REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 15 OF 2005

LESIIT, J.

REPUBLIC ……PROSECUTOR

VERSUS

STANLEY MURANGIRI……..…….1ST ACCUSED
DUNCAN MUCHUI……...3RD ACCUSED

JUDGEMENT

The accused persons Stanley Murangiri and Duncan Muchui are charged with murder contrary to section 2003 as read with section 204 of the Penal Code. It is alleged that the accused persons, on the 17th October 2004 at Mugae village in Rwarera Location of Meru Central jointly with others not before the court murdered Francis Kathenya.

The prosecution called 8 witnesses. The prosecution case was that the deceased and his wife PW1 had closed their kiosk at 8 pm on that day. The kiosk is within their home compound. PW 5 was left sleeping in the canteen with an uncle of his who was not called as a witness. Just after 8 pm when PW1 placed food on the table the family was invaded by thugs. It was during the incident that the deceased was fatally injured and died on the spot. On the other hand PW1 was robbed of money which she had in her pocket.

PW3 and 6 live within the same home stead as PW1. They were in their house when they were also attacked at the same time as PW1. The thugs demanded money and mobile phones from them. PW3 was seriously injured and was admitted in hospital for one week. PW1 was also injured and was admitted in hospital overnight.

PW4 Geoffrey Mubichi is the Sub Area of the village where the incident took place. He heard the screams at the deceased home which was 200 meters from he lives, and that he went to their rescue. He found PW1 within the compound of their home. PW4 threw stones and announced to the robbers that he had arrived.

Both PW4 and PW6 said that they heard one of the robbers as the 3rd accused telling the others that they should leave. The next morning after the incident several items were recovered at the scene by PW2 Inspector Ikura, the OCS of Subuiga Police Station. PW 2 assisted in most of the investigations in the case. He is the one who recovered the exhibits from the scene. These were a walking stick Exhibit 1, a Somali sword with a sheathe Exhibit 2, a khaki hat Exhibit 3, pair of safari boots Exhibit 4 and creamish khaki hat exhibit 5. PW2 also conducted three identification parades in respect of the first accused. The

first one was conducted on 12th November, 2004 three weeks after the incident where PW3 identified the 1st accused.

The 1st accused gave a sworn defence in which he put forward an alibi that he was not present at the scene at the time and place when the incident occurred. He was arrested one day after the incident and held for 75 days before being charged in court.

The 2nd accused was acquitted after the close of the prosecution case.

The 3rd accused gave a sworn defence in which he put forward an alibi. He said he was arrested on 30th November 2004 and was held for many days before he was charged with this offence.

The trial was conducted by the aid of Assessors. Each Assessor returned a verdict of guilty in respect of each accused, 1st and 3rd I do not agree with in their verdict in regard to the 1st accused and the reason will come out in my judgement.

The charge facing the accused persons is that of murder. It is the duty of the prosecution to demonstrate by evidence on a standard of proof of beyond any reasonable doubt that the accused persons by some act or omission committed the offence of murder. Murder is committed where a person causes the death of another with malice aforethought. One is said to have malice aforethought of it is shown that he had and intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not; or that he had an intent to commit a felony in the course of which death is caused. Malice aforethought will also be proved if it is shown that the accused had 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.

The accused person are charged jointly on allegations that they together with other not before court they committed this offence. The prosecution is therefore relying on common intention that the accused persons committed the offence in the execution of a common purpose. **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.”

It is the prosecution case the accused persons were executing a robbery with violence when the incident the subject matter of this case occurred. The prosecution has to adduce evidence to show that the accused acted with a common intention in order to secure a conviction for this offence.

Common intention is proved where it is shown that two or more persons formed 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. If that is proved each of the persons who formed the common intention to prosecute the unlawful purpose is deemed to have committed the offence, whether they actually did the act which constituted the offence or not.

The Court of Appeal considered the meaning of common intention in similar circumstances and made some observation. That was in the case of **NJOROGE VS. REP (1983) KLR 197, at pg 204:**

“if several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or a better 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. 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."

The evidence before court shows that more than three men went to the complainant's home attacked them viciously before robbing them of personal properties. The prosecution has adduced sufficient evidence to establish that the attackers were executing a common intention to commit a robbery and in the course of it the deceased death was caused. I am satisfied that it was during the prosecution of the robbery that the murder was committed. I am satisfied that the murder in its very nature was a probable consequence of the prosecution of such purpose. As **section 21 of the Penal Code** provides, each of those who were involved in the robbery are guilty of he murder even if they did not themselves commit the act that caused the death of the deceased.

The other issue to consider is that of identification. From the account of the witnesses the only form of lighting at the scene at the time was torches carried by the robbers. The prosecution relied on identification by witnesses made in ID parades. It is trite law that in order to mount fair and credible ID parades, an identifying witness should first have expressed their ability to identify a witness. The parade or investigating officer may go further and require the witness to give a description of the assailant to be identified before mounting the ID parade. Doing otherwise weakens the evidence of such identification considerably. (See **AMOLO VS. REPUBLIC (1988 – 1993) 2 KAR 254).**

The evidence against the 1st accused is by PW1, PW3, PW4 and PW6. PW1 identified the 1st accused in the ID parade conducted by PW2 on the 8th of December 2004. In her evidence however she was categorical that apart from the 3rd accused she did not identify any other person. The evidence against the 1st accused by PW1 was not safe bearing in mind that she made no reference of having seen the 1st accused at the scene of the incident. Since PW1 had not mentioned to anyone that she had indentified the 1st accused, there was no purpose taking this witness to an ID parade. Having gone to the identification parade in those circumstances renders that piece of evidence unreliable and suspect. Identifying someone one never said they saw during the incident may well weaken the credibility of such witness especially in regard to that identification. Such evidence should be disregarded as it ought not to found a conviction. PW1's evidence against the 1st accused is therefore worthless.

PW3 said that she saw the 1st accused at the scene by the help of a torch that was flushed at the 1st accused by his colleague as the 1st accused pulled out PW3 from under the bed. PW3 also identified the 1st accused from the ID parades three weeks after the incident. PW3 had a brief glance at the offender. She did not say that she knew him before. In the circumstance for her evidence to be relied on there was need for her evidence to be relied on there was need for corroboration of some material particular. I have searched for such corroboration in the prosecution evidence and have found none.

PW4 in his evidence did not say that he had seen the 1st accused at the scene of the incident. However he identified the walking stick Exhibit 1, as the property of the 1st accused. PW 4 said he had seen the 1st accused with it on several occasions. The question is whether the identification of the stick was good and whether there was a possibility the walking stick may belong to anyone else.

I did not conduct this trial from the beginning. I took it over when the initial trial judge was transferred from this station. I did not therefore have the opportunity to see the walking stick and I cannot form any opinion in its regard as to whether it was unique or a common walking stick which can easily be bought from the market or found. PW4 identified the walking stick by the marks "SK" on it. That mark is not the initials of the 1st accused. It is not a special mark and the reason the witness connected it to the 1st accused was not disclosed.

I also noted that in cross examination of this witness, he admitted that his statement indicated that he led police to raid the home of the 2nd accused because he was the owner of the hat and walking stick. He also admitted that he did not tell police in his statement that the walking stick belonged to the 3rd accused. I find that there is a possibility that PW 4 may have been mistaken. Since a mistake cannot be ruled out, I find the evidence against the 1st accused by this witness worthless.

The evidence against the 3rd accused was that of recognition. This was given in the evidence of PW1, PW 4, and PW6. In the case of PW1 she said that she was chased out of the house by two people who caught up with her and demanded many from her. PW1 said that she was able to recognize the 3rd accused by his voice. She also said that she flashed a torch in order to see the money to give him and that in the process she saw him and recognized him by the torch light. PW1 said that she had known 3rd accused for over 20 years. PW1 did not state the actual words allegedly spoken by the 3rd accused except to say that he demanded money from her.

In testing voice identification, in addition to considering the length of time the witness has known the person and the circumstances of their acquaintance, one has to consider the words heard by the witness in order to determine whether they were sufficient to enable her correctly recognize his voice. PW1 did not state the specific words that were spoken by the 3rd accused, I am unable to find that the words heard were sufficient to enable PW1 recognize the voice of the person who spoke them. PW1's evidence against the 3rd accused was also that of identification by recognition. She says that as she gave the 3rd accused money she saw him by torchlight. From the account of PW1'sevidence, the robbers had chased her outside her house and had caught up with her. That means that they came close in order to catch her to demand money. The evidence of recognition was however made under poor lighting conditions. It is necessary to have evidence to corroborate that of PW1.

PW4 and PW6 each said that they recognized the voice of the 3rd accused as the one who spoke certain words during the robbery. They said that they have known the 3rd accused since he was a child. In respect of PW4 he said that he heard the 3rd accused say **"Let us go."** PW6 on his part said that he heard the 3rd accused say **"Mwenda, Let us go. They have arrived".**

When I put that point to the assessors, they stated in their address and opinion that the two witnesses state in court that they heard the same words to the effect "**Let us go, they have come".**

I will go by the record of the court as written by the trial judge then Hon. Lenaba, J. His record shows that what PW4 said he heard the 3rd accused say was slightly different from what PW6 heard. Three words were however common to both, "LET US GO". I considered that PW6 was inside his house. It may be the words were not heard by the witnesses at the same time and therefore the variation in the circumstances is not that material.

As to whether the words allegedly spoken by the 3rd accused as heard by PW4 and 6 were sufficient to enable a correct recognition of the voice. I considered that each witness knew the 3rd accused for a long time, since he was a child. The words spoken were not few as to make identification difficult. I am of the view that the recognition was in the circumstances safe.

I find that the 3rd accused was recognized both by facial identification and by voice by three witnesses. I find the evidence against him was safe and strong enough to sustain a conviction.

Having come to the conclusion I have of the prosecution case, I find that the evidence against the 1st accused fell short of the required standard of proof beyond any reasonable doubt. I give him the benefit of doubt and acquit him accordingly.

I am satisfied that the prosecution has proved its case against the 3rd accused beyond any reasonable doubt. I find it that the 3rd accused was in a group of people who went to the home of PW1 and PW6 to

commit a felony namely robbery. And in the execution of that robbery the deceased was viciously attacked and killed. I find the 3rd accused guilty of the charge against him as charged, find him guilty and convict him accordingly.

Dated and delivered at Meru this 8th day of March, 2011.

LESIIT, J
JUDGE