



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Criminal Case 223 of 2003

REPUBLIC PROSECUTOR

VERSUS

ADAN KEYNAN WEHLIYE ACCUSED

RULING

The Accused Adam Keynan Wehliye is charged with three counts of offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63 Laws of Kenya).

The particulars of the offence are that on the night of 18th and 19th October, 2003 at Oloolua Forest, Ngong in Kajiado District within Rift Valley Province he jointly with others not before the court murdered three named deceased persons namely Abraham Ali Abdulle alias Sheikh (Deceased in count I), Hassan Abdulrahman Mohamed (Deceased in count II) and Mohammed Haji Abdi (Deceased in count III).

After eleven witnesses had given their evidence the Prosecution sought to enter **Nolle Prosequi** to terminate the proceedings herein so that the Accused could be charged for this offence along with four others. It was contested before the Constitutional Bench of the high Court and it was ruled that Nolle Prosequi was null and void and thus the matter proceeded once again before me.

At the close of the Prosecution case, Mr. Kilukumi the Learned Defence counsel submitted under Section 306 (1) of CPC that the Prosecution has not led any evidence to link the Accused with the crime. The Learned State Counsel Mr. Ondari was of the view that the Accused be placed on his defence under Section 306(2) of the CPC (Criminal Procedure Code).

What I have to determine thus is whether the Prosecution has been able to produce or to lead **evidence in law** (emphasis mine) which show that the Accused was linked with the offence leveled against him. I have emphasized that the evidence led should be evidence in law and not any evidence which cannot be taken against the Accused to prove his guilt.

With this short introduction of law as per my opinion, I shall deal with the evidence before me.

It is amply on record that the bodies of the aforesaid three deceased persons were found at Oloolua forest. Those of Deceased in count I and Deceased in count III were lying side by side and that of Deceased in count II was found at a distance of about 1 km from that place.

PW.27 Inspector Otieno and PW 26 Inspector Mumo have categorically stated that the deceased persons were not killed at the scene but were dumped there after having been killed somewhere else. PW.24 Chief Inspector Eliud Lagat the Scenes of Crime Officer also had the same opinion and explained that he did

not find any signs of struggle on the scene and that there were marks of Motor vehicle tyres at the edge of the road.

I shall pause here and mark that those marks were not further investigated which could have led to the material evidence as to the scene of the crime.

I also shall note at this stage, that even though all the police witnesses have specifically agreed that the offences on hand were not committed at Oloolua Forest the particulars of charges still mention that place as the scene of committal of the alleged offences allegedly committed by the Accused. The prosecution case thus does not prove that ingredient of the particulars and falls short of proving the offence as charged.

Be that as it may, I think, I should proceed to consider the evidence in whole. There is no doubt that all the bodies had almost similar bullet wounds. They all had gunshot wounds slightly above their right ears. Neither the murder weapon nor used bullet heads are before me. I am also not shown which kind of fire arm or ammunitions were used to commit this crime.

What in short the Prosecution has succeeded to show is the deaths of the three deceased persons.

PW.11 Awalle Olad identified all the three bodies of the deceased persons at the City Mortuary before Dr. Kamau who performed Post Mortem on them. The Post Mortem reports of all the three deceased persons were produced in evidence (Ex.24, Ex.25 and Ex.26) by Inspector Otieno after the Application under Section 77 and Section 33 of the Evidence Act was made to allow Inspector Otieno to produce the same. The application was not objected to, was considered by me and then was allowed by me. The cause of death as per Dr. Kamau was head injury with brain haemorrhage due to gunshot wound.

What was the case of the Prosecution to show that it was the Accused with others who killed the three deceased persons with malice? The Prosecution really relied on the evidence of several witnesses to show that business transaction of sugar import licence gone sour was the malice out of which the Accused killed the three deceased persons. I shall have to deal with this evidence very carefully.

Apart from the evidence of those witnesses the Prosecution also produced a detailed report of Inspector Mumo (PW.26) after he analysed the communications amongst the Accused, the two deceased persons and several suspects, on 18th October, 2003 and thereafter.

After analyzing the aforesaid communications, Inspector Mumo made his final recommendations which I would quote:

“According to this stage of the telephone analysis involving this case, if there are any other potential and relevant evidential materials related to this evidence, the above five persons may be preferred charges of murder and tried before the court of law. Meanwhile analysis continues”.

The five suspects mentioned by him are

1. Adan Keynan Wehliye (Accused before me)
2. Mohammed Maalim Noor alias Buuran (PW.10 in this case)
3. Zakayo Kimaita
4. Billow Abdi Adille
5. Noor Mumiin Ali. Apart from mentioning their names in the report (Ex.23), there is no evidence connecting the Accused with suspect Nos. 3, 4 and 5 before me.

Before I dwell in details with this report, I must note that, as per Appedix 1 of his report, the Deceased in count II Hassan Abdulrahman had called the aforesaid Zakayo Kimaita on 18th October, 2003 from his mobile. He also received and called several calls from unknown subscribers. Although their mobile phone numbers and international mobile electronic identification (IMEI) were known, no efforts are made to divulge their identity.

Similarly the Deceased in count I also, on 18th October 2003, received calls from unknown subscribers. Although the cell phone numbers and their IMEIs were available and known (Appendix c), no reasonable explanation was given to the court when Inspector Mumo was questioned on those phone calls, and on absence of their identities.

I also note with concern that even though the cell phone No.0721-421516 pictured very prominently in the analysis report of Inspector Mumo, I do not have any evidence as to who owned that number. I do note however that on page 22 of the report it is described as formerly owned by the deceased (count II) along with another phone No.0721-389892. But I did not find any basis for such conclusion from the report or from the evidence of Inspector Mumo. Moreover the same does not appear amongst the six numbers mentioned in letter of 3rd February, 2004 from Inspector Otieno (PW.27) after receipt whereof Inspector Mumo commenced his investigations.

I further note that the report concentrated on phone calls made or received on 18th October 2003 and thereafter, even if from the call records produced by witnesses from Safaricom and Celtel Kenya it was clearly shown that the Accused was constantly in touch with deceased in counts I and II as from October, 2003.

It may be apportune to mention one fact at this juncture that as per the report (page 5) the Deceased in count II contacted the Accused on 18th October, 2003 at 8.59 a.m. while the former was within Paramount Plaza area and also received a call from the Accused at 9.05 a.m. while he was still at Paramount Plaza.

I shall pause here and observe that PW.3 Fausia Hassan Abdulrahman widow of the deceased (Count II) testified that he left home on 18th October, 2003 at around 8.30 a.m. after the Accused called him, which call was picked by her, and she heard the deceased saying '**yes yes I am putting on clothes and am meeting you there**'. It is on record that they stayed at Eastleigh. There is nothing to show that the BTS at Paramount Plaza has radius connecting Eastleigh. Furthermore as per the report of Inspector Mumo the call was first made by the Deceased (count II) and not vice versa.

PW.15 Ali Said also stated that on 18th October 2003 when he was leaving the house of Deceased (count II), with whom he was staying, to go to the shop at around 8.30 a.m., he heard the mobile of Deceased (count II) ringing.

The above evidence which was adduced to show that it was at the behest of the Accused that the Deceased in count II left his house, has been negated by the timings of the calls in the report. It also emerges that it was the Deceased in count II who initiated the call to the Accused.

The said report deals with calls to and from the Deceased (count I) and the Accused on pages 3 and 4.

Out of five attempts between 2.09 p.m. to 2.19 p.m. on 18th October, 2003, the Accused could only talk once to the Deceased (count I) when he was within City Centre and the deceased (count II) was within Post Office, Ronald Ngala area. They talked about 2 minutes.

Then at 6.28 p.m. the Accused's mobile was inserted with new mobile chip of 07210600826 and their call lasted only 15 seconds. The next was 6.29 p.m. (one minute thereafter) and it lasted for 20 seconds. The last call between the two was at 6.33 p.m. lasting 18 seconds when at 6.36 p.m. the mobile of the Deceased (count I) was switched to voice mail.

From the call records of safaricom (Ex.19) the deceased (count I) received many calls, some lasting for

more time than those with the Accused, up to about 10.22 p.m. and all of them do not seem to be left on the voice mail, as I see a highlighted sentence, reading “722122 – voice mail” on page 19 of 22.

On page 12 of the report it is stated that Accused’s old line was returned to his IMEI on 19th October, 2003 at 9.33 a.m. and at 9.20 p.m. on 18th October, 2003 his old Simcard was inserted in IMEI 350 – 6389611973800 and a **call** was made to Maalim (PW.10). But in earlier part of that page and on the first paragraph at page 15 thereof it is stated that Mohammed Maalim’s mobile was flashed by Accused’s mobile using its usual line 0722-785593 at Kaputei road near Argwings Kodhek Road from Ngong area. This court is not told that the said mobile with referred IMEI belonged to whom. It has definitely not been established on record that it belonged to the Accused. It means that the old simcard of the Accused was inserted in another mobile handset and the police had not bothered to find who owned that handset.

The report then talks of several calls made by various people including the Accused on and after 19th October, 2003. The names like Zakayo Kimaita, Billow Abdi and PW.10 were mentioned. Emphasis is made on long conversation between Zakayo Kimaita and Billow Abdi but the prosecution failed miserably to connect these people with the Accused in connection with the offence on hand. I am told and am aware that the said three persons are charged with the same offence in another Criminal case No.57/2004 but that fact only without any further evidence produced before this court becomes totally irrelevant and lame.

With this brief outline of the mobile contacts to and from the Accused, I shall now deal with the evidence of other witnesses who have deponed on the issue of sugar deals and the land development projects which the Accused and the deceaseds in count I and count II were involved with.

Omar Ali Yoborani (PW.1) is a self-confessed broker of everything or all. He was approached by one Burona (PW.10) to get a partner for the plot in City Centre being sold by a Bank. He thus brought in the deceased in count I. Ebrahim Ali Abdille. According to his evidence, on 17th October, 2003 the said Abdille called him from Cairo, Egypt that the land was fake. He also testified that he talked about Shs.3,400 (emphasis mine) to be used to prepare a document to import sugar and that he was told that those documents were also fake. He met Abdille (deceased in count I) on 18th October, 2003 in a hotel but they did not discuss anything except that he had an appointment at 2.00 p.m. The deceased did not specify the details of the appointment. The deceased was also to see a relative who had broken her leg. I also note here the date of the said appointment which happens to be the day of the deaths of the deceased person.

I pause here and observe that despite the averments that the deceased told him a day earlier of two fake deals it is absolutely improbable that the very next day on their meeting nothing was discussed on those issues especially the land issue which was brokered by him. Although he did change that date of 17th to 1st October, 2003 even if the earlier date appears in his statement also. My observations stand more validated when he himself has agreed that out of the income of the land development project he would get his 5 per cent share. He himself gave those details which are corroborated by Hassan Maalim (PW.10). He agreed that the purchase price of the land was Shs.37,000,000 and the same would be shared by the Accused and Buran (PW.10). The deceased would contribute in the development of the plot. He also stated that the deceased (count I) was 50 per cent shareholder and the remaining 45 per cent was to be divided between the Accused and Hassan (PW.10).

In his cross-examination he further stated that his mobile was stolen and he did not remember its number. He agreed however, that all parties in the said deal were communicating during the month of October, 2003.

He agreed that the Accused was helping him in his medical problem and stated that due to that problem (which again was not divulged) his doctor had restricted him even to learn to drive. This he said when he was questioned whether he ever drove deceased’s (count I) vehicle registration No.KAM 277P. He also stated that the deceased did not use any other vehicle.

He once again gave the figure of money given by Deceased in Count I as KShs.3,400 but at the fague end

he changed the same to US.\$ in his re-examination.

Mohammed Jamale Awale (PW.2) was a dealer in mobile phones and Hassan (deceased count II) was helping him in the business and called him at around 11.00 a.m. on 18th October, 2003 to collect some money, which he later counted and found them to be KShs.124,000. The deceased (count II) had informed him earlier, which once again is not specified, that he was asked by Shaikh deceased (count I) to check some documents to import sugar. When he (deceased) went he was told by an officer that the documents **'were not good'** and that he was released only after he left his ID Card, and details of his telephone number as well as place of work. He (deceased count II) further told him that he gave the officer the Accused's name as the one who obtained those documents.

Pausing here, I note that all the witnesses from the Sugar Board have specified that they do not ask for ID card and the Deceased (count II) in fact was not required to leave his ID card and further testified that the details which were left by Deceased (count II) were found to be untrue on further inquiry.

Going back to what this witness testified as to what was told to him by Deceased (count II), it was stated that he was also informed by the officer that the Board did not issue import licence as there is sufficient supply of local sugar.

Once again PW.8 Francis Kamau who testified that a Somali person came to visit him on 16th October, 2003 with some documents, did not corroborate this piece of evidence.

Without inputting the relevance, he gave evidence of some dispute which landed him to police officers which made him call the deceased (count II) who promised to join him but did not come. This piece of evidence was absolutely haphazard and did not make any sense, to say the least. He also stated surprisingly that he did not see the body of the Deceased (count II) but when he was told one of the delegates of peace summit was killed, he knew that the Deceased (count II) ought to be one amongst three bodies found.

I may add here that if he had made call to Deceased (count II) from the Police Station, the Report of Inspector Mumo does not mention that fact.

In cross-examination he conceded that he made three statements (not specified when and how) and the original one shown was recorded by him. He agreed that the statement does not mention anywhere the name of the Accused. He also stated that deceased (count II) did not tell him that he left fake telephone number and place of work with the officer.

I shall observe here that the above factor of not mentioning the name of the Accused in the statements before the police is consistent in evidence of all other material witnesses.

PW.3 Fausia Hassan Abdulrahman is wife of the deceased (count II). On 16th October, 2003 the Deceased came home and she heard him talking to someone on mobile that his documents (later specified as his ID card) was detained and he was about to be arrested. He then told her that he went to check on some documents given by a relative named Sheikh Ibrahim (unknown to her) which were fake and was released after he promised to bring the person who had given the documents which were between Sheikh (deceased count I) and Keynan (Accused).

On 17th October, 2003 their travel to Busia was postponed due to problem between the Deceased (count I) and the Accused. There was a meeting at Hilton Hotel at 2.00 p.m. to discuss the documents given by the Accused to the deceased (count I). I observe that PW.1 has given the date of this meeting on 18th October, 2003. The deceased came home at 10.00 p.m.

Next day he left the home at around 9.00 a.m. after receiving a call from the Accused. I have already commented earlier in my ruling on this piece of evidence.

She learnt of his death on 19th October, 2003. She reiterated that her husband (deceased count II) was in

between the Accused and Sheikh Deceased (count I) as regards problems of the documents.

As I had noted earlier, this witness also had not mentioned the name of the Accused in her statement recorded to the police as regards communications of 16th October, 2003. She stated then that she suspected the involvement of the Accused due to proximity of calls and deaths. I can undoubtedly state that these are not her words and they are coached by the police. After she was recalled to give further evidence, she stated that she had recorded IMEI number of her husband's mobile when he purchased it which was about two months prior to his death. But she recorded the same in her statement minus the last digit. I had made my observations on this part of her evidence in latter part of my ruling and do not want to repeat the same here.

PW.4 is Wilson Njue who rented his vehicle Registration No. KAK 505 E to the Accused as from 31st May, 2003 and its rental agreement was extended till end of October, 2003.

Jackson Mathenge (PW.8) is a taxi driver who took a customer to Hilton Hotel on 17th October, 2003 at 7.30 p.m. I note that as per evidence of other witnesses the meeting was scheduled at 2.00 p.m. In any event he was not asked to identify the customer and his evidence thus lacks any relevance.

Adan Isaack Ibrahim (PW.6) is a receptionist at a hotel called Ramada Hotel in Eastleigh area of Nairobi. He used to assist Abdulei the Deceased (count I) since 1997 in his business. He gave him a loan of US. \$1,000 to assist him (the deceased) to get import licence which he received but was awaiting further documents like letter of credit. He was later told by people that he was killed due to political reason or incident of thuggery. He also clarified that it was PW.1 who told him so. In his further testimony he said that the licence was shown to him a week prior to his death and that the deceased (count I) had no doubt on its validity. It is pertinent to note that this witness also testified that he was the one registered as owner of mobile No.0722-364579 which was used by the deceased (count I). This fact once again is very relevant to be considered as Inspector Mumo has not explained how he established that the said number was owned and used by the deceased (count I).

In a series of witnesses who were with the deceased during his last day, I shall now deal with evidence of PW.10 and PW.15.

PW.10 is Mohammed Maalim Noor alias Burona was a co-director with the Accused in a company called Lamu Travellers Co. Ltd. They, as businessmen and partners, were interested in buying a plot of land along Haile Sellasie Road to be sold by Central Bank of Kenya since June, 2003. The sale price in August, 2003 was Shs.37,000,000 and they intended to develop the same by erecting 317 stores thereon. They were looking for partners and were introduced to Deceased (count I) who showed his interest and asked them to form a company with him holding majority (**lion**) shares.

He was to give Shs.20,000,000 towards the purchase and also to contribute in Development. They signed a partnership agreement and the firm's name was Ilham Modern Ltd. The Bank Account forms were also signed by all. (Ex.10 & Ex.11).

He was with the deceased (count I) on 16th October, 2003 when the latter accompanied him to a hospital to visit his neighbour and offered Shs.10,000 towards his medical expense. The deceased (count I) had come back from Cairo, Egypt where he had gone to look for finance of the project agreed upon.

On 17th October, 2003 he went to a meeting at Hilton Hotel to finalise drawings and plans. He found the deceased (count I), the Accused and another person of Somali Origin. The deceased (count I) and the Accused were laughing at that person because he was saying that the documents they obtained for Sugar Importation were fake. The Accused told that person if he had left the documents at Sugar Board it was his problem and on that the other person got angry and accused that the Accused was conning the deceased (count I). At that point the deceased (count I) chided that person by saying that he was not a child to be conned by any one and that he should respect the Accused. The deceased (count I) also said that he had a Somali person named Abdul Fatah who was his partner in Sugar deal. They left the meeting and the deceased (count I) told them to wait for land project till January, 2004 as he had to sort out his

finance. He stressed that there was no tension or problem between anyone before they left for the meeting. He was not asked the question on the identity of the Somali person with whom they met.

I shall pause here once again to note that this is the sole witness who has testified as to what transpired at the meeting on 17th October, 2003. It is very relevant because the Prosecution is basing their case against the Accused on the Sugar documents which were found to be fake and that as a result of that the problem arose between the two which led to the Accused planning for death of deceaseds which occurred the very next day. This witness is a witness from the Prosecution and even afterwards he was charged with the same offence in another case, he was neither recalled nor is any attempt to discredit his deposition made. In the premises, I have no other option but to treat him as one of the prosecution witnesses and cannot disregard his evidence only because he is now an accused person in another case. Doing that will be against all norms of Criminal law.

In cross-examination this witness also specified what was the expected income from the land deal. He estimated it as 6 to 7 billion shillings per year. He further stated that without the assistance of the Deceased (count I), the project would not have proceeded. It is also to be noted that he was arrested for this case and was released after 14 days. According to him the issue of ID card of Somali person was also decided to be finalized on coming Monday.

He reiterated that if Hassan (PW.1) had stated that the land deal was fake “**he was mentally bankrupt**”. He also testified that the Accused helped PW.1 in his medical problem because he had introduced to them a very important partner.

I shall have to pause here once again to regrettably note that although PW.1 had stated that the land deal was fake and the Prosecution was aware of that deal from statements of its own witnesses, no effort is made to bring forth evidence on the land project to show its validity or otherwise. In absence of such evidence on an important issue, without any explanation coming forth from the Prosecution, this court is entitled to presume that its evidence could have been adverse to the Prosecution case. This court has on several occasions lamented on the half hearted and inefficient investigation from the state authorities and the court becoming helpless in face of such lacuna. I have to reiterate that, it is more lamentable when this case is based on circumstantial evidence. I shall deal with the legal aspect on this aspect later in my ruling.

Last in the line of witnesses as regards alleged problem between the Accused and deceased (count I) is Ali Said Hassan (PW.15). He was working with Hassan Abdulrahman the deceased (count II). According to him when he was with the late Hassan and two others (named by him but not called before the court) at 6.00 p.m. on 17th October, 2003, the late Hassan received a call and he was informed that the Accused had requested him to postpone his travel to Busia that night to solve a problem between the Deceased (count I) and the Accused. This call has not been linked in the report of Inspector Mumo. Although he was told by late Hassan to make a call to Deceased (count I), he did not do so. Next day he saw the late Hassan in and out of shop up to 1.00 p.m. and that was the last he saw of him. He started calling the late Hassan around 7.00 p.m. but he was receiving message that the subscriber was not available.

However, an interesting but shocking fact emerged during the cross-examination of this witness. He stated that he recorded two statements one at Ngong Police Station and another at Central Police Station. A typed copy of statement titled as CD 12 (Ex.15 B II) which was in bundle of documents in the present case (which he confirmed was his statement) did not mention the name of the Accused. That statement only deals with the incidents of 18th October 2003. The statement is dated 19th October, 2003, the very next day from the day the bodies of the three deceaseds were found. It is stated to have been recorded at 2.30 p.m. at C.I.D. Ngong Police Station. Even though its original was asked to be produced, the same was not done on the reasons that it was not traced. PW.15 agreed that he knew that he was making that statement in connection with three murders.

On the other hand, he also agreed that he had recorded a statement (CD BI) on the same date and at the same time at CID Central Police Station whose contents are different than that of the other statement (Ex.15 B ii). It is titled CD 11 which is in the bundle of documents of Cr.C.57/2004 where other four

Accused were charged. Its original was also produced which is Ex.15 A. It is very sad to note that no explanation on such discrepancy is coming forth. One statement does not mention the Accused and the other one allegedly written at the same time and on the same day talks about the Accused.

I have to note here that in the statements of other witnesses as well, as commented by me, the name of the Accused has not been mentioned. His name was only given by respective witnesses while giving evidence obviously after he was charged.

I am facing a very deplorable situation and have no words to describe how despicable the matter is. It is, to say the least, the desperate effort by the Prosecution to drag in evidence against the Accused against all norms of fairness and justice. Less I say about the matter the better it would be.

This witness also stated that the late Hassan received a call at 8.00 a.m. on his mobile on 18th October, 2003 when he was leaving to go to work. I have already commented upon this evidence hereinbefore.

The next witnesses PW.7 Rosemary Onyango, PW.8 Francis Kamau and PW.9 Jason Nyaga are officers from Kenya Sugar Authority and gave evidence on Ex.6 A and 6 B which were left by a Somali person in their office on 16th October 2003. PW.8 was the one who received that person but he was not asked to identify the person either by showing him a photograph of dead body (Deceased count II) or by showing him his other known photograph.

My observations are more pertinent as PW.8 Francis agreed that he would recognize the person who brought the documents. He did not testify that the person divulged to him the name of the person who gave him the documents. He also confirmed that he did not ask the person to leave his ID card. Moreover the details left by the said Somali person were found not to be true. In the circumstances, their evidence, except the fact that Ex.6A and Ex. 6B were not genuine documents on reasons given by them, falls very short to connect the Accused with those documents. They all further confirmed that one need not leave ID card at the reception and that only registration number of the motor vehicle is recorded.

Pw.13 Joshua Musyoka is the last witness from the Kenya Sugar Authority. He books the visitors of the office of the sugar Authority in a register. On 16th October 2003 he registered a Somali visitor around 4.10 p.m. who arrived in a Motor vehicle KAM 277P, which vehicle is accepted as that of the Deceased (count I). According to his register the visitor wanted to visit purchasing officer named Lillian and that he seemed to know her by name. This Officer, without any explanation, is not called as a witness. As per his register the visitor left at 4.30 p.m. There is no explanation how then this visitor at around 4.00 p.m. happened to see PW.8 who is head of the Sugar Authority, when the visitor as per their record, had arrived at 4.10 p.m.

PW.12 Collins Odhiambo Odipo is an Advocate of the High Court of Kenya having his offices at Kencom House. He knew the Accused as his client and recalled that around 22nd or 23rd August, 2003 he advised Accused and the deceased (count I) to register a business name for the project which they were intending to undertake, due to expediency of the matter. He prepared a draft of a partnership agreement which had not been signed. He however stated that *'Memo and Article of company was executed'*. He also confirmed that he wrote an introductory letter to KCB, Kencom branch to enable them to open accounts.

PW.14 Benedict Mulinge was a watchman at the gate of the Shade Hotel. He referred to his register of movement of motor vehicles at the hotel on 18th October, 2003. It stated that two vehicles **KAN 277P** Toyota Corolla and **KAK 505 E** entered the hotel gate at 5.34 p.m. and 5.35 p.m. respectively. The latter vehicle left and came back after about 15 minutes. He left his duty at 6.00 p.m. and the two vehicles were still in the hotel's compound. He was asked to give statement on those two vehicles only. It is obvious that the number of the first vehicle differ from the established number of the vehicle of deceased (count I). Inspector Otieno testified that he called the owner of vehicle which is registered by this witness but he did not oblige. With this evidence before me I do not think the evidence of this witness should be relied as showing any value to this case.

PW.16 Guhad Abdi Adan, PW.17 Nuria Mohammed Ali, PW.18 Abdi Hassan Modey and PW.20 Robert Murage were either found in possession of the mobile handsets of two deceaseds (count I and II) or had dealt with them. Apart from the fact that the two mobiles were stolen from the said deceaseds, in my opinion, nothing much turned by their evidence so far as the Accused is concerned.

PW.21 Abdullah Mohammed was staying with the deceased (count I) and confirmed that the deceased had a mobile No.0722-364574. When he was shown Ex.16 www.kenyalaw.org Republic v Adan Keynan Wehliye (No. 2) [2005] eKLR 20 he said that the same did not have antenna which the deceased's mobile had. This piece of evidence coupled with that of PW.15 when he stated that the deceased was using his number does raise a question which is not answered by the Prosecution. He also stated that the deceased had many wives out of which only one live in Kenya. Other witnesses are officials of two mobile companies in Kenya. PW.22 Miriam Gikonyo is the Risk Analyst with Celtel Kenya and on request from CID Headquarters, provided Call Record for mobile phone having IMEI 351004 – 26324866 000 to Inspector Mumo for the period of February, 2004 to May, 2004. She agreed that she did not have any technical qualification in telecommunication technology. She thus could not explain how 15 digits on the IMEI shown on the handset became 17 digits without showing the last digit appearing on the handset. She could not shed much light on the radius of each Base Transmission Station (referred to hereinafter as 'BTS') served. I am not told that how Inspector Mumo received other records as before or from May, 2004.

PW.23 Henry Odongo Gila is an Engineer with Celtel Kenya. He holds MSC Degree in Radio Engineering. His duty is analysis of network, control of traffic of calls and quality of network.

He specified how the calls received and made could be located/traced through the nearest BTS. But he also stated that the tracing also depends on the exact location of the caller and receiver to exactly place them on a certain BTS. However, this witness did not give any details on the numbers of BTS around the area of the scene. I may easily state that the court was not told how many BTS are situate around Ngong area so as to exactly locate the places of receiver or caller of a mobile phone. He also stated that the Celtel captures 14 digits of IMEI of a handset followed by a '0' and stressed that if there are three '000's he could not comment. It is easy to note that as per data record (EX.17) supplied by PW.22, there are '000' shown. It is interesting to note that they both work with the same company.

He also confirmed that the last digit of the IMEI on the handsets definitely has a meaning but could not explain what it was as well as the reason for its absence on call record data. He confirmed that the last digit is on IMEI for purpose of identification of the handset. He also opined that the IMEI number should appear on the screen of the handset but he did not check that fact on Ex.14 B which once again is the handset of the mobile of the Deceased and was produced. He however confirmed which also follows logic, that the personal identification of the caller or the receiver cannot be confirmed.

PW.25 David Nderi is fraud analyst with Safaricom. He produced Data record prepared by his predecessor Mrs. Awuor. He holds Degree of Bachelor of Arts in Information Management and does not have any technical qualification. He could not explain why only first 14 digits in IMEI are important for Data record and why the last digit is not captured therein.

In short what these 'expert witnesses' gave impression to the court was that they are unable to satisfy this court, without harbouring any doubt, that their opinions as experts should be accepted unhesitantly.

I have already dealt with evidence of Inspector Mumo (PW.26) earlier in this ruling.

Scenes of Crime Officer (PW.24) made conclusive observations that the two scenes where the bodies of the deceaseds were found were not disturbed and that the bodies were dumped there after being killed somewhere else. He did find tyre marks at the edge of the road but did not undertake any further investigation to establish the scene of actual murder. Inspector Otieno (PW.27) Investigation Officer of this case stated that as the road was not muddy it was not possible to establish anything from those tyre marks. Be that as it may, as I have observed earlier there were many gaps which were not tried to be filled in by the Prosecution. To this, I add one more observation by mentioning that one Mohamed who

identified deceased (count I and III) is also not before the court. Inspector Otieno stated that he found a crowd around the scenes and did not make any observations whether there was any opportunity of theft from those bodies. It became more relevant when he stated that no identification documents were found from any of the bodies, not even wallets. Deceased in count (I and II) are shown to be men of means from the record of the case. He did not explain even after these observations as to why he did not investigate further the possibility of thuggery although he did toy with that idea. He also did not explain to the court how he eliminated possibility of political motive despite the fact that the deceased (count I) was an important delegate in peace talks between warring groups of Somalia. He has also been shown to be the recipient of funds. He just stated abrasively that he did not find any link. He also did not get any information on the identities of occupants of two motor vehicles said to be at the Shade Hotel. He could not explain the mention in Register of that date of Registration number of motor vehicle KAN 227 P in the register of Shade Hotel and how he assumed that it was a mistake and that it should be read as KAM 277 P, despite the fact that the owner of KAN 277 P was found to be difficult and did not come to the Police Station even though asked by him. He also fell short of mentioning his name even if he stated that he found out the owner of the said vehicle.

He also conceded that the lady called Lillian whom deceased (count II) was supposed to be visiting at Sugar Authority Office had not been interviewed. Finally, he candidly agreed that there is no direct evidence against the Accused and stated that ***“He could have organized the acts of killing”***.

This, in short, is the evidence before me. Can the same be accepted as evidence in law to link the Accused with the offence on hand as is provided in Section 306 of the CPC?

For that I have to connect the facts of the case with trite laws established in Criminal Law Jurisprudence.

On cursory glance at the evidence, one can find that the case of the prosecution rests on circumstantial evidence only. It is also conceded by the Prosecution witness (PW.27). The trite law is that before convicting the Accused on circumstantial evidence the court must be satisfied that

“The circumstances must be such as to produce moral certainty, to the exclusion of every other reasonable doubt” and

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

(Taylor on Evidence 11th Edition adopted in case of **Simani Musoke vs. R. (1958) EA 715 at pages 718 – 719**). In the case of **Chhabildas D. Somaiya v. R. (1953) 20 EACA 144 at 145**, the Court of Appeal of E.A. also decided that if each part separate from other evidence could be capable of an innocent explanation, even if accumulation thereof could establish a guilt, the conviction cannot be based thereon.

What I can state here is to simply reiterate the quoted principle, which is, that the court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of the guilt.

I may not reiterate what I have already stated and observed earlier on. The witnesses (PW.1, PW.2, PW.3 and PW.15) agreed that they did not mention the Accused in their statements before the police but even then went on and mentioned him in their evidence. In the same breath I have evidence of Aden Issak (PW.6) and Mohamed Malim (PW.10) who stated that the deceased in count I had no problem with the documents of the sugar deal.

Now it is obvious that the Prosecution rests its case to link the Accused with the said deal and to show that he had malice aforethought to eliminate the deceaseds because of that deal. The case of the Prosecution is this that the Accused came to know on 17th October, 2003, that the deceased (count I) had been made aware that the documents were fake, and he planned the murder and executed the same the very next day on 18th October 2003. As Deceaseds (count II and count III) happened to be with the

deceased (count I) they were also killed. There is however no evidence that how Deceased (count II) happened to be with deceased (count I) on that day and at the time which the Prosecution pins down between 6.00 p.m. to 6.30 p.m. specially when it is tried to be shown that the deceased (count I) and the Accused were at the Shade Hotel uptil 6.00 p.m. (PW.14). I would reiterate here that in absence of any evidence to show that the land deal between the Accused and Deceased (count I) was not fake, I have to accept the same as valid from the evidence of witnesses who talked about the same (PW.1, PW.10 and PW.12).

From the evidence of the witnesses who talked about fake documents (PW.1, PW.2, PW.3 and PW.15), I can easily raise doubt on the evidence of those witnesses who did not mention the Accused at the first opportunity availed to them. As a result thereof, the same can be categorized as an after thought {see **Cr.Ca. R. v. Shaban Bin Donaldi (1940) EACA 60**}.

In short they all have not proven themselves to be creditworthy witnesses and it shall be unsafe to rely on their evidence.

Furthermore, there are discrepancies in the evidence of witnesses who testified as to visit of a Somali person (allegedly deceased count II). I do not have to reiterate here those discrepancies. Thus this part of the evidence to link the Accused with the documents has no basis in fact or in law.

Once I have found them to be unsafe witnesses, I cannot accept or rely on their respective evidence as to what the deceased (count I) had told them. These statements supposed to have come from the Deceased (count I) are in similar position as that of a dying declaration. Those statements have not been tested by cross-examination as obviously they cannot be. I have often quoted the case of R. v. Choge (1985) 2 KAR page 41. The Court of Appeal has stressed that the weight attached to a dying declaration in this country must be less than that attached to them in England and that the exercise of caution in reception of such statement is even more necessary in this country.

Once I have given reasons why it would be unsafe to rely on evidence of those witnesses, I should also find that the part of their evidence as to what was allegedly told to them by the Deceased (count I) would also lack credibility.

Lastly I shall now come to the evidence of expert witnesses (PW.22, PW.23, PW.25). I have observed their evidence and made my comments thereon and I need not reiterate them. Suffice it shall be to find that I found them lacking in their knowledge in their professed field of expertise. The case of **Pravin Singh Dhalay v. R. [Nbi Misc.Cr.Appeal No.10 of 1997) Unreported]** is very much on this point. In short this court can refuse to accept their evidence if there is proper and cogent basis to do so. In absence of any other independent evidence to connect the Accused and the Deceased persons to this crime, I shall hesitate to rely solely on the evidence of these witnesses to prove guilt of the Accused.

With these facts and laws as observed by me, I shall be unable to convict the Accused even if he chooses to keep quiet. In short what is before this court cannot be said to be the evidence in law which links the Accused with this offence. This court is then enjoined as per Section 306(1) of CPC to enter finding of not guilty.

I do so, bowing to the law, and find the Accused not guilty of offence of murder of three deceased persons named in count I, count II and count III of the information dated 24th November, 2003 and acquit him of the charges leveled against him.

I also direct that the Accused be released forthwith unless held otherwise as per law.

I do note with deep sorrow that due to unavailability of evidence as per law, I have to decide as I have done, although this court did harbour some suspicion as to guilt of the Accused. I cannot base my decision on suspicion which should be, as I have indeed done so, on the facts before the court.

Dated and signed at Nairobi this 28th day of November, 2005.

K.H. RAWAL

JUDGE

28.11.05