



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 28 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

EMERICUS HENDRICUS VAN DE WERF.....1ST ACCUSED

SAID ABDALLAH KADENGE.....2ND ACCUSED

VERA JULIET ANYANGO.....3RD ACCUSED

JUDGEMENT

1. On 14th November, 2012 the body of a female adult was found stuffed into a septic tank at Sailfish Club also known as Big Game Fishing Club, a hotel in Malindi town. The hand and legs were tied with bedsheets and sisal rope and the head was put inside a polythene bag. It emerged that the deceased was one Lillian Mwikali Andree, a Kenyan who had relocated to Germany with her late German husband Karl Andree. Lillian had come to Kenya to lay claim upon the property on which the hotel was established as it allegedly belonged to Andree.

2. After investigations, Emericus Hendricus Van De Werf, the 1st accused, Said Abdallah Kadenge, the 2nd accused and Vera Juliet Anyango, the 3rd accused were arrested and charged with murder of Lillian contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the information being that on 11th November, 2012 at Sailfish Club, Malindi Township within Kilifi County they jointly murdered Lillian Mwikali Andree

3. Dr. Makoha Alan performed autopsy on the body of Lillian and concluded that the cause of death was strangulation, stab on the neck and suffocation with a polythene bag. PW8 Gilbert Katana Angore a medical officer at Malindi Sub-County Hospital produced the post-mortem report as he was familiar with its author's handwriting and signature and no objections were raised.

4. The narrative that emerged is as follows. On 27th October, 2012 PW2 Bakari Mkala Dzila Mwero a housekeeper at Sailfish Club reported on duty at 7.00 a.m. and found Lillian at the hotel. He knew her from her previous visits as she was a frequent guest at the Club. It was PW2's testimony that he had been employed at the Club by the 1st accused since 2007. The 2nd accused was the manager at the Club and the 3rd accused is the wife of the 1st accused. PW2 first met Lillian at the hotel in 2007 or 2008. She visited annually.

5. It was PW2's testimony that about four days from 27th October, 2012 Lillian started quarrelling with the 1st accused telling him that the hotel was not his. She also sacked two employees at the Club. PW2 was alone with Lillian most of the time after this. Lillian literally took over the operations of the hotel including recalling a former employee by the name Kenga. During that period he saw the 1st accused attempt to serve Lillian with some papers.

6. On 12th November, 2012, a Sunday, PW2 left his place of work at about 3.00 p.m. leaving Kenga behind. When he came back the next morning at 6.00 a.m. he found the door bell not working and the door handle dismantled. He called Kenga and asked him about the guard and he was told Alex Mzungu had been on duty.

7. PW2 decided to call Lillian; her phone was picked by a man who sounded sleepy. The voice was unfamiliar to him. The phone was switched off thereafter. He then called the 2nd accused who in turn called PW5 Dan Onyango Okoth the owner of the firm which provided security services to the hotel. PW5 sent a supervisor to the site. They were joined by the 2nd accused, Mwinyi Kombo and David Kadenge who had been fired by Lillian. The 2nd accused said he would notify the 1st accused.

8. They stayed outside the hotel until 12.30 p.m. By then they had been joined by the 1st accused, the 3rd accused and PW5. PW5 instructed

the supervisor to jump over the wall and open the door. On entering the premises they found that a television set, a radio, speakers and some chairs were missing from the bar. At the backside PW2 saw a towel on the floor and in the changing room there was a knife with bloodstains on the bed.

9. The 2nd accused and PW5 went and reported the matter to the police. Police officers visited the scene and took away the knife.

10. As the police officers were still at the scene, the reception door which was locked was forced open by PW5. Inside the kitchen they found some utensils missing. While still at the scene they were joined by the 1st accused's advocate who was identified as Dr. Owuor.

11. The next day, PW2 reported on duty. He worked as usual and left at the end of the day. The day after he also reported on duty and found Kadenge already at work. They noticed unusual presence of flies. After a short while Kadenge came crying to where he was and told him **"mama ameuiliwa."** They went and opened the septic tank and saw the body of the deceased. They immediately alerted the 2nd accused who came with the 1st accused. PW5 also came. The matter was reported to the police who immediately visited the scene. Police officers inspected the area and retrieved Lillian's key and a worker's uniform from banana plants in the compound. The body of Lillian was removed to the mortuary.

12. On 31st October, 2012, PW1 Maurice Kilonzo, an advocate practicing in Malindi, encountered Lillian for the first time at his law firm. She had been directed there from the DCI, Malindi Police Station as her complaint concerned a property allegedly taken from her irregularly. She had been bequeathed the property by the other heirs of the estate of her late husband.

13. PW1 upon learning that the dispute touched on Sailfish Club which was at one time his client instructed his colleague PW7 Kyalo Matata to handle the matter. Lillian notwithstanding this disclosure retained their legal services. A file was therefore opened and she was requested to bring her documents.

14. PW7 confirmed that he took up Lillian's brief. He was shown the ownership documents for the hotel and the succession documents. She informed him that her husband owned the hotel which he established in 1981. They lived there until 1995 when he passed on. The succession proceedings were taken out in Germany and she was granted her husband's shares in the hotel. Her husband co-jointly held the shares of the hotel with two other persons. It was Lillian's case that she found a stranger, the 1st accused at the hotel. She showed PW7 a search she did on the property to verify her position.

15. PW1 also testified that he saw the original title documents with Lillian and the firm had made copies of the same. The documents bequeathing her the property were in German language which PW1 did not comprehend. PW1 confirmed that the property was jointly owned and Lillian did not explain her long absence from Kenya and neither did she give the litigation history with the co-owners nor explain the status of the said joint owners. PW1 further indicated that no documents were found at the hotel after the murder of Lillian.

16. According to PW7 a suit was commenced before the Environment and Land Court and the titles in the 1st accused's possession were found to be fake and confiscated by the Land Registry at Kilifi. Lillian also informed PW7 in face to face interviews and via text messages that the 1st and 3rd accused persons had threatened to kill her if she did not vacate the premises. PW7 advised her to move out of the hotel but she was insistent that since it was her property she was not going to do so. PW7 stated that he showed the text messages to the investigating officers.

17. On 10th November, 2012 at 5.40 p.m. PW1 was called by an officer by the name Njeru from the DCI who informed him that the 1st and 2nd accused persons were at the hotel together with others threatening and demanding that Lillian opens the place so that they could serve her with eviction orders from the court. In PW1's view, it being a Saturday he found the demand odd. He therefore got Lillian's number from Njeru and called a crying and shaken Lillian advising her not to open the place as no eviction could take place at such time. PW1 also alerted PW7 about the alleged service. PW7 also called Lillian and found that PW6 Samson Bahati Kimbenja, a process server, had attempted to effect service in the company of the 1st and 3rd accused persons and a Dr. Owuor. At the time, according to PW1, the chef was the only other person with Lillian at the hotel.

18. Cross-examined, PW1 explained that he advised Lillian not to open the door as he doubted the veracity of the service and also because Lillian felt threatened. In his view, a court service undertaken wrongly amounts to a threat. PW1 testified that he travelled to Kisumu after the funeral of Lillian and found that there was no such case as the one purportedly served on Lillian but he did not prepare a report on his findings. PW7 also claimed to have enquired about the case from Kisumu Court and found the documents to be fake.

19. PW6 introduced himself as a court process server and confirmed that on 10th November, 2012 at about 5.30 p.m., he together with the accused persons and their advocate went to effect service on Lillian. PW6 had been called earlier by the 2nd accused whom he knew. The 2nd accused introduced him to the 1st and 3rd accused persons. They proceeded to Malindi Airport to receive a man introduced to him as Dr. Ochieng Hannington who gave him the documents that were to be served. There were no pleadings accompanying the order that he was asked to serve.

20. PW6 testified that during the service, Lillian refused to open the door and took the documents over the wall. She then refused to return the documents after confirming she was to sign them. PW6 indicated that Lillian appeared drunk.

21. It was PW1's evidence that on 12th November, 2012 PW7 waited for Lillian to turn up for a meeting at the firm as agreed but her phone was not going through. PW1 coincidentally met all the accused persons, PW6 and another man at Bar Bar Restaurant where he had gone to take breakfast. The 1st accused enquired from him the reason why he had taken up the Sailfish matter yet he had known him for a long time and he was aware that he had titles to the land. PW1 informed the 1st accused that he was not handling the matter and suggested to him to get himself an advocate. The matter was coming up for hearing and the 1st accused told him to stay away from the case.

22. When cross-examined, PW1 stated that though it was not unusual for a client to be concerned that their advocate had taken up a matter adverse to them, he was of the view that the 1st accused was trying to intimidate him. The 1st accused told him to stay away as there was more to it than Lillian had revealed to him. At cross-examination PW1 stated that the 1st accused's tone at Bar Bar Restaurant was unusual having known him for a long time and that he told him not to handle the matter and stay away completely. He stated that he also received threatening calls and he reported the threats to the police.

23. PW4 Alan Munyaka Dishon a brother to Lillian identified the body of Lillian for post-mortem purposes. He testified that Lillian had travelled to Kenya from Germany two weeks prior to her murder and had informed him that she had a dispute over Sailfish and the matter was already in court. She however did not tell him who her opponents were.

24. PW5's evidence was that he had assigned Alex Mzungu duty at Sailfish Club on the night of 11th November, 2012. On 14th November, 2012 at about 9.00 p.m. PW5 led police officers to Alex Mzungu's house from where some of the items stolen from the hotel were recovered. Alex Mzungu was not at home but his wife told them the items had been purchased.

25. Intriguing evidence came from PW3 Corporal Fondo Karisa Masha. He testified that on 17th November, 2012 he received a call from a male person who informed him that he was a guard at Sailfish hotel where Lillian was killed and he wanted him to pass over some information to the DCIO Malindi. The man expressed fear for his life when PW3 offered to take him to the DCIO and asked PW3 to keep the information. The caller informed PW3 that he was on duty on the material night when one white man and two male Africans arrived at the hotel. The whiteman told him to open the door as he wished to speak to his wife. He opened the door and later found the woman had been killed.

26. PW3 urged the caller to inform the DCIO of what he had said but the caller repeated that he feared for his life and disconnected the call. It was PW3's testimony that the caller never told him his name, the date he was on duty, who the three men were, the number plates of the two motor vehicles they used and how the killing was done.

27. PW3 told the court that he had been travelling from Mombasa to Malindi when he received the call. Before reporting the matter to the police he received a call from a DCI officer by the name Lenny. When he met the officer, the officer informed him that there was a call that had been made to him (PW3) and he wanted to confirm the number. PW3 gave the number to Lenny but nevertheless proceeded to the DCIO and made a report to him and recorded a statement. He, however, did not record in his statement the phone number used to call him.

28. Answering questions put to him during cross-examination, PW3 stated that the caller told him that the *Mzungu* owner of the club is the one who went there with two vehicles. The caller who identified himself as a member of the Kalenjin Community did not say what he did when the woman was being killed. PW3 had no connection with the hotel nor the people there but assumed the caller knew he was a police officer as he was attached to a Member of Parliament.

29. The investigating officer Corporal Kariuki Njeru testified as PW8 and tied the pieces together. His evidence was that on 31st October, 2012, the accused persons accompanied by another person who claimed to be an advocate went and reported to the police that a guest, Lillian, had checked into their hotel on 26th October, 2012 and had declined to vacate claiming the property was hers. The accused persons gave the police Lillian's contacts and she was summoned to the police station. Both parties were asked to present their ownership documents. The 1st accused, who only had copies of the titled documents, informed him that the 2nd accused had presented the originals at the land registry and they were detained. Lillian presented two indentures for adjacent plots and informed him that the plots changed hands when they relocated to Germany. An inquiry file was opened by the police and forwarded to the Director of Public Prosecutions for directions.

30. Lillian also informed PW8 about threats she had received from the 1st accused but did not file a complaint. She also spurned his advice to her to vacate the hotel as the issue was being resolved.

31. On 10th November, 2012 at 5.00 p.m. Lillian called PW8 informing him that the accused persons, their advocate and a process server were compelling her to sign some court orders. He advised her to call her advocate. At 7.00 p.m. she called back informing him that the court orders were left behind and she was in her room.

32. It was PW8's testimony that on 14th November, 2012 the DCIO called him and told him that Lillian had been murdered and her body had been recovered in a septic tank within Sailfish Club. He visited the scene with his colleagues. The head was covered with polythene bag and ropes. Photographs were taken at the scene by a scenes of crime officer and the body removed from the scene. A bloodstained knife was also found at the scene. Lillian's room at the hotel was in disarray with documents strewn on the floor. There were bloodstains on the way to the septic tank. Neither the room nor the knife were dusted for fingerprints.

33. PW8 also noted a robbery report filed on 12th November, 2012 by the 1st accused and that the duty guard Alex Mzungu Francis had not been seen from 12th November, 2012. The police had also recovered items from Alex's house suspected to have been stolen from the hotel. PW8 did not take a statement from Alex's wife.

34. In his investigation PW8 did a search of the property and established that a third share belonged to Karl Andree. The post-mortem revealed that the cause of death was strangulation, suffocation and a stab on the neck. PW8 also received information that the 1st accused's motor vehicle had been seen at the hotel on the night of 11th November, 2012. He however did not record the registration number of the said motor vehicle and neither did he carry out any search with the Registrar of Motor Vehicles. PW8 produced exhibits being the stolen items recovered from the house of Alex. The items were rope, polythene bags, knife, bloodstained sheet, photographs and search certificate for the land on which Sailfish Club is established.

35. PW8 informed the court that the dispute between the 1st accused and Lillian was a civil one and was resolved in favour of Lillian. The allegation of threats lead him to believe that the accused persons were involved in the murder. PW8 stated that the 2nd and 3rd accused worked with the 1st accused and Lillian had reported that the 1st accused and his team including the lawyer had threatened her. PW8 however retracted his statement stating that Lillian did not inform him of the members of 1st accused's team nor the lawyer's name. PW8 also informed the court that he was not shown any text messages of threats from the 1st accused.

36. In his defence the 1st accused person who testified as DW1 denied killing Lillian. His testimony was that he is a director of Big Game Fishing Lodge and he had been running Sailfish Hotel since 1999. Lillian patronized the hotel with her children. He held no grudge against her. He confirmed that there was a dispute over the parcel of land but denied using force to evict her.

37. The 1st accused's version of events was that on 28th October, 2012 his wife, Vera and the manager of the hotel, Abdalla called him while he was in Mombasa informing him that Lillian wished to speak to him. When he arrived, Lillian informed him that she would not settle her bills as she was the owner of the property. He informed her that if she had any dispute she ought to settle it in court and he called his lawyer based in Kisumu about the issue. His advocate, Hannington, advised him to leave the hotel while he organized for an order from the court which he later obtained. Prior to this there had been no complaint against Lillian.

38. On 10th November, 2012 his advocate jetted in at about 5.00 p.m. They picked him together with Vera and PW6, had some coffee and then headed to the hotel to serve the court documents on Lillian. They found the hotel locked, knocked at the door and Lillian took the said documents over the wall. They then left the hotel. According to the 1st accused, their advocate spent at their home and the following day spent the whole day and evening with them. He also slept in their house for the second night.

39. On 12th November, 2012 the 1st accused was called by Abdalla explaining to him that there was an issue at the hotel. He headed there and found the door locked, the lights on and their calls were not responded to. He found Abdalla and the askari outside. Vera and the advocate came later. The said askari was directed to scale over the wall whereby he was able to open the door from inside. Neither Lillian nor the night guard were present and the TV set, stereo and some utensils were missing. He requested Abdalla to call the police who came over and conducted investigations on the basis that it was a robbery.

40. Lillian's room was locked and they accessed it using a spare key from the 1st accused's office. Upon opening the door the police found items scattered on the floor. The 1st accused then informed the police that an old client was coming over to the hotel and preferred the room Lillian had occupied. They therefore directed him to put her clothes in a suitcase and prepare the said room stating that perhaps she had left for Mombasa. The room was therefore prepared. A bloodied knife was also found in an empty house behind the hotel and the police stated that a goat may have been slaughtered there by the cook.

41. It was the 1st accused's testimony that PW5 explained that the guard was missing. The 1st accused stated that the missing guard has never been traced.

42. The 1st accused told the court that on 13th November, 2012 he went on with his normal schedule but on 14th November, 2012 he was called by the 2nd accused who informed him that there was a problem at the hotel and he ought to come over. His wife, the 3rd accused was at that time at Mombasa and their advocate had already left. On arrival at the hotel the 2nd accused and PW2 informed him that they had found flies at the septic tank and on opening it found a human body. He did not check the tank to confirm this nor was he present at the removal of the said body though he confirmed that there was blood at the said tank.

43. The 2nd accused testified as DW2 and denied committing the offence. He stated that he had been employed by the 1st accused as a manager at Sailfish hotel. He informed the court that he had known Lillian from 2007 as a frequent paying guest at the hotel. She last checked in on 26th October, 2012 but failed to make payments and when he enquired about it on 10th November, 2012, she informed him that she was not going to pay and he ought to tell the 1st accused. The 1st accused and Lillian then had a discussion which he was not privy to but the 1st accused later informed him that Lillian was claiming to be the owner of the hotel. The 2nd accused stated that he suggested that the matter be reported to the police, which he together with his co-accused did. The police advised that they take up the matter with an advocate instead and head to court which the 1st accused did. He stated that Lillian did not fire him.

44. The 2nd accused confirmed the sequence of the events that followed thereafter as told to the court by the 1st accused in his testimony. He told the court that the items stolen from the hotel were recovered from the house of the watchman who was on duty on 11th November, 2012.

45. The 3rd accused was DW3. She confirmed that she was present at the service of the court order and that Lillian objected to the service, snatched the documents and refused to open the door to the hotel. She was also present when PW5's supervisor scaled the wall on 12th November, 2012 and opened the hotel door and observed that there were missing items. The police were called and an inventory of the missing items taken. She denied committing the offence. She stated that she was with her husband and their advocate on the night the deceased was killed.

46. The defence case was closed by DW4 Celestine Nyevu Kazungu, the wife of the 2nd accused who informed the court that the 2nd accused was off-duty on 11th November, 2012 and was at home the whole day and night.

47. The starting point is to note that in a criminal trial it is the duty of the prosecution to prove its case beyond reasonable doubt. I back this statement with the decision of the House of Lords in **Woolmington v DPP [1935] UKHL1** in which Viscount Sankey stated that:

“Throughout the web of 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 subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

48. In the instant case the prosecution was required to prove that a murder took place; the ingredients being *mens rea* that is malice aforethought and *actus reus* which is the act, in this case the death.

49. The evidence adduced in form of the post-mortem report and the witnesses being PW1, PW2, PW4, PW5, PW7, PW8 and PW9 confirmed death through strangulation, a stab wound and suffocation. The defence did not waste time disputing this obvious fact. The prosecution therefore established *actus reus*.

50. The prosecution, as already stated, was also required to prove malice aforethought. The prosecution's case was attended by a missing link from the night of the murder being Alex Mzungu. Alex Mzungu was the night watchman on 11th November, 2012 which was the last day Lillian was seen alive. PW2 saw her at about 3.00 p.m. on 11th November, 2012. His evidence was that he left Kenga with the deceased. For whatever reason the investigator never bothered to produce Kenga as a witness although he was available. Be that as it may, the evidence adduced clearly pointed at the Alex Mzungu as a man of interest. Some of the items stolen from the hotel on the night of 11th November, 2012 were traced to his house. Hence Alex Mzungu became a key suspect at worst and a key witness at best. Over six years later he is yet to be arrested, that is if the police are indeed looking for him.

51. Considering that no eye witness was called, the prosecution's case was anchored on circumstantial evidence. PW8 explained that the accused persons became suspects as the 1st accused had a dispute with Lillian in regard to the hotel. He also stated that the 1st accused's original title documents had been confiscated at the lands office and a search confirmed that Lillian was the owner of the property. The 2nd and 3rd accused on the other hand were suspect as they worked for the 1st accused and Lillian had claimed that the 1st accused and his team had threatened her.

52. Circumstantial evidence must meet certain parameters before it can be used to enter a conviction. The applicable test was spelled out in **Abanga Alias Onyango v Rep. C.R.A. No. 32 of 1990** (UR) cited by the Court of Appeal, with approval, in **Daniel Muthomi M'arimi v Republic [2013] eKLR** thus:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 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 none else."

53. PW8 the investigating officer did not produce proof of the alleged threats and neither did PW1 and PW7. PW1 and PW7 had testified that Lillian had told them of the threats verbally and also forwarded to them the threatening messages. Indeed PW1 talked of threats to him after the funeral of Lillian. No message from the phones of any of the witnesses was placed before court as evidence. Furthermore the nature of the threats were not disclosed. The witnesses only talked of threats that were issued.

54. PW1 told the court that when the 1st accused told him to back off the land case he was trying to intimidate him but went further to explain in cross-examination that a former client of an advocate would be concerned if their advocate takes up a matter that is adverse to them. PW1 testified that on the day he was at Bar Bar Restaurant he was approached by the 2nd accused as the 1st accused wanted to have a word with him. It appears PW1 did not put much weight to the alleged threat as it is not indicated that he sought the intervention of the police as he had done following the threats he received after Lillian's funeral. Even for the threats received after the funeral no call logs were produced in court and neither were copies of the pages of the police occurrence books capturing the reports exhibited.

55. The court order restraining the 1st accused from entering or working on the suit property and the judgement or ruling indicating that Lillian was the proprietor of the property and not the 1st accused were not produced either. Further, there was no proof that the 1st accused's title documents has been confiscated at the lands office at Kilifi. There was also no proof that the order served upon Lillian was fake as claimed by PW1 and PW7. If the prosecution intended to rely on these facts to establish that the 1st accused formed a criminal intent because his property had been taken from him then these facts failed to support its case.

56. PW5's evidence about an anonymous caller claiming that a *mzungu*, meaning a person of European descent, who was the owner of the hotel had gone to the hotel with two other men on the night of the murder is unsupported by evidence. No call log was produced and the allegation that the caller, who had made calls to several other people, was being traced by the police was not proved. The evidence that was adduced was that the watchman on duty on the material night was one Alex Mzungu. PW3 talked of being called by a member of the Kalenjin community. The prosecution could have propped its case by establishing from PW5, the employer of Alex Mzungu, whether Alex Mzungu was a Kalenjin.

57. PW2 left the hotel on 11th November, 2012 at 3.00 p.m. leaving behind his colleague Kenga who later left Alex Mzungu on night guard. When he came back the following day the guard was not there. Kenga was not called as a witness. Alex Mzungu's wife in whose house the items stolen from the hotel were found was not called as a witness. Alex Mzungu is still at large and from the evidence placed before the court he was a key suspect in the murder.

58. The information disclosed that the accused jointly with others not before court executed the murder. This connotes that the persons charged had a common intention. The prosecution was required to prove this intention. The Court of Appeal defined common intention in

Dickson Mwangi Munene & another v Republic [2014] eKLR thus:

“52. The law is well settled on the definition and in what circumstances common intention can be inferred if it is not express or obvious. Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act.”

59. Section 21 of the Penal Code legislates the principle of common intention as follows:

“21. Joint offenders in prosecution of common purpose

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.”

60. The Evidence Act at Section 10 establishes how common intention can be proved by stating that:

“10. Statements and actions referring to common intention

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”

61. This doctrine of common intention was also expounded by the Court of Appeal in **Roba Galma Wario v Republic [2015] eKLR** as follows:

“44. It was also argued that PW4 and PW5 were the appellant’s accomplices. The learned Judge considered this and failed to find common intention to commit an offence. S. 21 of the Penal Code and as interpreted in this Court in the case of DICKSON MWANGI MUNENE & ANOTHER V R, CR. NO. 314 OF 2011 [2014] eKLR deduces common intention:

“... where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention.

It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence ...”

62. The Court of Appeal went on to state that:

“45. In the above case, for common intention to be proved, it was stated that one must show: criminal intention to commit the offence jointly with others; the act by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose; and that the parties were aware of this when he or she agreed to participate in the criminal act.”

63. According to the Court of Appeal in **Dickson Mwangi Munene**, the prosecution has to prove the following elements:

“57. It is evident from the above definition and authorities that in order to secure a conviction on the basis of common intention, the prosecution must prove that the accused had (a) a criminal intention to commit the offence charged jointly with others, (b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and that (c) the accused was aware of this when he or she agreed to participate in that joint criminal act.”

64. PW8 explained that he charged the accused persons jointly as the 2nd and 3rd accused worked with the 1st accused. This was not proof of common intention for purposes of charging them jointly. In fact the only proved concerted effort of the three was when they accompanied PW6 to effect service of the purported court order. There was no criminal element in that action.

65. The accused persons offered the defence of alibi which was not rebutted. The 1st and 3rd accused who are a couple were with their lawyer Hannington Ochieng on the night of the murder. The 2nd accused was with his wife DW4. The investigating officer did not check out on the alibis of the accused persons.

66. In order to obtain a conviction in a case of murder, the prosecution must establish malice aforethought as defined in Section 206 of the Penal Code as follows:

“206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- c) an intent to commit a felony;**
- d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

67. Apart from establishing the existence of a land dispute, the prosecution failed to show that any of the accused had the intention to kill the deceased as a result of the dispute. In any case the killing of the deceased could not have resolved the land matter.

68. It is not only the accused who had issues with the deceased. PW2 talked of two workers being sacked by Lillian although he stated that one of them was later reinstated. The sacked workers are not before this court facing murder charges.

69. There was important evidence from PW2 that when he called the phone of Lillian on 12th November, 2012 it was picked by a man who appeared sleepy. The phone was then switched off. The voice was not familiar to PW2. That voice, to me, is most likely to have belonged to the murderer.

70. It is indeed sad that Lillian lost her life in such a gruesome manner. However, from the evidence availed by the prosecution the killers are not before this court.

71. The case against each of the three accused stands unproved. They are thus acquitted of the charge facing them.

Dated, signed and delivered at Malindi this 19th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT