REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 37 OF 2015

REPUBLIC...PROSECUTOR

Versus

EDWARD KAMAU MBURU..1ST ACCUSED

DANIEL MWAURA GITAU...2ND ACCUSED

FRANCIS WANYORO MBURU...................................3RD ACCUSED

JUDGEMENT

The accused persons **Edward Kamau Mburu, Daniel Mwaura Gitau** and **Francis Wanyoro Mburu** were charged before this court on 9/9/2014 with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the offence as stated in the information was that the three accused persons named herein on the night of 25th and 26th day of August 2014 at Namanga Township within Kajiado County jointly with others not before court murdered **Kenneth Ndungu Muthoni** hereinafter referred as the deceased.

The plea was taken on 22/10/2014 where each of the accused denied the charge and particulars herein. The case was set down for trial where Mr. Masese Advocate represented the accused persons and Mr. Akula, a Senior Prosecution Counsel conducted the prosecution.

The prosecution called ten (10) witnesses who included one government analyst, one pathologist, a scene of crime officer, an investigating officer and four witnesses allegedly acquainted with the accused persons and the deceased.

It is therefore necessary at this stage to give a broader overview of the evidence by the prosecution set to prove the case against each of the accused persons beyond reasonable doubt. According to the testimony of PW2 – Saitoti Sailimo in the morning of 26/8/2014 while walking to his place of work along Orrauyu Amboseli Road he came across a dead person lying on the road and a shirt placed over his head. While confronted with this situation of a deceased person he decided to telephone Namanga police station and notify them of the incident. The police responded to the call from PW2 and made arrangements to have the body taken to the mortuary. PW2 further stated that the three accused persons were later arrested as suspects to the murder of the deceased.

PW1 – Regis Wamoyo who worked as a conductor at Namanga Township gave evidence that in the morning of 26/8/2014 he saw many people gathered at Lukunga area. This attracted his attention and on arrival he noticed a dead body which he could identify as that of Kenneth Ndugu Muthoni, the deceased in this case. As the deceased was a person known to him. PW1 passed information to the parents who

resided at Thika District. In so far as the death of the deceased was concerned PW1 stated that they suspected the 1st and 3rd accused who used to stay with the deceased in the same house. The police armed with that information sought and apprehended the accused persons. PW1 further testified that the second accused was also arrested on the very day the body was discovered at Lukunga area – Namanga Division.

The prosecution also adduced evidence from PW3 Bernadette Mungai a sister and PW4 Leonard Ndichu Wamburu an uncle to the deceased to identify the body at the mortuary before the postmortem was to be carried out. PW3 and PW4 positively identified the deceased body as that of Kennedy Ndungu Muthoni given their close relations and knowledge during his life time.

PW5 PC Hassan Mohammed testified on the role he played in company of one PC Nderitu to effect arrest against the 1st accused person at Namanga town. The evidence of PW5 on being cross-examined by the defence counsel stated that prior to the 26/8/2014 at 5 pm he had not known the accused person.

PW6 Elizabeth Onyiego a government analyst was asked by PC Mutinda to analyse a blood stained piece of a mattress recovered from the scene and the blood sample extract of the deceased to determine the presence and origin of the blood stains. According to PW6 the DNA analysis conducted at their laboratory confirmed the blood stains to belong to the deceased. The report was as per exhibit 1 admitted in evidence dated 29/7/2016.

PW7 – Sgt Patrick Leweri testified that on receipt of the murder report he visited the scene where they made arrangements to transfer the body to the mortuary. PW7 further testified that a quick inquiry and interrogation from members of the public revealed that the deceased stayed with the three accused persons. In this regard PW3 deposed that they sought to look for the three suspects whom they arrested to undergo investigations for causing the death of the deceased. The three accused were duly identified by PW7 as the ones arrested in connection with the death as the people who lived in the same house with the deceased.

PW9 C.IP Mwangi Gitau testified as a gazetted scences of crime officer who was called in to develop photographs taken at the scene stored in a flash disk from Namanga police station. PW9 produced in evidence a set of photographs and a certificate to that effect as exhibit 4 (a) (b) in support of the prosecution case.

PW8 Cpl Kiprotich Ngeno who investigated the murder gave evidence and outlined steps taken to record witness statements. PW8 further testified as being involved in drawing the sketch plan of the scene, collecting a piece of blood stained mattress and arrangements for the body of the deceased to be moved to Kajiado District Hospital Mortuary. PW8 further added that from the witness statements it emerged that the deceased lived together with the accused persons in the iron sheet house at Lukunga area. On that basis the accused persons were sought and arrested in connection with the murder of the deceased.

DW10 Dr. Kaggia Serah the pathologist who conducted a postmortem on the body of the deceased set to prove the death of the deceased as homicide in nature. In her testimony PW10 make the following findings on examination and tests done to the body of the deceased. The deceased had suffered laceration to the frontal bone, bruising of the left cheek extending to the left eye to the vassal – labial told, missing upper incisors and canine with fracture of lower middle incisor. Abrasion on the dorsum of the left hand, depressed fracture of the left temporal bone, depressed fracture of the bone, left maxilla bone fracture, subdural haematoma and intercranial haemorrhage. The probable cause of death was opined by PW10 as head injury due to blunt force trauma, secondary to being hit by a blunt object. The autopsy report by PW10 was admitted in evidence as exhibit 6.

At the close of the prosecution case ach of the accused persons was called upon to answer the charge under section 306 (2) of the Criminal Procedure Code. The first accused gave evidence on oath and denied committing the offence or any knowledge of the deceased person. The accused further stated that he is a bicycle repairer based in Thika. He further stated that on the night of 25th and 26/8/2014 he was never at Namanga or where the alleged murder took place. According to the accused in the morning of

26/8/2014 he travelled from Thika to Namanga to visit his brother the third accused. The accused further told this court that while on arrival at Namanga he was arrested by the police for an offence he did not know nor commit. It was accused testimony that he has never lived or worked in Namanga as alluded to by the prosecution or lived in the same house with the deceased. The second accused on his part also denied being with the deceased or at the scene on the fateful night of 25th and 26/8/2014. According to the second accused his residence was in Tanzania – Namanga and at no time did he know or associate with the deceased. The third accused gave a sworn testimony and denied the murder charge involving the deceased. It was his evidence that he worked as mkokoteni operator between Tanzania and Kenya. According to the accused he never lived in Kenya as deposed by the prosecution witnesses but in Tanzania side of the border. The accused further stated that while at Namanga shopping centre he learnt that his brother who was visiting from Thika had been arrested by the police. On the same say he went to the police station to check the reasons for his arrest, he was also detained as a suspect for an offence he did not commit.

In their statutory statements from the dock the accused persons were cross-examined on the thread of evidence to ascertain the stay together theory put forth by the prosecution but the same miserably failed.

ANALYSIS AND RESOLUTION

The accused persons are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Under section 203 the code provides as follows:

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

The prosecution is therefore under a legal duty under this provision to establish the following ingredients of the offence beyond reasonable doubt:

> **(1) That the deceased Kenneth Ndungu Muthoni is dead.**
>
> **(2) That his death was unlawful.**
>
> **(3) That the accused persons in causing death acted unlawfully and with malice aforethought.**
>
> **(4) That the harm which caused the death of the deceased was occasioned by the accused persons before court.**

On the burden of proof of beyond reasonable doubt required of the prosecution, Lord Denning in the celebrated case of **Miller v Minister of Pensions [1947] 2 ALL ER 372** stated interalia as follows:

> **“Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the court of justice.”**

As outlined under section 107 – 109 of the Evidence Act (Cap 80 of the Laws of Kenya) the burden of proof is on the prosecution to lead evidence that the accused persons as alleged on the night of 25th and 26th/8/2014 at Namanga murdered the deceased. It is a burden which rests throughout the trial upon the prosecution unless where statutory provisions shift that burden to the accused i.e. evidence on possession of stolen goods.

In appraising the evidence presented before me, there is no doubt that this is a case based purely on circumstantial evidence. It is therefore necessary at this stage to consider each of the ingredients of the offence vis viz the evidence to establish whether the prosecution has discharged the burden of proof of beyond reasonable doubt against the accused persons.

> **(a) The death of the deceased.**

The testimony of PW1 and PW2 confirms that the deceased was found lying dead along Lukinga road in the morning of 26/8/2014. PW7 and PW8 both police officers visited the scene and confirmed the death of the deceased. The body of the deceased was removed from the scene on arrangements made by PW7 and PW8. The photographs taken of the scene and admitted in evidence as produced by PW9 relate to the death of the deceased. PW3 and PW4 a sister and an uncle to the deceased on 28/8/2014 participated in positively identifying the body of the deceased to PW10 the pathologist who performed the postmortem. The postmortem form produced and admitted in evidence as exhibit 6 confirms the deceased died as a result of multiple injuries more specifically; head injury due to blunt trauma. In the face of the evidence adduced the ingredient as to the death of the deceased is not in dispute.

(c) The second ingredient involves the unlawfulness of the death of the deceased.

The principle behind this ingredient is succinctly provided for under the supreme law of the Republic which states as follows in Article 26 (1):

> **"Every person has the right to life.**
>
> **(3) A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law."**

Going by this provision, death of a human being within our borders is not excusable unless committed in execution of the law as punishment, in defence of person or property or in circumstances deemed to be not criminal in nature. This position was well illustrated by the Eastern Court of Appeal in the case of ***Guzambizi Wesonga v Republic [1948] 15 EACA 65*** in the following passage:

> **"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."**

Under this ingredient the prosecution led evidence of PW10 Dr. Kaggia who performed the postmortem two days after the body of the deceased was discovered at the scene. In her findings the deceased suffered multiple skeletal injuries on the various limbs of his body. PW10 noted severe fracture to the neck and head region. According to PW10 the injuries were inflicted with a blunt object and force. As a result of the harm inflicted the deceased died of head injury due to blunt force. PW7 and PW8 recovered a blood stained mattress which was subjected to profiling by PW6 at the government chemist. The blood stain in the mattress compared with the blood sample of the deceased was found to be that of the deceased.

The inference i draw from the evidence by the prosecution is that the deceased was assaulted suffering grievious harm from which he succumbed to death. The death of the deceased does not therefore fall under any of the exceptions provided in the constitution or in the statute. His death was unlawful. This ingredient has also been proven by the prosecution beyond reasonable doubt.

(c) The prosecution has also to prove that the death of the deceased was due to malice aforethought.

Malice aforethought is deemed to be proved by the prosecution if any of the following circumstances under section 206 of the Penal Code exist:

(a) An intention to cause the death of another.

(b) An intention to cause grievious harm to another.

(c) Knowledge that the act or omission causing death will probably cause death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death of grievious injury occurs or not or by a wish that it may not be caused.

(d) An intention to commit a felony; and

(e) An intention to facilitate the escape from custody if or the flight of any person who has committed a felony or attempted it.

In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the Court of Appeal of Eastern Africa stated as follows:

> **"In determining whether malice aforethought has been established the court has to consider the nature of the weapon used, the manner in which it was used, part of the body injured, the nature and number of injuries inflicted, the conduct of the accused immediately before and after the attack."**

What runs through the provisions of section 206 of the Penal Code is the word intention to kill or intention to cause grievious harm to another person. In the instant case the circumstantial evidence by PW1, PW2, PW7, PW8 point to the evidence that the assailants attacked the deceased with an intention to cause death or grievious harm. The deceased appeared to have been killed elsewhere and his body moved to the road side to break the chain of events. The blood stained mattress was recovered next to the deceased house. The mattress had been set on fire to destroy the evidence. The attackers occasioned multiple injuries and specifically targeted the head and neck which had severe fractures and haematoma. There is uncotroverted medical evidence from PW10 that the deceased died of head injury due to blunt force trauma. There is no evidence on record to show that the deceased injuries were self inflicted.

During the investigations the alleged murder weapon used to inflict injuries was not recovered by the police. What is clear from the evidence, the nature of injuries were not occasioned by a fall but inflicted by a third party with a sole intention of causing the death of the deceased. I wish to add that the prosecution evidence of PW7 and PW8 provided an unusual occurrence which can be attributable to the assailants attempting to destroy any evidence like that of the burning of the mattress to confuse investigators as to how the deceased met his death.

On the question of malice aforethought, there is sufficient evidence that whoever participated in the killing of the deceased formed the necessary intention and armed himself or themselves to attack and or cause grievious harm. I am therefore satisfied that this ingredient of the offence has been proved beyond reasonable doubt by the prosecution.

I now turn to the last ingredient that of placing the accused persons at the scene of the crime. The three accused persons were charged jointly with the offence of killing the deceased. The prosecution was therefore duty bound to prove interalia a common intention as provided for under section 20, 21 and 22 of the Penal Code.

Section 20 (1) provides as follows:

> **"When an offence has been 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 actually 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 consents or procures any other person to commit the offence and in the past mentioned case he may be charged either with committing of an offence or with**

consenting or procuring its commission.

(2) A conviction of consenting or procuring the commission of an offence entrails the same consequences in all respects as a conviction of committing the offence.

(3) Every person who procures another to do an act or omit to do any act of such a nature that if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or made the omission and he may be charged with doing the act or making the omission."

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 a purpose an offence is committed of such a nature that it is commission was a probable consequence of such purpose each of them is deemed to have committed the offence."

Section 22 (1):

"When a person counsels another to commit an offence and an offence is actually committed after such consenting by the person to whom it is given, it is imminent whether the offence actually committed is the same as that counselled or a deference one, and whether the offence committed in the way counsels or in a different way provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

(2) In either case the person who gave the consent is deemed to have committed the other person to commit the offence actually committed by him."

What therefore section 20, 21 and 22 illustrate is that the harm complained of by the prosecution against an accused person must be traceable to that person or persons in order for the court to make a finding on criminal liability. The Court of Appeal of Eastern Africa in the case of ***Wanjirodo/Wamario v Republic 22 EACA 521*** held as follows:

"Common intention generally implies a premeditated plan but this rule out the possibility of common intention developing in the course of events though it might not have been present to start with."

In considering these provisions on common intention it must be admitted that the charge in this case is very serious. It is my view that the prosecution had the burden to demonstrate the chain of events among the accused persons. The court is entitled to know the motive and how the accused formed a common intention to murder the deceased. This is in line with the legal proposition in the case of ***Libambula v Republic [2003] KLR 683*** where the court stated as follows:

"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 after proved by the conduct of a person. See section 8 of the Evidence Act Cap 80 of the Laws of Kenya. Motive becomes an important element. In the chain in 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."

It appears to me the investigating officer did not perform his duty by presenting cogent evidence to implicate the accused persons jointly or severally with the crime. In the course of the investigations the accused persons were arrested on the basis that they stayed in the same house with the deceased. However the landlord/lady of the said house was never called as a witness. PW1, PW2, PW7 and PW8

alluded to the piece of evidence that the accuseds and deceased lived together in the same house at Namanga. In putting this theory the prosecution failed to go a step further to call evidence of ownership of the house.

It is not in dispute that the deceased was killed on the night of 25th and 26/8/2014. There is no eye witness to the murder. That follows therefore that circumstantial evidence of identification must be cogent, credible and consistent for this court to safely rely on it in convicting the accused persons. That aspect of identification and placing the accused persons at the scene of the crime is tainted with suspicion. Suspicion however strong cannot be used to enter a verdict of guilty in favour of the prosecution. This court therefore rejects that line of evidence to nail the accused persons for the death of the deceased.

In absence of direct evidence on this point on stay together theory advanced by the prosecution circumstantial evidence also failed to aid their case against the accused persons.

It is not in dispute that the case by the prosecution is purely circumstantial. For this court to find each of them guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of ***Simon Musoke v Republic [1958] EA 715*** and ***Teper v Republic [1952] AC 480*** as follows:

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

In this case i find no nexus between the accused persons and the fatal injuries sustained by the deceased. In applying these legal principles on the totality of the evidence, it is not disputed that the deceased was found dead in the morning of 26/8/2014. The deceased was found by PW2 having sustained multiple injuries to the head and other parts of the body. There was no eye witness to the assault of the deceased. It is not in dispute that the evidence that the deceased and accused persons lived together in a house at Lukunga area came from a single identifying witness PW1. This piece of evidence was circumstantial in nature. The position in law in this issue is well illustrated in the case of ***Charles O. Maitanyi v Republic [1986] KLR 198*** where the court held"

> **"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lesser the need for testing with greatest care the evidence of a single witness respecting identification."**

In the instant case i was only confronted with the testimony of PW1 on this theory of the accused and deceased staying together. In analysing it the following questions arose: When did PW1 learn of that fact and relationship of the accused persons and the deceased? How long has he known or seen the accused persons and the deceased staying together? What was the common factor which brought them together? Was the house referred to owned by the deceased or rented? If rented who was the landlord/or landlady? In the night of 25th&26th/8/2014 were the accused persons and deceased together when he met his death?

In my view these questions remain unanswered from the testimony of PW1. The prosecution did not endeavour to independently corroborate the evidence by PW1. When this court does test the evidence in line with the principle in ***Charles O. Maitanyi v Republic Case (Supra)*** it falls short of the legal threshold of a testimony of a single identifying witness. There was a murder yes but it was not established that the accused persons committed it.

Similarly the appellants took the stand and each raised the defence of an alibi. It is trite that the onus is on the prosecution to displace the alibi after the defence raises it at the trial. The Court of Appeal in the case of ***Wangombe v Republic [1980] KLR 149*** held interalia as follows:

> **"The defence of alibi was put forward for the first time some months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution for the police ought to check and test the alibi wherever possible. Udo Udoma CJ**

> **also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."**

This proposition comes within the limits of section 309 of the Criminal Procedure Code which states as follows:

> **"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."**

In ***Victor Mwendwa Mulinge v Republic [2014] eKLR*** the Court of Appeal stated thus:

> **"It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja v Republic [1983] KLR 501 this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's 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 investigations and thereby prevent any suggestion that the defence was an afterthought."**

Applying the above legal principles to the instant case, i find that the alibi defence was not investigated by the prosecution. What each of the accused persons stated to discount the theory by the prosecution that they stayed in the same house with the deceased remained unchallenged. The alibi defence coupled with insufficient evidence by the prosecution leaves this court with no evidence to go by to record a verdict of guilty against any of the accused persons. The discrepancies and the gaps in the prosecution does not inspire confidence as one where the burden of proof was established beyond reasonable doubt.

In the result i find each of the accused not guilty of the charge of murder contrary to section 203 of the Penal Code. Each of the accused is hereby set free forthwith unless otherwise lawfully held.

Dated, delivered and signed in open court at Kajiado on 30th day of January, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused - present

Mr. Akula Senior Prosecution Counsel – present

Mr. Masese for the accused - present

Mr. Mateli Court Assistant - present