REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 10 OF 2014

REPUBLIC

VERSUS

TOBIAS MWACHAKA MWAMBURI

ONESMUS KIRIGHA MWAKIO

JUDGMENT

INTRODUCTION

1. The Accused persons herein, Tobias Mwachaka and Onesmus Kirigha, are jointlycharged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the charge were that on the 5th day of May 2012at Mwaroko sub-location, Mgange location within Taita Taveta County, jointly with another not before court,murdered George Mwabingu Msangi.

2. Initially, G. Nzioka J heard the matter and found the Accused persons to have had a case to answer. When the matter was transferred to High Court of Kenya Voi and parties appeared before this court on 16th June 2016, they requested that the matter proceeds *denovo.* This court therefore heard the matter afresh.

On 28th February 2017, this court found that a *prima facie* case had been established against the Accused personsand put them on their defence.

THE PROSECUTION'S CASE

3. The Prosecution's case was that on the aforesaid date and time, the deceased and Samson Mghanga Mwakisha Theophillus (hereinafter referred to as "PW 6") went to drink traditional liquor at the house of one Mwadime when the said Mwadime and the Accused persons herein attacked the deceased and occasioned him fatal injuries. The following day, blood stains beginning from the said Mwadime's house led them to where the deceased had been killed and dumped. The Accused persons were arrested after PW 7 informed the police that they had killed him.

4. It called a total of seven (7) witnesses to demonstrate the following ingredients of murder outlined in Section 203 of the Penal Code Cap 63 (Laws of Kenya) :-

1. Proof of the fact and cause of death of the deceased;

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

part of the accused persons; and

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

5. It submitted that in addition to the above principles, the court must also consider a further principle set out in the case of **Musoke Vs. R (1958) EA 175** where the court cited with the approval the decision in **Teper Vs. R (1952) AL 480** where it was held as follows:-

> **"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."**

6. In demonstrating proof of fact and cause of the deceased's death, the Prosecution contended that PW 6's testimony contradicted that of the both the Accused persons confirming that having arrived at Mwadime's den with the deceased, the customers at Mwadime's den at the material time were not many.

7. PW 6 further confirmed that Mwadime wanted to take a cup away from the deceased which led to a confrontation and the 1st Accused attacked the deceased. PW 6testified that when he tried to intervene he was attacked by the 2nd Accused person using a walking stick which caused him to run off and he testified that he heard a scream as he took off.

8. It pointed out that if indeed there were many customers present as alleged by the Accused persons, then they would have called any of those present to corroborate their evidence. It further pointed out that the testimony of there being many customers present at Mwadime's den at the material time was not brought out during cross-examination of PW 6 but rather at the defence stage, demonstrating that it was an afterthought.

9. It contended that the photographs adduced by Number 61751 Sgt David Chege (hereinafter referred to as "PW 2") confirmed that the deceased was carried from the point of murder to the point where his body was dumped. It contended that Mathias Mwangi Musangi (hereinafter referred to as "PW 1"), Ngeti Mwakio (hereinafter referred to as "PW 3") and Mwachofi Nyambu (hereinafter referred to as "PW 4") all testified that they had seen footprints of two (2) people on the river bed which led upto the point where the deceased's body was found demonstrating that the murder of the deceased was not carried out by one person but that there was an accomplice.

10. It averred that it was not clear why the Accused persons sought to report to the police that the deceased had been murdered before they received information that the deceased's body had been found. It further averred that it was clear from the evidence of PW1, PW 3, PW 4 and PW 6 that the deceased was injured from Mwadime's homestead as there was a trail of blood from his homestead on the footpath towards the river where pieces of human brain were found. Further, PW 4 confirmed that the 2nd Accused's homestead was near the river where the human brain was found.

11. It conceded that it did not have direct evidence on who inflicted the fatal injury on the deceased which resulted in his death but that PW 1 and PW 6 testified that they went to Mwadime's homestead the same night and saw a torch light leading down the path towards the river which is the same path where they found blood trail on the following morning. It submitted that the alibi defence is wanting and can be considered an afterthought.

12. It further averred that though it was not clear who inflicted the fatal blow on the deceased, where the deceased was found rules out the possibility that the deceased's murder was carried out by a single person. It submitted that both Accused persons formed a common intention to execute an unlawful purpose in conjunction with each other which resulted in the commission of an offence.

13. It relied on the case of **Francisca Ngina Kagiri Vs. Republic Court of Appeal Nyeri [2000] eKLR**where the Court of Appeal defined common intention thus;

> **"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 proven to start with."**

14. It was its contention that there were no co-existing circumstances weakening the chain of events it had relied upon, which clearly pointed to the fact that both the Accused persons were involved in the death of the deceased. It submitted that the totality of the evidence irresistibly proves that both the accused persons caused the death of the deceased.

15. It argued that the Accused persons' defence was more of alibi defence because they contended that there were several people at the Mwadime's house and that they witnessed Mwadime chasing out everyone from his house. It stated that they had an opportunity to corroborate their evidence by calling Darius Mwandigi Mwadime, the 2nd Accused's younger brother**,** to corroborate their evidence but they did not.

THE ACCUSED PERSONS'CASE

16. The two (2) Accused persons adduced unsworn evidence but did not call any witnesses. They stated that they were at Mwadime's house on the material date to drink local brew sold that he used to brew but denied having committed the offence.

17. They submitted that the entire Prosecution case was based on suspicion but that suspicion, however, strong could not form the basis of a conviction and in this regard, relied on the case of **Republic Vs. Benson Ochieng Oyungi [2016] eKLR**where Sitati J held as follows:-

> **"With regard to suspicion the law is clear that no amount of evidence based on suspicion, no matter how strong the suspicion may be can be treated as credible evidence."**

18. They therefore urged this court to acquit them as the Prosecution had failed to prove its case beyond reasonable doubt.

LEGAL ANALYSIS

19. Dr Mwanajuma Ali (hereinafter referred to as "PW 5") confirmed that the deceased died after being hit on his head with a blunt object. PW 2 produced in evidence the photos of the crime scene but he did not visit the scene of crime.

20. According to PW 1, PW 6 told him that he left the deceased being beaten by Mwadime and the Accused persons. He admitted that in his initial statement that he recorded at the Police Station, he had mentioned that he saw two (2) foot prints along the river but that the correct position was that there were three (3) footprints. He was emphatic that the version he told the court was the correct one and rejected the Accused person's suggestions that what he recorded at the Police Station in the first instance must have been the whole truth.

21. He admitted that he did not see the number of people who left Mwadime's house or recognise the voices after they followed the torch towards the river. He also stated that he found the 1st and 2nd Accused persons at the Police Station but he did not know what they were doing there.

22. He testified that Mwadime committed suicide on 6th May 2012, a day after the deceased died on 5th May 2012. On his part, PW 3 stated that Mwadime committed suicide a week after the deceased's death.

23. In his evidence, PW 3 said that he was going to work when he heard screams coming from the direction of the river. He went there and was informed that the deceased had been killed. He confirmed having seen the blood stains along the river bed, brain matter and the deceased's body. He said that he saw footprints of two(2) people. He said that he never met the 1st and 2nd Accused persons on 5th May

2012.

24. On his part, PW 4 stated that he was called to the scene on 6th May 2012. He saw blood stains, brain matter and the deceased's body. He said that he got to know on 7th May 2012 that Mwadime killed himself.

25. The star witness for the Prosecution was PW 6. He testified that he had gone with the deceased to Mwadime's shop to purchase cigarettes. His evidence was that Mwadime enticed him and the deceased to go to his house by promising to buy him alcohol which he said was strange. He said that there wereother people inside Mwadime's house and at some point,Mwadime drank deceased's alcohol that he had been served by the 1st Accused person.

26. His evidence was that after Mwadime, the 1st and 2nd Accused person started beating the deceased, he ran away but while he was at the door, he saw Mwadime holding a panga and a piece of wood. He said that he could not see properly and he ran away to PW 1's house to call him so that they could go and assist the deceased.

27. His evidence was that when they got to Mwadime's house, he did not see how many people were going towards the river but that there was a person holding a lit torch. He added that when they went to the 2nd Accused's house on the morning of 6th May 2012, he noted that he had mud in his elbow and legs.

28. He contended that the Accused personswent to report that a thief had been killed but that they were arrested after he told the OCS what had happened. He said that the Recording Officer may have confused the name of the person who was selling the alcohol when he indicated that it was Darius Mwandigi Mwadime, the 2nd Accused's younger brother, who was serving alcohol and not the 1st Accused person as he had told the court.

29. His testimony was that by the time he ran away from Mwadime's house, there were six(6) other people in his house. He was categorical that he did not see the Accused persons beat the deceased but that they were involved in the fight. He denied that the said Darius Mwandigi Mwadime was involved in the fight between the deceased and Mwadime.

30. The Investigation Officer Number 55742 PC Reuben Guya (hereinafter referred to as "PW 7") denied that Darius was in Mwadime's house at the material time. He, however, confirmed that Mwadime killed himself after the incident. He stated that he relied on what PW 6 told him to charge the Accused persons with the deceased's death.

31. While Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives the prosecution the discretion to decide the number of persons to call to prove a particular fact, this court was concerned that the Prosecution did not call Mwadime's wife who PW 1 and PW 6 said they found cleaning blood outside Mwadime's' house and the said Darius Mwandigi Mwadime who PW 6 said was also in Mwadime's house at the material time. In fact, the Prosecution did not interrogate Mwadime's' wife to explain where she was when the fight occurred more so as she was cleaning the scene. Clearly, Mwadime's wife must have known what had transpired.

32. Both Mwadime's wife and Darius Mwandigi Mwadime were crucial witnesses who would have shed light as to what happened on the material date. The failure by the Prosecution to call them as witnesses weakened its case tremendously. The burden of proof is always on the Prosecution. The Accused persons were under no obligation to call the said Darius Mwandigi Mwadime to confirm that he was the one who was serving alcohol in Mwadime's house.

33. This court also agreed with the Accused persons that although PW 6 indicated that the deceased was screaming, PW 7 did not find it necessary to interrogate immediate neighbours of Mwadime with a view to establishing whether really PW 6 was saying the truth.

34. PW 7 relied on the evidence of a single witness, PW 6, yet he was said to have been drinking. The lighting conditions were also not favourable and he ran away when Mwadime started chasing people who were in his house. He only came back when he and PW 1 saw a torch going towards the river but did not see or recognise the voices of those people. The fact that PW 6 stated that he never saw either of the Accused person's beat the deceased was enough to satisfy this court that relying on his evidence to convict them was too risky. This is also because he did not see them carry blunt weapons and hit the deceased on the head or carry him to the river where his body was dumped.

35. It was not in doubt that the deceased died from unnatural causes. Notably, Mwadime committed suicide only a day after the incident. PW 6 saw him hit the deceased. His committing suicide a day after the incident where his wife was found cleaning blood from his compound was sufficient to have inferred negative inference against him relating the deceased's death.

36. This court associated itself with the case of **Republic Vs. Benard Obunga Obunda [2015] eKLR**that was relied upon by the Accused persons where Mutuku J held as follows:-

> **"What is obvious is that the beating of the deceased by the accused is not the cause of death. This is so because this court must be guided by the evidence adduced before it….The defence cannot be expected to fill in the gaps for the prosecution."**

37. Both the 1st and 2nd Accused person adduced unsworn evidence. Their evidence showed that there was an altercation between the deceased and Mwadime.Although their evidence had little or no probative value,the Accused persons were under no obligation to fill the gaps the Prosecution had left.

38. The Prosecution failed to adduce evidence to point to any unlawful act on the part of the Accused persons which would have caused the death of the deceased. It failed to satisfy the ingredient in Section 203 of the Penal Code cited hereinabove despite adducing a Post mortem Report in evidence that showed that the deceased had injury on the back of the head and on the left ear.

39. The fact that the Accused person were in Mwadime's house together with the deceased was not conclusive evidence that the Accused persons killed him as no one saw them injure him and there were other people in his house. In fact, there was no evidence that PW 6 who was with the deceased at the material time saw the Accused persons hit the deceased and dump him by the riverside.

40. This case was based solely on circumstantial evidence. Although the cause of the deceased's death was proven as could be seen from the Post mortem Report, there was no proof that he met his death as a result of the Accused persons' unlawful act or omission and/or that the unlawful act or omission was committed with malice aforethought as contemplated under the provisions of Section 203 of the Penal Act.

41. On the contrary, as seen hereinabove, there were several other co-existing circumstances that weakened or destroyed the inference of the Accused persons' guilt. The holding in the case of **Musoke vs Republic**(Supra) was thus not applicable in the circumstances of the case herein.

42. It is unfortunate that a life was lost due to an unnatural act. However, the person who committed the heinous act could not be discerned from the facts that were placed before this court.The doubts created in the mind of this court and the several unfilled gaps led this court to conclude that the Prosecution had not proven its case to the required standard, being, proof beyond reasonable doubts. The burden lay on the Prosecution to fill the gaps and not for the Accused persons to explain the said gaps. However, it failed to prove its case against the Accused person's to the required standard, which was, proof beyond reasonable doubt.

DISPOSITION

43. In the premises foregoing, the upshot of this decision was that as the evidence adduced by the Prosecution could not sustain a conviction herein, this court hereby acquits the Accused persons under the

provisions of Section 322(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

44. The Sureties in this case are hereby discharged from any further obligations to this court in respect of the Accused persons herein.

45. It is so ordered.

DATED and **DELIVERED** at **VOI** this **19th** day of **December** 2017

J. KAMAU

JUDGE

In the presence of:-

Tobias Mwachaka – Accused person

Miss Anyumba - for State

Josephat Mavu– Court Clerk