



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO.11 OF 2012

REPUBLICPROSECUTOR

VERSUS

BONFACE PERKINS OUMA1ST ACCUSED

HENRY MULAMBA BWIRE2ND ACCUSED

JOHN ONYANGO PAMBA3RD ACCUSED

BRIAN JUMA SANYU4TH ACCUSED

CALEB OMONDI5TH ACCUSED

BRIAN ALVIN OTIENO6TH ACCUSED

KEVIN BWIRE KUDUNDI7TH ACCUSED

J U D G M E N T

1. The Prosecution theory is that on the night of 31st August 2012 at about 11.00p.m, Dennis Wandera Ouma (the Deceased) was found seriously injured along Sagania-Mudoma Road. That a few hours later, he succumbed to the fatal injuries. It is alleged that Bonface Perkins Ouma (A1), Henry Mulamba Bwire (A2), John Onyango Pamba (A3), Brian Juma Sanyu (A4), Caleb Omondi (A5), Brian Avin Otieno (A6) and Kevin Bwire Kudundi(A7) inflicted the fatal injuries and left the Deceased for Dead.
2. The Prosecution called 6 witnesses in a bid to prove its case. Maurice Ouma (PW2), Joseph Okochi Ouma (PW4), Jared Makokha (PW5) and the Deceased are brothers. Their mother, Regina Nabwire (PW1) resides in the same compound as PW4. It was the evidence of PW1 that on the night of 31st August 2012, at around 10.00p.m, she heard voices within her compound. Shortly, her door was knocked four times. She declined to open for the visitors. She says that amongst the voices outside her door were those of Mulamba (A2) and Caleb (A5).
3. The visitors left the house of PW1 and went to that of PW4. On his part, PW4 was woken up from his sleep by the bark of dogs. When he peeped through a hole on his door, he saw 3 people near the house of his mother (PW1). He opened his door and the three people came towards his house. He was able to recognize Mulamba (A5) and Caleb (A2). After exchange of greetings, the three told him that his brother Dennis (Deceased) had been badly assaulted and was lying at Sagania-Mudoma road near the home of one Peter Kudundi.
4. Alarmed by the news he had received, PW4 telephoned his brother Jared Makokha (PW5). PW5

- came to his house and together, they left to the scene. But, before they did so, they passed by the house of their elder brother Morris also Maurice Ouma (PW2). The three of them then went to the rescue of their injured brother.
5. That true to the information given to PW4, the three brothers found the Deceased by a roadside near the house of Peter. In similar evidence given by the three witnesses, it is said that the Deceased was struggling to stand but in vain as he was badly injured. Although dressed in a coat, his trousers were out and on his shoulder, and so was left with his underwear. PW2, PW4 and PW5 carried the badly injured Dennis to his house. Once there, they asked their relatives including the mother PW1 to administer first aid on the Deceased as they sought transport so as to take him to hospital.
 6. PW1 described how he saw her son the Deceased, lying on his bed facing up. She saw him with injuries on his ribs and back. He had cut wounds on his head. The Deceased was so injured that he was unable to sit on his own. PW1 says that as she massaged and tried to provide comfort for the Deceased, the Deceased told her that he had been assaulted by many people but he recognized five of them. The Deceased did not name the five assailants. That this conversation was in the presence of the Deceased's children.
 7. As PW1 administered first aid on his injured son, his other sons PW2, PW4 and PW5 went out to look for transport. PW2 told Court of the frustrations they faced that night. First, they approached Josephat Ouma Oduori and requested him for his motor cycle. Josephat was not in a position to help as the motor cycle had a puncture. But he suggested to them that they could get help from Jackim Juma. That, on their behalf, Josephat asked Jackim for his motor cycle and Jackim obliged. But it was not of much help as it soon, after a very short ride, run out of fuel. PW4 and PW5 gave testimony that materially supported this account by PW2.
 8. Frustrated, as they must have been, PW2, PW4 and PW5 returned back to the home of Dennis. That on their return they were able to speak to the Deceased. This would be at about 2.00 a.m. PW2 says that the Deceased, told them that he had gone to check on a door frame that the mother of Perkins (A1) had sold to him when he was found there by a group of many people who attacked him. That he was able to recognize 3 of the assailants as Perkins, Mulamba and Caleb. PW2 says that the Deceased told him that Perkins used a spear to stab him. While Mulamba had a fimbo (walking stick). PW4 gave a similar account but did not say that the Deceased gave details of the weapons of attack. As for PW5, he says the Deceased, told them that Mulamba had a fimbo, Perkins a spear and Caleb a knife.
 9. It was the evidence of PW1, PW2, PW4 and PW5, that later that morning, at about 5.00a.m, the Deceased was overcome by his wounds and he passed on. The three brothers, in the company of others, reported the death of Dennis to Funyula Police Station. There, they found Police Sgt John Gatiri (PW6). It was the testimony of PW6, that under the command of the Officer in charge of The Police Station, Inspector Tarus, the reporteess led them to the house of the Deceased. PW6 saw the body of the Deceased and observed that his head was swollen, he had a fresh cut wound below the right ear, fresh cut on his left leg and bruises all over the body.
 10. The body was removed onto a waiting Police vehicle and the group was led on foot by the reporteess (being PW2, PW4 and PW5) to Nangina village. PW6 told Court, that he found nothing at the spot where the Deceased is said to have been found on the previous night. But at the compound of Peter Kudundi, PW6 observed that the grass was disturbed. He also found a piece of belt (PExhibit 1) and next to it was a broken stick (Exhibit 2). It was the evidence of PW2, PW4 and PW5, who were present during the Police visit, that the piece of belt belonged to the Deceased as they had seen him wear a similar belt. There was nobody at the home of Peter.
 11. Later on that day, PW6 says that it was in the afternoon, a lady by the name Rosemary Ouma visited the Station and introduced herself as the owner of the home that he had earlier visited. That based on information given to him by the lady, details of which are inadmissible as hearsay, PW6 proceeded to Nangina. He arrested Accused 6 at home. After interrogating him, he set him free. That the release of A6 was a strategy not to scare away other suspects. On the night of 2nd September 2012, PW6 organized a raid at Nangina village and arrested A1, A2, A3, A4 and A5. He then preferred charges against the five accused persons. About 10 or so months later on, 28th July 2013, PW6 arrested A6 and A 7. They were added as accused persons in a fresh Information.
 12. Back to the lady Rosemary, PW6 informed Court that she made a detailed statement before the Police officer John Kipkemboi (The DCIO Busia) and was to be a key witness for the State. PW6,

- however, told Court that he was unable to trace her. That he had, in vain, tried to get information of her whereabouts using informers and the Local Administration from both her matrimonial home and her maiden home. That at one time, he received information that the witness could have been hiding at her daughters' home in Eldoret, but on visiting Eldoret he could not trace her. Again he was unable to trace her at Bungoma and Mombasa where it had been suspected she had moved. It was the view of PW6 that Rosemary was avoiding the Police because she was reluctant to give evidence against the Accused persons who are her close relatives. It is said that she is the mother to A1 and A7, stepmother to A3, A 4 and A5 and grandmother to A6.
13. A postmortem was conducted on the body of the Deceased by Dr. Mitei. As Dr Mitei was not available to testify, the Medical report was produced on his behalf by Dr Rabare Nina (PW3) who is familiar with Dr Mitei's handwriting and signature. The highlights of the report is that, on the external appearance, the body had bruises on his left and right thighs, left forearm, anterior chest, right clavicle, lateral to the left eye and on left forearm. It also had a shallow laceration of the left lower limb. Internally, there was adhesion of the right lung suggestive of past chest infection and a bruise on the forehead with a hematoma below the scalp. The Doctor formed the opinion that the cause of death was **“multiple injuries secondary to repeated blunt trauma secondary to beating.”**
 14. Invited to make their Defence, the Accused persons would put up a gallant fight. A1 is a 38 year old school teacher, married to Margaret Were (DW10) and a parent of two. It was his evidence that he had undertaken training in Special Education and so travelled on the morning of 30th August 2012 to pick his results from Kenya Institute of Special Education (K.I.S.E.) He travelled by motor vehicle registration KBC 039C, a vehicle operated by Palmdam Coaches Ltd. On reaching Nairobi he picked his results from K.I.S.E. and proceeded to The Teachers Service Commission for purposes of lodging a request for promotion. There, he learnt that the question of promotion had been devolved.
 15. A1 has a brother by the name Norbert who, at the material time, according to his evidence, resided at Kahawa 44 Estate in Nairobi. That is where A1 spent his nights of 30th and 31st August 2012. On 1st September 2012, using a bus christened “Western Emirates” the Accused made his trip back to the countryside. He told Court that he reached Bumala in Busia County at 7.00a.m of 2nd September 2012. Feeling under the weather he spent the whole day and night at home. On 2nd September 2012, at about 11.30p.m, he was arrested by a group of 10 (ten) Police officers led by Inspector Tarus. Despite inquiries made by him, no explanation was given for his arrest. Later, he was booked into the cells by Sgt Gatiri (PW 6) and charged with the current offence. He denies being with any of the other Accused persons on the night of 31st August 2012 and professes his innocence.
 16. Although DW10 did not see her husband (A1) board a bus for Nairobi on 30th August 2012, she was sure that he had travelled there to collect his Diploma Certificate. It was her testimony that A2 was away up to 2nd September 2012 when he returned. That he was arrested on that night. It was also the testimony of the father of the Accused, Peter Ouma Kudundi (DW 11) that A1 rung and informed him of his plan to travel to Nairobi.
 17. Henry Mulamba Bwire (A2) is a Boda Boda operator and a resident of Nangonga village. He is married to two wives, Christine Auma Mulamba and Sarah Auma Mugabe (DW 9). It was the evidence of A2, that on 31st August 2012, he left Sarah's house at 6.00a.m for work at Funyula Town. He spent the whole day at work and only returned home at 5.30p.m. On that night he stayed with his family and retired to bed at 8.00p.m. He stated that he never left his house until 5.30a.m of the following morning. When as usual duty called, he left for Funyula Town. He denies going to the house of Rosemary on the night of 31st August 2012. Similarly, he denies telling anyone that a person had been attacked and injured. Again he denies being in the company of the other Accused persons on 31st August 2012.
 18. A2 told Court that his wife Sarah (DW9) informed him of the presence of a Police vehicle at the home of Rosemary. That the vehicle was carrying a corpse. On 2nd September 2012, A2 and his family attended a church service at Ushindi Baptist Church at Nangonga. He returned home at 3.00p.m. Later, between 10.00p.m and 11.00p.m, Police Officers knocked at his door and arrested him.

19. DW9 says that, on 31st August 2012, she prepared supper for her husband (A2) at 7.30p.m and together, they retired to bed at about 8.00p.m. That they spent the night together in one bed and that her husband never left the house at all. That her husband only left home on the morning of 1st September 2012 at about 6.30a.m. She also gave evidence in support of her family's day activities on 2nd September 2012. Later, in the night of 2nd September 2012, A2 was arrested in her presence.
20. John Onyango Pamba (DW3) is a masonry student at Nangina youth Polytechnic. Because he is an orphan, he resides with his uncle Peter Ouma Kidundi (DW11) and his Aunt Mary. It was his testimony that on the evening of 31st August 2012, he returned home at 6.15pm after performing some evening chores. He joined Brian Juma Sanyu (A4), Brian Alvin Otieno (A6) and Kevin Bwire Kudundu (A7) at 6.45p.m for evening studies. Supper was prepared for them by Mama Mary after which they resumed their studies until about 9.00p.m. In the meantime, at about 8.30p.m, his uncle Peter (DW11) returned home.
21. Sometime after 9.00p.m the 4 boys retired to sleep in their cottage which is 10 metres from the main house. It was his testimony that the four of them never left the house on that night and only left in the morning of 1st September 2012 on being woken up by Mama Mary. That this was the usual course. Whilst at the farm on 1st of September 2012, he heard a lady inform Mzee Peter (DW11) that the Police had been at the house of Rosemary and had a corpse in the Police vehicle. The four boys accompanied (DW 11) to the house of Rosemary but found that the Police had already left. The witness recalled that he was arrested at about 10.30p.m whilst at home with A4, A6 and A7. That only he and A4 were arrested.
22. A similar story is told by A4, A6 and A7. As for A6, he is a student at Nyakhobi secondary school. He was arrested on 28th of July 2013, this would be about 11 months after the death of the Deceased. It was his testimony that he never evaded arrest and was staying with (DW 11) at his house at Nangoma all this while. He explained that during this period, he only missed school for 5 days after he had been sent home for non-payment of school fees.
23. As for A7, he too was arrested on 28th July 2013 at Funyula market after he and A6 had attended a church service at Funyula ACK Church. It was his testimony that in the intervening period, from 1st September 2012 to 28th July 2013 he resided at the home of DW11. He attended school in 2012 at Sigalame High School and later joined Namboboto Secondary school in January 2013. Sigalame High School is a Provincial school and A6 was a border there. He sought to explain the change of school from Sigalame to Namboboto. He told Court that he had to join a more affordable school as his sponsor A1 had been arrested and was therefore hardpressed for fees. When DW10 testified she supported the evidence of A7 and told Court that it was indeed her husband (A1) who paid the fees for the Accused. That pressed with the issue of fees, she made arrangements to change A7 from Sigalame to Namboboto.
24. Caleb Omondi Pamba (A5) is a Blacksmith. Prior to his arrest, he resided at Mauko village in Busia County. He resides there with his uncle Fredrick Kudundi (DW8). It was his testimony that in the evening of 31st August 2012 he returned to his uncles house at Mauko village after work at his shade. He ate supper at 7.30p.m with Fredrick's wife and her children. He retired to his room to sleep at about 8.00p.m. He got up at 6.00a.m on the 1st of September 2012 and after breakfast, he left for his place of work. On 2nd September 2012 he and DW8 visited their grandmother Pascalia Nabwire at Nangoma village. Whilst there they were told by their grandmother about the death of the Deceased. That later in the night, he and DW8 were arrested. It would seem that Fredrick was later released. A5 denied killing the Deceased and maintained that on the date of the incident he was at Mauko Estate, Busia. In support of his evidence was the testimony of DW8 who says that in the evening of 31st August 2012 he returned to his Mauko home about 10.00p.m but found that A5 had already retired to bed. That on the morning of 1st September 2012 he woke up and they had breakfast together with A5.
25. The last witness in this trial was DW11. He is Peter Ouma Kudundi. He is the father of A1 and A2. He is married to two wives namely; Rosemary Akumu Ouma and Mary Nungo Onyango. In his testimony he told Court that he spent the night of 31st of August 2012 at the house of Mary Onyango after returning home between 8.00p.m and 8.30p.m. On his return, he found A3, A4, A6 and A7 studying. Mary was also in the house. After taking supper, he left the 4 boys still

studying.

26. On the morning of 1st September 2012 he and the boys were working at their shamba when one Sabina (a neighbour) informed him that a Police vehicle carrying a dead body had been seen in the compound of his 1st wife. He and the 4 accused persons hurriedly left to the compound of Rosemary but found that the house deserted. Later he visited Funyula Police Station so as to inquire from the Police the purpose of their visit to his 1st wife's house. While at the Station, he found Rosemary (his wife) with Sgt. Gatiri (PW6). He never had an opportunity of speaking with Rosemary as she was being questioned by the Police Officer. That was the last time he had seen Rosemary. He has tried to trace her in vain at her parents' home at Ukwala in Ugenya. He told Court that he had a cordial relationship with Rosemary and did not suspect she had an extra-marital affair with either Dennis or any other person. He also told Court that he had a good relationship with the Deceased.
27. At the close of the Defence case, the Court invited Counsels to make their closing arguments. Mr. Bw'onchiri for the Defence, submitted that the Prosecution had failed to discharge its onus of proof. He asked the Court to take cognizance that Rosemary a key witness had not been called to testify. This Court was asked to find that no good reason had been put forward by the Prosecution for its failure to call such a critical witness and that a negative inference there should be made on the Prosecution case (**Fredrick Okarau Chesebe v Republic** [2009] e KLR). Counsel then addressed Court on the approach to be taken in considering the alleged Dying Declaration of the Deceased. Firstly, it was the view of Counsel that the children who were said to be present when the Deceased spoke to PW1 should have been called to corroborate her evidence. Secondly, that there was a disparity in what was said to be the statement made by the deceased. On the one hand, it was said that the Deceased alleged that he had been assaulted by 5 people. This was the evidence of PW1. This contrasts with what the Deceased allegedly told PW2, PW4 and PW5, that the assailants were 3. Importantly, this Court was asked to give regard to the sentiments made by the predecessor of the Court of Appeal in respect to the weight to be attached to a Dying Declaration. In **Shadrack Mbaabu Kinyua v Republic** [2013] e KLR the Court of Appeal again approved the following proposition made by its predecessor in the case of **Pius Jasunga s/o Akumu –vs R**, (1954) 21EACA 333.

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition on Evidence has repeatedly been cited with approval...It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R –v Eligu s/o Odel & Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accusedBut it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

28. Counsel further submitted that the evidence suggested that the Deceased died before he was found by PW2, PW4 and PW5. It was the view of Counsel that it is for that very reason that the 3 brothers never bothered to take the Deceased to hospital. Counsel made the point that no person outside the family was called to confirm the evidence that the 3 had sought transport to take the victim to hospital. Counsel further suggested that this explains why the Information (charge sheet) puts the date of death as 31st August 2012 and not 1st September 2012 as testified by the Prosecution witnesses. All the Defence witnesses gave alibi evidence. Counsel asked this Court to find that the alibi evidence was credible and not shaken in cross examination.
29. On behalf of the State, Mr Obiri submitted that Dying Declarations was made to PW1, PW2, PW4 and PW5. That those Declarations implicated A1, A2 and A5. That the Dying Declarations were satisfactorily corroborated by independent evidence of PW1, PW2 and PW4. Firstly, A2 and A5 visited the home of the deceased and informed PW1 and PW4 that the Deceased had been seriously assaulted and left for dead along Sagania-Mudoma road. That upon PW2, PW4 and PW5 rushing to the said place, they indeed found the Deceased seriously injured and writhing in pain.
30. On the non-availability of Rosemary as a witness, this Court was asked to find that the Prosecution had made every effort to trace the said witness. The Court was asked to give regard to

- the evidence of PW6 and DW11.
31. In respect to the Defence of Alibi, the State submitted that any person wishing to rely on that Defence should raise it at the earliest opportunity. This gives the Investigation together with the Prosecution an opportunity to authenticate and disprove the Alibi. In the instance before Court, the Defence of Alibi by all the Accused persons first came up during the Defence hearing. For that reason, the duty of the Trial Court is to weigh the Alibi Evidence against the evidence adduced by the Prosecution (**Wangombe –vs- Republic** [1980] KLR 149). The Court was invited to consider the Alibi of each of the Accused persons and to reach a Decision that it was swept away by the strength of the Prosecution evidence.
32. It would be opportune for this Court to begin its analysis of the evidence by making some comments on Rosemary Ouma. This is the first wife of DW11 and in whose house, allegedly, the accused persons attacked the Deceased and inflicted fatal injuries. PW6 (the Investigating officer) told Court that on the afternoon of 1st September 2012, Rosemary visited Funyula Police Station and introduced herself as the owner of the house which had been visited by Police officers in the earlier part of the day. Upon interrogating her, the Investigating officer formed the opinion that he should arrest the Accused persons. What Rosemary told the Police officer is not admissible in evidence as she did not testify in the proceedings. In her absence, that account would be a hearsay. That said the Court does believe the Investigating officer's testimony to the effect that Rosemary indeed visited the Police Station. This was in fact confirmed by her husband DW11 in his Defence testimony. It was his evidence that he found his wife Rosemary at Funyula Police Station having a conversation with PW6.
33. On PW6's own admission, Rosemary would be a crucial witness. She was the only eye witness to the incident. This attracted some comments from the Defence. In his closing arguments, Counsel for the Defence asked this Court to draw a negative inference of the Prosecution for its failure to call a known eye witness (Eldoret Criminal Appeal No.272 of 2008 **Fredrick Okararu Chesebe –vs- Republic** [2009] e KLR). The critical question is whether the Prosecution deliberately kept Rosemary away from testifying. PW6 explained, at some length, the effort the Prosecution had made to procure the attendance of the witness. That after giving a detailed statement, the witness disappeared without trace. Using informers, the Police tried to trace her both at her matrimonial home and in Siaya where she was born. It was a vain effort. At one time, the Police got information that she was in hiding at her daughter's house in Eldoret. A visit to Eldoret did not yield any positive results. Further effort to trace her at Bungoma where it is said she had hired a house was also unsuccessful. Lastly when the Police thought they could find her at Mombasa, she had left. This Court on its part believes PW6 and does not doubt the effort made by the Police to trace this crucial witness. If any affirmation was required that Rosemary was evading these proceedings then it comes from her very own husband (DW11). He told Court that he last saw his wife at Funyula Police Station. She was neither at her matrimonial home nor at her parents homes. Even his children who work outside Busia County had not seen her. In his own words.

“I have tried to look for her all over.”

That effort was without success. In these circumstances, no negative inference can be drawn against the Prosecution. The crucial witness has disappeared and cannot be traced notwithstanding diligent effort by the Police. The Prosecution did not deliberately keep her away. Quite to the contrary the emerging evidence is that it was the wish of The Prosecution that she testifies. There could be some merit in PW6's view that Rosemary was reluctant to give adverse evidence against the Accused persons who are her close relatives. Indeed A1 and A7 are her biological children.

34. Without the evidence of this eye witness, the Prosecution case was bound to suffer a setback. That, perhaps, explains why none of the Prosecution witnesses gave evidence that incriminated A3, A4, A6 and A7. As my evaluation of the evidence will presently reveal, there are two significant pieces of evidence put forward by the Prosecution. An apparent visit of some people to the home of PW1 and PW4 on the night of 31st August 2012 and a dying declaration allegedly made by the Deceased. The evidence of PW1, PW4 and the Dying Declaration will be discussed in greater detail shortly. At this stage of the judgment, suffice it to say that the evidence does not

in any way implicate A3, A4, A6 and A7.

35. Conscious, I would think, that there was no evidence linking A3, A4, A6, and A7 to the crime, The State Counsel asked this Court to consider the behavior of the four after the death of the Deceased to infer guilt on them. Save where the evidence made in the course of Defence hearing amounts to a confession or admission of the offence, Defence evidence cannot be used to repair a fatally weak Prosecution case. None of the 4 Accused persons confessed or admitted to the offence or incriminated themselves in their Defence. I reach a decision that the Prosecution has failed to prove its case against A3, A4, A6 and A7 as required by Law.

36. Let me now consider the evidence of PW1 and PW4 in greater detail in respect to the visit of some people into their compound on night to 31st August 2012. PW1 put the time at 10.00p.m while PW4 thought it was sometime after 9.00p.m, when he had gone to sleep. PW1's evidence was that she heard people talking outside her house. The people then knocked her door but she would not open for them. She then testified,

“I recognized the voices of Caleb and Mulamba”

Later she was to say,

“I heard the voices of Mulamba and Caleb. I recognized their voices. I know Mulamba well.”

37. There was evidence by PW1 that the door of her house faces the door to the house of her son (PW4). PW1 says that after she refused to open for the unwelcome visitors, they went to the house of PW4. PW4 testified,

“I saw three (3) people near the house of my mother. I opened the door, as I did that the three people came towards my house.”

He then says that he saw and recognized Mulamba and Caleb but was unable to identify the third as he wore a hat. The witness then had a conversation with the three in which they told him that his brother Dennis had been beaten and was badly injured. The witness knew Mulamba as a Boda Boda operator. Mulamba (A2) confirmed his trade when he testified. As to how the witness was able to see the two when it was at night, PW1 told Court that there was moonlight. The accounts of the two witnesses were not shaken at all in cross-examination.

38) This Court finds the evidence of the visit by three people to the compound of PW1 and PW4 to be consistent and credible. PW1 was able to recognize A2 and A5 by voice. Both A2 and A5 were well known to PW1. Indeed in his own evidence A2 said,

“Before the incident, on other dates we had met with Regina we used to exchange greetings.”

Regina is PW1. This Court has no doubt that PW1 was familiar with the voices of A2 and A5 as the two were well known to her and they interacted. As for PW4 he, saw A2 and A5 and was able to recognize them. As stated earlier, PW4 knew A2 well as a Boda Boda operator. And in respect to A5 he was able to easily pick him out in the dock as he was known to him. This Court also believes that PW4 did not make up the evidence as he was candid enough to admit that he was unable to identify the third person. This Court reaches a decision that A2 and A5 visited the compound of PW1 and PW4 on the night of 31st August 2012 at about 10.00p.m.

39. PW4 told PW2 and PW5 that he had received information from A2 and A5 that their brother Dennis had been injured. They set off to the place where PW4 had been directed by A2 and A5. PW4 says that they found Dennis by the road near the home of Peter. In cross-examination he said that the Deceased was by the Sagania-Mudoma road, PW5 testified,

“We found the deceased on the roadside near the homestead of peter. The road was

Sagania-Mudoma road.”

PW2's version was also similar and consistent with that of PW4 and PW5. The trio found Dennis (the Deceased) on the road near the home of Peter Kudundi(DW 11). What was the condition of the Deceased when he was found by his brothers?

40. In remarkably consistent testimony, the three witnesses described their brother's condition. He wore a coat but had no trousers on. His trousers were on his shoulder and the lower part of his body was only covered by his underwear. He was struggling to stand on his own but could not do so. He had multiple injuries all over his body. The three carried him and after making some stops they reached the home of the Deceased. On reaching his home the three asked PW1 and others to administer first aid on him as they sought transport to take him to hospital. That the Deceased died on the morning of 1st September 2012.
41. The Defence submitted that the Deceased died at the scene and could not have been found alive by his brothers (PW2, PW4 and PW5). The Defence argued that this was the reason why they never bothered to take him to hospital. It was further suggested it is for this same reason that the Information (charge sheet) alleges the date of murder of the Deceased to be 31st August 2012 and not 1st September 2012. This latter argument may not have merit at all because the date of murder is taken to be the day on which the last lawful act contributing to the cause of death was done and not on the date of actual death. That apart, does the evidence on record support the Defence theory that the Deceased must have been dead when the witnesses found him?
42. PW2, PW4 and PW5 gave a vivid account of the condition of the Deceased when they found him on the Sigania-Mudoma road. PW2 describes as follows:-

“He was injured, he had stab wounds behind both ears, on his head and blood on his left ankle. He also complained of pain on the chest and back.”

PW4's evidence was that the condition of the Deceased was critical and at that point was unable to speak because he was writhing in pain. PW6 told Court that the Deceased had stab wounds on both his ears and head. He also had injuries to the back, both his hands were swollen and he had injuries to his left leg. The description of the injuries is materially similar.

43. The witness told Court that the journey from the scene to the home of the Deceased was a difficult one and they had to take breaks on 4 – 5 occasions. The evidence of PW2 and PW4 was that from the place they had picked the Deceased, one would get to the home of the Deceased before the hospital. PW4 further explained that they sought transport to take the Deceased from the house to the hospital because they were exhausted from the difficult journey. As for PW1, she was emphatic that she saw the Deceased lay in pain in his bed and she administered first aid on him as PW2, PW4 and PW6 sought transport. As they were away, she spoke with the Deceased. The evidence of these witnesses was firm even on cross-examination. The evidence of PW2, PW4 and PW5 is that Dennis was alive, albeit critically injured, at the time they picked him and when they took him home was supported by PW1. Why else would PW1 administer first aid on him? Would she be administering first aid on a dead body of her son? I hold that the account of the Prosecution that the Deceased died on the morning of 1st September 2012 is believable.
44. The attention of the Court now shifts to yet another significant part of the Prosecution case. The Prosecution case was that about four hours prior to his death, the Deceased made statements that implicated A1, A2 and A5. This Court was asked to accept this as a statement under the provisions of Section 33(a) of the Evidence Act,

“33 (a) made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”

45. The evidence of PW1 is that the Deceased spoke to her as she administered first aid on him. She stated,

“He told me that his assailants were many but he was able to recognize the faces of five of them. He never told me who they were?”

She repeated this under cross-examination. The statement by the Deceased as told to the PW1 did not implicate anyone.

46. Separately, the Deceased it is said, spoke to PW2, PW4 and PW5. This was after the witnesses had made their vain effort to get transport. The witnesses put the conversation at about 2.00 a.m. The condition of the Deceased was critical and he would pass on about 3 hours later. PW2 describes the conversation and recalls,

“He told us that Perkins (points at Accused 1) used a spear to stab him. That Mulamba (points to accused 2) had a fimbo. That they were many people, they switched off the lights and so he was not able to recognize the rest. He was able to recognize Perkin, Mulamba and Caleb (point at Accused 5). he told us that they found him at Perkins mother’s house. That she had sold to him a door frame.”

Facing questions in cross-examination, the witness conceded that the Police may not have written the names as he recorded his statement although he mentioned them. I shall revisit this shortly.

47. As for PW4, he said,

“He told us that I have been beaten for nothing, that he had gone to collect some wooden frames from Rose. That he was beaten by a mob of people but he mentioned Perkin, Mulamba and Caleb.”

That also should be compared with the evidence of PW5,

“he told us that Rose had sold him frames which he had gone to collect. While at the home of Rose he saw Mulamba with a fimbo, Perkin with a spear and Caleb with a knife. They were with other people who he was not able to identify.....That they attacked and started beating him.”

48. The evidence of the three witnesses which I have just quoted was not debunked in cross-examination. They are consistent in material particulars. That, the Deceased spoke to them at about 2.00a.m and told them that he had been attacked by many people who included “Perkins” “Mulamba” and “Caleb”. That this happened at the house of Rosemary a wife to Peter Kudundi. The statement was made by the Deceased who was laboring under severe injuries and extreme pain. He would shortly thereafter succumb to the injuries. Surely his death was imminent and he was under expectation of death. The statement was in respect to the circumstances of the incident that led to his death. I would hold, as I now do, that the statement made by the Deceased was a Dying Declaration in terms of the provisions of Section 33 (a) of The Evidence Act.

49. But let me, as promised, revisit the evidence of PW2, he conceded that the names of the assailants were excluded in his statement to the Police. It would be expected that such critical evidence be included in the statement of a witness who is recording a statement soon after the happening of an incident and whose memory would, presumably, be fresh. This Court would have otherwise doubted this aspect of the evidence of PW2 had it not been adequately supported by the evidence of PW4 and PW5. Again I do not think that it was a material departure that the evidence of PW3, PW4 and PW5 was that the Deceased mentioned 3 (three) names while the evidence of PW1 was that he said that he knew 5(five) of his attackers. The conversation of the Deceased with the trio was at a different time from that of his conversation with PW1. Another reason that gives some credence to the dying declaration is that on the day following the assault, PW6 in the presence of PW2, PW4 and PW5 found a small piece of belt in the compound of Peter Kudundi (DW11) and

- his wife Rose (Rosemary). Was there no truth in the statement of the Deceased that he was attacked and injured while in the house of that couple?
50. What then is the effect of the evidence of the Dying Declaration? It is now opportune for this Court to heed the caution that, “**generally speaking is very unsafe to base a conviction solely on the dying declaration of a Deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.**”(Pius Jasunga (supra)). The need for corroboration is even greater where the attack takes place in circumstances where the identification of the assailant is difficult. It was the evidence of PW2 that the Deceased told them that he was attacked by many people but was only able to recognize Perkins, Mulamba and Caleb as the assailants switched off the lights. It would seem that part of the attack was therefore in the dark. The condition for identification may not have been easy. For this reason, this Court shall require that the Dying Declarations be corroborated by satisfactory evidence.
51. Let me consider the fate of A1. Although he was mentioned in the Dying Declaration no other evidence implicates him. There is no evidence that he was in the company of A2 and A5 when the two visited the compound of PW1 and PW4. This Court has not found any evidence that corroborates that part of the Dying Declarations that incriminates A1. Although the Prosecution submitted strongly that the Alibi of A1 was weak, I am unable to find that the Alibi incriminated him or connected him in any way to the offence. For this reason, this Court does hereby give A1, the benefit of doubt.
52. As against A2 and A5, this Court has already accepted as believable the evidence of PW1 and PW4 that the two visited them in the early part of 31st August 2012 and informed them that the Deceased had been beaten and was lying seriously injured on the road side. Is it not too much of a coincidence that the Deceased named a Mulamba and a Caleb as amongst his assailants when the middle name of A2 is Mulamba and a name of A5 is Caleb? Is it not too much of a coincidence that A2 and A5 correctly directed PW4 to the place where the Deceased lay injured? Does it make sense that A2 and A5 could have seen the Deceased critically injured and offered no help? All these questions put together beg, was A2 and A5 not amongst the persons who assaulted the Deceased on the night of 31st August 2012?
53. Before reaching a final conclusion on this question, this Court is dutybound to consider the Defence put forward by A2 and A5. Both were in the nature of Alibi. Both were raised for the first time in the course of the Defence. For this reason the Investigators or Prosecution would not have had a fair opportunity of authenticating the Alibis and disproving them. Echoing the proposition in **Wangombe**, (supra) the Court of Appeal, recently, in **Victor Mwenda Mulingi – vs- Republic** [2014] e KLR said,

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the Prosecution; see *Karanja –vs- Republic* [1983] KLR 501this Court held that in a proper case, a trial Court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the Defence was an afterthought.” (my emphasis)

This Court in testing the Alibis of the two accused persons and in weighing them against the other evidence will bear in mind that the Defence was not put forward at the investigation stage or prior to the close of the Prosecution case. They could therefore not be authenticated by the Investigators or the Prosecution. If the Court is to believe the Alibis of the 2 Accused persons, then it must be satisfied that they were not afterthought.

54. A2 told Court that he spent the night of 31st August 2012 at the house of his second wife Sarah (DW9). He returned home in the early part of the evening and took his supper at 7.00p.m. Thereafter he, and his wife, retired to bed. That would be at 8.00p.m. That he spent the night with his wife in one room and that he never left his house until 5.30a.m on the following morning. His wife (DW9) gave evidence in support of her husband.
55. Their accounts were not shaken in cross-examination. Yet there was an aspect of the evidence of DW9 that this Court cannot overlook. The witness told Court that in the usual course the time A2

returned home depended on how busy he was at work. And then in respect to 31st August 2012, she said,

“he returned home early that day because he told me he was not busy”

I cannot help but think that this is at least one aspect of the Alibi that the Police and Prosecution would have been able to verify if it had been raised at the investigation stage or in the course of the Prosecution case. Comparing this evidence with that of the Prosecution case, I must also bear in mind that this is the evidence of a man and wife made in Defence of a man facing a murder charge and which Defence was raised for the first time when it could not be authenticated by the Investigators or by the Prosecution. It seems to me, and I so hold, that the strength of the dying declaration which implicated a Mulamba and the evidence that A2 (whose middle name is Mulamba) was seen in the compound of PW1 and PW4 at about 10.00p.m on the night of 31st August 2012 outweighs the Alibi Defence set up by A2.

56.As for A5, he told Court that he spent the night of 31st August 2012 at the house of DW9 at Mauko Estate Busia. That he retired to bed at about 8.00p.m and never left the house until the morning of 1st September 2012 at 6.00 a.m. The people who saw him retire to bed were Fredrick’s wife and her children, one of who is aged 18 years. In support of his evidence, however, A5 chose to call Fredrick (DW8). On his part, DW8 told Court that on that day he returned to his house at 10.00p.m by which time A5 had gone to bed. He then added,

“I never saw him that evening.”

DW8 could not therefore vouch the accused’s story that he was at Mauko throughout in the night of 31st August 2012. I find it rather curious that the Defence chose not to call Fredrick’s wife or adult child who are said to have seen the Accused on that night. That alibi is rather pale in the face of the strong Prosecution evidence. Just like for A2, the Prosecution has discharged it onus in respect to A5.

57.Denis Wandera Ouma died on the morning of 1st September 2012. The opinion of the Doctor who conducted a port-mortem on his body was that the cause of his death was multiple injuries secondary to repeated blunt trauma secondary to beating. The Prosecution has proved beyond reasonable doubt that the Deceased was beaten on the night of 31st August 2012. The Prosecution has also proved beyond reasonable doubt that A2 and A5 were amongst the people who assaulted and inflicted the fatal wounds on the Deceased. The postmortem confirmed that the injuries sustained by the Deceased were serious. The Assailants, no doubt, intended to kill or seriously injure him. In the end the Deceased succumbed to the injuries. There is no evidence that the assailants were provoked into attacking the victim. It is the finding of this Court that A2 and A5, with others who we may never know, murdered the Deceased on 31st August 2012. I do hereby convict A2 and A5 on the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

58.On the other hand the Prosecution failed to prove its case against A1, A3, A4, A6 and A7. I do hereby find that they are not guilty of the offence they face. They are now set free unless detained for some other lawful reason.

59.In conclusion, I must make a very short observation on a question raised by the Defence. Counsel for the accused submitted that at the time of arrest of the accused persons the Police failed to promptly or at all inform them of the reasons for their arrests. That this affronted their Constitutional Right as arrested persons (Article 49 (1) (a) (i) of The Constitution of Kenya, 2010). Without any hesitation, I agree with the view of Mr Obiri for the State that the allegation even if proved would not invalidate or nullify this trial. I make no findings on the allegations because it is not the duty of a Criminal Court to adjudicate on violations of the Rights to the accused person. That Duty falls elsewhere. (see generally **Julius Kamau Mbugua –vs- Republic** [2010] e KLR)

F. TUIYOTT

J U D G E

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 20TH DAY OF
NOVEMBER, 2014.**

IN THE PRESENCE OF:

KADENYICOURT CLERK

OBIRI.....FOR STATE

BWONCHIRI.....FOR ALL ACCUSED PERSONS