REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 21 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

LOKI KATHULE KANDI.....1st ACCUSED

HELLEN MUENI LOKI.....2nd ACCUSED

JOSEPH MWAURA NJUGUNA.....3rd ACCUSED

SUNSET MUTULI MUNGUTI.....4th ACCUSED

JOSHUA KILONZO WAMBUA.....5th ACCUSED

JUSTUS WAMBUA NGUNDO.....6th ACCUSED

JUDGMENT

The Accused persons herein were jointly charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the charge as stated in the information from the Director of Public Prosecutions dated 4th April 2011 are that on the night 1st and 2nd September 2010 at Kaewa village, of Kathiani District within Machakos County, the said accused persons jointly murdered Martin Mutuku Kaindi (hereinafter referred to as "the deceased").

The Prosecution called eighteen (18) prosecution witnesses to testify during the trial. Loki Kathule Kandi, the 1st Accused person; Hellen Mueni Loki, the 2nd Accused person; Sunset Mutuli Munguti, the 4th Accused person; and Justus Wambua Ngundo**,** the 6th Accused person were found not to have a case to answer after the prosecution closed its case, in a ruling delivered by this Court on 9th June 2016. Joseph Mwaura Njuguna, the 3rd Accused person; and Joshua Kilonzo Wambua, the 5th Accused person; were however found to have a case to answer and put on their defence. The 3rd and 5th Accused persons gave sworn testimony and did not call any witnesses. in their evidence, the accused persons denied murdering the deceased and stated that on the date the deceased died, they were nowhere near the place of death of the deceased They further denied being in the homestead of the 1st accused person on that fateful night.

The learned counsel for the 3rd and 5th Accused persons , Wambua Kilonzo & Co Advocates, filed final written submissions dated 8th November 2016, while Ms. Rita Rono, the learned Prosecution Counsel, relied on the record for the final judgment.

As I commence my analysis of the evidence led during trial and legal arguments by the counsel for the 3rd and 5th Accused Persons, I am mindful that the offence of murder is defined as follows by section 203 of the Penal Code:

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

Therefore in order to establish the offence of murder the prosecution is required to tender evidence sufficient to prove the following three ingredients beyond reasonable doubt:

1. Evidence of the fact and cause of the death of the deceased.

2. Evidence that the deceased met his death as the result of an unlawful act or omission on the part of the accused.

3. Evidence that the said unlawful act or omission was committed with malice aforethought.

Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died on 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.

c. Intent to commit a felony.

d. 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.

On the Fact and Cause of Death:

Many of the witnesses who gave evidence, namely Joyce Loki (PW1) who was the wife of the deceased, Harrison Jeremiah Mumo (PW4), Ruth Mwende (PW5), Michael Mulei Nzioki (PW7), Benson Wambua Mutisya (PW9), Jacinta Mulewa(PW10), Micheal Mutua Nthenge (PW11), and CI Joel Mwaura (PW14) testified as to finding and/or seeing the dead body of the deceased on the morning of 2nd September 2010.

Dr. Geoffrey Mutuma (PW16) who conducted the post mortem on the deceased on 9th September 2010 produced a post mortem report in court as the prosecution exhibit 10, which identified the cause of death as multiple stab wounds using a sharp object or objects. The fact and cause of death of the deceased was therefore proved beyond reasonable doubt.

On Unlawful Acts or Omissions on the part of the 3rd and 5tH Accused Persons:

The evidence linking the 3rd and 5th Accused persons to the deceased' death, was firstly the evidence of Harrison Jeremiah Mumo (PW2). On the night of 1st September 2010 between 8.30 and 9.00pm PW2 was asked by a young man to take him and two old men they picked on the way to Kathiani in his taxi. Further, that he was later called to pick two of the said passengers at 4 am the next day, and that one of the elderly men was missing. PW2 testified that he knew the young man who was the 5th Accused from before, as they went to the same church, and he also picked the 3rd and 5th Accused out at an identification parade. C.I Benjamin Kiprono (PW18) testified that he conducted the identification parade where PW2 identified the 3rd and 5th Accused persons as his passengers on that night.

Further evidence on the acts of the 3rd and 5th Accused persons on that night was that given by Kasyoka

Wambua (PW6), who testified that on 1st September 2010 at about 11pm a motor vehicle stopped outside the bar where he was employed as a watchman, and the deceased called him from the said motor vehicle. When he went to where the deceased was standing next to the motor vehicle, he saw two other people in the said car. He also saw and took the motor vehicle's registration number which was KAH 642T.

C.I Lawrence Wahome (PW15), who was at the time the Deputy DCIO at Machakos Police Station is the one who took PW6's statement, and upon investigation of the ownership of the motor vehicle registration number KAH 642 traced the owners of the said motor vehicle, and established that on 1st and 2nd September 2010 the said motor vehicle was the one being driven by PW2 on that day. Therefore, from the evidence the deceased was the 2nd elderly man who was with the 3rd and 5th Accused in the motor vehicle driven by PW2 on the night of 1st September 2010, and the 3rd and 5th Accused were therefore the people who last seen with the deceased.

PW5, who was in the house of the 1st Accused on the night the deceased was attacked and killed, also testified that the voices she heard on that night warning them not to come out the house during the attack were those of the 3rd and 5th Accused persons, whose voices she testified she knew as they were frequent visitors to the 1st Accused's house. Lastly, it was the evidence of Agatha Mweni (PW3) that the 5th Accused, who was her co-employee, is the one who sold a cellphone that the deceased owned and had at the time of his death to the 6th Accused person. This was after PW15 traced the use of the said cell phone to the 6th Accused in Mombasa on 1st April 2011.

Therefore, the 3rd and 5th Accused was suspected of having caused the death of the deceased by reason of having been alleged to have been with the deceased on the night of his death, and also by the evidence that their voices were heard at the scene of crime and a telephone belonging to the deceased was traced to the possession of the 5th Accused person. As this is a case founded on circumstantial evidence, this court is guided by the dictum laid down in **Kipkering Arap Koske & Another v R**, **[1949] EACA 135**, the Court of Appeal for Eastern Africa had laid it down:-

> "**That in order to justify, on the circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused ……..."**

The learned counsel for the 3rd and 5th Accused Persons argued in this regard that there is no direct evidence linking the accused persons to the murder of the deceased nor is there any circumstantial evidence whatsoever. Further, that no single prosecution witness saw the accused persons commit the crime. Again, that no murder weapon was found in their possession nor were they found with anything belonging to the deceased. In addition, that the accused persons were not found to have blood on their bodies or cloths belonging to the deceased Lastly, that the 3rd and 5th accused persons were arrested 7months after the death of the deceased.

On the particular evidence linking the 3rd and 5th Accused to the death, it was submitted that the identification parade carried out to identify the 3rd and 5th Accused was flawed and did not meet the legal threshold, as PW2 was shown photographs of the said accused before the identification. Reliance was placed on the decisions in **Simon Musoka vs R, 1958 EA 715,** and **R vs Marzuk Salim (1951) EACA 251** in this regard.

Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act. (Cap 46) which has since been repealed. The procedure for identification parades were also laid out in the cases of **R V. Mwango s/o Manaa (1936) 3 EACA 29** and **Ssentale v Uganda (1968) E.A.L.R 365.** The rules include the following:

- The accused has the right to have an advocate or friend present at the parade;

- The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
- Witnesses should be shown the parade separately and should not discuss the parade among themselves;
- The number of suspects in the parade should be eight (or 10 in the case of two suspects);
- All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
- Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
- As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

PW18 testified during the trial that he conducted the identification parade in which the 3rd and 5th Accused persons were identified by PW2 on 3rd April 2011, and he described the procedure he used at pages 101-103 of the record of proceedings in the trial court .While the actual conduct of the identification parade on its face appears to have been conducted according to the applicable rules and procedure, there was a glaring error in the procedure before the conduct of the parade which greatly reduces its probative value.

PW2 while giving his evidence on 6th February 2012, testified that he indeed identified the 3rd and 5th Accused persons as the persons who were with the deceased in PW2's taxi on the night of the deceased death in an identification parade. Upon cross examination, he stated that the parade was conducted in a compound and that he was shown the photographs of the suspects prior to the identification parade. He could not remember the number of photographs he was shown, and he testified that he saw the photographs in a video form in a digital camera. Further, that the Deputy DCIO was the one scrolling the camera, and that the said Deputy DCIO told him he had arrested some people whom he wanted PW2 to identify. PW2 then stated that he picked the men who were in the camera in the identification parade.

Failure to adhere to the identification parade guidelines will affect the evidential value of a resulting identification, and the Court of Appeal held as follows in this regard in **Samuel Kilonzo Musau vs Republic (2014) e KLR**:

> **"The purpose of an identification parade, as explained in KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."**

The identification by PW2 of the 3rd and 5th Accused persons as the ones who were with the deceased on the night of 1st September 2010 cannot therefore be relied upon.

Coming to the voice recognition by PW5, the said witness testified that she knew the 3rd and 5th Accused persons as they used to come to the home frequently and she knew their voices. PW5 was at the time staying with the 1st and 2nd Accused. She reiterated during cross examination that she knew the 5th Accused who came from Taita Taveta, and the 3rd Accused who was from Thika. The counsel for the 3rd and 5th counsel submitted in this respect that the evidence of PW5 who was a minor of tender years was not corroborated, and that this was a fatal defect. Further, that PW5 did not tell the court whether she knew the 3rd and 5th Accused persons before the night of the death and she did not state what the accused

persons came to do at their house, for her to know them.

The Court of Appeal in ***Karani v Republic*** **[1985] KLR 290** and in **Mbelle v. R [1984] KLR 626** held that i*dentification by voice nearly always amounts to identification by recognition. The said Court* laid down the guidelines when a court is dealing with evidence of identification by voice, and stated that the court should ensure that –

(a) The voice was that of the Accused.

(b) The witness was familiar with the voice and recognized it.

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

In this appeal, PW5 testified that she knew the 3rd and 5th Accused persons as they used to come to her home. However, PW5 did not give details of her previous interactions with the 3rd and 5th Accused persons, and particularly if the said Accused persons had ever talked to her before the incident, how many times and the last such interaction. The fact that the PW5 was familiar with the 3rd and 5th Accused persons and used to see them in the house is only reliable evidence when it comes to visual identification. For voice recognition to be established, the prosecution needed to prove that the PW5 had also in addition been talking and interacting with the 3rd and 5th Accused Persons before the incident, which was not done. In the absence of such evidence, the Court cannot definitely find that the voices heard by PW5 were that of the 3rd and 5th Accused persons, or that PW5 was familiar with the said voices.

In addition, Section 124 of the Evidence Act requires the corroboration of evidence of minors in criminal cases as follows:

> **" Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof**
>
> **implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

None of the other prosecution witnesses corroborated the evidence by PW5 that the voices of the 3rd and 5th Accused persons were heard at the scene of the crime.

Lastly, as regards the evidence that a phone belonging to the deceased was sold to the 6th Accused by the 5th Accused person, PW3 testified that the same was sold by the 5th Accused in October 2010. This was one month after the death of the deceased, and I agree with the submissions by the counsel for the 3rd and 5th Accused persons that as the said phone was not found in the possession of the 5th Accused person, evidence ought to have been adduced by the prosecution placing it in his possession after the death of the deceased and before the alleged sale, for this Court to conclusively link the 5th Accused to the said telephone.

On malice aforethought:

Finally, no evidence was adduced by the prosecution on any motive or intention on the part of the 3rd and

5th Accused persons to harm the deceased. In addition no evidence was called of any prior interactions that the 3rd and 5th Accused persons had with the deceased before the day of his demise, or of any altercations the two accused persons had with the deceased on the date of his death. The *mens rea* on the part of the 3rd and 5th Accused persons for the offence of murder was therefore not proved.

It is thus my finding after analysis of the evidence brought as regards the 3rd and 5th Accused persons that the charge of murder against them was not proved beyond reasonable doubt. I accordingly find the 3rd and 5th Accused persons not guilty of the offence of murder and accordingly acquit them. The 3rd and 5th Accused Persons shall forthwith be released from prison custody unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 28th DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE