



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 12 OF 2009

REPUBLIC PROSECUTOR

VERSUS

HOSEA MAKORI..... 1ST ACCUSED

BENJAMIN NYABUTO SOSPETER 2ND ACCUSED

GEOFFREY BOSIRE NYANETI Alias TOM 3RD ACCUSED

JUDGMENT

The three accused persons have been charged with the offense of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 14th day of February 2008, at Eldoret West in Uasin Gishu District of the Rift Valley Province, jointly with others not before the court murdered Joeson Muchiri Wachira.

EVIDENCE

The accused persons entered a plea of not guilty and prosecution called a total of 11 witnesses. The evidence of PW1 – 8 was heard by Hon. Justice J. R. Karanja. I took over the trial from the evidence of PW9. I summarize the evidence as follows:-

PW1 Juliet Akirapa told the court that on 14th January, 2008 at about 11.00 a.m., her late father and one of her children called the deceased and he told them to meet him at West Indies estate. On her way, she tried to call Muchiri (deceased) but there was no answer on his cell phone. PW1 stated that she then headed for the deceased's home where she found the gate open but the door to his house was locked. She knocked on the door severally and called the deceased and when she did not get a response she decided to wait outside the house.

PW1 continued to testify that a young man staying within the compound, Geoffrey Momanyi came to where she was and asked her why she had been standing outside the house. Geoffrey then told her that the deceased had been unwell and helped her to break one of the windows to the house. They peeped through the window. In the house, she saw a bed without a mattress and some blood, which she and the said Geoffrey had thought was juice on the floor. She also noticed a stranger in the house whom she had not seen before.

PW1 told the court that Geoffrey went to look for help and after a while 2 people bolted out of the house and took off. She screamed for help and neighbours came. When they went into the house, they found the deceased dead and this is when the police were alerted and investigations began.

PW1 identified the 2nd accused person as the stranger she saw in the deceased's house when she looked through the window. She said that she recorded a fresh statement with the police on 15th January 2008 and went for 2 identification parades where she identified both the 1st and 2nd accused.

In cross-examination, she stated that Geoffrey arrived at the compound at about 3 p.m. while she had arrived there an hour earlier. She said that the 1st and 2nd accused were strangers to her, whom she identified in an identification parade about 2 to 3 months after the incident. She stated that she never heard anything in the deceased's house before Geoffrey arrived. PW1's description of the 2nd accused was that he was a tall brown man while the 2nd accused may have changed colour as he appeared dark. She told the court that she identified the 2nd accused at an open parade at Langas Police Station.

In re-examination, PW1 reiterated that she saw the suspects at the scene and stated that when she was called by the police with the news that some suspects had been arrested, she went to the station and identified the first and 2nd accused.

PW2 Geoffrey Momanyi Ogenda, testified that on 14th January, 2006, he was at the home of the deceased who had employed him as a driver. He stated that he left home (same compound where deceased lived) at 6 a.m. to go to work while leaving the deceased behind.

At about 1 p.m., the deceased called him and told him they should meet at 1p.m at a garage. He met the deceased who complained to be feeling unwell and he returned to work. The deceased went home. When he left work at around 4 p.m, he found PW1 seated outside their compound. The deceased was not in the house though they had agreed to meet there. PW2 stated that he knocked the door and when there was no response, he decided to break the window. When he peeped through the window, he saw a blanket on the floor and what seemed like juice. He went to seek help from neighbours who were reluctant to go to the scene. He stated that he did not see the accused persons clearly. He further told the court that shortly thereafter, he heard PW1 screaming and then saw the 2 persons jumping over a wall. He stated that they found the deceased had been killed in the house and what they thought was juice was actually blood.

PW2 testified that one of the two people escaping was carrying a *panga* and one of them left a jacket on the fence as he was escaping. The jacket was marked P.MFI.1. He said that later police were called and they came and photographed the scene, recorded statements and removed the deceased's body.

In cross-examination, the witness stated that he could not recognize any person he saw in the deceased's house and said that the 3rd accused person is his cousin. The person had been employed by the deceased as a foreman and continued working after the deceased's death, leaving after about 6 weeks.

PW3 one Francis Muraya, the deceased's elder brother, testified that on 14th January 2008 at about 5.45 p.m., PW2 called him and informed him that the deceased had been found dead in his house. He stated that he rushed to the scene of the crime and found the deceased's body on the floor. He reported the incident to the police and they took the body to the Moi Teaching & Referral Hospital mortuary and investigations were commenced.

He told the court that on 17th January 2008, he, together with his sister-in-law, his brother James and a police officer identified the deceased's body for post-mortem purposes.

PW4 Dr. Walter Maganyi conducted the post-mortem on the deceased's body on 17th January 2008. He stated that the body had blood all over the head and had multiple fractures of the bones of the face. It also had a laceration on the left side of the face and bruises and lacerations on the lower part of the mouth, the right ear lobe and the front part of the skull. He concluded that the cause of death was strangulation and severe head injury.

PW5, No. 34430 P.C Peter Khwatenge then serving at Eldoret attached to Tarakwa Police testified that on the 14th January, 2008 at 7.30 p.m., he was on duty at the police station when he got information of a crime that had occurred at West Indies Estate. He stated that the suspects were said to have escaped the scene and when he and his colleagues entered the house, they were shown a bedroom which they found ransacked and a dead body covered with a blanket. On uncovering the body, they found that the deceased was bleeding and had head injuries. A jacket (P.MFI.1) and an iron bar (P.MFI.2) were also found in the sitting room. The deputy D.C.I.O took over the investigations. The deceased's body was then moved to the Moi Teaching & Referral Hospital mortuary and he recorded his statement.

In cross-examination, he said that the owner of the items P.MFI. 1,3 &4 was unknown and that no suspect was found at the scene. He further stated that he could not say whether anything of the deceased was stolen.

PW6, No. 41871 P.C. Haji Lumumba then based in Eldoret testified that on 15th February 2009, he was on duty when he was called by the D.C.I.O and instructed to take over a matter and conduct an arrest. There were two people in the office namely, Nyaoge and Murage. He was accompanied by two police officers, the two people and an informer who led them to Nyamira on 19th February 2009. He averred that it is on this day that they arrested the 1st accused (identified). In another house, they arrested the 2nd accused (identified) who had a healing wound on his right hand. They escorted them to Eldoret. On interrogation, the 2nd accused gave information that implicated the 3rd accused (identified). The 3rd accused was traced in Nakuru and arrested. The three suspects were then charged.

In cross-examination, he stated that he arrested the 2nd accused at his father's home in Nyamira and mentioned the fact that though he found nothing on him, the accused did not resist arrest. He said that the 3rd accused was arrested on the basis of a confession he made.

PW7 retired **Chief Inspector John Mureithi** then serving at Eldoret Police Station testified that on 4th March 2009, he conducted an identification parade respecting a suspect in a murder case whom he identified as the 1st accused in the dock. He told the court that he lined up a number of men with similar stature stating that the identifying person was one Juliet Ekuaja. He stated that after the identification parade, he filed and signed the necessary parade forms (P.Exhibit.5). The suspect did not raise any objection to the parade.

In cross-examination, he stated that the identifying witness did not tell him how she came to know the 1st accused. He stated that he did not conduct the parade for the 2nd accused.

PW8, Peter Njoroge Macharia told the court that the deceased person was the son of his sister-in-law. He testified that on 14th January 2008, he was in Nakuru when he received a telephone call from the deceased's brother who informed him that the deceased was murdered in Eldoret. On 17th January 2008, he identified the deceased's body and later received a tip off on the person who was responsible for the murder of the deceased. He shared the information with the D.C.I.O. He stated that the information was to the effect that the deceased had been murdered by one of his employees named Tom and identified him as the 3rd accused in the dock.

In cross-examination, he told the court that he assisted the police with investigation and supplied them with crucial information. He stated that he did not tell the police about the 1st accused but had given the information about a lady who was arrested in Nakuru in possession of a cell-phone believed to be that of the deceased.

The witness told the court that in all his statements, he did not talk about the 3rd accused because he had not yet received information about him. He said that the 3rd accused was not previously known to him and that he was not the source of the information but merely relayed what he had been told. PW8 told the court that the police had been informed by the 1st and 2nd accused that the 3rd accused was involved in the murder incident.

PW9 No. 51981 Corporal Fredrick Walela of CID Provincial Headquarters Nairobi who was formerly at Eldoret CID recalled that on 15th January 2008 he was called by the DCIO Mr. Nyaboke and was accompanied by Corporal Sakwa to his office where he met the deceased's brother. The DCIO explained the details of the case to him and asked him to take over investigations. He stated that he left the station in the company of the deceased's brother and went to the deceased's house in West Indies Estate where he found fresh blood stains though the body had been taken to the Moi Teaching & Referral Hospital mortuary.

PW9 testified that he wrote the witness statements at the scene of the incident and was later present as relatives identified the deceased body at the Moi Teaching & Referral Hospital mortuary and as the doctor conducted a post mortem. PW9 further testified that the 1st and 2nd accused were traced in Kisii by Safaricom mobile phone subscriber and were later arrested. The two accused then told the police of the involvement of the 3rd accused in the murder incident. When the 3rd accused heard of the arrest of the 1st and 2nd accused, he moved to Kisumu where the police followed him. The 3rd accused then moved to Nairobi where he was finally arrested and charged jointly with the 1st and 2nd accused.

In cross-examination, he too stated that the accused persons were not previously known to him. He stated that the 1st accused was arrested after his SIM card was tracked by Safaricom but he had not given the mobile phone to the court saying that it had been given to the Inspector of Police one Ate. He stated that the investigations were about the phone number and not the phone itself. He admitted to receiving a Nokia 2600 phone but stated that this was before the 1st accused was arrested. He stated that four other suspects were interrogated but were not connected with the offense. He also told the court that he did not indicate in his statement that the 1st accused had mentioned the 3rd accused during his interrogation.

He further stated that he did not know where in Kisii the 2nd accused was arrested. He indicated that a mobile phone was stolen from the deceased but he did not know whether the deceased had any money taken from him.

PW9 stated that he found out the motive for the murder was that the 3rd accused who was a partner in one of the deceased's companies wanted to acquire the deceased's property though he stated that he did not have any evidence of the joint partnership. He told the court that the cell-phone was in the hands of the DCIO who was conducting investigations and that it was the Deputy DCIO who took the confession statement of the 3rd accused person.

PW9 also stated that he did not include in his statement the fact that the 3rd accused moved to Kisumu then to Nairobi when he realized he was being sought.

In re-examination, PW9 stated that it was Safaricom who helped to track the 3rd accused person though he did not know exactly where he was arrested.

PW10 was No. 71825 Corporal George Kaberia from Fort Tena Police Station in Kericho. On 23rd March, 2009, he was attached to Flying Squad, Nairobi. He told the Court that on 23/3/2009, he was going about his duties as a flying squad officer when he was called back to the office for an assignment. He stated that on arrival he found officers from the DCIO's office in Rift valley together with a relative of the deceased person. He was asked to accompany them to arrest one Geoffrey Momanyi who was a murder suspect and was alleged to be hiding in Nairobi. He stated that he accompanied them to Muthurwa Estate where the suspect was renting a house and the arrest was made. The deceased's relatives identified him as the person they were looking for. PW10 identified the said Geoffrey Momanyi as the 3rd accused person and stated that he was not previously known to him.

In cross-examination, he said that he found the 3rd accused in the company of a lady but indicated that he did not know whether or not the accused was in hiding.

PW11, No. 214799 Chief Inspector Shadrack Wachira who was based in Uasin Gishu as the Deputy DCIO testified that on 23rd February, 2009, a suspect by the name of Anthony Nyabuto Sospeter was taken to him by P.C. Lumumba who requested him to record a statement under inquiry from him. The statement was taken voluntarily and the formal caution was read to him. He read the suspect's statement over to him and when he confirmed that it was true, the suspect signed and he also counter-signed. He produced the statement as P. exhibit-6. He stated that the suspect he recorded the statement from is the 2nd accused Anthony Nyabuto.

In cross-examination, he told the court that he worked in Uasin Gishu between 2008 and 2012 and he recorded the statement at Eldoret Police Station. He said that he recorded the statement of Anthony Nyabuto and he did not know that the 2nd accused who was escorted to him by PC Lumumba was Benjamin Nyabuto.

He stated that he took the statement as narrated to him and that he never got involved in the case or the investigations.

PW11 further confirmed the content of the statement of Corporal Fredrick Walala, in which he stated that he gave him a phone belonging to the suspect was true as it was part of his administrative duties as deputy DCIO to keep exhibits. He stated that he believed that the 2nd accused participated because he never reported the incident.

In re-examination, the witness reiterated that the 2nd accused told him that his name was Anthony Nyambuto as he took his statement of inquiry.

The accused persons were put on their defence and testified as follows;

DW1, Hosea Makori, the 1st accused told the court that he was a secondary school student who hailed from Nyamira. On 14th January 2008, he was at his home where he did farming. He stated that the deceased person was not known to him and he was not involved in killing him. He indicated he was short in height and dark in colour as opposed to the suspect PW1 said she saw at the scene who was tall and brown. He stated that PW6 arrested him at his home where he was sleeping at around 3 a.m. He did not however know who directed the police to his home where they came and conducted a search before he was arrested by the police whom he told that he was a student. He stated that he recalled it was PW7 who conducted the identification parade on 4th March, 2009. He denied he participated in the parade. He first saw PW1 in court when she was testifying.

DW1 added that the phone and SIM card were not recovered from him but those who had them were arrested and named but did not appear before the court. He concluded his testimony by saying that the deceased was not known to him and he therefore did not understand why he was in court. Finally, he stated that both the 2nd and 3rd accused persons were strangers to him.

DW2, Benjamin Nyabuto Sospeter, the 2nd accused person, told the court that he hailed from Homabay and was an electrical course student at a college in Rongo. He testified that on the material date, he was at his home in Rachuonyo and not in Eldoret as alleged and stated that he had never been to the deceased person's home and he was not known to him. He further testified that he did not have a phone on the date of his arrest. He told the court that on 14th January, 2008, he was at home when four men who identified themselves as police officers went to his house and conducted a search but recovered nothing. He told the court that he was then taken to the police station but he never recorded a statement. He testified that the name on the statement that was said to be his was Anthony Nyabuto Sospeter while his name is Benjamin. He also indicated that no ID parade was done in his respect. He stated that the deceased person was unknown to him and he never went to his house. In addition, DW2 stated that Juliet Ekirapa (PW1) was not known to him and neither had he met the 1st or 3rd accused persons before they were arraigned in court.

In cross-examination, he stated that he was a resident of Homabay and visited Eldoret for the first

time after his arrest. He denied having an injury on his hand saying he had a healing wound. He stated that he did not record any statement and the interrogating officer only questioned him concerning Anthony Nyabuto. He denied giving any incriminating evidence concerning the 3rd accused. He added that he did not jump over a fence. (*NB: The court described DW2 as a "physically tall man with a slightly dark complexion"*).

DW3, 3rd accused, one **Geoffrey Momanyi** stated that he hailed from Langas. He told the court that he worked for the deceased as a rent collector from his houses and had worked for him since June 1996. He stated that the deceased was a contractor and he also did construction work for him.

He told the court that on 14th January, 2008, he was called by PW2 who told him that the deceased had been killed. He stated that he had been with the deceased in Eldoret town going about their usual work when he was sent to Kapsoya to collect rent. He returned to the deceased with Ksh. 22,000 and he gave him Ksh. 4,000 out of this money. He averred that at about 8 p.m is when he was informed that the deceased had been killed and accompanied the deceased's brothers to the police station to record statements. He stated that after the deceased was buried he continued working for the deceased together with his brother Muraya. The accused produced a rental collection sheet for January, March and April, 2008 from Spacematic Systems Limited which he produced as D Exhibits 1, 2 and 3. He testified that before the deceased's death, money would be deposited in the deceased's account but after his death it would be given to his brothers James Muraya and Francis Muraya who in turn opened an account where they deposited the money.

He produced a deposit slip for Ksh. 11,000 dated 20th February 2008 and another for Ksh. 10,000 dated 20th March 2008 both deposited into the joint account of the two brothers and were produced as D.Exhibit 4 and D.exhibit 5 respectively.

DW3 testified that he worked for the deceased's company for 7 months after the deceased's death, i.e until July 2008 when he joined the deceased's brothers in other construction work at the Moi Teaching and Referral Hospital. There, he worked as the foreman and also continued collecting rent. He quit the job after the brothers stopped paying him and got another job in Kisumu and later in Nairobi. He testified that sometime in 2009, one of the deceased's brothers called him and told him that some cement in the Moi Teaching & Referral Hospital project was lost and he travelled to Eldoret to address the issue. He stated that it was at this time that he was arrested and told that he had been involved in the deceased's murder. He indicated that the 2nd accused who is said to have implicated him is not known to him. He stated that the deceased's brothers had implicated him because they wanted to take over the whole of the deceased's estate yet he was very close to the deceased. He stated that they asked him to show them all his assets and this is when they implicated him and caused his arrest. He told the court that he had had a good relationship with the deceased who had even built a house for him and paid dowry for his wife. He stated that he was never interested in the deceased's estate and was never at the scene of the incident.

In cross-examination, DW3 reiterated that he gave the deceased's Ksh. 22,000 but did not know how much he already had with him. He stated that he heard the evidence of PW1 but could not tell whether it was truthful. He stated that the 1st and 2nd accused persons were not known to him and he had no claim against the deceased person who used to pay him well.

SUBMISSIONS

The prosecution's final submissions dated 23rd June 2014 summarized the evidence of the witnesses. They submitted that the evidence adduced is corroborated by direct, indirect, oral and circumstantial evidence. Learned state counsel, Ms. Oduor submitted that the evidence adduced by PW1 who was able to single out the 1st and 2nd accused persons on the identification parade as having been corroborated by that of PW6 who was present during the two identification parades.

Counsel made reference to the 2nd accused person's statement/confession where he admitted to being at the scene of crime and stated that he saw the deceased being beaten with a metal bar until

he collapsed. She submitted that the statement was issued voluntarily and was legal because, the 2nd accused had been cautioned that it would be admitted as evidence. She further stated that the 3rd accused's involvement as mentioned in the 2nd accused's statement was corroborated by the arresting officer PW10 who told the court that the accused fled from Eldoret when he heard of the arrest of the 1st and 2nd accused persons. Further, the fact that the 3rd accused was close to the deceased meant that he was aware of his schedules and whereabouts.

Counsel submitted that the Doctor's (PW4) testimony corroborated the testimony of PW5 (P.C. Peter Khwatenge) as to the extent of the injuries on the deceased body.

Counsel concluded that the accused persons had ample motive and opportunity to commit the offence and that the prosecution had effectively discharged its burden, proving the case against them beyond reasonable doubt.

Submissions on behalf of the 1st accused are dated 23rd June, 2014. His counsel submitted that the main witnesses who are PW1, 2 and 3 did not see anyone at the scene of crime. They also did not give a description of how the 1st accused looked like. It was submitted that although PW1 claimed to have seen the 1st accused and another running from the scene, she saw them from their back. In the identification parade though, she identified them from the front, a fact that was confirmed by PW7. That kind of identification could not be water tight.

It was also submitted that court ought to look into the 1st accused's alibi defence. Further, the 1st accused did not record a statement under inquiry that could have implicated him.

Finally, it was submitted that the 1st accused had never worked for the deceased as a driver. He also did not know the 2nd and the 3rd accused persons. It was urged that he be acquitted accordingly.

Counsel for the 2nd accused filed submissions dated 23rd June, 2014 in which he submitted that the instant case is that of a single identifying witness which cannot be relied upon since no one else was present to identify the 2nd accused. He also highlighted the notable discrepancy where Chief Inspector Wachira (PW11) stated that one Anthony Nyabuto referring to the 2nd accused was brought to his office by P.C. Lumumba. The 2nd accused however told the court that his name was not Anthony but Benjamin Nyabuto and therefore, the statement of inquiry recorded was not in his respect. Counsel further maintained that the accused persons did not know each other and had not met before as alleged by the prosecution. Lastly, counsel for the 2nd accused submitted that the mode of arrest of the 2nd accused was not properly demonstrated as no phone number used in the investigation to trace the 2nd accused was provided in Court and further, the 2nd accused in his defense stated that he did not have a cell phone at the time of his arrest. Consequently, it was submitted that the prosecution had not sufficiently discharged its threshold as required by law and thus the 2nd accused ought to be acquitted.

Submissions on behalf of the 3rd accused person are dated 23rd June, 2014. Counsel raised an issue with the charge sheet where it indicates that the incident occurred on 14th February, 2008 while the evidence adduced by the witnesses says that the incident happened on 14th January, 2008. Counsel pointed out that the post-mortem report shows that the examination on the deceased's body was conducted on 17th January, 2008 which clearly shows that the charge sheet was erroneous. Counsel stated that this was contrary to the assertion that each and every item particularized in the charge sheet must conform to the offense. As regards the confession, Counsel stated that the only evidence that connects 3rd accused to the offence is that of PW11 who told the court that he recorded a statement under inquiry from the 2nd accused who implicated the 3rd accused. He cited the case of **ANNA WANJAH NJAGI & ANOR vs. REPUBLIC CR. APP. NO. 133 OF 1987** where the court stated that a confession by an accused person can only be used as a lending assurance to other evidence against the co-accused and is usually self serving and of no evidential value against a co-accused. He stated that there is no corroborated evidence connecting the 3rd accused with the offense apart from the statement which they said ought to be disregarded.

In addition to this, counsel stated that no outside court confession was applicable because the evidence (out of Court confessions) Rules 2009 had not yet come into effect.

EVALUATION OF EVIDENCE

I have now considered the evidence in record together with the respective submissions. The task of the court is to determine the following issues;

- (a) Proof of the fact and cause of the death of the deceased.
- (b) Proof that the death was caused by unlawful act(s) or omission(s) on the part of the accused persons.
- (c) Proof that the accused persons had malice aforethought when they killed the deceased.

With regard to the cause of death of the deceased, the same was proved by PW4, Doctor Walter Maganyi who performed the post mortem. He also produced the post mortem form which he filled. He concluded that the deceased died of manual strangulation after severe head injury. The post mortem was done in the presence of PW3 and 8 who identified the body as that of the deceased, Joeson Muchiri Wachira.

On the second issue, it is important to note that this is a matter that was marred by very poor investigations where police did blunders that were seemingly deliberate.

To start with, no one was present when the deceased was strangled to death. The only witnesses who almost came into contact with the killers were PW1 and 2. The evidence of PW1 was that when she entered into the deceased's house and after she had noted blood stains on the bed, two people "*bolted out of the house*" and ran away. In court, she identified the 2nd accused as the stranger she had seen when she peeped through the window. She then identified both the 1st and 2nd accused persons as the persons she saw bolting out of the house. She thereafter attended two separate identification parades in which she identified both the 1st and 2nd accused persons.

In cross-examination by counsel for the 1st accused, she stated that one of the persons she saw was a tall brown man who did not fit the description of that stranger.

In cross-examination by counsel for the 2nd accused, she said she was able to see a tall thin brown man who she said was the 2nd accused person. On further questioning, she admitted that the 2nd accused was not a brown person, but dark but added that he could have changed colour.

In further cross-examination by the counsel, she indicated that in the further statement she recorded, she stated that she identified a young man but did not describe him as tall and brown.

In his defence, the 1st accused stated that he could not be the tall thin brown man PW1 said she saw bolting out of the deceased's house as that description did not fit him. In that case, the court noted the physical appearance of the 1st accused in the following description;

"Accused 1 is dark in complexion, of medium height."

What this means then is that the 1st accused was not the stranger PW1 saw through the window or bolting out of the house. This then shatters her evidence that the thin tall brown man she both saw through the window and bolting out of the deceased's house was the 1st accused.

As regards the 2nd accused she testified as follows:-

"I saw inside the house when I peeped through the window. He was a tall, thin, brown

man. He was the second accused in the dock. He (second accused) is not a brown person. He is dark. He may have changed colour.”

This testimony again rules out the 2nd accused as the 'tall, thin brown person, PW1 saw in the deceased's house.

I then grapple with the question as to whether, then, either of the two accused persons was the other person accompanying the '*tall, thin, brown man*'.

PW1 when being cross-examined by counsel for the 2nd accused further stated as follows:-

“In my further statement, I said that I identified one young man. I did not describe the man as tall and brown.”

This statement implies that the other person accompanying the tall thin brown man who bolted out of the deceased's house was '*one young man*'. PW1 said she did not describe this young man. She neither identified either the 1st or 2nd accused persons as young men. So, her evidence rules out both the 1st and 2nd accused persons as the two men PW1 identified.

More importantly, PW1 indicated that the two men she saw were strangers to her. This called on her to specifically described their physical appearances to the police so that when she sees them in an identification parade, she would be able to identify them without difficulties.

It then calls on this court to critically examine the credibility of the two identification parades in which PW1 identified the 1st and the 2nd accused persons. She had not previously known the two accused persons. Her description of the person(s) she saw on the fateful day did not fit the appearances of both accused persons. So, how was she able to pick out the two? That is not realistic in law. She could only have picked them if she had been coached about the persons who were required in the dock.

Besides, although PW1 testified that she participated in these identification parades, one witness (PW7) testified in respect of only one parade in which the suspect was the 1st accused. So, what became of the second parade? In all, it is this court's view that the identification of both the 1st and 2nd accused persons by PW1 is not credible and cannot be relied on by the court.

Moving on to the evidence of PW2, he said that when he peeped into the house through the window he noticed people moving inside but did not get an opportunity of seeing or looking at those people. He decided to leave and seek help from neighbours. Shortly after, he returned to the scene. He saw people escaping the scene by jumping over a wall. He only saw them from their backs.

On being cross examined by counsel for the 1st accused, PW2 stated that he did not see anyone. He therefore could not relate any of the three accused persons to the death of the deceased persons.

According to PW2, the suspects who jumped over the wall as they escaped left behind a jacket, a pair of slippers and a blue iron bar. No witness was able to relate these exhibits with the accused persons. Suffice it to say, the exhibits were recovered immediately the deceased was found dead. If the investigators were serious, after the arrest of the accused persons, they ought to have caused for a scientific forensic examination of the exhibits so as to determine whether the accused persons had any connection with them. This vital piece of investigation was totally ignored to the utter detriment of the prosecution's case.

There is also the fact of how the accused persons were arrested. It was disclosed that among the items that were stolen from the deceased person was his mobile phone. This mobile, according to PW7 in cross-examination, was recovered from a lady. The phone was thereafter given to PW9 who was the key investigator. Those facts are inter-twinned with the evidence of PW8 and 9 that

both the 1st and 3rd accused persons were arrested through the help of the Safaricom mobile phone subscriber.

I pose here and ask, what became of the lady who was arrested with the deceased's phone? What was the link between this phone and the arrest of the 1st and 3rd accused persons? Why did the police particularly PW9 deliberately decline to produce in court the recovered mobile phone? These are questions which were not answered in the prosecution's case. The evidence in these areas was led in such a casual manner that it raised eye brows whether the cover up of such obvious loopholes was deliberate. Even basic issues as stating what help the Safaricom offered to the police was not disclosed. For instance, the police did not disclose what the deceased's mobile number was, the serial number of this mobile phone hand set and how the two instruments were linked to both the 1st and the 3rd accused persons. Again, the person who was arrested with the deceased's phone ought to have been either a witness or an accused in the dock. And it begs again, how come the police could not even disclose her name or the information she gave relating to how she was found in possession of the phone?

The last straw is in respect of the confession taken from the 2nd accused person. It was recorded by PW11, then serving as the Deputy DCIO in Uasin Gishu. He testified that he took the confession of one Antony Nyambuto Sospeter. The confession statement which was produced as P. Exhibit 6 is in respect of Antony Nyambuto Sospeter. In court, he pointed at the 2nd accused as the person he was referring to as Antony Nyambuto Sospeter.

The charge sheet names the 2nd accused as Benjamin Nyambuto Sospeter. This is also the name the 2nd accused described himself with in his sworn defence.

At the point of cross-examination of PW11, the prosecutor casually omitted to ask the witness if he used any identification documents of the 2nd accused to identify him with the name of Antony Nyambuto Sospeter. That would have shed light on whether the 2nd accused lied about his name. In his defence the prosecutor too did not bother to confirm about the said accused's identification documents. Again, the 2nd accused denied having written any confession. Even if PW11 pointed at him as the person from whom he recorded the confession, I take note of the fact that the witness had an opportunity of seeing the accused in court and by their sitting position could tell who was the 2nd accused person. In the instance, I would give that benefit of lack of clarity from whom the confession was recorded to the 2nd accused.

The above observation notwithstanding the credibility of the confession has been raised. Counsel for the 3rd accused submitted that the confession was recorded on 23rd February, 2009, one month before the Evidence (Out of Court Confession) Rules, 2009 came into effect on 27th March, 2009.

Section 25A of the Evidence Act was introduced by Act No. 5 of 2003. At that time, it read as follows:-

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court.”

The section was thereafter amended by Act No. 7 of 2007 by introducing sub-sections (1) and (2) thereof at its current provision. It reads thus:-

“25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a Magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya,

Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

Hence, before the amendments introduced by Act No. 7 of 2007 there was no provision for the making of the rules governing the recording of a confession. Pursuant to sub-section (2), The Evidence (Out of Court Confessions) Rules, 2009 were made. By legal Notice No.41, they were gazetted on 27th March, 2009 vide Kenya Gazette Supplement No.18.

Therefore, prior to coming into effect of the amendment to Section 25A by Act No. 7 of 2007, confessions were governed by S. 25A as introduced by Act No. 5 of 2003. The Rules as provided by sub-section (2) were effected on 27th March, 2009. The confession was taken on 23rd February, 2009. As such, it ought to have been governed by Section 25A as introduced by Act No. 5 of 2003 which I duplicate again as follows;

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court.”

The 2nd accused person's confession was not made in court. It cannot therefore be deemed as admissible evidence tending to proof his guilt or other persons mentioned in it. Although it was admitted as an exhibit, had the above fact been brought to the attention of the court, the court would have declined to admit it as an exhibit. Now that it is an exhibit already, is of no evidential value as corroboration or direct evidence the strength on which the 2nd accused and his co-accused can be convicted.

All the accused persons gave alibi defences. None was corroborated as would be expected. However, the weakness of the defences notwithstanding, the onus still lies with the prosecution to prove its case beyond all reasonable doubts. For the reasons I have enunciated, it is clear that this burden was not discharged. The evidence on record is insufficient. It renders credible doubts that the accused persons committed the offence.

Finally, it was submitted that there is variance of the dates the offence is said was committed as reflected in the charge sheet and the evidence of the witnesses.

The charge sheet indicates that the murder was committed on 14th February, 2008 whereas all the witnesses stated that it was on 14th January, 2008. It begs why the prosecution did not find it prudent to amend the information so as to reflect the date of the offence that was in consonance with the evidence. However, from the testimonies of all witnesses, it is doubtless that the murder was committed on 14th January, 2008 and the error on the date in the information does not dislodge that fact.

In the end, I find that the prosecution has failed to tender sufficient and concrete evidence that the three accused persons murdered the deceased. Poor investigations were exhibited. Obvious deliberate blunders were made by the investigators for reasons best known to themselves. This court has no alternative in the circumstances but to find that the case was not proved beyond reasonable doubts. The accuseds are not guilty of the offence of murder as charged contrary to Section 203 as read with Section 204 of the Penal Code and I acquit them accordingly.

DATED and DELIVERED at ELDORET this 17th day of November, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Okara for the 1st Accused

Mr. Nyamweya holding brief for Misoi for the 2nd Accused

Mr. Nyamweya for the 3rd Accused

Mrs. Busienei for the State