



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 25 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BRIAN MOISASI MOPIA.....ACCUSED

JUDGEMENT

The accused herein Brian Moisasi Mopia has been charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the night of 18th April 2013 at Impolosat Sub-Location, Enkirigiri Location within Kajiado County, accused jointly with others not before court murdered Moses Moisasi Kiparki hereinafter referred as the deceased.

The accused pleaded not guilty to the charge. He was represented by Mr. Sekento, advocate while the prosecution was conducted by Mr. Akula, the senior prosecution counsel.

THE PROSECUTION CASE:

In support of the allegations against the accused the prosecution adduced evidence of eleven witnesses. According to PW4 Nakuyetu Moisasi, in the evening of 18/4/2013 she was at home with her deceased husband. As PW4 was preparing the evening meal for the family she was approached by the accused who wanted to know the whereabouts of his father, the deceased. In their conversation PW4 revealed that accused apparently was in company of some people in need of hiring the deceased motor vehicle. All she could hear thereafter was the vehicle being driven off and never was she able to see the deceased again that night. PW4 further deposed that her efforts to reach the deceased on phone failed, but managed to contact the accused on or about 1 am. She was therefore to learn from the accused that the deceased was still in company of the people who wanted assistance to sort out a mechanical problem of their vehicle. The next time PW4 knew of what happened to the deceased was at the time the police and other people contacted her on the matter of the death of the deceased which was now in the public domain.

PW2 Jeremiah Timama testified on how he received the message from a clan elder regarding the death of his brother. PW2 further alleged that on arrival he confirmed that the deceased had passed on. He was later to be called in by the police to identify the body at Shalom Hospital Mortuary to the pathologist who conducted the post-mortem.

The prosecution further alleged through the testimony of PW3 Tuta Moisasi who stated that on the night of 18/4/2013 at about 7 pm the accused entered in the house of the deceased. PW3 further told this court that he was the one sent by the accused to wake up the deceased so that he could have a talk with him on behalf of some people. According to PW3 the accused was in company of some people whom the accused never introduced to them. On the basis of the explanation given by the accused PW3 testified that he saw the deceased leave the house and drive away his vehicle registration number KAF 543S. In the evidence

of PW3 he never saw the deceased again until the following day when information was received that he is dead.

In an effort to bring the culprits to account PW5 Cpl Syengo stated that the murder report was booked at Isinya police station. PW5 further testified that they got information about the accused as one of the suspects whom they pursued and arrested in his house on 19/4/2013. PW6 PC Malonza police detective attached to Isinya further testified as having visited the scene of the murder involving the deceased. His testimony was to the observations made on the body of the deceased with multiple stab wounds, a bottle of richot whisky, a block of stone which was blood stained, a blood stained sword, the deceased clothes and footwear. It was at this juncture according to PW6 that they collected the body and took it to Shalom Hospital Mortuary. This formed the basis of the investigations as to the cause of death of the deceased.

PW7 Oinoti Ole Sirikwa further testified that on the night of 18/4/2013 he spent the night in the home of the deceased. It was further his testimony that while in the house in company of PW3 the accused came in knocking demanding to see the deceased. PW7 further deposed that after a brief conversation with the accused he saw the deceased pick the car keys and drove off the vehicle. According to PW7 the deceased was requested by the accused to assist some people who had a mechanical problem with their vehicle. As regards what happened thereafter PW7 testified that the deceased apparently never came back from the alleged rescue mission. He was to be confronted in the morning with information from PW4 that the deceased had been killed and his body was already in the land rover outside his compound. What PW7 was able to observe was a body with multiple injuries more specifically to the head.

PW8 Elizabeth Oyiengo a government chemist testified as to the analysis done to exhibits item A fresh and finger nails, over coat indicated as of the deceased, item 2, a blue jacket, item B1 indicated as of the accused, blood sample of the accused, a Maasai sword and a bottle of richot whisky. In the forensic analysis PW8 testified that the DNA profile generated from the over coat and blood stained sword confirmed to be that of the deceased. In the second DNA profile the blood stains jacket indicated to be that of the accused matched the blood sample of the deceased. Thirdly the DNA profile generated from the blood sample of the accused and that of the deceased revealed father – son biological relationship. The analyst report was admitted in evidence as exhibit 2(a).

The testimony by PW9 Dr. Kaggia who performed postmortem examination of the deceased revealed deep cut on the left forehead 16x4cm extending to the bone with exenteration of the left eye ball, deep cut through the nasal ridge 6cm x 3cm and also a further cut measuring 8 x 3cm extending to the maxilla, deep cut measuring 9 x 2cm on the upper lip, deep cut on the right orbit measuring 7 x 1cm, laceration of the vertex about 9 x 0.02cm, deep cut on the occipital area 5 x 1.5cm, bruises on the right upper quadrat 14 x 13cm, abrasion on the right medial elbow 6 x3cm, right hand cuts on the dorsum involving the wrist joint measuring 7 x 0.5cm, 5x 0.5cm, 2 x 0.5cm, cut on the thumb 2 x 0.2cm, cut on the index finger 2.5 x 0.2cm, middle finger 2.5 x 0.2cm, right finger fracture cut 2.5 x 0.5 cm, left hand deep cut on dorsum 6 x 0.2cm, small finger with fracture distal cut, right finger fracture, middle finger fracture, index finger fracture and cut measuring 3 x 0.2cm. Haematoma on both temporal regions – fracture of the temporal bone both right and left side, frontal bone and orbit, fracture at the unbriform area. Brain flattening the gyri and narrowing of the sulci. According to the doctor the death was caused by the injury to the head secondary to trauma using sharp objects leading to increased intracranial pressure and blood loss externally. The postmortem report was admitted as exhibit 7.

The tenth prosecution witness was Sgt George Odhiambo PW10 who testified as the gazetted scenes of crime officer. According to PW10 he visited the scene of the murder where various photographs were taken to document the incident. The bundle of photographs and the certificate detailing what was captured was admitted in evidence as exhibit 1A and 1B respectively. PW10 observed that the body of the deceased consisted of multiple injuries.

The eleventh prosecution witness C.IP Robert Kurgat PW11 and PW12 Sgt Nicholas Kirimi who were at the time based at Isinya police station investigated the offence of murder involving the deceased. According to their evidence on receipt of the report they mobilized resources by moving to the scene and the home of the deceased. PW11 stated that the body of the deceased was found at the scene in a pool of

blood. In the observation of the scene a block of stone, a blood stained sword, the deceased clothing, the bottle of richot whisky were all recovered. It was the testimony of PW11 that an arrangement was made to take the body from the scene to the mortuary where the postmortem was performed. After collecting the relevant evidential material the accused who was in custody has charged with the offence of murder. PW11 and PW12 further stated that in the course of investigations the accused alluded to the fact of recording a confession statement. The request was accorded to by PW11 and PW12 by inviting PW14 C.IP Gabriel Muriu to record the statement.

In the testimony of PW14 upon receipt of the accused he explained to him the rights and obligations under the constitution and statutory law. PW14 further confirmed to this court that there was strict adherence to the Out of Court Confession Rules 2009 in respect of confession statement recording from the accused. PW14 further testified that the accused elected to have PW1 Alex Shanka be present as a friend to witness the recording of the statement thus in PW14 they sought to look for PW1 whose telephone number was given by the accused. In this respect PW1 heeded the police call and confirmed that he did participate as a witness for the accused when PW14 recorded the confession statement. According to PW1 the accused gave the statement voluntarily without any coercion or inducement. The original and typed confession statements were produced by PW14 and admitted in evidence as exhibit 8(a) and (b).

THE ACCUSED DEFENCE:

After the closure of the prosecution case the accused person was placed on his defence. In his statement of defence the accused denied the offence as presented by the prosecution. In the chronology of events the accused told this court that on the material day he went about his duties as a sand broker. He also spent sometime in the livestock market purchasing some goats for slaughter in his butchery. According to the accused in the evening while at home he came across some people who wanted to hire a vehicle from the deceased. As a result he took up the responsibility of introducing them to the deceased. Further the accused denied being involved in the killing of the deceased. The accused alluded to the confession statement which he denied that it was obtained voluntarily as stated by PW14. The accused testified that prior to the recording of the confession statement he was beaten and tortured. In essence he retracted that the contents of the statements are correct.

SUBMISSIONS BY THE PROSECUTION COUNSEL:

At the close of the defence case, both counsels made final submissions. According to the learned senior prosecution counsel Mr. Akula, he submitted that the 14 witnesses have proved the elements of murder beyond reasonable doubt. Mr. Akula, further contended that deceased was alive on 18/4/2013 as up to the time when he was requested by the accused to go and assist some people who needed to hire his vehicle. Learned counsel submitted that after the accused left with the deceased on that fateful night, he was never to be seen alive again. Mr. Akula further submitted that the testimony by PW3, PW4 and PW7 points to the accused person as the one who left with the deceased and two other people whom he did not introduce to the them. Mr. Akula, further advanced the arguments to this court to consider the relevant chain of events from the time the deceased was called out of his bedroom at the instigation of the accused and his subsequent death. It is clear from the contention of Mr. Akula, the accused had a deliberate plan on how he was to kill the deceased on the material day. Mr. Akula further submitted that the prosecution case is based on circumstantial evidence from that of PW3, PW4 and PW7 who first saw the accused with the deceased on the night of 18/4/2013 at Impolosat home.

The second piece of evidence according to Mr. Akula submissions is in respect of PW8 the government analyst who conducted a forensic analysis on the DNA profile involving the blood stained jacket and the blood of the deceased. Mr. Akula invited the court to take notice on the DNA profile and its correlation of placing the accused at the scene. In further submissions by Mr. Akula the prosecution witnesses do demonstrate that whoever killed the deceased had the intent to cause death or serious bodily harm which is sufficient enough in the ordinary course of nature to cause death. This intent in Mr. Akula's contention can be traced as per the postmortem form produced by PW9 as exhibit 7 in support of the prosecution case. Mr. Akula argued that there was a deliberate act on the part of the perpetrators to inflict multiple

grievous harm against the deceased whose sole intention was to cause death. Mr. Akula further submitted that all the four elements required of the prosecution under section 203 of the Penal Code for the offence of murder have been established beyond reasonable doubt. Mr. Akula contended that the defence testimony by the accused did not controvert the direct and indirect evidence by the prosecution on how the deceased met his death.

Mr. Akula in a nutshell invited the court to find in favour of the prosecution, enter a verdict of guilty and convict the accused person. Mr. Akula, in support of his submissions cited the cases of; *Republic v Godfrey Ngotho Mutiso [2008] eKLR*, *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996*, *Republic v Tubere S/O Ochen [1945] 12 EACA 63*, *James Masomo Mbatha v Republic [2015] eKLR*, *Republic v Daniel Anyango Omoyo [2015] eKLR*, *Libambula v Republic [2003] KLR 683*. It is on this basis of the legal principles in these cases learned counsel submitted that the prosecution has laid out a watertight case to secure a conviction for the offence of murder.

THE DEFENCE COUNSEL SUBMISSIONS:

On the part of the defence Mr. Sekento, learned counsel submitted and observed that the prosecution case falls below the required standard of proof of beyond reasonable doubt. Learned counsel submitted that its discernible from the evidence that there is no direct link between the accused and the death of the deceased.

The question which learned counsel vehemently submitted on, was whether the accused participated in the killing of the deceased? It was learned counsel contention that the accused also came from his normal duties only to be confronted with the death of the deceased. Learned counsel submitted that the circumstantial evidence in this case is such that it does not lead to the irresistible inference that the accused committed the offence in question. Learned counsel urged the court to take into account the conduct of the accused before the death of the deceased. In reference to the accused conduct learned counsel pointed the incident of 18/4/2013 when accused is alleged to have called the deceased out of his house. According to learned counsel contention the mere fact that the accused entered the deceased house and asked for him is not of any evidential value to link him with the offence. Learned counsel urged the court to resolve the benefit of doubt in favour of the accused and make an order of acquittal. He cited the following authorities; *Republic v Kipkering Arap Koske [1949] 16 EACA 135*, *Miller v Minister of Pensions [1947] 2 ALL ER*.

ANALYSIS AND DETERMINATION:

It is therefore incumbent upon this court to properly evaluate the evidence, in light of the alleged offence to determine whether the prosecution has discharged the burden of proof required by law.

The findings of this case to me turn on the provisions of section 203 of the Penal Code. It's the relationship between section 203 and the evidence by the prosecution that will determine whether the charge of murder has been proved beyond reasonable doubt. Under section 203 of the Code murder is defined to the effect that:

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

This definition is clearly captured in the case of *Republic v Andrew Mueche Omwenga [2009] eKLR* the offence of murder consist of the following elements:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

(a) The death of the deceased and the cause of that death.

- (b) That the accused committed the unlawful act which caused the death of the deceased; and**
- (c) That the accused had the malice aforethought.”**

At this juncture i wish to address myself to each of the ingredients of the offence under section 203 of the Penal Code:

(a) The death and cause of the deceased death:

The general principle of law is that in homicide cases proof of death is essential to link an accused person with the offence. In our jurisdiction proof of death is either through medical evidence or any other cogent and tangible evidence to point as to the death of the victim. In the later scenario the court held in *Kimwari v Republic [1968] EA 452* as follows:

“That although death may be proved by circumstantial evidence, that evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive.”

While in the case of *Benson Nganyi Nundu v Republic Cr. Appeal No. 171 of 1984* the Court of Appeal held inter alia that, ***“in cases where the body is available and has been examined, a postmortem report must be produced and that the normal and straight forward means of seeking to prove cause of death is by producing the postmortem examination report.”***

Proof of death is also an aspect of the inquiry as to the cause or circumstances as to the death of the deceased. The nature of the inquiry at the stage of determining legal causation is provided for under section 213 of the Penal Code. The section defines causing death, ***“to include acts which are not the immediate or sole cause of death. The following circumstances when proved would hold the offender to be responsible of the death of the victim notwithstanding that his actions were not the immediate cause of death:***

- (a) Where the deceased suffers bodily harm and as a consequence undergoes treatment which results in death.***
- (b) Where the deceased sustains bodily injury but fails to get proper medical attention as to his/her well being.***
- (c) Where the acts of an offender forces the deceased to take evasive action which results in his death.***
- (d) Where the acts of the offender hastens the death of the deceased.***
- (e) Finally where the acts of an offender would not have caused death unless it be accompanied by that of the deceased or of other persons.”***

Going by the above principles and the evidence on record the fact of the death of the deceased cannot be disputed. Nearly all the prosecution witnesses who testified confirmed that they had personal knowledge or were correctly informed of the fact that the deceased met his untimely death on 18/4/2013. PW2 Jeremiah Kiparki testified that he identified the body of the deceased to the pathologist PW9 Dr. Kaggai Serah. The identity of the deceased was confirmed by the members of the family like PW3 Tuta Moisasi, PW4 Nakuyetu Moisasi which it was brought to the homestead upon recovery from the scene. Similarly on proof of death and the cause of death PW9 Dr. Kaggai testified that the postmortem conducted on 20/4/2013 in the presence of family members and police officers it emerged that the deceased had sustained multiple injuries to the head, upper limbs, the fracture of the skeleton, the area described as ultracasual, occipital region resulting in haematoma on both temporal regions occasioned by sharp and blunt force. The nature of injuries more specifically the head injury secondary to trauma and blood loss led the deceased to succumb to death.

The prosecution therefore proved beyond reasonable doubt the cause and death of the deceased Moses Moisasi Kiparki.

(b) The second element to be proved by the prosecution is that of unlawful death of the deceased (Moses Moisasi):

Generally all homicides are unlawful unless excusable under the provisions of statutory law i.e. in defence of self, property, advancement of criminal justice or accidentally caused. A human death is homicide if the dead person was once alive and is now dead because of the unlawful act of another human being. The classic case of *Guzambizi S/O Wesonga [1948] 15 EACA 65*, clearly illustrates this principle. See also text book on *Criminal Law 2nd Edition by William Musyoka J Chapter 12 at 12:2*.

Under Article 26 (1) (3) of the Constitution thus provides:

“Every person has a right to life, and no one shall be deprived of life intentionally except to the extent authorized by the constitution or other written law.”

According to the Kenyan constitution any other circumstances outside these parameters provided by law death is considered unlawful.

It is therefore pertinent to state that causation is the relationship between the conduct and result. It is envisaged under section 203 of the Penal Code that, **“an accused may be held liable for the offence directly or indirectly”** in any of the following scenarios. **“If while armed with a gun shot at A and with it kills him, he has caused the death of A directly.”** In the second scenario **“if the accused procures B to kill A he will be held to have caused his death indirectly.”**

The legal causation is well illustrated by **G. Williams** in his text book on **Criminal Law 2nd Edition, 1983 at pg 381-382, pg 568:**

“Where one has settled the question of but for causation, the further test to be applied to thebut for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction. The question is whether the result can fairly be said to be imputable to the defendant, if the term cause must be used, it can best be distinguishable in this meaning as the imputable or reparable or blameable cause, to indicate the value judgement involved. The word imputable is here chosen as best representing the idea, whereas the but for cause can generally be demonstrated scientifically, no experiment can be devised to show that one of a number of concurring but for causes is more substantial or imper presence than another, or that one person who is involved in the causal chain is more blameworthy than another.”

The issue of causation is relevant as an element of murder as provided for under section 213 of the Penal Code. The court here has a duty to examine the role the accused played in causing the death of the deceased.

Unlawful means without lawful justification or excuse. Sir William Blackstone in his commentaries on the Laws of England set out the definition of murder as follows:

“When a person, of sound mind and discretion, unlawfully kills any reasonable creature is being and under the King’s place, with malice aforethought, either express or implied.”

The essential test under this ingredient is the fault element. That fault element that in murder is an intention to kill or to inflict grievous bodily harm. In our penal code the definition of grievous bodily harm, comprises of the loss of a distinct part or organ of the body, or serious disfigurement, or maim, any bodily injury of such a nature. That if left untreated would endanger or likely to endanger life or cause permanent injury to health. In this context if an accused person unlawfully assaults another who dies as a direct or indirect result of the assault, he will be held guilty of the offence of murder. The key exception is when the unlawful act is within the scope of defence of property or self or accident.

In the instant case therefore the unlawful acts of omission to have caused the death of the deceased can be inferred from the scenes of crime officer photographs. According to PW10 Sgt Odhiambo when called upon to visit the scene he documented the body of the deceased far away from his home lying in a pool of blood. As deduced from the photographs the deceased has suffered grievous bodily harm on various parts of his body. PW10 was further to capture a block of blood stained stone and a sword which apparently were the murder weapons. The pathologist PW9 opined that the deceased died of the head injury secondary to blunt and sharp trauma to his body.

It is also evident from PW8 Elizabeth Oyiengo the government analyst that the forensic undertaken between the blood stained sword and the blood sample of the deceased created a DNA match. The nexus to be drawn with that piece of evidence is that the sword exhibit 3A was the murder weapon which must have inflicted the deep cut wounds against the deceased. The testimony by PW3 Tuta Moisasi, PW4 Nakuyetu the widow, PW7 Oinot Ole Sirikwa, was to the effect that in the early hours of the night on 18/4/2014 the deceased was in good health resting in his house. The situation seems to have taken a turn for the worse following his request by his son the accused to leave the home and assist some unknown people who offered to hire his vehicle. The nature of the injuries and the surroundings in which the deceased blood stained body was recovered is a clear demonstration that the death was unlawfully caused. It is trite that when a person dies or is killed due to negligence or assault with intent to cause harm, that death is considered unlawful.

This ingredient has therefore been proved beyond reasonable doubt.

(c) The third ingredient which distinguishes murder from manslaughter is that of malice aforethought:

Section 203 of the Penal Code provides for the element of malice aforethought. It is further the provisions of section 206 of the Penal Code which defines what constitutes malice aforethought by the prosecution adducing evidence to establish any one of the set of circumstances stated herein:

- (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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause 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.**

The *mens rea* for the offence of murder is malice aforethought. This was stated in the case of *Bonaya Tuyut Ipu & Another v Republic [2015] eKLR* where the court held that *“malice aforethought is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for the offence of murder depends on the peculiar facts of each case.”*

In another case: *Paul Muigai Ndungi v Republic [2011] eKLR* the Court of Appeal held that *“malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person.”*

As noted elsewhere the intention to cause death or cause grievous harm can be inferred from the facts of each case. This can be seen clearly from the decisions representing the threshold to be met for malice aforethought to be manifested. One such element has been the nature of injuries suffered by the victim. The Court of Appeal in the case of *James Masomo Mbatha v Republic [2015] eKLR* held:

“In the present case, the slier force of the wounds on the deceased are indicative of malice aforethought. Phyllis had a cut in the head region, which extended to the skull, bones, and exposed the brain. In addition she suffered a deep cut on the right hand with a fracture of the right hand. She also had cuts on her legs and suffered burns. Everlyn Ndituu Nyamai had deep cuts on the right elbow and several cuts on the skull. Susan Mbute – also had two deep cuts which extended to the brain and Elijah Kasyoki had deep cuts on his skull which also extended to the brain. Surely in inflicting these wounds on the deceased the appellant intended to cause them fatal harm.”

The burden of proof on the part of the prosecution is to prove any one of the set of circumstances or combination as provided for under section 206 of the Penal Code. In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the predecessor of the Court of Appeal held on how an intention to kill under section 206 (a) can be inferred and thus stated as follows:

“It is the duty of the court in determining whether malice aforethought has been established to consider the nature of the weapon used, the manner in which it was used, the part of the body injured and the conduct of the accused before, during or after committing the crime.”

The Court of Appeal emphasized further in the case of ***Ernest Asami Bwire Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990*** that ***“a consideration to the nature of the killing and where it is found to be brutal coupled with the use of the lethal weapon. One can infer that the killing was well calculated and planned to bring the case within section 206 (a) of the Penal Code (Cap 63 of the Laws of Kenya).”***

With this background in mind the question which begs for an answer is whether whoever killed the deceased had malice aforethought. In so far as this case is concerned no evidence was tendered to suggest this murder arose under circumstances such as self-defence, provocation or existence of insanity.

In order to substantiate motive the prosecution relied on the evidence of the widow PW4 Nakuyet Moisasi and the investigating officer PW12 Sgt Nicholas Kirimi. The investigating officer had alluded to the fact that the deceased had sold substantial portion of his land without consulting the family. What the prosecution was inviting the court to take into account with the relevance of motive is to buttress the presence of malice aforethought in the death of the deceased. In support of this legal proposition the relevance of motive in criminal case has been discussed in the case of ***Libambula v Republic [2003] eKLR 683.***

In a persuasive authority by the Supreme Court of India in ***Basdeu v The State of Pepsu Air [1956] SC 488*** the court discussed the place of motive, intention and knowledge in a crime in the following words:

“Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt then but it is not difficult to perceive that they connote different things.”

I find this observation by the Supreme Court relevant in our situation in view of the fact that section 203 part II of the Indian Penal Code has similar provisions with our own section 203 of the Penal Code. Has the prosecution brought this case within the provisions of section 203 of the Penal Code? According to the prosecution case from the evidence of PW9 Dr. Kaggia who performed the postmortem and detailed the positive finding in the postmortem from exhibit 7 it is not disputed that the deceased suffered serious multiple injuries. The evidence of the doctor PW9 confirmed deep cuts to the head skull, nasal region, occipital and orbit, the left hand, right hands, brain flattening, subdural haemorrhage, fracture of the temporal bone resulted in the death of the deceased. The doctor attributed the trauma as having been caused by both blunt and sharp objects.

What can be deduced from the testimony of PW9 this was not a case where the deceased was hit with a single blow but repeated multiple grievous harm to both external and internal organs. The assailants in this case concentrated in hitting the deceased head with such a force including use of a lethal weapon knowing too well it would cause maim or grave injury. The part of the body targeted is therefore indicative of intention to cause death or grievous harm. From the postmortem report the deceased sustained 17 different deep cuts to the head and upper limbs involving the skeletal and muscles. The nature of injuries suffered were physically seen by PW6 PC Nickson Malonza, PW10 Sgt Odhiambo, the scenes of crime officer, PW11 C.IP Kurgat and PW12 Nicholas Kirimi all police officers who came into contact with the body in the course of their duty in one way or another to unravel the death of the deceased.

The second aspect of this case is the nature of the weapon and the manner it was used against the deceased. According to PW10, PW11 and PW12 a Maasai sword was recovered from the scene. The sword was later subjected to a forensic analysis for the DNA profile by PW8 Elizabeth Oyiengo to establish whether it was used to inflict the injuries. It is not in dispute from PW8's evidence that the blood stains on the sword matched the DNA profile with the blood sample of the deceased. The sword is a lethal weapon particularly when used for purposes of inflicting harm against the body of a human being. The prescribed 17 cuts confirmed from the postmortem were all caused by a sharp object. The accused conceded in his confession statement that the sword used to kill the deceased belonged to him and had given it out to the killers on the material day. The answer as to the ownership of the sword was voluntarily admitted by the accused goes along to affirm the fact on how it found itself at the scene of the crime.

Thirdly, there is the element as to the conduct of the accused before, during and after the murder. According to the investigating officer PW12 Sgt Nicholas Kirimi the accused had spent part of material day on the 18/4/2013 having drinks and socializing with some men at Lemuya Bar upto 9.30pm. This testimony by PW12 to the effect that accused was in company of two men is corroborated by PW3 Tuita Moisasi. PW3 added that when accused came to the deceased house there were two people waiting outside. PW3 further stated that on request by the accused the deceased left the house to go and assist them to sort out their alleged damaged vehicle. The wife of the deceased PW4 also testified to the fact that there were two people in need of towing services from the deceased. PW12 further explained that it was the accused who fronted the request on their behalf to the deceased. On the other hand PW4 stated that though she did not see the actual men she could hear the deceased vehicle leaving the compound.

In reference to PW12 detective Sgt Nicholas Kirimi as to the time when accused is said to have left the bar the narrative by PW4 creates a chain on placing accused at the home of his father. At the relevant time PW3, PW4 and PW7 were present at home with the deceased. There is evidence from PW3, PW4 and PW7 that the accused was the one who caused the deceased to leave the homestead. There is evidence that the accused insisted that the deceased should wake up and attend the two men who needed their vehicle towed. The accused never took any steps to introduce the two men to his mother PW4, his brother PW3 or the visitor who spent a night in their home identified as PW7. He kept all these matters close to his chest as the physically managed to persuade the deceased to drive his motor vehicle registration number KAR 503S under the pretext of offering a service to genuine customers. There is evidence from PW3, PW4 and PW7 that on the night of 18/4/2013 at about 10.00pm was the last time the deceased person was seen alive. The appraisal of the evidence indicates that the following day the deceased body was discovered about 30 kilometres away from his home. The last seen evidence in this case is like well knit chain comprising of incriminating material pointing at guilt of the accused.

In the case of *Ndinguri v Republic [2001] 1EA 179* the Court of Appeal stated as follows inter alia that ***“the appellant was the last person to be seen with the deceased and the deceased body was later retrieved from the appellant’s latrine. The appellant was unable to give a plausible explanation of how he parted ways with the deceased.”***

The prosecution in this case besides the testimonies of PW3, PW4 and PW7 adduced evidence of investigating officers PW11 and PW12. In the course of investigations PW11 and PW12 recovered the blood stained jacket of the accused. It is clear from PW3, PW4 and PW7 evidence that on the night of

18/4/2013 when the accused came for his father. There was no indication of any harm to his body to occasion blood stained jacket. The prosecution further connected the accused with the murder through the confession statement recorded by PW14 Gabriel Muriu in the presence of PW1 Alex Shanka. As deduced from the evidence of PW1 and PW14 the confession statement was administered on the accused on 21/4/2013 pursuant to section 25A of the Evidence Act Cap 80 of the Laws of Kenya.

The requirements to be met by PW14 are outlined in Out of Court Confession Rules 2009 which encompasses the rights and obligations of the accused. According to PW14 the accused was cautioned that he was not obliged to say anything unless he wished to, but whatever he said would be written down and might be used in evidence. The accused according to PW1 and PW14 having understood his constitutional and statutory rights elected to make a statement in English which too was read over to him in the same language. PW1 and PW14 confirmed that the accused having understood the content and that he was being charged with murder he agreed as to the information and signed it.

I am alive to the fact that the element of the charge like malice aforethought may not have been covered in a legal strict sense to the accused. However i am satisfied that the accused understood fully the charge which he elected to make a long detailed statement in answer to the charge. The accused refers to two unnamed men as the ones who executed the murder.

The accused goes on to state on how they met in a bar prior to moving to the home to pick the deceased to accomplish the mission. The accused further states that the planning took place on the 17/4/2013 when the cost of Ksh.40,00 was agreed as payment of killing the deceased. In keeping his part of the bargain the accused confirmed having paid a down payment of Ksh.20,000 with a balance on a later date. The events of the 18/4/2013 and his role to drag the deceased out of the house were all covered in greater detail. The accused providing of the sword to the two men and his presence on the material night equally points to his involvement in the crime. There is no dispute from the confession statement that the accused knew from the time he met the two men on 17/4/2014 that his intention was to kill the deceased.

The pre-meditation and design of the manner the two were to carry out the plot was crystal clear to the accused. The two men were not going to hire a vehicle from the deceased as alluded to by the accused to PW3, PW4 and PW7. Their intention including the accused was to cause death. The accused facilitated the unlawful attack by making payment leading them to the house, by trapping the deceased with an offer of hiring his vehicle for reward. The accused was all aware that the deceased was to be attacked and possibly killed that night. The accused took part in every step of the plan. A clear reading of the evidence by the prosecution circumstantially establishes that the whole conduct of the accused from the time he enlisted the two men was such that of an intention to unlawfully assault and kill the deceased.

I find no evidence that in all these criminal transactions the accused was a by stander or a passive perpetrator before, during or after the murder. The accused conduct brings into play the gist of the principle of common intention. Section 21 of the Penal Code provides as follows:

“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 purposes 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.”

The accessories and abettors in a criminal offence are also dealt with under section 20 (c) of the Penal Code. The principle here is that, ***“whoever shall aid, abet, counsel, encourage, counsels instigates, or procures the commission of any indictable offence shall be held liable indicted and punished for that offence as the principal offender.”***

An early example of this principle is illustrated in the case of ***Msembe & Another v Republic [2003] KLR 521*** where the judgement highlighted the importance of identifying the common purpose as follows:

“When an offence is committed by A, C and D who ride together with an intention to rob or cause death to a particular victim and each of them joineth together to engage in pursuing the

offence and executing it, every person who does or omits to do any act for purpose of enabling or aiding another to commit the offence is deemed to have taken part in committing the offence and is to be held guilty of the offence and indicted of it as if he actually committed the robbery or the murder.

In the present case anybody who was a party to an attack on the deceased which resulted in an unlawful killing in law is a party to the murder contrary to section 203 of the Penal Code.”

There are various decisions on this issue to shed light as to the consummation of common intention in a crime scenario. In the decision of Wanjiro D/O Wamario v Republic 22 EACA 521 it was held:

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

In Njoroge v Republic [1983] KLR 197 the court stated as follows:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against 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 endeavour to the effect the common assault of the assembly. The common intention may be inferred from their presence, their actions and the omissions of either of them to dissociate himself from the assault.”

In the instant case the accused seems to exonerate himself from the actual assault and killing of the deceased. The evidence on record shows otherwise in the manner he embarked on a mission to cause the death of the deceased. The overt acts of enlisting the killers, going for the deceased at his homestead, making a down payment towards the cost demanded by the killers rendered the accused to be a principal offender under section 20 (1) (c) of the Penal Code.

I do accept the evidence of PW3, PW4 and PW5 as credible and acceptable in respect to the facts to draw an inference to the guilt of the accused. In my conceded view the defence testimony attempt to retract the confession statement did not destroy nor demonstrate any part of it as being untrue. The deceased was killed in the circumstances stated by the accused. It is also true that the prosecution relied on circumstantial evidence to nail the accused person for the offence. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other hypothesis of innocence is on the prosecution and remains so throughout the case. (See Republic v Kipkering Arap Koske & Another [1949] 16 EACA 135).

The Court of Appeal in the case of Mwangi & Another v Republic [2004] 2KLR 32 had this to say on circumstantial evidence:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”

The evidence of PW3, PW4 and PW7 turned out to circumstantially link the accused to the deceased under the last seen theory principle. This was further corroborated by the confession statement which was recorded by PW14 in the presence of PW1. The confession statement was admitted in evidence without any challenge from the defence.

I am satisfied that it was recorded voluntarily and within the provisions of section 25A of the Evidence Act.

The accused in this case had a rebuttable burden to explain either how he parted with the deceased or

whether indeed he went with him together with the hirers. The answer to this is found in the evidence of PW1 and PW14 in support of the prosecution case. I am satisfied that the accused unsworn statement does not demolish nor create any doubt in the mind of the court on how this crime was committed. I have no doubt that the accused defence on how he learnt of the death the following day is a false statement in answer to the charge. It did not discharge the statutory burden created under section 111(1) and 119 of the Evidence Act.

In this case it exists against the accused person to rebut the presumption which is manifested by the prosecution evidence. The two sections stipulates as follows:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualifications to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such persons is upon him provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119: The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to all facts of the particular case.”

The accused had a rebuttable burden to explain how he parted ways with the deceased when he woke him from the house. There is ample evidence that the accused did not give any explanation of his whereabouts when the alleged hirers presumably left with the deceased. On the material day neither does he explain how he interacted and parted with the deceased immediately he came out of the house. What the accused did was to deny any knowledge of the circumstances that unlawfully occasioned the death of the deceased. He also ever denied the location of the vehicle which the people who sought help from the deceased required it to be towed and delivered.

Having considered the evidence by PW1 – PW13 i have no doubt that there existed no vehicle which had a mechanical breakdown to have forced him to seek assistance from the deceased on behalf of the hirers. The accused in this case did not attempt to explain facts which he was reasonably expected to be able and intended to explain in answer to the charge. What the court was treated to in the defence was a disjointed statement of facts which in review are obviously false.

It is my conceded view that the accused embarked on a joint enterprise to execute the death of his father with two other persons not before court. As part of the common enterprise he played the key role in the design, strategy and the unlawful attack which resulted in death. The intent with which the accused went about executing the joint enterprise which caused the death of the deceased is overwhelming from the ample evidence adduced before this court. There has been no intervening act of such a character as to break any connection between the accused conduct and the deceased death.

In conclusion i find that the prosecution has proved its case beyond reasonable doubt by establishing the intention to cause death under section 206 (a) and (b) of the Penal Code. The evidence as appraised therefore brings the case under the rubric where malice aforethought has been proven beyond reasonable doubt.

Secondly, it follows that the case for the prosecution has satisfied the test on circumstantial evidence to link the accused with the offence. This has been laid down in the case of ***Republic v Kipkering Arap Koske & Another 16 EACA 135, Simon Musoke v Republic [1958] EA 715 Musili Tulo v Republic [2014] eKLR*** where the court had this to say on circumstantial evidence requirements test:

Restatement of the principles:

“It would not be satisfactory for the trial court to rely on circumstantial evidence unless it satisfies the following:

- (1) That the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.***
- (2) Those circumstances should be of a definite tendency unerringly, pointing towards guilt of the accused.***
- (3) 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.***
- (4) It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”***

It is apparent from what I have said above these established principles show the form of liable acts of omission and commission expressly and impliedly coupled with a common intention on the part of the accused to commit the offence of killing his father, the deceased. The nature and sufficiency of it is such that the facts exclude every other theory but that of guilt of the accused person.

Before I pen off I am persuaded to refer to the classic statement by **Pollock CB** Way back in 1866 in **EX ALL 176 ER 850** on these metaphor “links in a chain” where he said:

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall.

It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite be of sufficient strength.”

Thus it may be in circumstantial evidence there may be a combination of circumstances. None of which would raise a reasonable conviction, or more than a mere suspicion but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of. When applying this “links in a chain” metaphor it is inescapable that the circumstances as deduced from testimony of PW1 – PW14 establishes beyond reasonable doubt an inference of commission of the offence and the accused involvement.

The alibi defence:

The particularization of the accused whereabouts on the crucial day of the murder has been dislodged by the evidence tendered by PW3, PW4 and PW7. In early hours on the night of 18th April, 2013 there is sufficient evidence positively identifying the accused was in the house of the deceased. This credible evidence by PW3, PW4 and PW7 went further to name the accused as the last person who accompanied the deceased to be shown the location of the car to be towed. It was therefore unnecessary for the prosecution to seek adjournment for purposes of investigating the alibi statement. Invariably though an afterthought it did not cast any doubt as to the reliability and credibility of the prosecution evidence linking the accused with the commission of the offence.

Finally when the confession statement by the accused is carefully pieced together it is indicative of facts made freely and voluntarily. This acknowledgement squarely places the accused at the scene of the crime and not in the livestock market as he wants this court to believe. I therefore reject the accused alibi defence.

It is reasonable to conclude that the evidence by the prosecution comprises the establishment of the offence of murder contrary to section 203 against the accused person beyond reasonable doubt. That principle in law the accused person is found guilty of the charge and consequently convicted of killing **Moses Moisasi Kiparki** as provided for under section 203 of the Penal Code.

Dated, signed and delivered in open court at Kajiado on 15th day of August, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Sekento for the accused present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant