Accused and the deceased in the cause of investigations, which data revealed communication between the Accused persons and the deceased in the material period. The Accused were then charged.

7. **Ngugi J** who heard the prosecution case in full ruled on 2nd August 2018 that both Accused persons had a case to answer, and subsequently when the matter was placed before me on 3rd October, 2018, the defence indicated to proceed with the defence. Both the accused persons elected to make sworn statements but did not call witnesses.

8. For his part, the 1st Accused testified that in the material period he resided at Makongeni, Thika and was employed at Delmonte Thika. He was categorical that he did not know the deceased but knew **PW2** with whom he transacted in the sale of second-hand appliances. That on 14th July 2013 he had placed several calls to **PW2** to demand KShs.10,000/= which he owed him, arising from a certain transaction involving sale of hair driers. That **PW2** paid him KShs.9000/=. He said that he had never visited Kayole and that he neither met the deceased nor **PW2** at Image bar on 19th July 2013. He stated that he met the 2nd Accused for the first time in police cells following his arrest on 1/1/14.

9. The 2nd Accused testified that he operated boda-boda motorcycle taxi and lived at Kiganjo, Thika during the material period. He said he did not know or transact with the deceased or **PW2** at any time. He claimed that prior to the identification parade he and his co-Accused were photographed by the same persons who subsequently attended the parade as witnesses.

10. The defence and prosecution tendered written submissions. The defence attacks the identification parade held by **PW9** as faulty and the evidence unworthy of credit. More so as the witness at the parade (**PW8**) did not supply a prior description of the two men to the investigators. The defence relied on the case of **Fred Machoka v R (2016) e KLR** in that regard. Regarding the telephone data, the defence took issue with the fact that **PW2's** call data was not tendered and asserted that evidence of mere communication between the deceased and Accused persons was not proof of the substance of the communication, and that at any rate **PW10** who tendered the data was not an expert.

11. The defence highlighted certain inconsistencies in the prosecution evidence including testimony by **PW2** and **PW8** as to the location of the deceased early on the night of 19th July, whether Kayole or Thika, the failure by **PW2, PW3** and **PW4** to promptly report to police despite allegedly receiving calls indicating that the deceased was in danger.

12. The prosecution, reiterating evidence at the trial submitted that death and cause thereof through an unlawful act had been established. Further that the prosecution evidence proved malice aforethought on the part of the Accused and connected them with the murder of the deceased.

13. The court has considered the evidence on record and submissions by the respective parties. As regards the fact of the death of the deceased, there is no dispute, nor is there any dispute as to the cause of death. He died of severe head injury due to trauma. This, and the fact that his vehicle was found abandoned by the road-side in Makuyu some distance from the farm where the body was found, clearly demonstrate that his killers intended to conceal the body and the murder, and that he died a violent death.

14. There can be no doubt that whoever inflicted the head injury intended to cause death to the deceased. Section 206 of the Penal code provides that:

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 nor not

b. Knowledge that the act or omission causing death will probably cause 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 harm is caused or not, or by a wish that that it may not be caused.”

14. The issue that is in dispute in this case is the identity of the persons or person who inflicted the fatal injuries on the deceased, or in other words, whether of malice aforethought, the Accused persons jointly caused the death of the deceased. The prosecution, evidence tending to connect the Accused persons with the act is primarily circumstantial, there being no eye witness to the actual murder.

15. The prosecution relied on three key related strands of evidence that is, by **PW2** and **PW8** regarding dealings and disputes arising therefrom between the Accused persons and the deceased several days prior to the murder; evidence by **PW2** that the last persons to be seen on the 19th July 2013 in the company of the deceased were the Accused persons; and evidence of demands, allegedly made to **PW2, 3, 4** by the Accused on the night of the murder.

16. The principles applicable in dealing with a case where the prosecution case rests on circumstantial evidence are settled. In **Joan Chebichii Sawe -Vs- Republic** the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that:-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the

prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

This passage captures the principles pronounced in the timeless decisions on circumstantial evidence, namely **Republic - vs Kipkering Arap Koske [1949]16 EACA 135** and **Simoni Musoke -Vs- Uganda (1958) EA 715**.

17. In **Musili Tulo -Vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of **Kipkering Arap Koske and in Musoke’s case**. In **Tulo’s case**, the courts restated the principles as follows:-

“i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

18. The Court went on to state that:

”In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke -Vs- Republic [1958] EA 715 citing with approval Teper -Vs- Republic [1952] A.C. 480 thus:

“It is also necessary before drawing the inference of the Accused’s guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference.”

19. Of relevance to the joint charge herein are the provisions of Sections 20 and 21 of the Penal Code. Section 20 provides in Subsection (1) that:

“(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”

20. Regarding common intent Section 21 provides:

“When 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 commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

21. In this case the common intention, or *mens*

- ? (1) ?There must be two or more persons;
- (2)?The persons must form a common intention;
- (3) ?The common intention must be towards prosecuting an unlawful ??purpose in conjunction with one another;
- ? (4) An offence must be committed in the process;
- ?(5) ?The offence must be of such a nature that its commission was a ???probable consequence of the prosecution of the unlawful

24. Bearing the foregoing principles in mind the court will proceed to analyse the evidence and to determine whether the prosecution has discharged the burden of proof beyond reasonable doubt. Regarding prior dealings between the Accused persons and the deceased, and disputes arising therefrom, the evidence by the deceased's brother **PW2** was that the deceased and both Accused persons had since early in 2013 been involved in business dealings. He alluded to trade in liquor and oil but the exact nature of the business itself was not very clear. The witness stated that he had met the deceased in the company of the Accused persons on several occasions, and in particular, on 14/7/13 or thereabouts, for the purpose of resolving a dispute over some money which the 1st Accused claimed the deceased owed him and his co-Accused, relating to business transactions between them. He said that he had sent some KShs.9000/= to the 1st Accused to settle the issue. This payment was admitted by the 1st Accused who, however asserted that his dealings were with the witness **PW2** and not the deceased whom he claimed, like his co-Accused not to know.

25. During lengthy cross-examination of **PW2** the defence did not suggest to the witness that indeed the payment was made by **PW2** because he, and not the deceased, was involved in dealings with the Accused. Moreover claims by the 1st Accused that he did not deal with or know the deceased, his co-accused or deal with the deceased cannot stand in light of the call logs tendered as exhibits by the prosecution. The defence indicated no objection to the production of the logs and related evidence by **PW10** at the trial on 5/6/18. In my view, it is too late in the day for the defence to raise new challenges concerning the call data records at submission stage. Besides, whether or not **PW10** was an expert was not put to the witness during cross-examination; and moreover, once produced as exhibits the data set speak for themselves in so far as recorded calls are concerned. There was no suggestion that the data set was false or fabricated.

26. The logs produced as **Exhibit 3B, 3C and 3D** bear the particulars of the subscribers to the respective telephone numbers and calls going in and out of the said number in the material period. The evidence shows that the 1st Accused's telephone number was 0721556479; the 2nd Accused's No. 0702119388 while the Deceased's number was 0716266321. The particulars of the subscribers in **Exh. 3C and 3D** correspond with the particulars of each of the accused person contained in identification reports **Exh. 4B and 4B** obtained by **PW10** from the National Registration Bureau. The reports bear among other details, the full names of the holders of identification card numbers in the call data logs, home particulars and even the photographs of the identification card holders. I agree with the defence however that the prosecution ought to have also tendered call data in respect of **PW2's** registered phone number. The omission however does not in any way diminish the value of the call logs tendered with regard to the two Accused and the deceased.

27. The court has carefully perused the logs **Exhibit 3B, 3C and 3D** and also related testimony by **PW10**. A comparison son of the call logs in respect of the deceased (**Exh. 3B**) and the 1st Accused (**Exh. 3C**), reveals that between 17th July 2013 (9.07a.m.) and 19th July 2013 (22.45) the deceased had communicated with the 1st Accused through 33 calls (both outgoing and incoming). Whereas I appreciate the defence submissions that the call logs do not reveal the substance of this communication, the inescapable fact is that the 1st Accused's assertion that he did not know the Deceased cannot be true. These logs indeed confirm the evidence of **PW2** as to the existence of a relationship albeit mysterious between the 1st Accused and the deceased.

28. The same call logs (**Exh.3C**) indicate that the 1st Accused had in the same period communicated through at least 11 calls (incoming and out going) with his co-Accused. For some inexplicable reason the call logs **Exh.3D** in respect of the 2nd Accused relate to a period earlier than July 2013 i.e. 11th January 2013 to 11th May 2013. Even so, the said call logs reflect at least 14 calls (incoming and outgoing) between the two Accused in the latter period.

29. And even though the call logs **Exh.3D** does not reflect any calls between the 2nd Accused and the deceased in that particular period (January to May, 2013) the deceased's log for the period between 17th and 19th July 2013 (**Exh. 3B**) reveals that on 18th July 2013 at 11.55 a.m. the deceased called the 2nd Accused from the location indicated to be **5677 Kayole Sokoni – BNK**. Interestingly, the 2nd Accused had an hour earlier (at 10.44) called the 1st Accused, speaking with him for 69 seconds. Thereafter, the 1st Accused communicated at least 5 times with the deceased between 12:14 hours and 14:12 hours. From the log **Exh. 3C**, it appears that while the 1st Accused's call with the 2nd Accused at 10.44 hours was made at location **ECOO 47 Thika – Makongeni East OUTB – BNK**, the 1st Accused's subsequent calls are located to Kahawa, Ruaraka, Kangundo Raod, Kayole Section 1, Thome was Kahuti and eventually back at Thika Makongeni at 19.11 hours. Of particular note, calls made/received by the 1st Accused on 18/7/19 between 13.15 hours and 14.32 hours are principally within location **589 Kayole Section 1 OUT – BNK**.

30. According to the Deceased's call log, (**Exh. 3B**) his calls to and from the 1st Accused on 18/7/13 started at 12:14 with deceased at **Kayole – Sokoni BNK** resting with the one at **14:12** from the 1st Accused received at location **Kayole Section 1** at 19.39 hrs. Notably, comparing **Exh. 3C and 3B** after the 14:12 hrs call received by the deceased while at **Kayole Sokoni**, the subscriber's location remained the same until 14:35 hrs when calls were received/made at location described as **5689 Kayole Section 1 BNK** for the rest of the day, while the 1st Accused's call log (**Exh. 3C**) shows that calls received/made from 13:57, to 14:32 including two to the deceased at 13:57 hrs and 14:12 hrs were located at **Kayole Section I OUTH – BNK** moving eventually to Thome Wa Kahuti and back to Thika Makongeni at 19:08 hrs. So that absent an explanation for this movement of the same gadget **IMEI** No.35663058373600 used in respect of 1st Accused's line

throughout, the 1st Accused's assertion that he had never been to Kayole cannot stand.

31. Given these records, it may be possible that **PW8** indeed met the deceased arguing with some men on 18/7/19 and not on 19th July 2019. PW8 despite claiming to be a journalist or reporter appeared to have scanty attention to detail. His evidence was punctuated by uncertainty as to details such as time, registration number of vehicle owned by of the deceased and dates. In my view, this witness was not so much an untruthful witness as a man devoid of any serious attention to detail. So that even his purported identification during an identification parade some five months later of the two men he allegedly saw with the deceased on 19th or 18th July, 2013 cannot be taken seriously.

32. Reviewing the evidence of **PW2** and the call logs **Exh,3B, 3C** and **3D**, and the admissions made by the 1st Accused, I accept the evidence by PW2 that indeed the two Accused persons were known to the deceased and related with him concerning some business, which had in recent days caused a dispute in which the witness had to intervene and admittedly paid some money to the 1st Accused. The assertions by the two Accused to have not known the deceased or dealt with him, and for the 1st Accused never having been to Kayole are patently false, and are displaced by the prosecution evidence.

33. Moving now to the presumed night of the disappearance and murder of the deceased, **PW2** narrated his interaction with the deceased in the afternoon of the material date, resting with the journey, in the company of the deceased from Ruai to Thika. His testimony was that the Deceased informed him that **"the people he was doing business with had called him for a deal"**. Thus he needed to travel to Thika. That the witness drove the deceased's vehicle arriving at Ruai at 7.39 p.m. or so, and subsequently drove to the rendezvous at Thika where the Accused persons joined them. Again, the exact nature of the business is shrouded in mystery. Nonetheless the witness was firm in his evidence that as the night wore on, the three men (Accused persons and deceased) got up to go ostensibly to collect an unidentified person, leaving the witness at Image Pub.

34. This meeting is disputed by the two Accused persons. First of all, **PW2** was questioned at length during cross-examination concerning this incident. From his testimony, the two Accused joined the witness and deceased shortly after their arrival at Thika and the men had tea at Image Pub before they left, at 1.00 a.m. or thereabouts. The witness was unable to give a very elaborate description of the clothes worn by the two Accused persons on that night, but as admitted by the 1st Accused, the witness knew him prior. The witness also gave evidence that he had met both Accused persons several occasions before his deceased brother having introduced them to him. Once more, the call logs in respect of 19th July 2013 are useful. The deceased's call records (**Exh. 3B**) indicate that the Deceased's calls after 17:41 are located at **Koma Rock** when he had received the second SMS messages from the 1st Accused and been on six calls with him on that date. By 19:05 the deceased calls were located at Njiru and thereafter at Ruai, and eventually Thika town at 22:41. From 19:01 to 22:45, no less than 9 calls were exchanged between the Deceased and the 1st Accused, resting with the call at 22:45, the last between them on that day.

35. The call data **Exh. 3C** shows that from 21:38 right up to 22:45 when the deceased placed a call to him the 1st Accused's location was at **Gathuthu house OUTB BNK** which is also the location of deceased's calls at 22.45 hrs only changing at 23:07 hrs to Delmonte Thika **BNK** From 23:18 the 1st Accused's data reflects the movement of call location as follows:

23:18 hrs Thika – Delmonte

23:20 hrs Thika – Murathe Plaza

23:24 hrs Thika Murathe Plaza

23:26 hrs Thika Delmonte

1:12 hrs Mitubiri OUT – BNK

36. The movement of location of the calls by Deceased from 22.45 are as follows:

22.45 hrs Gathuthu huse – call to first Accused

23:07 hrs Thika Delmonte

23:48 hrs Thika Delmonte

0:55 hrs Mitubiri Road

0:55 hrs Mitubiri Road

0:57 hrs Mitubiri Road

0:58 hrs Mitubiri Road

0:59-1:25 hrs Gatunyaga

1:25 hrs Mitubiri OUT BNK

37. These locations are significant and especially the last one – Mitubiri – because according to **PW6** and **PW10** officers attached to Makongeni police station and Thika DCI respectively, the body of the deceased was found at Kabuku farm, within Mitubiri area. And according to **PW5** the Deceased's vehicle was abandoned at Makuyu some 2 km after Kenol trading centre. The call at 1:25 p.m to the deceased's line appears to be the last received call as it is followed by 13 forwarded calls from 11:49 hrs on 20/7/19 to 21.52 hrs on 23/7/19.

38. Earlier on in the night of 19/7/19, the 1st Accused had placed two calls to the 2nd Accused at 21:13 hrs and 21:17hrs from location **ELO 332 Thika Kiganjo – OUT B** the caller apparently having moved there from Thika Makongeni. The call data of the 2nd Accused though not concerning the material dates in July 2013 reveals that calls on his number were almost invariably located at area described as **ELO 332 – Thika Kiganjo OUT B**. The 2nd Accused stated that he lived at Kiganjo Thika in the material period and denied that he knew the 1st Accused. What then is the explanation for the two calls placed by the 1st Accused to his number from a location within his residence on the night of 19th July 2013? Is it possible that having received the calls he accompanied the 1st Accused to Thika to meet the deceased at Image Bar? What reason would **PW2** have to falsely implicate a man he did not know at all in the disappearance and subsequent death of his brother?

39. It is true as the defence submits that **PW2's** reluctance to report to the police immediately he sensed that the deceased was in danger was questionable. **PW2** explained that he was confused at the time and did not believe that the Accused persons would harm his brother. I think the real reason may lie with the nature of the 'business' in which the 3 men were involved – all indications are that it was dubious. I will advert to this question presently in considering the third strand of evidence against the Accused person. Nevertheless, having reviewed evidence by **PW2** on the incident at Image bar I am satisfied that the witness had opportunity to recognize the two Accused who were already known to him, and that the two men left prior to 1 a.m. in the company of the deceased who was not seen alive thereafter. The call records **Exh.3B, C and D** in my view tend to confirm the evidence by **PW2** concerning the events of the fateful evening.

40. In distancing themselves from the deceased's murder both Accused persons asserted, quite falsely, that they neither knew him nor interacted with him on any dealings. They further asserted that they did not know each other until their arrest on 1/10/14. These statements as shown by the respective call logs (**Exh. 3B, C and D**) are patently false.

41. On the evidence of demands allegedly made to **PW2, PW3 and PW4** by the Accused persons on the material night, to the general effect that, the deceased owed or had taken their KShs.200,000/= and that if this sum was not paid the Accused persons would kill the Deceased and burn his vehicle, the prosecution's failure to tender call records of **PW2, 3 and 4** as well as their respective telephone numbers greatly diminished its value. While it is true that a total of 7 calls were made from the Deceased's phone to the phone number **0702391520** between 0.59 and 1.25 hrs [see **Exh. 3B**] and whereas 3 calls were made to phone number **0727201286** from 0:59 to 1:21 (**see Exh. 3B**), with an additional call from the latter number to the 1st Accused at 1:12 hrs, being one of several calls from and to the 1st Accused's line around that time, no effort was made to link any of these numbers with the witnesses **PW2, 3 and 4**. There is hardly any credible evidence therefore that the Accused person having left Image Pub in the company of the deceased subsequently demanded, what on all accounts, was ransom money on pain of death.

42. Moreover **PW2, 3 and 4** did not deem it important to notify the police about the threats. That is curious in my view and possibly points to what **PW8** adverted to and what can also be gleaned from an examination of the evidence of **PW2** and indeed the 1st Accused. The business in which the Accused persons and deceased were allegedly involved in is shrouded in vagueness: oil, liquor, appliances. The person who came closest to revealing the truth on that aspect was **PW8** his poor recollection of events notwithstanding. He said the deceased was associating with bad or dubious persons in the material period. Perhaps it was known to the witnesses that the 'business' between them was not legal or was even criminal hence the reluctance by **PW2, 3 and PW4** to involve police or be involved themselves.

43. Whereas if proven the alleged demands and threats to kill by the Accused would have provided useful corroboration of other evidence tending to implicate the deceased for the murder, its failure is not fatal to the prosecution case, in my view. By and large the said evidence appeared to advert principally to motive, an ingredient not essential in proving murder. In a criminal case where the prosecution relies on circumstantial evidence, motive, though not essential in proving a crime, becomes an important element in the chain of presumptive proof.

44. As stated by the Court of Appeal in **Libambula V Republic (2003) KLR 683**:

“We may pose, 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 Section 8 of the Evidence Act). Motive becomes an important element in the chain of 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 crime.” (Emphasis added)

45. In this regard, the court takes into account the partially admitted evidence of **PW2** in connection with events at Kayole on or about 14th July 2013 only five days prior to the murder. The Accused persons had complained that the deceased had reneged on some deal and failed to pay them. The exact sum demanded is not known, but it is admitted that some KShs.9000/= was sent to the 1st Accused, the evident prime actor in that respect. On 18th July 2013, the 1st Accused was back in Kayole according to call data and during some parts of the afternoon in the same location with the Deceased and contacting him on phone. He has claimed that though employed at Delmonte as a watchman he was doing the business of selling appliances such as hair driers. On 18th July alone 6 calls were exchanged between the 1st Accused and deceased. Two were with the 2nd Accused.

46. On 19th July, a record 16 calls were exchanged between the 1st Accused and deceased and 4 of them between the two accused. The data shows that the deceased left Kayole late in the evening, to Ruai and eventually to Thika, where both Accused resided. In this scenario, it is believable that the deceased may have been lured to Thika for purposes other than the ostensible business, and when he appeared in the company of **PW2**, was coerced or tricked to leave the meeting point, never to be seen alive again.

47. The Accused persons have been shown to be the last persons seen in the company of the deceased on the material night, when he was last seen alive. They deny this in their respective defences and assert falsely that they did not even know the deceased. The deceased's body was found within proximity of Thika town early on the morning of 20/7/13, only hours since leaving Image Pub in the company of the Accused persons. His bludgeoned body was dumped in an area close to Thika town while his vehicle was abandoned at Makuyu near Kenol township, which is not very far from Thika town.

48. **Lesiit J** in her decision **R v. Nicholas Ngugi Bangwa (2015) e KLR** relied on the Court of Appeal case of **ERNESTABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990**, where the Court had observed that:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect” (emphasis added).

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.

49. In these circumstances, the proven inculpatory facts appear incompatible with the Accused's innocence in the death of the deceased, there also being no co-existing circumstance to weaken such inference. In their defence the Accused persons have put forth false and incredible statements incapable of belief, namely that they did not know or deal with the deceased, or know each other prior to arrest, or in the case of the 1st Accused had never visited Kayole in the material period, nor met the deceased and **PW2** in Thika town on the night of 19th July. These obviously false statements have substantive inculpatory effect. This court, upon a thorough review of the evidence is satisfied that the two Accused persons, lured the deceased from Kayole to Thika town and thereafter led him away to his violent death at Mitubiri area on the same night.

50. Although it appears from the evidence that the 1st Accused person acted more as the prime mover of the entire criminal transaction, the 2nd Accused was also equally involved and common intent can be inferred from his conduct as emerges from the prosecution evidence by **PW2** and data logs; and augmented by his evidence and the putting forth unbelievable and false denials and statements to the court. The court is satisfied that the prosecution has proved the charge facing both Accused persons beyond reasonable doubt and convicts both of them accordingly.

DELIVERED AND SIGNED AT KIAMBU THIS 26TH DAY OF SEPTEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

1st Accused person

2nd Accused person

Ms Ndombi - DPP

Ms Gichuhi holding brief or Mr. Nyakundi for the Accused

Court clerk – Kevin/Nancy