**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**High Court CRIMINAL CASE NO. 21 OF 2015**

**(FORMERLY MERU HCCR CASE NO.77 OF 2013)**

**REPUBLIC……...PROSECUTOR**

**VERSUS**

**JACKSON MUIANDI KEA……ACCUSED**

**R U L I N G**

1. On 20th August, 2013, the state brought information to the High Court against Jackson Muiandi Kea (hereinafter *"the accused")* alleging that on the 29th July, 2013 at Gitareni location within Tharaka Nithi County, jointly with others not before court, the accused murdered Paulino Muchangi Mbuba *("the deceased").* The accused disputed the charge and the state lined up even (7) witnesses against him.

2. Sebastian Mbuba Nyaga (PW1), the father of the deceased, told the court how on the night of 29th July, 2013 at about 3.00 a.m. he was awoken by a crowd of between 20 to 50 people. The crowd demanded that he opens the house of his son, the deceased, with whom they came with but had tied his hands. He opened the house of the deceased wherein they searched for items that the son had allegedly stolen but did not find anything. The search was carried out by six (6) people who included the accused. On finding nothing in the deceased's house, the crowd left with the deceased while beating him and headed to the home of the sub-area. The following morning, PW1 went to the sub-area who informed him that although the crowd had come to his home with the deceased the previous night, he had referred them to the area sub-chief (PW3). On inquiring from the sub-chief if the deceased was taken to her, she confirmed that no one visited her that night. PW1 then started looking for his son

3. On the 3rd day, the body of the deceased was found in a bush with multiple injuries. PW3 was informed of the fact whereby she called the police from Cheera Police Post. In cross-examination, PW1 stated that they started looking for the deceased on 27th July, 2013 and that they found his body on 29th July, 2013.That the deceased had been arrested at the home of one Ciankui by a group of about 50 people who beat him up. Serina Kanjiru (PW3) the Assistant Chief for the area told the court how PW1 made inquiries from her about his son on 29th July, 2013. That on the following day, 30th July, 2013, she received information that the body of the deceased had been found in a bush. She called the police who removed the body to Chuka General Hospital Mortuary. James Kinyua (PW4) in the company of P.C. Joseph Cheboi identified the body at the mortuary on 9th August, 2013 for post mortem before removing it for burial.

4. Corporal Donald Ngoka (PW4) told the court that on 30th July, 2013 while at Cheera Police post, he received a report of a missing person from PW1. He told him to search for him. On 31st July, 2013, the

search party found the body whereby he called for a vehicle to remove the body to the mortuary. While at Nduria Primary School waiting to remove the body, PW1 pointed the accused as one of the people whom he had identified in the group that was beating the deceased two (2) days previously. He arrested the accused and handed him over to Inspector Martin Wanga (PW7) who investigated the case. When PW4 took the statement of the sub-area, one Karuku, the latter was 83 years. According to Inspector Wanga (PW7), he was instructed to go to where the body was found on 31st July, 2013. At the scene, he found the body and PW1 who narrated to him the circumstances of the disappearance of the deceased. He also re-arrested the accused on the information given by PW1. During his investigations, he was unable to know when the deceased died. That PW1 named seven (7) suspects but he was only able to apprehend the accused whilst the others remained at large. Dr. Justus Kitili (PW2) carried out the post mortem on the body of the deceased on 9th August, 2013. After examining the body he formed the opinion that the cause of death was cardio pulmonary arrest due to severe head injury due to trauma on the head with a blunt object. That then was the prosecution case.

5. At the close of the prosecution case, this court is called upon to rule whether or not a prima facie case has been established against the accused to warrant him to be called upon to offer his defence. Mr.Mutani, learned counsel for the accused submitted that no such case had been established. He submitted that the identification of the accused by PW1 was unsafe considering the surrounding circumstances. He referred to the case of **R .V. Eria Sebwato [1960] EA 174** on the danger of convicting on the evidence of a single identifying witness. He further submitted that there was no credible evidence that had been tendered to establish a case against the accused; that two crucial witnesses, one Ciankui and the sub-area had not been called to testify. According to him, the burden of proof as enunciated in **Ramanlal Bhatt .v. R [1957] EA 332** had not been discharged by the prosecution. On his part, Mr. Ongige learned counsel for the state submitted that a prima facie case had been established against the accused and he should be called upon to respond. That the evidence of PW1 who was an eye witness was consistent and unshaken. That he had properly identified the accused as being amongst those who came to his home on the night of 29th July, 2013 with the deceased. He further submitted that the sub-area was too old to attend court and testify. He urged the court not to be concerned with the confusion on the dates between the 26th and 29th July, 2013 as to when the crowd stormed PW1's homestead while beating the deceased. He therefore urged that the court should find that a prima facie case had been established and thereby place the accused on his defence.

6. As to what a prima facie case, is was considered in the case of **Ramanlal Bhatt .v. R (supra) .** In that Case the court held at pages 334 and 335 that:-

> ***"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case…… It may not be easy to define what is meant by a prima facie case; but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." (underlining mine)***

Does the defence require to give an explanation in this case?

7. The first question is the date when the offence was committed. The information presented to this court is that the deceased was murdered on the 29th July, 2013. The only eye witness who testified was not sure when the crowd of people came to his home whether it was on the 29th July, 2013 or the 26th July, 2013. In his evidence in chief, PW1 told the court that the mob that stormed his home in the company of the deceased, did so on 29th July, 2013. He later changed and stated that the mob visited him on 26th July, 2013 and that by the 29th July, 2013 , the deceased was already dead. He said he reported the matter to Cheera Police Post where he was informed by the police to search for the deceased. That he and others searched for the deceased for three (3) days and only found the body on 31st July, 2013. If he reported to

Cheera Police Post on 30th July, 2013 and searched for the body for three (3) days would 31st July 2013 be the day they found the body or much later? It is also the same PW1 who told the court in cross-examination that they searched for the deceased on 27th, 28th and found the body on 29th July, 2013. With such conflicting dates, when was the deceased murdered? Is it the accused to tell the court when he last saw or was with the deceased? I don't think so.

8. On identification, Mr Mutani submitted that this case depended on identification by a single witness. He relied on the case of **R.v. Erio Sebwato [1960] (supra)** wherein it was held that in a case of identification, there has to be water tight evidence before a conviction can be returned. In my view, that case is not applicable. The present case is not one of identification but one of recognition. PW1 told the court that:-

> ***"A group of people came to my homestead at around 3.00 a.m. and woke me up. They told me that they wanted to see the things which my son, Muchangi had stolen. I knew some of the people in that group. I recognised one Jackson Muiandi, Mwiti Mwithi, Mugendi Ciankui, Muthomi Kanyua Magana, Gitonga Professor from Embu and Mutwiri Mutegi. These are the ones I recognised."***

9. This was therefore a case of recognition rather than mere identification. Of course evidence of recognition is much stronger and more credible than identification. See the cases of **Obwana-Vs Uganda [200] 2 EA 33 and Wamunga .v. Republic [1989] KLR 424**. In the later case, the Court of Appeal delivered itself at page 430 as follows:-

> ***"Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting t he defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J in the well known case of R .v Turnbull [1976] 3 EA 549 where he said:-***
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> ***Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."( Emphasis mine)***

9. In this regard, notwithstanding that the evidence of recognition is much stronger than that of identification, the court still has to examine the circumstances surrounding the recognition. This is so because, as stated in the **R.v. Turnbull case** there can also be a mistake in recognition. The evidence of PW1 was that a group of between 20 to 50 people invaded his homestead on the morning of 29th July, 2013. It was about 3.00am. They woke him up and demanded that he opens the house of the deceased so that they could search for the items that he had allegedly stolen. He opened that house and six (6) of them entered and carried out the search. He said that he recognised the six (6) people, whom he named, because they entered the deceased's house and carried out the search. He stated that there was moonlight. There was no evidence of there being any other source of light except the moonlight. Of course there could be no moonlight inside the deceased's house. It will be expected that in the circumstances, one will be better placed to recognise someone outside where there is moonlight than inside a house at night. There was no evidence that the accused spoke to PW1 or vice versa.

11. In his testimony, PW5 told the court that when he took the statement of the sub-area, the latter told him that he did not see the accused on the material night. It should be recalled that immediately the mob left PW1's homestead, it headed to the home of the sub-area yet the accused was not seen in that crowd by the sub-area. Apart from entering the dark house of the deceased, there is nothing so pronounced that the accused is said to have done when the crowd stormed PW1's compound on the night of 29th July 2013 to have made PW1 pick him out of the large crowd of 50 people. It was at night. PW1 must have been under a lot of anxiety because of the sudden invasion by the large group of people and the condition he saw his dear son in. Indeed, he told the court that after a mob left, he feared that they might return. In my view, those circumstances were not favourable at all for PW1 to have firmly and

clearly recognised the accused. I do not think that it will be necessary in the circumstances to require the accused to explain where he was on the material night.

12. Accordingly, I find that the prosecution has failed to establish a prima facie case. I hereby dismiss the case, find the accused not guilty under Section 306 of the Criminal Procedure Code and acquit him of the offence of murder. He is to be set free forthwith.

**DATED and delivered at Chuka this 23rd day of June, 2016.**

**A.MABEYA**

**JUDGE**

**Ruling read read and delivered in open court in the presence of all parties.**

**A. MABEYA**

**JUDGE**

**23/6/2016**