



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE 15 Of 2011

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS-

J M.....1ST ACCUSED

DICKSON NYAGA.....2ND ACCUSED

HENRY KINOTI.....3RD ACCUSED

JUDGMENT

1. The accused persons, **J M** hereinafter the 1st accused and **DICKSON NYAGA** the 2nd accused were jointly charged with **HENRY KINOTI**, the 3rd accused, with **Murder** contrary to section **203** as read with section 204 of the **Penal Code**.
2. The particulars of the offence are that on the 22nd day of August, 2009 jointly with others not before the court murdered J K.
3. The 3rd accused was acquitted of the charge under section 306 of the CPC. The reasons for his acquittal are very simple. The prosecution did not adduce any evidence touching on the 3rd accused or his role in this offence. In fact only one witness mentioned him and that was PW8, one of the investigating officers in this case. PW8 arrested the 3rd accused based on reports from informers who did not make any statements and who were not called as witnesses. There was therefore no evidence to link the 3rd accused with this offence, and thus his acquittal at an early stage of these proceedings.
4. The Prosecution called a total of 12 witnesses. The facts of the prosecution case were that the deceased came from Nairobi with his wife and daughter. They passed by the local market before going home. When they went home, the deceased family was attacked by men who later left with the deceased and his vehicle. The deceased was found dead few days later and his vehicle also recovered. The full summary of the prosecution case was as follows:
5. PW1 was the mother of the deceased. Her evidence was that on 22nd August, 2009 at around 7:30 pm, she was at her son the deceased house in the kitchen. She went outside to answer a call of nature and while outside she heard voices and recognized one of the voices as that of her step-son, the 1st accused in the case. PW1 testified that she heard the 1st accused uttering the following words;

“Are you ready, are you ready”

6. PW1 went back to the kitchen where she was with PW2. Later her daughter in-law E, PW3 joined them. Shortly later while the three women and a worker one Mureithi (not called as a witness) were busy preparing food in the kitchen, they were confronted by three people with torches and among them one armed with a rifle. One of them asked PW1 ***“Mzee yuko wapi?”***
7. The attackers roughed them up and took them into the main house to the sitting room where they were tied up using a bed sheet. PW1’s son the deceased was however not tied. The attackers then sent J’s son to go and call his grandfather. Despite pleas from all present, the abducted the deceased and took his vehicle with them.
8. PW2 and PW3 confirmed PW1’s evidence that they were all in K’s house in the kitchen. The two confirmed that PW1 left the house and when she came back, she stated that she had heard some people at the back of the shamba asking each other ***“are you ready?”*** Shortly thereafter, some people came and entered the house through the Kitchen door. They were five men in total and the time was about 8 pm. They asked for PW3’s husband. They then took them to the sitting room where after being roughed up and tied, the deceased was abducted.
9. PW4 testified how his brother the 2nd accused offered him a phone and how he decided to buy for his wife to enable them communicate. PW4 offered him one and removed his simcard that was in it before putting his. He sold the phone to him for Kshs. 1,300 after which he took it to his wife. He later changed the cover of the phone from white to black. The police arrested him on 26th September 2009 while in his shamba. He was informed that he was arrested because of the phone and he explained he had purchased it from the 2nd accused.
10. PW5 BNK was then a student in *[particulars withheld]*, in form 3. On the 22nd August 2009, she had gone to Kianyai Market with her parents. Her Father later left while her mother remained in the market. It was around 5:30 p.m. when the 2nd accused approached her and inquired from her who the owner of the car was, which question she did not answer as she did not know. From there they went home and arrived at 7pm.
11. A minute later, PW5 heard commotion and a bang at the door and a loud scream from her grandmother. After a few minutes a man entered her room with a gun. By then she had already entered under her bed. The man summoned her from under the bed. PW5 recognized him as the one who approached her at her father’s car where she had been left by her parents at the market earlier that evening. PW5 identified him as the 2nd accused. PW5 led him to her parents’ room and told to produce the money her father had said she had.
12. PW5 testified that she recognized her father’s step brother who was part of the gang, standing at the door to the sitting room as she walked across it to her parents’ bed room. She identified him as the 1st accused. She also saw her father, grandmother and house help lying down. PW5 gave the accused a brown envelope with Kshs.3000/ which she got from her parents room. She was then led back to the sitting room to join the other members of the family.
13. PW5 testified that the 2nd accused kept on asking many questions and also for money which she did not know of. Meanwhile, they roughed her up, her grandmother and father. PW5 tried to defend her Father but was threatened with rape. They stated they wanted to reach an agreement with her father. She pleaded with them to spare her family the harassment and offered to discuss with them. They promised to return with her father should they reach an agreement. She noticed his shirt had blood stains as he went out with them. One of the attackers who remained in the house tied their hands using bedsheets.
14. Later one Peter, a family friend was called and he came and untied them. When she was shown her statement to the police, PW5 acknowledged that she did not indicate that she had seen the 1st accused in her statement. However PW5 maintained that the truth was that she did not mention his name because she was afraid.
15. PW10 I T K was the deceased’s son. He was at home on the 2nd August, 2009 with his grandmother, aunt and the farm-worker Muriithi. They were later joined by his parents, PW3 and the deceased and sister, PW5. Shortly after as food was being cooked, the assailants stormed in the house. PW10 testified that the farm worker came in first followed by the three men armed with a gun and knife. One of them roughed them up and ordered them to keep quiet before taking them to the sitting room where they were ordered to lie down on the floor. He said that he saw blood

- oozing from his father's head. PW10 testified that he saw his uncle at the scene at the door to the sitting room and identified him in court as the 1st accused. PW10 said that it was the 1st accused who was giving directions.
16. PW10 was 11 year old at the time of incident. He admitted that he did not mention the 1st accused in his statement.
 17. PW6 CPL Peter NdeiKanyi from scenes of crime, Kayole Nairobi testified that on the 23rd August 2009 he was at Meru Garage area where P.C Francis Njoroge of Meru Police Station then showed him the body of the deceased which was lying next to a dumping site near KPCU stores. It had injuries on the head and was tied with a vehicle safety belt around the neck and over the mouth. It also had blood from the nose and mouth. It was identified as that of J K the deceased in this case, by P.C. Njoroge.
 18. PW6 took several photographs of the body. He was also shown a motor vehicle registration [*particulars withheld*] Toyota DX station Wagon at Cathedral Road Meru by CIP Leamo Marcos. PW6 took several photographs of the vehicle as well. PW6 was also shown Mituntu area by the DCIO Maua Mr. Henry Kibet, where the deceased was said to have last spent the night and he took photographs of the same. PW6 produced the photographs and a certificate he prepared dated 14th January, 2010 as exhibits 4 and 5 respectively.
 19. PW7 James Kithinji was a watchman at the deceased's place of residence. He testified how he received a distressing call on 25th August 2009 from unknown persons threatening him with the same fate that his boss had suffered. The said phone call bore the number [*particulars withheld*]. PW7 had worked for the deceased for 3 years before he left two weeks prior to his murder. PW7 testified that in the month of May 2009, he recalled seeing 8 men at K's gate on a date he could not exactly recollect. Of the eight, he recognized K's brother who he identified in court as the 1st accused. PW7 testified that he was able to ward them away from entering the compound which is what they had attempted to do.
 20. PW7 testified how he once decided to smoke outside the gate of the deceased house and how he was confronted by six men with six torch lights at around 10p.m. PW7 said that he let out a loud scream. He however did not identify any of them.
 21. On another occasion, PW7 testified how he found Muriithi the shamba boy quarrelling with the 1st accused. PW7 learnt from the 1st accused that he had been looking for him. The 1st accused threatened him with death telling him he would cut him into small pieces and put him in a sack to a place where no one would ever find him. Muriithi the Shamba boy was present when this threat was issued.
 22. PW7 also testified how the 1st accused indicated he would do wonders the day he would enter the deceased house after which he would commit suicide. PW7 informed the deceased who advised him to report to the police which he did report the same day at Ngunduni Police Station. PW7 stated that 2 to 3 days later, he found 3 people attempting to enter the deceased's house. He screamed and they ran away. Among the three was the 1st accused.
 23. PW7 soon left his employment under the deceased and one week after he left, he met the 1st accused who told him that he would be able to accomplish what he had set out to accomplish there. Two weeks after the 1st accused issued this threat, PW7 learnt of the deceased's demise. During cross examination PW7 admitted having been arrested as a suspect, but denied being an accomplice to the deceased's murder.
 24. PW8 PC Jonathan Ngeno attached to the Criminal Intelligence Unit worked with the mobile phone providers Safaricom, Airtel and YU for purposes of investigations. The case was assigned to him as the Investigating officer, with the DCIO PW12 as the Chief Investigating Officer. He interviewed family members and villagers at the deceased's homestead and recorded their statements. PW8 produced the deceased's diary as an exhibit in court. PW3 identified that diary as that of her husband and also recognized the handwriting in it as his. The diary had details of threats on the deceased life between April and the date of murder. The diary also details other incidents reported to the deceased including the one by the watchman PW7. This diary was subjected to a handwriting expert.
 25. PW8 obtained the receipt of the phone that the gangsters stole from the deceased home P. exh2. PW8 contacted the Manager Safaricom and managed to trace and track the records to the 2nd

- accused Dickson Mugo. The recovered handset was also identified by PW3 the deceased's wife E as the one that was stolen. PW3 had received a threatening text from the said phone number *[particulars withheld]* in relation to her husband's case in court. The message read, "**Umesahau vile tulifanya Bwana wako? Chunga, next niwewe!**"
26. PW8 contacted the Risk Manager Safaricom who provided him with details of the registered owner of the line number *[particulars withheld]* and a printout which he produced as P.exh 14. The registered owner of the said phone was one J I who is the 1st accused. The ID Card of the owner was also provided as No. *[particulars withheld]*. The print out was also identified on the phone of PW3. The print out was produced in court as P. exh 6.
 27. The accused persons were also subjected to blood tests by the Government chemist and the exhibits produced in court as P. exh. 9,10 and 11. The summary of the report by the Government analyst indicated that the blood samples from the accused persons did not match the DNA generated from the cigarette butt or the recovered miraa sticks recovered at the scene where the deceased body was found.
 28. PW9 Juliet Wanjiru a Medical Officer produced a post mortem report on the deceased dated 24th August 2009 on behalf of Dr. Mutie who had since left Meru Hospital. It shows that Dr. Mutie examined the deceased body on 24th August 2009 and formed the opinion that the cause of the deceased's death was a severe head injury resulting in massive hemorrhage in the brain. The report was produced as P. exh 13.
 29. PW11 ACP Emmanuel Kenga was a Forensic Document Examiner. He examined the deceased diary P. exh 1 for purposes of examining his writing's to determine the author of the writings in the diary. He formed an opinion that the writings were by the same hand. PW11 prepared his report which he produced as P. exh 8.
 30. PW12 Henry Kibet led the investigations in this case. He was informed of the robbery of motor vehicle registration no. *[particulars withheld]* Toyota Station Wagon and kidnapping incident of the deceased. He conducted interviews of the family members as well as members of the public. PW12 testified that he learnt of the discovery of the deceased body at a garbage dumping grounds near KPCU from the OCS Meru. It was one day after the abduction of the deceased. PW12 had photographs taken of the body at the scene of recovery. The OCS later that day called him again and informed him of the recovery of the deceased's stolen motor vehicle at Cathedral Road, Meru.
 31. PW12 directed that the mobile line numbers of the deceased phone, his wife and that of the employee Muriithi which were stolen at the scene of crime taken for investigations. PW12 obtained records from Safaricom and established that the deceased wife's phone had been used two hours after the robbery. PW12 tracked the user and the persons he was communicating with and this led to the 2nd accused who was arrested with the phone.
 32. The IMEA number on the phone was confirmed as 3566750029229/7. It was however different from the IMEA number reflected on the receipt of purchase by one digit. This notwithstanding, from the records they received from Safaricom the IMEA number on data and the handset were similar. This phone was confirmed as the one stolen from PW3 by virtue of the sim line numbers reflected on the Data from Safaricom in respect of that phone. PW3's sim card was removed immediately from the handset when it was stolen.
 33. At the close of their case, the Prosecution applied to re-call the Investigating Officer to produce a sketch map in respect to the scene of crime, and in the alternative for the court to visit and acquaint itself with the scene of crime and in particular the deceased house. The Prosecution invoked section **150** of the **Criminal Procedure Code (CPC)**. This application was opposed. In its ruling, the court declined to grant either prayer for the simple reason that there was no need to visit the scene of the incident. There was nothing placed before the court to show that the visit was necessary. A scene is visited to enable the court appreciate details which are only better seen than heard. There was nothing unique about the scene and the request to visit it was not satisfactorily shown to be necessary for the just conclusion of the case.
 34. The 1st and 2nd accused persons were placed on their defense while the 3rd accused person was acquitted under section **306** of the **CPC**. The 1st and 2nd accused persons opted to give sworn statements.
 35. The 1st accused testified that he used to do the business of selling and buying cattle. The deceased was his step brother. He testified that on the 22nd August 2009, he was at home with his wife Z M

and children T K and F M. At the time he was looking at his son's report form as he had just brought him from school in Kajiado. Shortly after, at around 10 a.m. Muriithi the shamba boy who worked with the deceased came and informed him of the attack on him by thugs. He went with him and Peter Mweteri a neighbor to the deceased's house which was 100 meters from his and found that the family members had been locked up. Peter entered through the window while they broke loose the padlock to gain entry. They found his step mother, wife, mother and the children of the deceased tied with bed sheets. They called the police who came and begun their investigations. The following day on the 23rd August 2009, the police came and informed them that they had recovered the stolen motor vehicle as well as the deceased body and on 24th October 2009 arrested him as a murder suspect.

36. The 1st accused denied being at the scene of crime when it occurred or ever having any disagreement with the deceased or his wife. Regarding the case against him by the deceased mother, PW1, he urged that he had been discharged of the same after it was heard. He denied sending any threatening messages to the deceased wife, PW3 as his phone was not found to have sent any such message. He also denied any knowledge of his co-accused. On PW7 testimony that he saw him jump the fence, it was his position that he lied and that if at all he saw him, then he would have reported the same to the police.
37. The 2nd accused stated that he traded in miraa as a dealer in Isiolo. On 22nd September 2009 he was at Isiolo doing business. He was arrested when his step brother Kenneth Mutembei came with the police from Embu and identified him as the one he had given the phone. He was arrested on night of 11th and 12th October 2009. His brother had been arrested on 20th September 2009. The 2nd accused stated that at the time of his arrest, he did not know why they were arresting him. The 2nd accused stated that he was meeting the 1st accused in person for the first time over this case. He said that PW5 was lying when she testified that she had seen him at Kianjai Market when infact he was in Isiolo doing his business. He urged that if at all she had seen him, she would have reported to the police. He read malice in the charges preferred against him.
38. After the accused closed his case, both counsel, Mr. Anampiu for the accused persons and Mr. Mungai for the Prosecution, made their submissions which I have considered.
39. The burden to discharge in all criminal cases lies with the prosecution to prove its case against an accused person beyond any reasonable doubt. The 1st and 2nd accused persons have been charged with Murder contrary to **section 203** of the **Penal Code**. That section stipulates as follows:

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

40. The prosecution must show that the accused persons formed the necessary *mens rea* to commit the offence. The prosecution must also prove that having formed the necessary *mens rea*, the accused person executed the offence by causing the deceased severe injury from which he died. The prosecution must also establish that the act or omission constituting the offence was unlawful.
41. The prosecution must also establish that the accused persons were motivated by malice aforethought at the time the act causing death was inflicted. Section 206 of the CPC provides as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(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, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) ...

(d) ...

42. The accused persons are accused of having committed this offence with others not before the court. The prosecution must establish that the accused and those others were acting with one common intention to commit this offence. **Section 21** of the Penal Code defines what common purpose is in the following words.

“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 purpose 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.”

43. Mr. Anampiu counsel for the accused persons submitted that PW1 contrary to her evidence in chief did not identify anyone at the scene. Counsel urged that PW2 on her part testified in chief that she could not identify their attackers even if she saw them. Counsel for the accused also submitted that PW3 was lying on the ground when the attack took place and that therefore she could not have identified the attackers. Mr. Anampiu drew court's attention to the cross examination evidence of PW3 where she admitted that she did not mention the names of any of the accused persons due to the shock she suffered at the time. Regarding PW1 Counsel for the defense submitted that the evidence given by the PW1 was that of voice identification.

44. It is well established that where the prosecution case against an accused rests on identification under difficult conditions, the court must carefully assess such evidence with the greatest care. The evidence of PW1, 2, 3, 5 and 10 all testified that there was a solar energy saver bulb which was on inside the sitting room. They all stated that it had sufficient light which illuminated the room and enabled them to see clearly. PW1, 3, 5 and 10 all identified the 1st accused as the one who stood at the outside door to the sitting room. PW1, 3, 5 and 10 said that the 1st accused was the one who gave directions and orders to the others throughout the incident. PW2 said that she did not identify anyone because she was so shocked that she did not keep a mental note of anything.

45. PW1 in addition to seeing and recognizing the 1st accused as one of the intruders who entered the house wearing a hat. PW1 stated that earlier in the evening she recognized the voice of M, the 1st accused outside the Kitchen just before the attack. PW1 gave the details of what she heard the 1st accused saying as; **“Are you ready....are you ready...”**

46. In the case of **Karani –vs- Republic – CRA No.181 of 1984 at Kisumu**, (U.R.) the Court of Appeal stated that:

“Identification by voice recognition is admissible however; care must be taken to ensure that the voice is that of the appellant.”

47. In **Choge –vs- Republic [1985] KLR 1** the Court of Appeal held in part that:

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

48. I find that PW1 knew the 1st accused by virtue of being her step son. The evidence adduced in this case shows that the 1st accused, the deceased, PW1 and 3 and other members of the family all lived together in the same place. PW1 was therefore quite familiar to his voice. I am satisfied that PW1 could not have been mistaken the voice of the 1st accused. I am satisfied that PW1's

- evidence was reliable in regard to the voice identification of the 1st accused.
49. Regarding the evidence of visual identification and recognition of the 1st accused the evidence of PW1, 3, 5 and 10 is the evidence in focus. No identification parades were conducted in this case. PW12 the investigating officer of the case testified that there was no need for conducting an identification parade in respect of the 1st accused as he was well known to the witnesses. The fact the 1st accused was well known to PW1, 3, 5 and 10 is not in issue at all. The 1st accused was closely related to all four by virtue of being the half-brother of the deceased and therefore the uncle of PW5 and 10, the brother in law of PW3 and step son of PW1. In the circumstances I agree that there was no need for ID parades to be held for the identification of the 1st accused by any of these four witnesses.
50. Regarding identification made at night, in the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

51. The Court of Appeal in the case **John Njeru Kithaka & Ano. Vs. Republic Criminal Appeal No. 436 of 2007**, the court stated thus:

“As we have stated, only two matters of law were raised and are for consideration before us. On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness. Although recognition raises less problems than identification of strangers, nonetheless, even in cases of recognition, there is need to exercise caution before a conviction is entered. It is thus established that evidence of visual identification in criminal case can cause miscarriage of justice if it is not carefully tested. In the case of Kiarie vs. Republic [1984] KLR 739, this court made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even an honest witness to make a mistake. In cases of recognition it was stated in the case of R. vs. Turnbull [1976] 3 ALLER 549 as follows:-

Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

52. I am well guided by the decisions of the court of appeal on visual identification. That it is important to consider such evidence with caution and care as mistakes in identification is made even of close relatives. I have warned myself of the need for caution while considering the evidence of identification in this case even though the same involves very close relatives.
53. The issue is how to safely test the evidence of identification to determine its veracity and reliability. This was discussed by the court of appeal in the case of **Paul Etole and Another vs Republic CA 24 of 2000(UR)** where the court of held:

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to

evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made”.

54. The circumstances under which the 1st accused was identified are very clear from the prosecution evidence. The witnesses all attest to having seen the 1st accused standing at the entrance door to the sitting room. They were able to describe one of the attires he wore as a hat which did not cover his face, according to PW1's evidence. He was standing there, talking and giving orders and directions to the others who numbered five inside that room. The 1st accused face was not covered. Further from their evidence. The 1st accused was constantly talking. The 1st accused was very bold and was clearly not making any attempts to hide or disguise himself.
55. The witnesses are unanimous that there was lighting from an energy bulb inside the sitting room and that it was powered by solar energy. It was just after 8pm and therefore quite early in the evening. For a solar powered energy bulb, I find the witnesses evidence that it was bright at that time acceptable and reliable. PW3 and 5 in particular said that the light was strong enough as it lighted the entire room where they all were.
56. The length of time the incident took can be deciphered from the testimony of the witnesses. PW1, 2, 3, 10 and one Muriithi were rounded up from the outside kitchen of the house and brought to the sitting room. PW5 was in her room and she said that the 2nd accused is the one who went for her. PW5 testified that she saw the 1st accused standing at the entrance door as she walked across the sitting room to her parents room. She also found him standing at the same place on her way from the parents' room. PW5 said that at one time as the gang harassed her father, she stood up to plead with them to leave him alone. She had more chances to see the 1st accused and she said that he remained in the same place.
57. I have considered the evidence of visual and voice identification against the 1st accused and find that the 1st accused was properly identified by four witnesses at the scene of the incident. I am satisfied that PW1, 3, 10 and 5 had a lot of time to see and hear the 1st accused as he stood at the door to the sitting room and as he gave orders to his accomplices throughout the ordeal. I find that the circumstances of identification were difficult but from the length of time the incident took, and the opportunity particularly PW1 and 5 had to see and also hear the 1st accused, that the identification is safe and positive for a correct identification.
58. There was also other evidence which implicates the 1st accused with this offence. The evidence that was adduced by PW3 and the investigating officer, PW12 that the 1st accused had threatened the deceased on several occasions. The deceased had reduced the threats into writing in his diary, P. Exh.1. It was a diary of 2009. The entries on the 9th April and 13th May show that the 1st accused issued personal threats to the deceased on both days.
59. There was other evidence against the 1st accused. PW7, the deceased night watchman of many years up to two weeks to the incident reported to the deceased several attempts by people in the company of the 1st accused to enter the deceased home at night. PW7 one of those times the 1st accused threatened him, the 1st accused had been categorical that he would kill him, PW7, cut him into small pieces and hide his body so that no one would ever find his body.
60. PW7 testified that in May 2009, the 1st accused went to deceased home at 1am in company of 8 people armed with two guns. That they only went away when he screamed. PW7 testified that two

- days after that incident, the 1st accused came home again. This time the deceased was in being a weekend. PW7 stated that he saw the 1st accused climbing over the gate. That when he screamed, three neighbours went to his rescue leading to the escape by the 1st accused. PW7 testified that he then met with the 1st accused who informed him that the day he will succeed to enter the house of the deceased, he will do wonders after which he would commit suicide. PW7 stated that he eventually left his employment when the threats and attempts to break into the deceased home at night became many and close. PW7 stated that when he finally left his job, he met the 1st accused a week to the day of incident and that the 1st accused informed him that he will finally be able to enter the deceased home to do what he always wanted to do.
61. It is clear from this evidence that the 1st accused made several attempts to break into the deceased home prior to the incident in issue. The only explanation for these attempts is that he had ulterior motives. This is because being a relative, he did not need to break into deceased home, he could just have walked in to see his brother or his family. The 1st accused conduct from PW7's evidence shows clearly that the 1st accused had bad intentions against his brother.
62. There was other evidence against the 1st accused. PW3 testified that she received a message from her phone informing her whether she could remember what happened to her husband. The text warned her that she would be murdered the same way her husband was murdered. PW3 confirmed that the phone which sent the text was from the 1st accused. PW3 adduced the mpesa text she received when she sent 40/- to the phone number which sent her the threatening message. The phone owner's name is that of the 1st accused. PW3 testified that a second threat was sent to her when her sister in law started putting up a house for her son, PW10. The phone number used was the same as that owned by the 1st accused.
63. The mother of the deceased told the court that the 1st accused told her that by August of 2009, she would not be carried in the deceased car again. The deceased was murdered in that same month. That is further evidence that the 1st accused had formed an intention to eliminate the deceased long before he carried out his plans.
64. Regarding motive PW12 stated that after his investigations, he established that there was a simmering dispute between the family of the 1st accused and that of the deceased over subdivision of the family land that had resulted in the 1st accused issuing threats to the deceased's employee, PW7. PW12 testified that he established that the 1st accused had previously been arraigned in court for assaulting his step mother, PW1 in Case number Tigania No. *[particulars withheld]* where he was sentenced to serve 12 months Community Service Order on 29th June, 2009. PW12 testified that the murder took place before the 1st accused completed the CSO sentence. There was therefore a clear motive for the attack being dispute over family land.
65. Regarding the 2nd accused, the evidence against him is that of PW3. It was her evidence that at 6pm on the material evening, her parents left her in the family car at the local Kianjai market. As she sat in the car waiting for them, a person approached the car, knocked the window and started questioning her. PW3 testified that after they went home arrived there at 7pm. At around 8pm, PW3 testified that she went to her bed room and while there she heard her grandmother screaming after which she heard a bang and then a commotion.
66. Due to the commotion, PW3 decided to go under her bed. Soon thereafter a man armed with a gun entered her room. He looked under the bed and beckoned her to come out. PW3 testified that she held a discussion with the man face to face, that she was able to see him with the solar lighting in her room before he hit bulb with his gun breaking it. PW3 said that the man matched her to her parents' bedroom across the sitting room and also matched her back to the sitting room, and that during that encounter with the man, she recognized him as the one who approached her at the car earlier that evening.
67. The evidence of identification by PW3 against the 2nd accused was that of single witness dock identification for reason PW3 did not know the 2nd accused before and no ID parade was conducted for her to identify him. In the case of **Oluoch vs Republic 1985 KLR 549** the Court of Appeal held:

“The two appellants were convicted and sentenced by the magistrate's court on three

counts or robbery and one count of shop breaking and committing a felony contrary to the Penal Code sections 296(1) and 306(a) respectively. After their appeals to the High Court were dismissed, they made second appeals to the Court of Appeal where their cases depended entirely on whether or not there had been sufficient evidence of their identification.

The evidence showed that the appellants had been identified as the persons who had committed the offences charged in an identification parade by a witness who had previously known them. Another witness who had been the victim of a recent robbery attended the identification parade at which he stated that he had been told “to identify the people who robbed (him)”. Two other witnesses did not attend the identification parade but identified the appellants in the dock during the hearing of the case.

The trial magistrate and the High Court judge had made concurrent findings that the identification parade had been properly conducted and that the appellants had been positively identified Held:-

2. A dock identification of an accused person by a witness where there had been no identification parade conducted earlier, and at which the witness is present, is almost worthless.

3. A fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with the greatest care”.

68. It is trite law from the above case that the evidence of dock identification is almost worthless. What is required is other evidence implicating the 2nd accused with this case. I looked for and got other evidence creating a nexus between the 2nd accused and the incident in question. That was the evidence of the recovered phone belonging to PW3 which was stolen on the same incident where the deceased was abducted from his house. The phone was P. Exh. 3.
69. PW4 testified that he bought the phone P. Exh. 3 from the 2nd accused, who is his brother on the 23rd August, 2009. That was one day after the phone was stolen from PW3 and also the same day the deceased body was found. The 2nd accused did not deny selling the phone to his brother, PW4. All he said was that when he was arrested he did not know the reason. He also said it was long after his brother PW4 was arrested in October, 2009.
70. Delay in arrest does not exonerate the 2nd accused in this case. The evidence against the 2nd accused by PW5 is strengthened by that of PW4. I find that the 2nd accused was placed at the scene of the attack when the deceased was carried away only to be found dead the next day. PW4 bought PW3's phone from the 2nd accused one day after the deceased was abducted from his home, which is also the same place and day the phone was stolen from PW3.
71. An issue arose about the IMEA number on the phone being different from the one on the receipt. After considering the evidence adduced before me regarding the identity of the phone, I have no doubt it was the one stolen from PW3. First PW4 testified that he changed the cover of the phone from white to black. He gave it to his wife to use with his sim card. Three weeks later he traded the phone with the 2nd accused with a bicycle. PW4 was sure the phone he bought from the 2nd accused was the one in court, P. Exh3. The 2nd accused was arrested with the same phone.
72. PW12 confirmed PW3's evidence that she could not identify the phone recovered from the 2nd accused because the cover was different. PW12 testified that with the help of a letter P. Exh. 15 signed by the DCIO, he received a Data on the phone from the service provider Safaricom. With the Data, PW12 was able to confirm that the sim card bearing PW3's number had been used on the phone up to 22nd August, 2009. On the same day of 22nd, two hours after it was stolen, the phone was used with another line. Eventually when the 2nd accused was arrested with the phone hand set,

PW12 testified that it was confirmed that it was his number which had been used on the phone two hours after the robbery.

73. PW8 one of the other assisting investigations officers in this case told the court that he investigated the bit about the phone P. Exh. 3. He stated that sim line number 0717330981 was used on PW3's handset on 22nd August, 2009 and that the line was registered in 2nd accused names. That means that 2nd accused used the phone stolen from PW3 the day her husband was also abducted from their home. In fact the 2nd accused used it two hours after it was stolen.

74. In Ogembo vs. Republic [2003] 1 EA 222 at page 225 the court of appeal said:

“Dealing with a similar point, the Court of Appeal for Eastern Africa (as it was then) said as follows in the case of R. vs. Bakari s/o Abdulla [1949] 16 EACA 84.

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point no other reasonable conclusion, the presumption can extend to any other charge however penal. This principle was quoted with approval in the case of Obonyo vs. Republic [1962] EA 592. In this case the court stated as follows:-

“If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal.”

“In this we are satisfied the circumstances of the case did not point to any other reasonable conclusion other than the conclusion that the appellant was one of the six robbers that terrorized the two families in Bureti District and that he was arrested with some of the stolen property a day after the robbery in Kisii which is not far from Bureti considering the fact that the robbers had easy transport namely the stolen vehicle.”

“And in Matu vs. Republic [2004] 1 KLR 510 this court was dealing with a similar situation in which it conducted its judgment thus:-

The inevitable conclusion therefore, is that the appellant was in possession of the goods stolen from the complainant's kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion and rightly so in our view, that the appellant was one of the robbers.”

75. The 2nd accused ought to have explained his possession. The 2nd accused did not make any attempt to explain how he came by the phone. He used the phone within two hours after it was stolen. He gave it to PW4 whose line is also recorded as having used the handset of PW3 before he returned it to him. According to PW8 he found the handset with from Wilfred Mwitii who led to the 2nd accused. I find that the 2nd accused must have been the thief of the phone as the doctrine of recent possession applies to the circumstances of the case. I find that the prosecution proved beyond doubt that the 2nd accused had in his possession and used the phone of PW3 within two hours of its robbery from PW3. I find that the 2nd accused was in the deceased house when the deceased was abducted and when the phone was stolen.

76. The 2nd accused had a recently stolen phone from PW3 out of the same incident in which the deceased was abducted and later murdered. In absence of any explanation forthcoming from the 2nd accused, and in the presence of other evidence implicating him, I find that the 2nd accused was in the group which abducted and later murdered that deceased in this case.

77. After this case was registered in court, it is PW3's evidence that the 1st accused sent her two threatening texts one of them on the 17th September, 2013. The 1st accused was in prison awaiting this trial, and so he clearly sent the text from prison. She was able to confirm the text came from the 1st accused line by sending money to the line through mpesa. The matter was reported to PW8

who took action. He wrote to Safaricom to request a print out of line which sent the texts to PW3's line.

78. The 1st accused phone Data is exhibited as P. Exhibit 14. It shows that the line was used within Meru Prison area. His phone line is registered in his name under his ID card no. [particulars withheld] and is number [particulars withheld]. The messages saved in PW3's phone which she exhibited in court confirm that the two messages were sent from 1st accused phone to PW3' phone. Both threatened PW3 with death. Both are also a confirmation that the 1st accused was involved in the murder of the deceased.
79. The next issue to decide is that of common intention. The prosecution has charged the accused persons jointly. The Court of Appeal in the case of **NJOROGE VS. REP [1983] KLR 197**, considered the meaning of common intention and 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 in 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 endeavours to effect the common object of the assembly.

The appellants and Karuga set out to rob the deceased. All three were armed. Assuming that it was Karuga who killed the deceased with his axe the appellants joined him to dispose of the body by throwing it into a pit but changed their mind and threw it into the bush. Muiruri carried a big stone to throw it with the body into the pit. They brought the body out of the house. They were aiding Karuga in pursuance of a common purpose to rob which resulted in the death of the deceased which was a probable consequence which could necessarily ensue as a result of their unlawful design to rob, and each of them is deemed to have committed the act as provided in section 21 of the Penal Code (Cap 63). Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault Rep vs Tabulayenka s/o Kirya (1943) 10 EACA 51.”

80. I have no doubt from the evidence adduced in this case that the 1st and 2nd accused, with others who were not arrested formed a common purpose to go to the deceased's house, abduct him for purposes of causing his death, and that indeed they murdered him. His body was recovered the following day after the evening he was taken from his house forcefully. The 1st accused was the ring leader and or the person in charge of the plan and execution of the entire murder and was clearly seen giving orders at the scene where the deceased was abducted. I am satisfied that the 1st and 2nd accused persons, together with others planned and executed the deceased death. Common intention was therefore proved beyond any reasonable doubt.
81. The deceased was found to have died of severe head injury resulting in massive subdural subarachnoid and intracerebral hemorrhage. The post mortem form was P. Exhibit 13 and was produced by PW9, Dr. Juliet Wanjiru. The intention to cause death or grievous harm on those who injured the deceased is very clear from the severity of the injuries inflicted and the choice of the part of the body injured.
82. The 1st accused denied the offence and I have considered his defence. He said he was at home with PW1, 2, 3, 5, 10 and others after the deceased was abducted and that he even assisted to get neighbours to help them. All these witnesses were clear that the 1st accused disappeared soon after the incident. Furthermore, none of these witnesses were cross examined concerning the 1st accused role, nor suggestion made that he was present at the scene helping after the incident. That defence is not just an afterthought but also a lie.
83. The 1st accused denied sending threatening texts to PW3 with his phone. The evidence of PW3 and 8 and from the Safaricom Data are all proof beyond any reasonable doubt that the 1st accused sent the death threats to PW3 telling her he would do to her what he did to her husband, the deceased in this case. That is a bare denial as the prosecution adduced evidence to prove that the 1st accused actually sent PW3 death threats in 2013, long after this case had started.
84. The 1st accused denied being convicted or sentenced to CSO by Tigania Court in Criminal Case

number. I noted however that the defence did not cross examine PW8 or 12 concerning the case or his conviction. PW1 the complainant was also not questioned about it.

85. Having considered this case carefully and meticulously, I find that the prosecution adduced overwhelming evidence against the 1st and 2nd accused as evaluated and analyzed in this judgment. I find that the 1st and 2nd accused with others with one common intention murdered the deceased in this case. I find that the case against them was proved beyond any reasonable doubt.

86. Accordingly and in the result, I reject the defence advanced by the 1st and 2nd accused, find both of them guilty of murder contrary to section **203** of the **Penal Code** as charged and convict them under section **322** of the **CPC**.

DATED AT MERU THIS 22ND DAY OF JANUARY, 2015

LESIIT, J.

JUDGE