REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 29 OF 2015

REPUBLIC...APPLICANT

VERSUS

1. WILFRED KARANJA MUNGAI..........1ST ACCUSED

2. SAMUWEL MUCHIRI SIRONKA.......2ND ACCUSED

JUDGMENT

Wilfred Karanja Mungai and Samwel Muchiri Sironka hereinafter referred as the 1st accused and 2nd accused respectively were arraigned before court charged with the offence of murder contrary to section 203 of the Penal Code.

The particulars of the offence are that on the night of 5th and 6th day of September 2013 at about 2.00 a.m. at Birika trading Centre in Kajiado North District, within Kajiado county jointly murdered John Muriithi Nkonge. Each of the accused denied the offence. The 1st accused was represented at the trial by learned counsel Mr. Sekento while Mr. Mureithi represented the 2nd accused person. The state case was conducted by Mr. Akula, the senior prosecution counsel.

I now proceed to review the prosecution and the defence evidence adduced at the trial with a view of arriving to some conclusions.

The prosecution called a total of ten (10) witnesses it was the prosecution case though the testimony of PW 1 Maurice Mwiti Ngunya – that on the night of 5th and 6th September, 2013 he heard noises referred as thief, thief. At the same time screams followed calling out the name of Mwendwa, he further told the court that he went outside to check the source and location of the voice and screams. That is when pw 1 stated he came into contact a man by the name Sam whom he identified as the 2nd accused standing next to another one on the ground. In the evidence of pw 1 the man on the ground was not talking. Pw1 further told the court that they 2nd accused offered to go and call the police. He was able to observe that the man lying on the ground was bleeding from the mouth and nose as sign that he had suffered physical harm. Pw 1 was to be called later to record a statement with the police on the events he witnessed regarding this incident.

The next witness was Lawrence Kinyua, the Government Analyst based at Nairobi. According to pw 2 on 13th September, 2013 he received an exhibit memo and sample of exhibits – from pw10 Cpl Stanley Gichuru of Isinya Police Station. The request from pw 10 was accompanied with Blood Sample indicated as of the deceased, liver sample of the deceased, a beige trouser and blue jacket of the deceased as of the accused Samwel Muchiri, a white cap indicated as of the 1st accused Wilfred Karanja Mungai. This witness stated that on performing the DNA profile the blood stains on the trouser of the indicated as of the 2nd accused matched both the DNA profile generated from the owner/blood sample of the deceased. Pw 2 further confirmed that blood stains on the blue Jacket indicated as of the 2nd accused matched the DNA blood sample of the deceased. On the Other hand pw2 stated that the cap indicated as of the 1st accused failed to generate any DNA profiles. The analysis report was produced as exhibit 1(b)

Pw3 Cpl. Virginia Wanjiku a Gazetted Scenes of Crime Officer visited the scene with other police officers on 6th September, 2013. At the scene pw 3 testified that she saw the deceased body lying on the ground with signs of blood oozing form the mouth, ear and nose. She also observed a white cap with letter P and a building block of stone. It was further pw 3 evidence that she also was shown a green paper bag containing food staff and other groceries. She was therefore to document the various views of the scene into photographic impressions. The bundles of photographs numbering twenty five (25) of them were produced as exhibit 6A together with the certificates as exhibit 6B.

Pw 4 Eliud Nkonge the father to the deceased gave evidence as to his participation in identifying the deceased body to the pathologist who performed the postmortem.

Pw5 Elosy Kathumbi also gave evidence. She testified that while in the house with her husband pw1 they heard strange noises outside calling

Mwendwa; Mwendwa. As they ventured outside although it was dark pw5 stated that she saw accused 2 standing under some electricity lights with another person groaning in pain while lying on the ground. On the day in question pw5 told the court that when they came closer to the person standing next to electricity lights he explained that the person had been killed by a Kikuyu. It was further pw 5 evidence that the person whom they met is the 2nd accused person. According to pw 5 the following day the public had gotten information of the incident. When they gathered in conjunction with the police officer the 1st accused was arrested from his house as a suspect to the murder of the deceased.

Pw6 Zackary Mugambi testified that in the night of 5th and 6th September, 2013 he was woken up by a person he refers as Sam to provide a bed sheet. The request for the bed sheet was to cover the deceased who had been killed and was lying on the ground near the corner. According to pw6 he did not see nor venture out to the scene but he gave out the bedsheet to Sam. Pw 6 further told the court that he waited until the early hours of 6th September, 2013 to visit the scene where he saw the victim with visible injuries and next to the body was a building block of stone.

Pw 7 Apc Samuel Ratemo who was among the 1st responders to the scene also testified. He stated that while at the AP. Camp his boss APC Cpl Juma had received a report on a crime of a murder incident from the 2nd accused. Under instructions with Pw 9 Cpl Wycliffe Juma they proceeded to the scene. While at the scene Pw 7 noticed the deceased body lying in a pool of blood and a stone next to the body. In the course of the conversation pw 7 stated that it was agreed that his friend pw 6 be sought for to assist in any other way to unravel the murder. Pw7 further gave evidence that he proceeded went pw6 house together with the second accused where the first accused was arrested as a possible suspect. While pw 7 was still on the scene he conducted some investigations which led to the mention of the name of the 1st accused as a possible suspect.

In the house of the 1st accused pw 7 stated that he collected a white cap, a green paper bag containing food stuff and groceries suspected to have a link with the offence.

Pw 8 Dr. Kevin Chesoni a pathologist at Kajiado District Hospital gave evidence on behalf of Dr. Khan who examined the deceased body and found the following extensive injuries: Obvious distortion of face with face flattened, fracture of the Mandible and Maxilla, Skull fracture, Subdural of interior skull fossa with internal brain hemorrhage, bruise on right leg at mid-level of anterior aspect. Pw 8 concluded in his report admitted as exhibit 10 that the cause of death was severe head injury with base of skull fracture.

The testimony of PW 9 Cpl Wycliffe Juma was in material similar with that of pw7 APC Samuel Ratemo.

Pw 10 Cpl. Stanley Gichuhi testified on what action was taken when a murder complaint was made to the station. According to Pw 10 evidence the initial report was booked at APC Camp Birika where pw 7 and pw 9 visited the scene and effected arrest against the 1st accused person. Pw 10 further testified that he interviewed several witnesses, arranged for the postmortem to be carried out, the scene to be documented by pw3 Cpl. Wanjiku by way of photographic impressions. It was the testimony of pw 10 that after the testimony extracts of the blood sample, and trouser of the deceased were taken to the Government analyst for toxicology analysis. In the report forwarded by pw 3 he found a connection with the blood stains in the items taken from the 2nd accused. He further deposed that a green bag containing some food stuffs and groceries said to be that of the deceased was recovered from the 1st accused house by PW 7. This he took possession and formed part of the evidence to support the stated case.

He produced both documentary and physical exhibits as evidence itemized as one white cap exhibit 4, Blue Jeans exhibit 5, Building Block Exhibit 7, Hand written statement exhibit 11 (a), typed copy of Felista Mirikalis statement exhibit 11 (b), Sketch map exhibit 12. The investigating officer caused the charge of murder be preferred against the two accused persons.

At the close of the prosecution case each of the accused was placed on his defence. The 1st accused recounted the details of the incident on the fateful day. On such highlights was the aspect of his whereabouts in the evening hours of the 5th September, 2013 at Check Point Bar enjoying beer with other patrons. Secondly the 1st accused further deposed that in the course of the night there was a commotion and creating disturbance between the 2nd accused and other customers. This made the owner of the bar and self to order them out of the bar instead of escalating the disturbance. He denied that he was at the scene where the deceased was allegedly killed. According to the 1st accused there is no evidence from the state witnesses implicating him with the offence before court.

The second accused also testified that in the night of 5th and 6th September, 2013 he spent most of the time drinking in various bars. The accused further told the court that one such bar visited is called Check Point. In his evidence the accused alluded to the purchase of groceries/food stuffs he had done earlier and were in his possession all along. The accused admitted having a picked a quarrel with one Young while at Check Point bare but the deceased intervened and separated them. He also stated that this incident happened in the presence of the 1st accused and other customers. It was further his testimony that he exited the bar in company of the 1st accused. According to the accused he started to look for motorcycles or watchmen to walk him home. It was at that time he handed over his green bag containing groceries to the 1st accused as he looked around for somebody to escort him. According to the 2nd accused when he failed to get help from a boda boda rider or person, he parted ways with the 1st accused person. The accused told the court that before leaving he heard some noises which made him to go back. On arrival he stated that he met the 1st accused and the deceased fighting. He states further that his attempts to separate them fell on deaf ears that is when he saw the 1st accused pick a block of stone and hit it against the deceased who consequently succumbed to death. In his evidence realizing the deceased was injured he started to seek police assistance. However when the investigations were completed he was jointly charged with the offence he denies committing.

In the final submissions Mr. Sekento learned counsel for the 1st accused filed written submissions and urged the court to find that the case against him has not been proved beyond reasonable doubt. Mr. Sekento appraised the totality of the evidence relied upon by the prosecution in which he contended that there is no evidence that 1st accused caused the death of the deceased on his part. Learned counsel Mr. Muriithi for the 2nd accused in his written submissions contended that there is no lota of evidence implicating the accused with the commission of the

offence. He relied on the evidence of the prosecution witnesses PW1, pw5, Pw 7, Pw 9 to buttress his argument that the conduct of the second accused is such that he did not participate in killing the deceased.

Mr. Muriithi further contended that the prosecution evidence both direct and indirectly is not enough to sustain the offence of murder charge contrary to section 203 of the penal code against the second accused. In his arguments Mr. Muriithi submitted that in the evidence there is no sufficient connection between the death of the deceased and the acts of the second accused. His prayer was for this court to be guided by the plausible defence of the accused and order for his acquaintance. He pointed out that there was no witnesses who saw the second accused at the scene beating the deceased.

Mr. Akula, learned senior prosecution counsel for the state submitted that the prosecution has had before court evidence beyond reasonable doubt to prove the elements of the offence of murder contrary to Section 203 of the penal Code. Mr. Akula relied on the evidence of the prosecution witnesses Pw 1 – Pw 7 to support the state position that the burden of proof has been discharged as regarded under the law. Mr. Akula relied on the following cited authority in support of the position taken by state in his submissions. ***Republic v Godfrey Ngotho Mutiso 2008 eKLR, Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 , James Masomo Mbatha v Republic 2015 eKLR, Republic v Daniel Anyango Omoyo 2015 eKLR, Libambula v Republi 2003 KLR 683.***

Analysis and determination

I have examined the evidence by the prosecution, defence by each accused and submissions filed in court on behalf of the prosecution counsel and both counsels for accused person.

We are dealing with the crime of murder as defined under Section 203 of the Penal Code. It is this offence the law requires of the state to proof beyond reasonable doubt as articulated in the case of ***Miller V Minister of Pensions [1947] ALL ER 372 at 373*** in the case of Lord Denning stated as follows on the standard of proof:

> **"*The degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail 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 of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.*"**

In the present case the prosecution must prove the following elements against the accused persons jointly and severally beyond reasonable doubt, that the 1st accused or 2nd accused solely committed the offence or jointly they purposed to murder the deceased.

> **a. The death of the deceased John Muriithi Nkonge.**
>
> **b that his death was unlawfully caused.**
>
> **c. That in causing death the accused persons had malice aforethought.**
>
> **d. Finally the accused persons before court participated in killing the deceased.**

In this regard I shall proceed to consider each ingredient of the offence to establish how the prosecution faired in discharging the burden of proof.

Death of the deceased

In the offence of murder the prosecution must prove as an essential element that the victim is dead. It is also essential to prove that it was homicidal in nature either by way of direct or circumstantial evidence.

In seeking sufficient proof the prosecution usually relies on the evidence of a pathologist who examined the deceased and prepared a post mortem report.

For as the court emphasized in the case ***of Republic v. Chieya & another 197 3 EA 500, Benson Ngunyi v Republic Cr. Appeal No. 171 of 1984 and Ntaroka v. Republic 1976 – 1985 EA 433***, where the courts addressed the importance of the person who play a role in the post mortem exercise, the person identifying the body for postmortem purposes, the police officers involved in the matter and the compelling circumstantial evidence to infer homicidal death.

In the instant case PW1 Maurice Mwiti one of the witnesses who was the 1st person to arrive at the scene deposed that on the fateful night he saw the body of the deceased lying on the ground.

This was in response to screams of **thief, thief** heard of the night.

PW3 Virginia Wanjiku a Gazetted Scenes of Crime Officer placed before court photographs which she documented in the scene of crime comprising the deceased body and a block of stone next to it.

PW4 – Eliud Nkonge the father of the deceased deposed that he saw the dead body of his son at the mortuary bed. In the testimony of Dr. Kevin Cheson the aforesaid deceased person was examined on 10th September, 2013 by Dr. Kanyure and the postmortem report exhibit 10

established that the deceased sustained dislocation of the face, injury to the left mandible, eye blow, right eye, bruise on the right leg, sunken face, fracture of the mandible, Maxilla, skull fracture and as a consequence internal brain hemorrhage. It is not in dispute that the deceased person was positively identified as John Mureithi Nkonge by the prosecution witnesses.

There is no mistake or doubt as who is the victim of murder in this trial. The cause of death was established as per the opinion in the orthoepy's report exhibit 10. The prosecution has therefore discharged the burden of beyond reasonable doubt on this ingredient.

(b) The next element that has got to establish is that of unlawful death.

In Kenya a person commits the offence of murder when he kills another human being without lawful justification the unlawful acts will be the ones aimed at causing grievous harm or death. Some of the instances where causation and manifestation of death together with culpability of the accused have been defined under Section 213 of the Penal Code.

In order to sustain the element of unlawful acts the prosecution must establish that the deceased was alive prior to the incident and that it was due to the accused unlawful acts which caused the death. This is consonant with the 2010 constitution which provides under Article 26(1) for the right to life for every person. Further in Sub section (3) it states "***a person shall not be deposed intentionally of his life save in the advancement of the law or in circumstances prescribed by this constitution or any other written law."***

Death in Kenya is excusable in situations like for the defence of self or any other person from imminent danger, for the defence of properly or in prevention of a person escaping from lawful custody or in execution of a Penal sentence. In the case of ***Guzambizi Wesonga v Republic 1948 15 EACA 65*** the court buttressed this constitutional and statutory provisions that all homicides are unlawful unless excused by law.

The general circumstances in our law on causation of death are as outlawed in Section 213 of the penal code has been illustrated in various case law. In the diction by ***Lord Purker, C.J. in Republic v Smith 1959 2 ALL ER 193*** as follows: ***"That the time of death the original wound is an operating cause and a substantial cause then, the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating only if it can be said that the original wound is merely the setting in which another court operates can it be said that the death does not result from the wound"***

It does not appear from this decision that the prosecution must not only show that the deceased was wounded but the accused acts of omission or commission caused the death. I would add that the deceased death must be traceable to the injury inflicted by the accused.

In reference to the above element PW1 Maurice Owiti, was the first person to be awakened by the screams. In his observation the deceased was on the ground and another man identified as the second accused standing not far away from the body. PW6, PW7, PW9 and PW10 also were called in and in visiting the scene confirmed the deceased having suffered physical harm and bleeding from parts of the body.

The nature of injuries are as at confirmed from the photographs taken by PW3 the Scenes of Crime Officer. The postmortem report presented by Dr. Kevin Chesoni on behalf of Dr. Kunyuri showed a correlation between the injuries and the cause of death of the deceased.

In response to the screams the police from Birika Police Station who testified as PW7, PW9 and PW10 were shortly alerted and managed to reach the scene. It was at the scene where PW1 saw the deceased lying down. They confirmed that he had sustained physical body harm and next to the body was a block of stone herein admitted as exhibit 7. In answer to this evidence the 2nd accused blamed the 1st accused for the death of the deceased. On the other hand the 1st accused pleaded an *alibi* defence to exonerate himself from the scene. He relied also on the negative DNA analysis on the cap recovered from his house as stated in the alleged report exhibit 1(b).

According to the 1st accused he admitted to a disturbance likely to cause a breach of peace to have happened in the bar did involve the 2nd accused and other customers. He however denied that it escalated into a physical fight. In the defence of the 2nd accused this killing of the deceased occurred immediately they left the bar for their respective homes. He further explained that as he was looking for a motor cycle or a watchman to walk him home he saw the 1st accused pick a block of a stone and using it to hit the deceased. In the circumstances and facts of this case the accused persons engaged in a fight with the deceased on the fateful night. The screams in their fight and quarrel attracted the attention of PW1 and PW5 who individually reached the scene. It is the same scene where they saw the deceased body lying down in the ground and the 2nd accused standing not far away from it. From the investigations conducted the 2nd accused had purchased some foods and groceries. This groceries and foodstuffs found their way into the 1st accused house in a scanty chain of events not alluded to by the 1st accused.

The inference I draw from the evidence from the prosecution and the rebuttal testimony by both accused persons is that there were no other intervening factors which set in to exonerate them as the ones who inflicted the fatal injuries

I find that the prosecution has discharged the burden of proof that the death of the deceased was unlawful.

(c)The elements of malice aforethought

It is now well settled that the prosecution must prove beyond reasonable doubt the *mensrea* of the offence what commonly so referred to as the intention. The purpose is to establish that the offender in committing the crime was fully aware of the consequences likely to be caused by his unlawful action. Where the charge is murder malice aforethought as a key ingredient ought to be proved by the prosecution. In particular this elements distinguishes murder from other homicides when a human being has been killed.

In order for malice aforethought to manifest itself in any facts of a specific case such circumstances have been defined under Section 206 of

the Penal Code in the following passage: (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 in 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 grievous bodily harm is caused or not or by a wish that it may not be caused***

As stated in the case of ***Bonaya Tututi ipu v. Republic 2015 eKLR*** the court held that reliance aforethought is the *mensrea* for the offence of murder and its presence of absence of it is the determinant factor for the offence defined under Section 203 of the Penal Code.

The intention or knowledge element on the part of the accused must manifest itself and established by the evidence proving an intention to cause death or to do grievous harm to another human being (see also ***Paul Mwangi Ndungi v Republic 2011 eKLR*)** The interpretation and guiding principles on what constitutes malice aforethought undersection 206 of the Penal Code has been widely conserved in various case a sample of which I cite to establish whether this case there is malice aforethought. The court of appeal in Eastern Africa in the case of ***Republic v Tubere S/o Ochen 1945 12 EACA 63*** said:

> ***"That malice aforethought can be inferred from the facts of the case considering;' the nature of the weapon the manner in which it was used to inflict the injuries, the part or parts of the body targeted, the evidence of the accused before, during and after the offence"***

This landmark case imports words such as the nature of the murder weapon to differentiate between lethal and other basic tool like a stick or cub or human fists. Secondly, the nature and gravity of injuries which caused the death by an unlawful act.

In ***James Masomo Mbatha v Republic 2015 eKLR, Godfrey Ngotho Mutiso 20008 eKLR, Asami Baire Abang alias Onyango v Republic CACRA No. 32 of 1990 and Republic v Daniel Onyango, Orenyo v Republic 2015 eKLR*** the court discussed the pertinent question of a lethal weapon the brutal killing and presence of multiple wounds and injuries against the deceased as positive indicator that the death was accused with malice aforethought. It suffices to show as held in the case of ***Republic v David Anyango (supra)*** That the prosecution duty is to establish existence of any one of the circumstances as defined under Section 206 of the penal code to show that the accused had malice aforethought in causing the death of the deceased.

This is the test I will apply to the instant case. The genealogy of this offence seems have started with the creating disturbance which allegedly occurred in Check point bar where the two accused persons and the deceased were enjoying a social evening. It emerged from the evidence that after creating the disturbance incident the three of them left the bar presumably to their respective homes.

In the late hours of the night pw1 and pw5 neighbors to the scene heard screams and they became the first responders to this incident. Indeed in pw1 evidence he saw a person on the ground who had sustained injuries and bleeding from the nose and mouth. He also noticed the second accused standing under an electric light not far away from body. In the same scene pw1, pw5, pw3 pw7 and pw9 were called in they also confirmed the injured person and next to him a building block of stone a building block of stone. The postmortem report does fortified that the deceased suffered multiple injuries. The main cause of death was the severe head injury with accompanied with skull fracture.

The question to be answered is whether this court using the murder and nature of injuries should bring this case within the extreme of malice aforethought. The answer to me depends on the direct or the circumstantial evidence adduced by the prosecution.

As the facts and the evidence presented itself the accused persons and the deceased appear to have spent part of the night together at Check Point Bar and other bars drinking alcohol. It is accepted by this court that direct evidence as to the occurrence offence is not found in any of the prosecution. What pw1 and pw5 alluded to was purely circumstantial evidence. Pw1 came to the scene after the fact. The person who picked the stone from its location to hit the deceased between the two accused two accused persons did not come out clearly from the prosecution evidence.

The possibility of what must have happened is found in the defence testimony of the 2nd accused. It is stated by the 2nd accused that the fight was between the1st accused persons and the deceased and that is how the fatal injuries were inflicted.

The general principles of law is that intent or *mensrea* can be emaciated by mental infirmity, heat of person or provocation, in defence of property or oneself under reasonable belief of being in serious acute danger. It is also admissible under Section 207 as read with Section 208 of the penal code that where there was adequate provocation to warrant the use of excessive force on the victim the law recognizes it as a mitigating factor.

In the case before me there is undoubtedly circumstantial evidence to show death, unlawful acts, opportunity to cause death against the deceased, but the *mensrea* component for murder is insufficient. In arriving at this finding I draw inspiration from the dictum in the case of ***Nzuki v Republic 1993 KLR 171*** where the court of Appeal held: "***That not every case where serious injuries have been conflicted that malice aforethought should conclusively be said to manifest itself."***

The state of mind of the two accused persons at the time of commission of the offence did not come out clearly from the prosecution evidence. This does not lessen the legal threshold the element of malice aforethought.

What the prosecution has proved beyond reasonable doubt is that the two accused persons armed themselves with a heavy building block of stone, the voluntarily and recklessly aimed it on the head of the deceased on the head in total disregard of the consequences that may result.

The unlawful acts has manifested in the evidence from the postmortem report the deceased person was hit severally and more significantly on the venerable part of his body being the head which was completely shuttered. This was a dangerous act with foreseeable consequences of causing grievous harm.

I therefore find doubt as to the existence of malice aforethought in execution of the murder by the accused persons against the deceased.

(d) Identification of the accused persons as the one who caused the death of the deceased.

I would state from the onset that the outcome of this case started with the voice and screams heard by pw1 Mauarice Mwiti and pw2 Elosy Kathumbi. When the two got out to the scene they visually identified a man who came to be charged as the second accused. It was this accused person who on inquiry answered pw1 and pw5 that the deceased has been killed by a Kikuyu. The presence of the 2nd accused person having been at the scene was also confirmed by pw6, pw7, pw9 and pw10.

Bearing in mind the principles regarding visual identification an accused in the case of ***Republic v Turnbull 1976 ALL EA 132*** it is credible to hold that the second accused in all circumstances was positively placed at the scene. The prosecution further placed before court pieces of evidence by pw6, pw7 pw9 and pw10 on the conduct of the second accused running around to inform the police and a friend about the death of the deceased. In answer to whether he was involved in the death of the deceased the second accused shifted blame to the 1 st accused as the culprit who fought with deceased and inflicted total harm.

When considering the evidence of an accomplice it is the duty of the court to evaluate and examine the entire evidence in its totality to decide on its credibility.

As stated in the cases of ***Republic v Manlal Purohit 1942 EACA 58 and Republic v Taibali Mohammed 1943 10 EACA 60*** the court held as follows: ***"What is required is that there should be independent testimony corroborative of the accomplice in some material particular implicating the accused or tending to connect him with the crime which he is charged. The principle is that if an accomplice is so corroborated not only may that part of his evidence which is corroborated be relied on but also that part which is not corroborated"***

In the instant case according to the testimony of pw7 APC Samuel Ragira and PW7 CPL Wycliffe Juma in the wee hours on the 6 th September, 2013, they were approached by the 2nd accused at their police camp and informed that they 1st accused has assaulted and fatally injured the deceased. The evidence by PW 7, PW9 and PW 10 further revealed that a polythene paper containing assorted foodstuffs and groceries admitted in evidence as exhibit 8 were recovered from the 1st accused house. This property belonged to the second accused. The inference a draw from this circumstances is that the two accused persons parted ways after committing the offence.

The DNA profile conducted by the Government Analyst PW2 involving the 2nd accused white trouser exhibit 2, and his blue Jacket exhibit 3 marched the DNA profile generated from the liver/blood item marked as A1 and A as that of the deceased. The evidence of pw1 and pw5 further confirmed that the 2nd accused appears to wholly lay blame on the 1st accused as the sole perpetrator of the crime.

The record shows from the evidence of pw7, pw9 and pw10 the second accused apparently seemed to be exonerate himself from culpability as to the death of the deceased, while on the other hand the 1st accused on causation and blame-worthiness shifts the burden to the 2nd accused. The 1st accused on his part relied on an alibi defence. This court has tested the alibi defence against the prosecution evidence and comes to a conclusion that the 1st accused was at the scene of the crime when the deceased was assaulted.

In the light of all the evidence I believe the prosecution and the indictment of the two accused person's falls within the threshold of Section 20 and 21 of the penal code on criminal liability.

With regard with section 20 an accused person is said to be an aider or an abettor to an offence if through acts of omission or commission, counsels or procures, aids or enables another person to commit the offence.

Section 21 of the penal code is of significance and it states:

> "***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 such purpose, each of them is deemed to have committed the offence"***

It is important to note the words of Section 20 and 21 as to the knowledge of the joint offenders of probable consequences of the action and the doctrine of the common intention.

Having set out the events leading to the death of the deceased and immediately thereafter the conduct of the two accused persons there is prima-facie evidence against each of the accused as having been jointly involved in the murder of the deceased. This is in accordance with the decision of the court of appeal in the case of ***Njoroge v. Republic 1983 KLR 197*** where the court held: "***If several person corroborate for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of assembly:***

When I weigh both the circumstantial evidence and the defence in totality it points to the presence of the two accused persons being at the scene one has to evaluate the prosecution evidence which places the 2nd accused at the scene *visaviz* the defence he gave in resultant. The defence by the 2nd accused dwelt at length on how he searched for a Motor Cycle rider to take him home. Secondly, he confesses that when he missed to secure one, the second alternative was to look for a human being to walk him home but none was available.

It is also his defence that in a short while as he walked home he heard some noises and screams which caused him to return back. He however, further reveals that the 1st accused was one of the last persons he parted ways with on this fateful day. The question which arises if

indeed he was walking to his house why he left his groceries to the 1st accused. The groceries ended up being recovered from the 1st accused house at the time of his arrest. The presence of DNA profile in the jacket and trouser of the 2nd accused cannot be said to be that of a bystander in the commission of the offence. On his part accused gave a detailed narrative and basically relied on alibi defence.

As set out in the case of ***Okeith Okate & Others v. Republic [1965] EA 555*** the burden of proof of cases of like the ones facing the accused persons is on the prosecution and it is the duty of the trial judge to look at the evidence as a whole.

According to the decisions from the cases of ***Bernard v Republic EA 206, Rephael v Republic 1973 EA 473 473*** and ***Victor Mwendwa v Republic 2014 eKLR*** the accused person does not bear the burden of proofing his defence of *alibi*. Moreover, as the following authorities show certain for legal principles are key on application on the defence of *alibi* raised by an accused person.

There is also the case of ***Karanja v Republic 1983 KLR 501*** on the defence of alibi where the court held as follows: ***"In a proper case, a trial court may in testing a defence of alibi and in weighing it with all other evidence to see if the accused guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for interrogation and thirdly prevent any suggestions that the defence was an afterthought***"

The *alibi* defence by the accused means he was elsewhere when the offence was committed though an accomplice the second accused evidence places him squarely at the scene of the crime. Interestingly this evidence was not controverted by the 1st accused person. In fact the prosecution case weighed up together with *alibi* defence does dislodge that contention by the 1st accused that he was not at the scene despite the fact the white cap not able to produce samples for DNA profile is not fatal to the case for the prosecution.

I accept the prosecution contention that the 1st accused who was in company of the 2nd accused at the time they left Check Point Bar in late hours of 5th September, 2013 has not rebutted the circumstantial evidence that he was at all times with the 2nd accused. Secondly he does not explain the source of blood stain where cap adduced as exhibit 4. Thirdly he failed to give credible circumstances on how he came to be in possession of the 2nd accused shopping produced in court as exhibit 8.

To this extent I appreciate the underlying principles on circumstantial evidence which I find applicable in this case as stated by the court of appeal in the case of ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990*** where the court held: ***"it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy this facts:"***

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 adequate unerringly pointing towards guilt of the accused.

iii. The circumstances taken cummulatively should form a chain so complete that there is not escape from the conclusion that within all human probability the crime was committed by the accused and none else.

On analysis of the material evidence and the surrounding circumstances touching on this case there are no inculpatory facts or intervening factors in the chain which is incapable of any explanation than that of the accused persons guilt. Their mission from the time they stated drinking, exiting the bar, the ensuring fight and subsequent death of the deceased is all in the hands of the two accused persons. The explanation given by each of them in their respective defence did not exonerate anyone of them from being criminally culpable in causing the death of the deceased. Save that the court cast doubt on the element as regards malice aforethought.

The upshot is that I am satisfied the prosecution has proved the offence of manslaughter committed jointly by the two accused contrary to Section 202 of the penal code beyond reasonable doubt. As a consequence I find each of the accused guilty of the charge and do convict each one of them as per the provisions of the law.

Judgment dated, delivered and signed in open court on 16th January, 2018.

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R. NYAKUNDI

JUDGE

Sentencing

The two of you were initially charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged by the prosecution that on the night of 5th and 6th day of September, 2013 at about 2.00 p.m at Birika trading Centre in Kajiado North, you jointly murdered John Murithi Nkonge. The prosecution summoned ten witnesses to prove the elements of the charge against each of you beyond reasonable doubt.

The case for the prosecution was based purely on circumstantial evidence. It emerged from the evidence that prior to the fateful night you had been drinking alcohol together at various bars including one which prominently features in this trial as Check Point Bar within Birika Town.

At the close of the trial of this case each one of you was placed on his defence where you stated your respective versions on how you parted

ways at 2.00 am at the night of 5th and 6th September, 2013. The significant aspect of your defence is that you ended up blaming each other.

A combination of factors and evidence considered by this court made me to arrive at a conclusion that the offence of murder initially preferred by the state be substituted with that of manslaughter.

I am in no doubt that it might have been the level of intoxication that mainly explains the kind of behavior displayed by both of you at that night. It did however come out clear from the prosecution as to the motive of your killing the deceased person. What is certain is the fact that the deceased is death through your joint enterprise of committing an assault against him.

The autopsy report established multiple blunt injuries with more pronouncement on the fractured and depressed skull. This was the cause of death as opined by the pathologist.

During this sentencing hearings I have heard mitigation on your behalf from Mr. Mureithi and Mr. Sekento legal counsel who represented you in this trial.

This court also called for a pre-sentence report which has detailed content on your personal profile and community commentary about the offence and your conduct within the community. The prosecution counsel confirmed that each one of you has no record of previous conviction.

The father of the deceased Eliud Nkonge gave a victim impact statement on behalf of the family. As a family Mr. Nkonge deposed that they have never come to terms with the death of the deceased. He prayed that justice be done in passing an appropriate sentence. It is against this factual background that I now proceed to sentence you under Section 205 of the Penal Code for the offence of manslaughter which is stated to be life imprisonment. Essentially it is not a mandatory sentence. In the present case I take into account the mitigation factors, pre-sentence report which is favorable on your part. I also take into account since your first appearance in court for plea on 16th June, 2013 each of you has been in remand custody pending trial cumulatively more than 4 years. Under the proviso in Section 333(2) of the CPC this court must discount such period spent in custody pending trial and judgment.

Having reviewed the evidence I do accept that this murder was of a kind where violence was used against the deceased person. The deliberate choice of arming yourselves with a block of stone and specifically targeting the head is by itself in a variety of ways reckless, unlawful acts of commission, dangerous act involving excessive use of force in uncalled for circumstances. There was no evidence that your lives were in any eminent danger of attack from the deceased when this incident took place. It is also notable that from the postmortem the deceased suffered serious physical harm before he succumbed to death. It is also notable from the postmortem that the deceased suffered serious physical harm inflicted before his death. This attack to me was caused out by the two of you acting in consent.

I am therefore satisfied that this are aggravating factors that outweigh the mitigation offered on your behalf by both learned counsels. In sentencing each one of you this court will go for custodial sentence bearing in mind the four years you have been in remand custody. This is meant to punish a heinous crime where the life of a human being was terminated prematurely by your unlawful acts.

Doing the best I can I sentence each one of you to five years imprisonment for the offence of manslaughter as provided for under Section 205 of the Penal Code.

14 days right of appeal.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Gikonyo for the 2nd accused

Mr. Sekento for the1st accused

Mr. Akula for DPP

CC: Mateli