



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE NO. 21 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**LOKI KATHULE KANDI.....1<sup>st</sup> ACCUSED**

**HELLEN MUENI LOKI.....2<sup>nd</sup> ACCUSED**

**JOSEPH MWAURA NJUGUNA.....3<sup>rd</sup> ACCUSED**

**SUNSET MUTULI MUNGUTI.....4<sup>th</sup> ACCUSED**

**JOSHUA KILONZO WAMBUA.....5<sup>th</sup> ACCUSED**

**JUSTUS WAMBUA NGUNDO.....6<sup>th</sup> ACCUSED**

**RULING**

Loki Kathule Kandi, the 1<sup>st</sup> Accused person; Hellen Mueni Loki, the 2<sup>nd</sup> Accused person; Joseph Mwaura Njuguna, the 3<sup>rd</sup> Accused person; Sunset Mutuli Munguti, the 4<sup>th</sup> Accused person; Joshua Kilonzo Wambua, the 5<sup>th</sup> Accused person; and Justus Wambua Ngundo, the 6<sup>th</sup> Accused person; (hereinafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Accused persons), are 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 4<sup>th</sup> April 2011 are that on the night 1<sup>st</sup> and 2<sup>nd</sup> 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 trial commenced before Makhandia Asike J. (as he then was) on 27<sup>th</sup> January 2012, and the learned Judge heard thirteen (13) prosecution witnesses. The learned judge was subsequently elevated to the Court of Appeal, and the trial then proceeded before Mutende J. on 17<sup>th</sup> October 2013, who took over its conduct after complying with the provisions of section 200 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya), and heard five more prosecution witnesses.

I took over the conduct of the trial on 13<sup>th</sup> October 2015, after complying with the provisions of section 200 of the Criminal Procedure Code. On 19<sup>th</sup> January 2016 I ordered that the prosecution case be closed and parties file submissions on a case to answer, after the Prosecution failed to comply with directions as to the production of their remaining witnesses. After perusing the original and typed proceedings and submissions made by the prosecution and defence counsel, I am now called upon to make a ruling

pursuant to section 306 of the Criminal Procedure Code as to whether to find the Accused persons not guilty or to put them on their defence.

The issue before the Court therefore is whether the evidence brought by the prosecution establishes a *prima facie* case to warrant putting the accused persons on their defence. The threshold for a finding of a *prima facie* case has been set out in several cases among them **Ramanlal Trambaklal Bhatt v R [1957] EA 332**, **Wibiro alias Musa v R [1960] EA 184** and **Anthony Njue Njeru v Republic [2006] eKLR**. The law in this regard is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

In my analysis of the evidence brought by the prosecution, I am mindful that section 203 of the Penal Code defines the offence of murder as follows

**“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:

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 or 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.

The submissions by the learned counsel for the Accused Persons and the prosecution on the issue before the Court were as follows. Wambua Kilonzo & Company Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons, in their submissions dated 19<sup>th</sup> February 2016 argued that there was no direct or circumstantial evidence tendered to connect the death of the deceased to any of the accused persons and none of the accused was seen killing the deceased. Further, that the property dispute between the deceased and 1<sup>st</sup> Accused had been resolved in the succession court, and the wife of the deceased exonerated the 1<sup>st</sup> Accused by testifying that the deceased was calling upon the 1<sup>st</sup> accused to help when he was being attacked.

It was also submitted that the purported confession by the 5<sup>th</sup> Accused was of no effect as it was not produced, nor was the witness who recorded the same cross-examined. Lastly, that the identification parade carried out to identify the 3<sup>rd</sup> and 5<sup>th</sup> Accused 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.

B.M. Mungata & Company Advocates, the learned counsel for the 6<sup>th</sup> Accused person, filed submissions dated 10<sup>th</sup> February 2016, wherein it was urged that the Prosecution had not provided evidence to show that the 6<sup>th</sup> Accused person was in anyway involved in the murder of the deceased, that he had any reason to harm the deceased or that they knew each other. Further, that the sole reason the 6<sup>th</sup> Accused was charged with the offence was because he was found with a phone that allegedly belonged to the deceased. The learned counsel cited the decisions in **R vs Joel Nderitu Mihang'o (2009) e KLR** in support of the position that the prosecution case is based on circumstantial evidence which is not sufficient.

The Prosecution counsel did not file any submissions despite being availed the opportunity to do so.

I have analysed the evidence brought by the prosecution and arguments by the parties in light of the threshold that needs to be met to establish a *prima facie* case of murder. Many of the witnesses who gave evidence, namely Joyce Loki (PW1) who was the wife of the deceased, Harrison Jeremiah Mumo (PW4), Ruth Mwendu (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 2<sup>nd</sup> September 2010.

Dr. Geoffrey Mutuma (PW16) who conducted the post mortem on the deceased on 9<sup>th</sup> 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. No evidence was however brought by any of the witnesses as to what the sharp object that caused the death of the deceased nor of its recovery. The fact of the deceased's death is therefore not disputed.

The evidence that linked the accused persons to the death of the deceased as follows. For the 1<sup>st</sup> and 2<sup>nd</sup> Accused, who are the brother and sister-in-law respectively of the deceased, the evidence of PW1, PW4, PW7, PW9, PW10, PW11, and PW14 was that there were blood stains next to the house of the 1<sup>st</sup> and 2<sup>nd</sup> Accused and on the doors of their house, and dragging marks from their house to the place where the deceased was found. In addition, the deceased was found dead in the compound of the 1<sup>st</sup> Accused. PW1 also testified that she heard the deceased call out the 1<sup>st</sup> Accused name for help the night of 1<sup>st</sup> September 2010 before he was found dead. PW5 however stated that the 1<sup>st</sup> and 2<sup>nd</sup> Accused person did not leave their house when the deceased was being attacked.

I thus find that although the 1<sup>st</sup> and 2<sup>nd</sup> Accused were present at the scene where the deceased met his death, no evidence was brought of any acts on their part or contact they had with the deceased that led to his death. In addition no evidence linked them to the other accused persons in the commission of the crime. On the contrary their acts were those of failing to assist the deceased. In law, however, the omission required is an unlawful omission, which has not been shown in the present case, and the morality of the actions by the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons of keeping quiet as the deceased was murdered outside their house is not for this Court to decide.

There was also evidence brought of a land dispute between the 1<sup>st</sup> Accused and deceased which was alleged to be motive for the murder. This evidence was however contradictory. PW1 testified that the relationship between the 1<sup>st</sup> Accused and deceased was not cordial since June 2010, as the 1<sup>st</sup> Accused had sold plots belonging to their brother who was killed in 2000. She however on cross-examination testified that the deceased also had a case in Court involving a house of the said brother that he had sold jointly with the 1<sup>st</sup> Accused.

PW7 also testified that he knew of the land dispute but that it had been solved.

PW8 on his part testified that the land dispute between the deceased and 1<sup>st</sup> Accused was common knowledge in the village. However, according to PW11 who was the Assistant Chief of Kaewa sub-location, the deceased had sold a house to an army officer and the deal did not end well, and had also sold

land to a neighbor which turned problematic. He also testified that the deceased was not on good terms with neighbors. PW14 on his part testified that the copies of grant of letters of administration and confirmation of grant he found with the deceased body showed that the property of their father had been distributed. PW15 also testified that he found documents showing a family agreement as to sharing of the property of their brother Lawrence Kavitha Kaindi.

It is therefore not possible from the evidence to make a finding that the 1<sup>st</sup> Accused was the aggressor, as it also appears that the deceased had disputes with other persons other than the 1<sup>st</sup> Accused who may have had a motive to harm him. The evidence as to the 1<sup>st</sup> and 2<sup>nd</sup> Accused's motive to cause harm to the deceased is therefore inconclusive.

As regards evidence linking the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons to the deceased's death, the evidence of Harrison Jeremiah Mumo (PW2) was material. On the night of 1<sup>st</sup> 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 5<sup>th</sup> Accused from before, as they went to the same church, and he also picked the 3<sup>rd</sup> and 5<sup>th</sup> Accused out at an identification parade. C.I Benjamin Kiprono (PW18) testified that he conducted the identification parade where PW2 identified the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons as his passengers on that night.

Further evidence on the acts of the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons on that night was that given by Kasyoka Wambua (PW6), who testified that on 1<sup>st</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> September 2010 the said motor vehicle was the one being driven by PW2 on that day. Therefore, from the evidence the deceased was the 2<sup>nd</sup> elderly man who was with the 3<sup>rd</sup> and 5<sup>th</sup> Accused in the motor vehicle driven by PW2 on the night of 1<sup>st</sup> September 2010, and the 3<sup>rd</sup> and 5<sup>th</sup> Accused were therefore the people who last seen with the deceased.

PW5, who was in the house of the 1<sup>st</sup> 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 3<sup>rd</sup> and 5<sup>th</sup> Accused persons, whose voices she testified she knew as they were frequent visitors to the 1<sup>st</sup> Accused's house. Lastly, it was the evidence of Agatha Mweni (PW3) that the 5<sup>th</sup> 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 6<sup>th</sup> Accused person. This was after PW15 traced the use of the said cell phone to the 6<sup>th</sup> Accused in Mombasa on 1<sup>st</sup> April 2011.

It is my finding with in light of the evidence brought with respect to the 3<sup>rd</sup> and 5<sup>th</sup> Accused persons, they need to explain the happenings of the night the deceased died, as it has been shown that they were with the deceased on the night of 1<sup>st</sup> September 2010, and also at the scene of the crime. The legal issues raised by their learned counsel as to the propriety of the identification parade in which they were identified by PW2 will need to be canvassed in light of the totality of the evidence that links them to the death of the deceased. The 3<sup>rd</sup> and 5<sup>th</sup> Accused persons therefore have a case to answer.

Coming to the 4<sup>th</sup> Accused person, the testimony of PW15 was that she was arrested based on a confession by the 5<sup>th</sup> Accused person that she was among the people who plotted the murder of deceased. She was also arrested while in the same dwelling house with the 3<sup>rd</sup> Accused. The said confession was

however not produced as an exhibit by the prosecution. An attempt to produce the confession by Superintendent Joel Chebii (PW13), who was then an officer at Machakos Police Station, was objected to by the Defence counsel, and a trial-within-trial consequently held by Makhandia J. (as he then was). The learned judge ruled that the said confession was admissible in a ruling dated 29<sup>th</sup> November 2012 which was delivered on 7<sup>th</sup> December 2012. PW13 was however not recalled to produce the said confession as an exhibit, nor did any other prosecution witness produce the same, and it is not on record. There is therefore is no evidence linking the 4<sup>th</sup> Accused to the murder of the deceased.

Lastly, the 6<sup>th</sup> Accused person was arrested as a result of being found in possession of the cellphone belonging to the deceased at the time of his death. PW15 also testified that the 6<sup>th</sup> Accused and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons recorded confessions with police officers, but the said confessions were not produced as exhibits. I am of the view that being in mere possession of a phone belonging to a deceased – 6 months after the deceased has died, is insufficient evidence to establish that the 6<sup>th</sup> Accused person caused the death of the deceased, in the absence of any other evidence linking the 6<sup>th</sup> Accused to the actual act that caused the death, which was the infliction of stab wounds by a sharp object on the material date being 1<sup>st</sup> September 2010.

I therefore find that it is only Joseph Mwaura Njuguna, the 3<sup>rd</sup> Accused person and Joshua Kilonzo Wambua, the 5<sup>th</sup> Accused person who have a case to answer and I order that they be put on their defence. As regards the other Accused persons, the evidence brought by the prosecution is insufficient to put them on their defence, and I hereby enter a verdict of not guilty under section 306(1) of the Criminal Procedure Code against Loki Kathule Kandi, the 1<sup>st</sup> Accused person; Hellen Mueni Loki the 2<sup>nd</sup> Accused person; Sunset Mutuli Munguti, the 4<sup>th</sup> Accused person; and Justus Wambua Ngundo, the 6<sup>th</sup> Accused person. The said 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Accused persons are accordingly acquitted and are set free unless otherwise lawfully held.

The 3<sup>rd</sup> and 5<sup>th</sup> Accused persons are hereby informed of their right under section 306 (2) of the Criminal Procedure Code to address this court in the manner in which they intend to defend themselves whether by giving sworn or unsworn testimony. They are further informed of their right to call witnesses in their defence and to inform this court whether they wish to call any witnesses.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 9<sup>th</sup> DAY OF JUNE 2016.**

**P. NYAMWEYA**

**JUDGE**