Republic v Shisanya & another (Criminal Case E066 of 2018)
[2024] KEHC 6864 (KLR) (5 June 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E066 OF 2018

RN NYAKUNDI, J

JUNE 5, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MELISHA MUHINDI SHISANYA ..... 1ST ACCUSED

SAMUEL AMATUKA EKITUI ..... 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the night of 5th October, 2018 and 6th October, 2018, at Kibulgen village in Eldoret West Sub-County Uasin Gishu County within Uasin Gishu County jointly murdered Geoffrey Mateje Lulu.

2. The accused persons pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The lead prosecution counsel in these proceedings was Mr. Mark Mugun for the state whereas the 1st & 2nd Accused persons were under the retainer of Learned counsel Mr. Oburu and Mr. Kenei respectively.

3. The prosecution marshalled 12 witnesses who tendered evidence to prove the following elements of the offence;

    a. The death of the deceased,

    b. The death was unlawfully caused

    c. That in causing death of the deceased accused's unlawfully acts were accompanied with malice aforethought.

d. That additionally the accused was the person who committed the offence on the material day as against the deceased.

A summary of the prosecution case

4. Having presided over the matter and having gone through the submissions by both counsels, the submissions by the state counsel captures a fairly true record of the evidence adduced and I shall proceed to adopt the same.

5. PW1: Jane Muthoni Kahu testified that on the 5th of October 2018 at around 17000hrs she was at home when Samuel Amatuka Ekitui 9Accused 2) who was known to her as, "NANGAM" told her that he had been sent by her husband to collect a motor cycle Reg No. KMEB 428V. She gave him the keys and he rode off with the motorcycle. She discovered the chicanery when his husband came back at around 1800hrs and asked for the motor cycle. When they contacted accused 2, he initially promised to bring it back but he did not. Later refused to pick their calls or reply to their text messages. She was aware that her husband booked a report at the police station concerning the motorcycle the following day. In the evening, while watching KTN news, they discovered that the motorcycle had been abandoned while carrying a dead body.

6. PW2: Isaac Kiame Kiwo testified that on the 6th October, 2018 a around 0700hrs, he was at home when he was notified that a man had been killed and his body put in a sack. His nephew knew the owner of the motorcycle by his alias, Kibonge, and called to ask if the owner was similarly watching news. He accompanied the aforementioned nephew to the police station where they met up with Kibonge and heard Kibonge telling the police that Nangam, his brother-in-law, had deceived his wife into parting with the motorcycle. They were advised to report the matter at Baharini police station and when they got there, they were placed in the cells. He and his nephew were released shortly thereafter and asked to report to CPL Adongo. They were later notified that Nangam had been seen around Boma area. He rushed there together with other bodaboda operators and were able to arrest him and handed him over to the police. He identified Accused 2 as the person he had known as Nangam for the last three years.

7. PW3: Elijah Ngugi Waweru testified that on 6th of October 2018 he was at the bodaboda stage when he learned of the murder that had taken place in Bondeni. Later in the day he met up with Zacharia Nick alias Kibonge who told him that Nangam had deceived his wife into parting with his (Kibonge's) motorcycle. They went to the police post to report the loss of the motorcycle. In the evening while he was watching the evening news on TV, he saw Kibonge's motorcycle being televised as the one that was used to transport the body of the deceased. He escorted Kibonge to make follow-up report at the station and while there, Kibonge was arrested. They received a tip off that Nangam had been seen in Boma area. Acting on that tip off, they found him there and arrested him then handed him over to the officers investigating the matter. Lastly, he confirmed that he had known Nangam and knew that he worked at the slaughterhouse.

8. PW4: Evalyne Chepchirchir Leting testified that on the night of 5-6th October 2018 at around midnight she was at home sleeping. She was woken up by a loud barking of dogs from the neighbouring plot. Shortly thereafter, she heard a woman screaming calling the name of Nelson, the neighbour on the adjacent plot. It was then that she recognized the voice as that of her landlady (accused 1). She kept on screaming while going towards the gate but could not say why she was screaming. Other neighbours responded to the screams but she still failed to tell them why she was screaming. When Nelson asked why she was screaming, she ten told the crowd that Geoffrey, the deceased, was dead. The neighbours started moving around the compound to check but Accused 1 directed them to check outside the gate. Some of the neighbours went outside to check and came back saying that they had found the body

stacked inside a sack, a few meters from the house. When the policemen came, she also went outside to confirm the same and saw a body in a sack that had been fastened on a motorcycle.

9. PW5: Philemon Kiprugut Bett testified that on the night of 5-6th October 2018 at around 0100hrs, he was asleep at home when he heard dogs barking in an unusual manner and running within the compound. He moved towards the gate furtively to find out what was going on. He then heard the sound of something falling onto the ground. He then rushed back to the house, armed himself with a panga, bow, arrows and a torch and went outside again. Using the torch, he saw a motorcycle about 2 meters from his gate. He then switched it off and hid himself besides the gate. The Motorcycle was switched on and ridden towards him. When the rider got close to him, he switched on the torch then noticed that there were two people on the motorcycle carrying a sack. There were two hands dangling from the sack. This scared him enough to make him scream. At that point the rider lost control and the motorcycle fell on its side. The rider dropped his Marvin (hat) and struggled to pick a bag that was on the motorcycle. He picked up the bag and ran away. He wanted to give chase but turned his focus on the passenger, a female who was also trying to run away. He continued screaming while chasing after her and when he got close to her, the woman turned and called him, "Baba Tanui." It was at that point he pointed the torch at her and recognized her as the wife to a neighbour named Geoffrey. She approached him and he cautioned here against coming any closer because he had noticed that she had blood on the face. After she passed him, she screamed three times then headed to her home. He then called other neighbours to inform them of what he had just witnessed. When they responded to his calls, they went towards the abandoned motor cycle whence they were able to identify the body as that one of Geoffrey, their neighbour. When the police came, he similarly notified them on what he had witnessed. The wife (accused 1) came out but did not say anything. She was arrested on the spot.

10. PW6: Vincent Kirwa testified that on the night of 5t-6th October, at around 0100hrs-0200hrs, he was at home waiting on his cow to deliver. He heard a male voice screaming which he found to be unusual. He peeped through the fence and saw somebody running while holding a spotlight that had been switched on. He jumped over the fence and recognized the man as his neighbour, Philemon (PW5). Philemon told him that there was a body of a person inside a sack fastened on a motorcycle by the road. As Philemon was explaining to him that he (Philemon) had just witnessed, he heard their neighbour screaming. PW5 told him that he had seen the deceased's wife together with a male companion riding that same motorcycle and when he flashed his torch at them, the rider lost control of the motorcycle, fell down, picked up his bag and took off but he managed to recognize the passenger as Geoffrey's wife. Other neighbours who had been attracted by the screaming came to the scene and they calmed down accused 1. She told them that they had been attacked by thieves. They did not believe this story and notified the police about the murder. The policeman arrested her took away the body. He testified that prior to the police arriving, he went to the deceased's house and noticed that there was a lot of blood at the entrance. At the scene where the body in a sack was abandoned, they found a white canvas shoe and a Marvine hat but it was taken by Geoffrey's wife who claimed it was hers.

11. PW7: Zakaria Emuria Ekiru testified that also goes by the alias Kibonge. He stated that he is married to PW1 and that on 5th October, 2018 he had taken his livestock to the pastures and returned home at around 1800hrs. His wife informed him that she had released his motorcycle to Nangam (Accused 2), his cousin, who had informed her that he (Zakaria) had authorised it. He was startled by that because he had not authorised Nangam to take away his motorcycle. He then called Nangam to return the motorcycle but he did not respond. This made him opt to send a text message to which accused 2 responded that he would bring it back. He texted Accused 2 again at around midnight to demand for his motorbike but this text was not replied to. He then opted to take a boda boda to his workplace and went on with his business. In the morning, tried to call Nangam but his phone was off-network or switched off. He then decided to report the issue of the motorcycle at the police station after finding

Accused 2 was unreachable on phone and his whereabouts unknown. In the evening, while watching KTN news, he discovered that his motorcycle had been used to carry the body of murdered man. He took himself to the police station in the company of Kiarie (PW2) and Elijah (PW3) whereupon he was arrested and placed in the cells but released later. He blamed his arrest on his cousin Nangam, who had deceived his wife into handling over the motorcycle to him.

12. PW8: Dr. Kibet Keittany testified that he carried out a post-mortem on the body of the deceased. The external appearance of the body revealed that there were bruises behind the ears, eyes, back to head, right cheek and left upper lip. The ribs had been broken and there was also bleeding within the chest cavity and in the soft tissues around the chest. The left lung had collapsed and the liver had superficial tears. He noted that there was breakage of the bone in the head which had caused increased pressure had internal bleeding into the space between the skull and the brain. These findings led him to the conclusion that the cause of death was severe head injury due to blunt force trauma consistent with assault.

13. PW9: Branspurity Malimu Wafula's testimony was similar to that of PW4, PW5 and PW6 in that she was asleep when she heard their landlady screaming. When they asked her why she was screaming, she at first said nothing but later when pressed for answers, said that her husband had been murdered and his body was outside the gate. She corroborated PW4's testimony in the sense that he had recognized the landlady as the female passenger on the motorcycle carrying the body of the deceased. She had implored upon him not to cause her harm, was left to go her way and shortly thereafter began screaming.

14. PW11: Nelson Wasamba Makanji testified that he is one of the deceases Accused 1's tenants. On the night in question, he was woken up by the barking of their neighbours' dogs. A short while later, he heard Accused 1 screaming his name. When asked why she was screaming, accused 1 said nothing but when he forced her to speal, she said that her husband had been killed. He noticed that Accused 1 had blood on the face and hands and decided it would be better to check the house. He found a lot of blood on the inside part of the house. PW4 and PW5 then told them that the body of the deceased was inside a sack that had been fastened on a motorcycle outside the homestead. He confirmed this when the policemen came.

15. PW12 Inspector Joseph Adongo testified that he was the investigation officer in this matter and one of the first officers to respond to the distress call. When he visited the scene on the night of 5-6th October, 2018, PW4 told him that he had been able to recognize Accused 1 as the female passenger on the motorcycle. When he went inside the house, he noted that there was a lot of blood on the floor, door, curtain, chairs and other furniture. He also found a meal of rice and meat stew that was on the table next to a seat facing the TV. Accused 1 was busy cleaning-trying to wipe off the blood. The motorcycle was processed and the owner presented himself at the police station. He learned that the owner's wife (PW1) had ceded possession of the motorcycle upon subterfuge by the Accused 2 shortly after placing him in custody, he was informed that Accused 2 had been seen in his mother's homestead. He rushed there and found Accused 2 wearing a blood-stained vest. Insider Accused 2's bag, he found a white shirt that was similarly bloodstained. These, he collected and sent for DNA analysis which would reveal that the clothes worn by Accused 2 had the deceased's blood. He did a scene reconstruction and was able to professionally conclude that the person who attacked the deceased came from his bedroom as the deceased was seated on the Sofa watching TV while having his dinner. This was why the deceased's stomach contents had undigested rice and meat.

16. IP Adong also obtained call data record from Safaricom for Tel No 0712916544 registered in the name of Samuel Amatuka, accused 2 and 0713478544 registered in the name of Melish Muhindi Shisanya, Accused 1. The call data record showed that the two had been in constant communication even when Accused 2 was in Lodwar. It further revealed that Accused 2 left Lodwar on 02/10/2018, arrived in

Eldoret on 03/10/2018 and met up with Accused 1. Most crucially, on the night of the murder, the call data records placed both Accused 1 and Accused 2 at the crime scene and immediately thereafter, accused 2's phone was switched off. IP Adongo testified that he was greatly disturbed when Accused 1 requested to be escorted to her home and when she got there, she only took Britam Insurance Folder containing: Liberty Insurance Policy, Land sale agreement, Gemina Insurance Police and Several bank ATM cards. He found it quite odd that instead of asking about the children, accused 1 went for these documents. He decided to confiscate the documents, prepare an inventory of recovered items and use them as exhibits. He suspected that Accused 1 had orchestrated the murder of her husband out of greed and desire to possess his wealth.

17. Lastly, by mutual consent of all the parties, this witness produced a motorcycle, 9 photographs, land sale agreement, log book, assorted clothing, Sim cards, Back bag, Brown Shoes, Inventory of items recovered from Samuel Amatuka, Exhibit memo, government analysis report, Britam folder containing the aforementioned documents, inventory of items recovered from Melisha Shisanya and call data records.

18. In support of his case, learned counsel for the state relied on the following cases: Anthony Ndegwa Ngari v Republic [2014] eKLR, Abanga alias Onyango v Republic Criminal Appeal No 32 of 1990 (UR), Japhet Morara v Republic [2019] eKLR, Mamai v Republic [2022] KECA 649 (KLR), Wanjiru d/o Wamerio v Republic 22 EACA 521, Eunice Musenya Ndui v Republic [2011] eKLR, Republic v Tabulanyenka s/o Kirywa [1943] EACA 51, NMW v Republic [2018] eKLR, Bonaya Tutu Ipu & another v Republic [2015] eKLR, Kennedy Wesonga Kwoba v Republic [2013] eKLR, Alberty v US, 162 US 499 [1896] and John Mutuma Gatobu v Republic [2015] eKLR.

19. When place on their defence, DW1: Melisha Muhindi Shisanya, despite being placed at the scene and being recognized as the female passenger on board that motorcycle, decided to weave a specious tale of a grieving widow. She told the court that the deceased was her beloved husband. She testified that on the might in question, the deceased came home late and she offered him supper. She left him eating and retired to bed. Shortly thereafter, she heard someone knocking the door followed by what sounded like a fracas. When she went to check on what was happening, she found about 7 men in the house one of who had something that looked like a gun. According to her, they were ordered to lie down, roughed up then robbed. She said that after a while, there was silence and she believed that the robbers had left. It was at that point that she screamed for help and narrated that the neigh ours what had transpired. She emphatically denied ever meeting accused 2 prior to this date. In cross examination, she confirmed that there was a lot of blood found in the house-an indication that he had been harmed inside their house. She also confirmed that she had never had a disagreement with PW4 and PW5 and that the has no reason to implicate her. She also confirmed that her phone no was 0713478554 and that she has always been in possession of her mobile phone all through. She confirmed that her clothes and mop had the deceased's blood.

20. DW2: Samuel Amatuka Ekitui on his part raised the defence of alibi. He basically stated that on the night in question he was at home with his mother. According to him, they stayed awake all night to guard over the family goats. He said that he was gobsmacked that he was arrested over a murder that he did not commit. He also insisted that prior to his arrest, he had never met accused 1. In cross-examination, he admitted that the clothes he was wearing at the time of his arrest were stained with the deceased blood. He further admitted that he used to operate mobile phone no 0712916544 registered in his name but the phone was stolen together with his ID card.

21. DW3: Leah Longor testified that she is the mother to Accused 2. Her testimony basically supported that of Accused 2 in that they were together on the night in question. In cross-examination, she admitted that she had never recorded a statement with the police concerning the late alibi. Her

testimony in court was the first time that she was telling anybody that she was together with Accused 2 that night. She also conceded to the fact that accused 2 was her first-born son who she cared very deeply for and would not want harm to come his way. She also confirmed to the court that Accused 2's phone no is 0712916544 and that she was unaware that he had lost the phone or his ID Card. Her testimony marked the close of the defence.

22. The 2nd accused person filed his submissions in support of his case whereas the 1st accused person never filed her submissions.

2nd accused's case summary

23. According to the 2nd accused person the investigating officer failed in his obligation to get to the bottom of the incident and unearth the truth behind the death of the deceased. He took a very presumptive approach to the investigations. He chose to solely rely on the evidence of persons who had been treated as first suspects to charge the 2nd Accused person without any corroborative evidence. He equally failed to explain why he ignored some exculpatory evidence in favour of the 2nd Accused person. The shoes allegedly recovered from the scene and those allegedly belonging to the 2nd accused are of different sizes. That it is a clear pointer that the alleged rider could not have bee the 2nd accused person. It is common knowledge that a person cannot be wearing two different sizes of shoes. This should have pricked his antennae to look beyond the 2nd accused in his investigations.

24. As to whether the deceased's death was caused by the 2nd accused person, he submitted that the police who presented the case to the prosecution didn't provide a basis for charging the 2nd accused person other than the circumstantial evidence based on the allegation that he was the one in possession of the motorcycle that was found at the scene of crime. That the charges seemed to have been preferred arbitrarily and without any investigations. There was no evidence to show that Jane (PW1) gave the motorcycle to the 2nd Accused person or that PW7 tried to ask the 2nd Accused Person to return his motorcycle when he got back home on that evening and was informed that his motorcycle had been taken. Counsel submitted that the evidence on record do not link the 2nd accused person to the death of the deceased. He maintained that there was no witness who saw that the 2nd accused person at the place where the incident occurred or witnessed him killing the deceased. It is only (PW1) who tried to create a link by saying that the 2nd accused picked the motorcycle from her but fails to tender any evidence to corroborate her sentiments. On this he cited the decision of Sawe Vs. Republic (2003) KLR 364.

25. Additionally, it was submitted for the 2nd accused person that it is doubtful whether the accused person was in possession of the motorcycle that was carrying the deceased body. That no witness gave evidence to demonstrate that the 2nd accused was actually seen at the place where the incident occurred. It is doubtful whether one Zechariah Ekiru (PW7) who is the owner of the motorcycle was not involved in the death of the deceased. That Mr. Zechariah Ekiru Emuria could have killed the deceased and created a red herring by accusing the 2nd accused person. He urged the court to return a finding that there is no sufficient evidence to link the accused to the death of the deceased. That the alleged evidence of him being in possession of the motorcycle cannot be conclusive to point to the guilty of the 2nd Accused person. On this counsel relied on the case of Mohammed & 3 others V Republic (2005) 1 KLR 722.

26. On the question of whether the prosecution proved common intention between the 1st and 2nd Accused person, the 2nd accused person argued that the prosecution is founded on an alleged conspiracy between the two accused person to kill the deceased herein. On this he cited section 21 of the Penal Code on common intention. He also relied on the case of Adio v state (1986) NWLR. He maintained that for the prosecution to succeed to rely on the doctrine of common intention, its evidence must satisfy two conditions. The prosecution must tender evidence to the effect that there was a common purpose to

unlawfully killed the deceased. The prosecution must equally tender evidence to prove that the 2nd accused actually participated in the killing of the deceased. He quoted the case of Republic Versus Cheya case 1973EA

27. Whether the defence of Alibi was successfully rebutted, the 2nd accused submitted that when the defence is raised, the burden of proving to the contrary lies with the prosecution and this is cited extensively from past decisions such as the Court of Appeal in Victor Mwendwa Mulinge vs Republic. He argued that the prosecution did not call for evidence to disprove the alibi raised by the accused pursuant to section 309 of the Criminal procedure Rules and therefore this court must weigh the alibi against the evidence of the prosecution. This was supported by the case of Republic v Philip Ondara Onyancha (2021) eKLR and Argut v Republic of Kenya (Criminal Appeal 205 of 2017).

28. Finally, counsel for the 2nd accused person submitted that the prosecution's case leaves a glaring gap of doubts. That from the narration given in evidence by the prosecution witness there are doubts as to whether the 2nd accused person was at the scene of crime when the incidence occurred as there was no eye witness who saw him noting that (PW5) who was the first to get to the scene of crime informed the court that he did not see the 2nd accused person nor did he witness the killing of the deceased. He submitted that the prosecution failed to prove any element as required by section 203 which is malice aforethought. That the prosecution inadvertently or otherwise failed to satisfy the above provision of law and therefore this case a blatant abuse of the court process. He urged the court to find that the prosecution did not adduce evidence sufficient to cogently and firmly establish the circumstances from which the inference of guilt was sought to be drawn. The evidence adduced fell far below proof on the required standard of proof being beyond reasonable doubt. He prayed that the 2nd accused person be acquitted.

Analysis & Determination

29. Given this background from both the prosecutions and the defence it is now this court's duty to establish whether the standard burden of proof of beyond reasonable doubt has been established as against the accused persons beyond reasonable doubt as the ones who indeed killed the deceased. The evidence by the prosecution would be tested as against the provisions of sections of Section 107(1), 108 and 109 of the *Evidence Act*. The import of these sections has been interpreted and construed in various jurisprudential decisions.

30. As to what constitutes the burden of proof beyond reasonable doubt the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as follows by Lord Denning:

> " That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favor which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."
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> See also the cases of Republic versus Surbodinate Court of the First-Class Magistrate at City Hall, Nairobi and another, ex parte Yougindar Pall Sennik and another Retread Limited [2006] 1 EA 330, Republic v Nyambura and four others [2001] KLR 355, Semfukwe and others versus Republic [1976-1985] EA 536 and Modakaa v Republic [2000] KLR 411.

31. This initial burden of proof that the state bears to proof all the ingredients of beyond reasonable doubt in order for the accused persons to be convicted may only appear to be shifted to the accused persons

only in two circumstances. First, is in the exceptional circumstances formulated under section 111 of the *Evidence Act*. Secondly, where the defence raised falls within the rubric of insanity, justification, excusable, self defence or any other presumptions known in law. When an accused person raises any of these defences, more so the ones on self-defence, provocation, he/she is not denying the facts rather he/she affirms the action or omission asserted by the prosecution but invokes justification or excuses against criminal liability. The other defences like insanity are to have him/her exonerated from liability for reasons of mental infirmity. It is also sufficient to create a reasonable doubt on the prosecution case by raising an alibi defence. The essential manifestations of this case on the standard of proof required of beyond reasonable doubt is majorly or substantially based on circumstantial evidence. In this I am fortified by the following case law. In Simon Musoke v R [1958] EA 715 and Musili Tulo v R [2014] eKLR. In the latter case:

> " The Court of Appeal held "it follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at own conclusions, but also to ascertain whether the record evidence satisfies the following requirements:
>
> i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.
>
> ii. These circumstances should be of a definite tendency, pointing towards guilt of the accused.
>
> iii. The circumstances take cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.'

32. In determining this case, the court has also to bear in mind the duty to evaluate all the evidence by both the prosecution and the defence so as to draw credible inferences on the doctrine of presumption of innocence until the contrary is proved in Art 50(2)(a) of *the Constitution*. In furtherance to that conceptual framework, is the standard of proof required of beyond reasonable doubt which remains at all time within the realm of the state. In this case therefore, the following ingredients of the offence of murder must be proved beyond reasonable doubt without any conjecture or suspicion.

    a. The death of the deceased one Geoffrey Mateje Lulu

    b. The death was unlawfully caused

    c. The death was caused with malice aforethought

    d. The accused persons participated in or caused the death of the deceased.

33. In proving the above elements, the prosecution this case relied on evidence of 12 witnesses.

34. Issue No. 1 the fact of the deceased having been killed to bring the action within the provisions of section 203 of the Penal Code. It is trite that proof of death may be by way of direct or circumstantial evidence. In the criminal proceedings of this nature medical evidence or an autopsy report plays a significant role in settling this ingredient beyond reasonable doubt. The prosecution evidence shows that the deceased is dead. The post mortem examination was performed by PW8 Dr. Kibet Keitany, which was produced as an exhibit in support of the fact of death. The body was identified at Moi Teaching Referral Hospital by CPL Joseph Adongo and Evaline Khakai Mateche and Caleb Mukhala. The 1st accused person as the spouse to the deceased does not dispute that fact of the deceased having

passed away on 6th October, 2018. The court accordingly finds that the existence of this fact under section 107(1) of the *Evidence Act* proven by the prosecution to secure judgment in its favour.

35. The next ingredient is to determine whether the death of Geoffrey Marete was unlawful.

36. The right to life is protected and guaranteed under Art 26 of *the Constitution*. Therefore, no person is permitted to kill or cause the death of another person unless otherwise as provided for in our constitution or any other enabling statute. The law in Kenya presumes every homicide to be unlawful unless it is accidental or excusable or authorised by law. On this ground the court has to take into account the guidelines in Juma Lubanga v R (1972) HCD in which the court made the following observations:

> " Grievous harm as defined in the Penal Code involves a consideration whether the harm is such as seriously to interfere with the health or comfort, and the answer to the question may depend on the nature of the injury and the circumstances of the case."

37. In other words, it must be presented in evidence that the victim of the murder suffered either physical or bodily harm as a result of the unlawful act of omission or commission. That the evidence demonstrates beyond reasonable doubt that the wounds inflicted leading to the acute loss of blood or survival of a human being as known in law were unlawfully executed. It is therefore necessary to appreciate the scale of evidence on this ingredient as submitted before this court by the prosecution. In the first instance circumstantially, the flow of events are all addressed in one way or another by PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW9, PW11 and PW12. However, the evidence of PW8 Dr. Keitany corroborates that other circumstantial evidence in respect of this murder to credibly and clearly show that the deceased's death was unlawfully caused. In the evidence of PW8 as indicated in the post mortem report, the following injuries diagnosed on examination do manifest an inference of unlawful act of assault which ultimately formed the cause of death of the deceased. The injuries were indicated as: Cyanosis & Pallor, Multiple head and neck lacerations, Occipital Lacerations 3x0.5cm and Posterior right neck 3x2cm bruise/abrasion and multiple left upper hip small laceration with contusion. The pathologist formed the opinion that the cause of death was severe head injury due to blunt force trauma consistent with assault.

38. The bruises and abrasions that resulted into the extensive bleeding could not have been caused naturally or by accident or excusable or justifiable grievous harm, but those well designed and executed to cause the death of the deceased. There is no any other evidence from the defence which shows that the circumstances under which the deceased sustained the injuries and subsequently resulted in the death was in this regard lawful. This element also stands proven by the prosecution beyond reasonable doubt.

39. The third element is to determine whether the death was with malice aforethought.

40. What constitutes malice aforethought is defined under Section 206 of the Penal Code. From the instant case the facts tend to hinge towards the intentional killing of a human being or knowledge that the act or omission will result into death of a human being. To determine whether or not the prosecution has proved malice aforethought, court takes into account the circumstances surrounding each particular case. The circumstances include the nature and number of injuries inflicted the part of the body injured, the type of weapon used and the conduct of the assailants before, during and immediately after the injuries were inflicted. See the case of R v Tubere [1945] 12 EACA 63, Dafasi magayi & other v Uganda [1965] 1 EA 667 (CAK), Ogwang v Uganda [1999] 2 EA (SCU) and Mbugua Vs Republic [2000] 1 EA 150 (CAK). The objective test in determining the accused person's intention comes out

clearer from the principles laid out in DPP v Smith [1960] 3 ALL ER 161, 167 in which Lord Viscount Kilmuir had this to say:

> " It matters not what the accused in fact contemplated as the probable result, or whether the ever contemplated at all, provided he was in law responsible and accountable for his actions, i.e., was a man capable of forming an intent, not insane within the M' Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all circumstances of the case, have contemplated as the natural and probable result."

41. The question which must be addressed by the evidence is that proof of the fact that the accused persons unlawfully intended the natural and probable consequences of their conduct which resulted in the death of the deceased. The analysis of the evidence on record shows an unlawful act of assault carried out by the accused persons with the knowledge that was highly probable that death or grievous bodily harm would result persuading this court to find that species of evidence as constituting malice aforethought. In Cunliffe v Goodman [1950] 1 ALL ER 720, 724, the court stated that:

> " An intention, to my mind, connoted a state of affairs which the party intending.... does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about his own act of volition."

42. The other essential factor to this case is the aspect of the manner and brutal killing of the deceased, well calculated before, during and after the killing by the accused persons for this court to conclude existence of malice aforethought. See Ernest Asami Bwire Abanga Alias Onyango versus Republic Nairobi CACRA No. 32 of 1990. The post mortem report by PW8 captures both the intention and foresight of the consequences by the accused persons in executing this murder. The manifestation of malice aforethought is traceable to the serious injuries inflicted on the deceased and the fixed purpose to achieve their objective of death. Therefore, it is not only that both accused persons intended to cause the death of the deceased but they also foresaw the outcome of their conduct in engaging in the unlawful act. The lawful intention under section 206 of the Penal Code is based on an inference from the surrounding circumstances in each particular case. As I say it is the fact of testing the evidence of what a reasonable man in the shoe of the accused persons would have foreseen to be the natural and probable consequences of the acts of omission or commission as against the deceased person.

43. The questions to ponder from the perspective of the prosecution evidence is whether was death or very serious injury caused against the deceased was a natural consequence of the accused persons' voluntary acts. Did the accused persons foresee that the consequence of their unlawful act as being a natural consequence of causing the death of the deceased. In my considered view, I am satisfied that at the material time the accused persons recognized that death or serious harm would be virtually certain unless unforeseen circumstances set in to mitigate the intended assault. There was not such intervention looking at the evidence in totality. Thus grievous bodily harm as against the deceased was inflicted both directly and indirectly and the structural injuries are well tabulated in the post mortem dated 09th October, 2018.

44. The effect of the prosecution evidence on this element falls within the codification of Section 206 (a) and (b) of the Penal Code of persons in the name of the accused persons who formed the intention to kill and in doing so proceeded to cause serious injuries and being aware that they will terminate the right

to life of the deceased under Art 26 of *the Constitution*. Their purpose was achieved bringing the whole point on intention of this offence proved beyond reasonable doubt as of necessity from the Evidence.

45. The fourth element within the formulation of this prosecution case as against the accused person is that of the doctrine of common intention under section 21 of the Penal Code. It provides as follows:

> "When two or more persons from 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 is commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

46. The provision squares well with the following passage in the case of Njoroge in the case of Njoroge v Republic 1983 KLR 197 and Solomon Munga v Republic 1965 EA 363 where both courts held as to the elements on the principle of common intention thus. "If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavors to effect the common object of the assembly."

47. In addition, the court is satisfied of the evidence against the accused persons that their defence is regarded as being dislodged in line with the principles in the case of Republic Versus Cheya case 1973 EA. "The existence of common intention being the sole test of total responsibility it must be proved that the common intention was and that the common Act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under the section. It is only when a court can with some judicial certitude hold that a particular accused must have pre-conceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can be applied." As correctly pointed out these decisions on common intention may be inferred from facts and or any circumstances of the particular case. See also Eunice Musenya Ndui v Republic [2011] eKLR and Republic v Tabulanyenka s/o Kirya [1943] EACA 51.

48. The Kenyan criminal law on common intention recognizes four separate and distinct elements or requirements.

    a. A common act of omission or commission

    b. That act must be unlawful

    c. It must cause the crime or causation

    d. There is evidence of a necessary common intent

49. The evidence given by the prosecution must be in relation to cases of common purpose and some kind of causal connection to be proved as between the conduct of the particular persons as participants on the common purpose in causing the death of the deceased. The evidence also must show that the accused persons actively associated themselves with the conduct which caused the death of the deceased and had the required intention of the unlawful consequence. The questionable conduct under Section 21 of the Penal Code must fall within common design in execution of the crime preferred by the state. It follows therefore that a prior agreement that one of them or both of them participated in causing the death of their victim that conduct is imputed as falling within the definition of common intention hence the existence of mens rea.

50. In this context my appraisal of the prosecution case and that of the defence demonstrates the existence of common intention by the accused persons under section 21 of the penal Code.

Their participation may be summarised as follows:

51. Accused 2 was the one who picked the subject motorcycle registration No. KMEB 428V. The keys to the motorcycle were issued by PW1 Jane Muthoni under the pretext that the spouse, Zacharia Nick Alias Kibonge had sent for the aforesaid motorcycle. Essentially, from the evidence of PW1, PW2 and PW3 it turned out that accused 2 misrepresented and falsely obtained the keys of the motorcycle without the consent of the spouse to PW1. The decision by PW1 to release the motorcycle to the 2nd accused was tainted with falsehood, non-disclosure of material facts and fraudulent conduct which resulted in the chattel being used for unlawful purposes.

52. Accused 2 from the evidence of PW1 on being allowed to drive away the motorcycle meant to have been handed over to the spouse, one Zacharia Nick alias Kibonge, however immediately leaving the homestead his phone went unanswered on follow up telephone calls by PW1.

53. Further in so far as accused 2 is concerned PW5 testified as a neighbour to the 1st accused that on the material date i.e. 5-6th October, 2018 he was woken up by barking dogs whose sound was suspicious. In addition, PW5 decided to step outside the house armed himself with the necessary weapons to guard against his security and at that time he saw a motorcycle 20 meters away from his gate. It is evident that PW5 saw the motorcycle and on board were two passengers and a load of a sack with two hands dangling from it. He got close to the scene and manged to identify the 1st accused person, the wife to the deceased who streams of blood on her face. Apparently, in PW5's testimony the first accused refused to divulge any information as to what had transpired. Undoubtedly PW5 in the same scene saw the motorcycle rider drop the sack and ran away but he focused on arresting the 1st accused which was achieved on the spot. It is important to note that from PW1's testimony, the 2nd accused was the one who picked the impugned motorcycle which was later spotted PW5 carrying the deceased body and also the 1st accused with the 2nd accused as the rider. This identification of the 2nd accused flows from the last seen theory of evidence adduced by PW1. Accused 2 was part of the persons who picked the body from wherever it was dumped after the killing. The conduct of 1st and 2nd accused when confronted by PW5 can only be one which manifests destruction of crucial evidence for it appeared they were at a distance from the alleged scene of crime.

54. From the evidence by the prosecution witness PW12, inspector Joseph Adongo who also doubles up as the investigating officer in this matter visited the scene of the murder through a distress call. On arriving at the house, he observed a disturbed scene with a lot of blood on the floor, door, curtain, chairs and other furniture. The 1st accused person was busy cleaning and wiping off the blood. It is also the evidence of PW12 that further swift action resulted in the arrest of the 2nd accused who was found to be wearing a red bloodstained vest.

55. The other sequence of events which fulfils the objectives and purpose of common intention as between the 1st and 2nd accused flows from the data records requested by PW12 by the Safaricom provider for telephone numbers 0713-478-554 registered in the name Melisha Muhindi Shisanya whereas the 2nd accused data was extracted from mobile number 0712-916-544. The second stage of the definition of common intention in this crime is drawn from the testimony of PW12 who produced the call data records as exhibits with a positive finding that the two accused persons had been in constant communication even when the 2nd accused was in Lodwar. In the case of a prior agreement to manifest common intention evidence from PW12 reveals that accused 2 left Lodwar on 2nd October, 2018, arrived in Eldoret on 3rd October, 2018 and he met with the 1st accused. The answer to this question on

common intention to the two accused persons is also drawn from the evidence of PW12 who stated that on the night of the murder the call data records placed both accused persons at the scene and immediately thereafter the 2nd accused's phone was switched off. The motorcycle, 9 photographs documenting the scene, land sale agreement, log book, assorted clothing, Sim cards, black bag, brown shoes, inventory of items recovered from the 1st and 2nd accused were produced and admitted in evidence by PW12 before this court. It is therefore of significance that this call data information embodies credible and reliable evidence in support of the prosecution case on the conduct of the accused persons which falls within the common design or purpose. The 2nd accused also participated in driving the motorcycle carrying the remains of the deceased to some unknown destination until they were confronted by PW5.

56. The question which is at the heart of this case involves identification of the accused persons. This is a murder which occurred at night when circumstances traditionally may be described as unfavourable for any positive identification to take place. In my respective view, the physical link of the accused persons having been involved separately or jointly in committing the crime is extremely essential. The principles in R v Turnbull [1976] 63 CR Appeal 132 are remarkable in satisfying the criteria as to whether the prosecution in its quest to proof the charge of murder beyond reasonable doubt placed the accused persons at the scene. This is what the court stated:

> "Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused special need for caution before convicting in reliance of correctness of the identification is necessary the court should warn itself of the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could be mistake. The court should further examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition might be more reliable than identification of a stranger, but even then the court should remind itself..... that mistakes in recognition of close relatives and friends have been made sometimes."

57. In Bogere Moses and another Vs Ugandan Criminal Appeal No. 1/97 (unreported) the court in its judgment said:

> "The starting point is that court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been were or were not difficult and to warn itself of the possibility of mistaken identity. The court then should procced to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistake identity is ruled out. In doing so, the court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult."

58. I now turn to the evidence on identification as alluded to by the prosecution. In the analysis PW1 in the first instance places the 2nd accused at the scene of crime by dint of picking the motorcycle registration No. KMEB 428V on 5th October, 2018 which incidentally was confirmed by PW5 to have carried the body deceased. This happens to be same motorcycle which was produced as an exhibit by PW12 as

part of the physical evidence in support of the prosecution's case. Correspondingly, the logbook in support of registration and ownership was also recovered and admitted in evidence. On recovery of the motorcycle at the scene the same was photographed as evidenced by photographs 1, 2(c), 2(d), 4, 35, 36,37,38 and 39. In terms of the prevailing circumstances it is also correct from the evidence by the prosecution given the statements on oath by PW2, PW3, PW4, PW5, PW6, PW9 and PW11 the source of the screams came from the 1st accused. This same house has per the evidence of PW12, the investigating officer of the incident was confirmed to be the crime scene. This is as corroborated by the photographs produced as exhibits documenting the various facets of the scene by photograph No.12, 7, 9, 8, 6 and 5. In my considered view given this scenario without a doubt was the actual scene the deceased met his death. The other aspect of identification evidence to connect the accused persons with the commission of the offence is traceable to the call data of mobile numbers 0713-478-554 registered in the name of the 1st accused and 0712-916-544 registered in the name of the 2nd accused. In this respect it should be noted from the evidence of PW12 that from the 2nd, 3rd and the night of 5th and 6th October, 2018 the accused persons were in constant communication. It only stopped after accomplishing the mission of killing the deceased. The call data produced as documentary evidence by PW12 remains unchallenged by the defence as to the registration of the mobile Safaricom numbers, their usage on the material days and that there was no lapse of time which showed the numbers being out of physical reach by any of the accused persons. In the course of the investigations, PW12 traced and arrested the 2nd accused at Camp Turkana within Eldoret township with a brown stripped shirt and visible blood stains. It is also not in dispute that the 2nd accused is generally a resident of Lodwar as at 2nd and 3rd October, 2018. In unearthing the truth of this murder, the investigating officer extracted and dispatched the following samples to the government analyst at the Government Chemist Kisumu.

a. Various swabs of the alleged house being the crime scene

b. Swabs from the deceased's gate

c. Swabs from the blue jacket.

d. Swabs from the bloodstained face of Melisha the 1st accused.

e. Swabs from the motorcycled seat

f. Swab from the white canvass shoe.

g. Swab from the blood-stained clothes taken from the 1st accused.

h. Swabs from the white stripped t-shirt taken from the body of the 2nd accused.

i. Swabs from the black bag containing clothes.

j. Swabs from brown stripped long sleeved shirt.

k. Swab from bloodstained green bucket and 2 black socks.

l. Swabs from bloodstained yellow -shirt from the deceased

m. Blood sample of the deceased taken during post-mortem

n. Blood samples of the 1st accused taken at Moi teaching and referral Hospital.

o. Blood samples taken from the 2nd accused at Moi Teaching and Referral hospital

59. According to the sequence of evidence by PW12 a detailed DNA analyst report dated 14th May, 2020 by the government chemist one PL Kweyu was forwarded to his office with the following conclusions in place:

    1. "The DNA profile generated from the blood stains on the swabs (Item "A", "D", "E", "G", "H", "7A", and "7B") matched the DNA profile of Geoffrey Mateje Lulu (deceased).

    2. The DNA profile generated from the blood stains on the table clothe (Item "I"), curtain (Item "J"), mopper (item "M"), knife (item "2"), jacket (item "5"), shoes (item "8"0, soils (items "N", "L", "3", "4"), t-shirt (item "9"), jumper (item "9"), skirt (item "9"), shoes (item "11A/11B"), shirt (item "12"), bucket (item "13"), socks (item "13A") and t-shirt (item "15") match the DNA profile of Geoffrey Mateje Lulu (deceased).

    3. The DNA profile generated from the blood stains on the swabs (item; "B", "C", "F") match the DNA profile of Melisha Mhindi Shisanya (1st accused).

    4. The DNA profiled generated from the blood stains on the t-shirt (item "10") was a mixed DNA profiles of Geoffrey Mateje (deceased) and Samuel Amatuka (2nd accused).

    5. The DNA profile generated from the blood stains on the swabs (items "6A" and "6B") was a mixed DNA profiles of Geoffrey Mateje (deceased) and Melisa Mhindi Shisanya (1st Accused)."

60. It is no doubt that much of the evidentiary value attached to the identification of the accused person in court as discussed above and with the aforementioned legal principles it eliminates any possibility of error or insufficiency as to who indeed committed this crime of murder against the deceased person. The submission by learned counsel for the 2nd accused person, did not build up a strong case to unfold any evidence that he is a stranger to the place, incident or participation to the crime. Here are witnesses for the state who pieced together high-level circumstantial evidence which proved beyond reasonable doubt that the accused persons planned, designed and executed the murder of the deceased with precision. The genealogy of the 2nd accused going to the house of the house of PW1 with a false pretence that he had been sent the motorcycle which was the chattel used to remove and ferry the body of the deceased to some destination before they were caught up red handed by PW5 is admissible to the relevant facts in issue as against the death of the deceased. The evidence of identification of the accused persons did not stop there. It is instructive to note that the call data from Safaricom availed crucial incriminating evidence that is incapable of exonerating any of the 2 accused persons on culpability under section of 203 of the Penal Code. It is necessary to state that the details of facts against each of the accused persons before this court, which remain undisputed by the defence establishes their identity beyond reasonable doubt. The facts on the DNA samples extracted from the accused persons and recovery of some of the key exhibits which were subjected to the forensic analysis classified compelling evidence excluding any other person save for the accused persons as the perpetrators of this heinous crime. This evidence completes the chain of events and establishes the case of the prosecution beyond any reasonable doubt right from the screams by the first accused, the departure from the house, the recovery of the mutilated body of the deceased, the extraction of the DNA samples, the analyst report, the autopsy report, the call data records from Safaricom, all form significant parts of the chain of circumstances on how the accused persons committed the crime in question. The circumstantial evidence from the call data records affirms the applicability of the last seen together theory in this case which essentially establishes the time when the two accrued persons were together and the aftermath of it being the fact of death of the deceased. There was sadly any time gap between the 2nd of October, 2018 and the fateful day of the night of 5th and 6th October, 2018 when the alleged death was executed against the deceased. The defence contention of the 2nd accused on an alibi defence is founded on sinking

sand. The nature of it does not affect the core of the prosecution case on the five elements discussed elsewhere in this judgment. The probative value of the alibi defence based on the physical impossibility of the 2nd accused by placing him the location other than the scene of the crime at the relevant time and date was in absolute terms rebutted by PW1, PW5 and PW12. In the above context the alibi defence remains an afterthought poorly thought through and falsified on that account. In the defence of the 2nd accused and his mother who testified as DW2 aggressively made attempts to convince this court that on the material day they spent all available time resources together and therefore no opportunity for the accused to be at the scene of the crime. There is no way I can place any evidential value on the alibi defence in light of the overwhelming evidence adduced by the prosecution witnesses more specifically PW1, PW5 and PW12 who ably, properly and correctly through physical, documentary and forensic evidence placed the 2nd accused at the scene of crime. Besides, there is evidence from PW1 that the motorcycle was picked from the house and immediately thereafter it was never taken to her husband being the one allegedly who sent for it in the first place. The 2nd accused has not addressed the issue of the motorcycle, subject matter of this criminal case. The evidence on the call data on communication with effect from the 2nd October, 2018 to the night of 5th and 6th October, 2018 remains fundamental strong and weighed together with the rest of the evidence puts this accused person at the scene of crime. The proof is beyond reasonable doubt that the accused person was at the crime scene. In my view both circumstances of this crime considered favourably and carefully, both accused persons have been unable to fairly and equally remove themselves from the crime scene in which the deceased met his death. In the result the alibi defence for the 2nd accused fails and it is therefore dismissed for whatever is worth.

61. From the foregoing analysis, I find the accused persons guilty of the offence of murder and do convict him as per law established under section 203 and 204 of the Penal Code. The status conference shall be held on 16th May, 2024 for purposes of admitting submissions on aggravating and mitigation factors, the victim impact statement and the pre-sentence report.

Sentencing Verdict

62. The facts of this case in all their painful details are essentially undisputed and they have been rehearsed most carefully and with great clarity in the judgment of this court. It will serve no use of purpose for me to repeat at length what has already been said. Instead, I intend to simply highlight those aspects of what occurred that are in my view of particular relevance to the issue of sentence. First and foremost, Geoffrey Mateche Lulu was wholly a blameless victim of grotesquely executed series of assault that culminated in his death and the disposal of his body. He was a spouse to the 1st convict and must have been working hard to sustain his family. There is not even slightest evidence from the first convict as to why she premeditated, designed and executed the murder of her husband in a conspiracy hatched with the second convict. The evidence against the convict painstakingly compiled by the police as also presented by the prosecution essentially remained unanswered. The compiling of the call data report of the two convicts along with the cell site evidence revealed with absolute clarity the core essentials of what had transpired in the planning and execution of this heinous murder. The evidence tells us that by the time that exercise was complete there was in my view no credible innocent explanation for the evidence gathered against the first and second convicts to this offence and that, in my view is a responsive factor to be considered in arriving at an appropriate proportionate sentence.

63. The second convict spent considerable time during that period in focus travelling from Lodwar to Eldoret to engage with the first convict on how best to commit the crime between the night of 5th – 6th October, 2018. The degree of preparation as proven by the evidence and the length of time taken to piece together the plan sustained this offence under Section 206 of the Penal Code on malice

aforethought. This is a case where the second convict was hired to be part of the killing and subsequent disposal of the body in which they placed it in a sack loaded it into a motorcycle driven by the second convict to have it disposed remarkably to destroy any traces of evidence which could have tracked them down as the perpetrators of the crime. There can be no doubt as to the increasing sense of desperation on the part of the first convict to irredeemably plan selfishly so and have this brutal offending take place against her own spouse.

64. During the sentencing hearing the defence counsel Mr. Oburu for the 1st convict put in strong submission on mitigation to invite this court to pass a non-custodial sentence. The key characteristics revolved around the age of the 1st convict, Melisha Muhindi who apparently is aged 32 years and a mother of three children with diverse dates of birth. It was the contention of Mr. Oburu that the eventual incarceration of the first convict will render the children destitute and without a caregiver. Learned counsel further alluded to the fact that the first convict unfortunate background of being born an orphan is a factor which should not be ignored by this court in passing the appropriate sentence.

65. In considering this same question, learned counsel Ms. Chelogoi for the 2nd Convict, Samwel Amutaka submitted to the effect that he is remorseful and regrets the offence and overtime has learned transformative lessons not to be involved in such heinous crimes. It was learned counsel's contention that the second convict should be given a chance to mend his reputation and character as a family man who is spoken supportively by his next of kin.

66. As to the prosecution, the lead counsel Mr. Mark Mugun advanced the trajectory that this is one case which the court should exercise discretion to impose the rarest of the punishment provided for under section 204 of the Penal code being the death penalty. That the explanation suggestive by learned counsels on mitigation in favour of the convicts cannot survive the sequence of events prior, during and after the commission of the offence which resulted in his death.

67. In the submissions by the lead counsel for the prosecution, the convicts intended from the outset to murder the deceased Geoffrey Mateche. He further alluded to the fact that although the motive for the offence was not vigorously pursued during the trial of this case, one cannot rule out an affair as between the first and second convict in particular to the inevitable execution of this murder. The learned prosecution counsel persuaded this court in his submissions that no lesser sentence than that of the death penalty will serve the justice of the case for the victims of the offence.

68. In addition to the above submissions, the court received a pre-sentence report which captured the tone of the personal antecedents of both convicts and their historical community backgrounds. As for Melisha Muhindi Shisanya, after the social inquiry the probation officer remarked as follows:

That the accused before court is 34 years. She is the last born in dysfunctional family of three children. Her parents died while young forcing her to end up at a children's home after failing to get support from the relatives. She was educated up to form four then released at age of 18 years to start her own life as an adult. She later got married to the victim in this case and at the time of his death they had been blessed with two children, expecting the third born. Her first two children aged eleven and eight are with their paternal aunt, Everline Khakai. They are in grade five and three respectively. The third born, whom she gave birth to while in prison is five years old now, staying in the children's home at Kachibora, after being faced out from prison on age factor. The report indicated that she has been treated as a first offender who is not remorseful for, she strongly denies the offence. She still stands by her first statement recorded at the police station claiming to have been attacked together with the deceased, by a group of people who she managed to identify the co-accused. The report recommended that the fact that she seems not to agree with the court's findings is a clear indication that she is not

remorseful nor ready for rehabilitation. The hostile home environment and her poor community ties makes the situation even worse and therefore she is not suitable for a non-custodial sentence.

69. In addition, the pre-sentence report for Samuel Amatuka was also acknowledged by the court as comprehensively released by the probation officer. In the same vein, like the report for the first convict the narration of significance was on the personal antecedents which factored the following characteristics:

> " The offender is married with two wives and six children of school going age. The first wife Eunice Lelei lives in Lodwar with three children, the second wife used to live in Eldoret, at boma slums in close proximity with the offender's mother, but she left immediately following the arrest of the offender. She had three children and she left with the young child, the other two are now living with the offender's mother.
>
> The offender reports that he has been of stable mental and physical health. He also has no history of criminal behaviour. Although he consumed alcohol, he indicated that it was not to a problematic extent that it affected his life.
>
> This social inquiry information on personal history establishes that the offender was born and raised in a poor home background which is disadvantaged financially, but he showed resilience and has been able to hustle and provide for his family. The offender's mother stated that the offender was his favourite child and used to assist her financially.
>
> Views of the victim
>
> The victim, now deceased was married to the co-accused Melisha Muhindi, and together had two young children, all under the age of ten. One child is living with the paternal aunty while the other is in a children's home. Indicating that the offences has destabilized the children's life, owing to the fact that the father is dead and the mother is the offender and she has been in remand since 2018. The victim did not have any formal employment but earned a living as a newspaper vendor in Eldoret town. The sentiments of the victim's family were conveyed by the relatives. The family expressed that they are still in grief and shocked with the heinous act that took away their kin. They want justice to be served. They reported that there are no attempts that have been made by the offender's family for reconciliation and compensation, and even if they were there, they reported that they were not ready for it. These sentiment from both sides reflect a hard stand on reconciliation with no willingness to reconciliation and the view implied that the legal process to take its course in view of the seriousness of the offence committed."

70. As to the circumstances of the offence, the following chain of events became evident from the inquiry.

> " The offender denies any involvement in the murder of the deceased. However, he states that a female friend (Melisha Muhindi Shisanya) who is the first accused in this matter, who he had been in communication with for some time had requested him to assist carry a luggage at night and he borrowed a motorbike from his brother in-law during the day around 1700hrs, and at close to mid-night he proceeded to the female friend's house. He says that when he got there the female friend welcomed him warmly but the situation changed immediately when he was asked by the female friend to pick a gunny bag which he immediately noticed was carrying a body. He says that the female friend requested him to remove the body from the house or else she will scream. He co-operated out of shock and fear, picked the gunny bag and loaded it on the motorcycle together with the female friend he drove off, but he says that

he intentionally fell the motorcycle and fled leaving the woman screaming and attracting a commotion. He fled back to his house and stayed there until his arrest.

The offender admits that its true he was placed at the scene where the body was recovered and the house of the deceased but he did not participate in the murder. The deceased in this matter is the spouse to the first accused.

From the above inquiry the, the offender distances himself from committing the crime and implies that he got himself in a mix he could salvage himself, however his actions and movements imply that he may have been aware of what he was doing or getting himself involved in for he prepared well, first by borrowing a motorcycle early enough at 1700hrs and secondly waiting for the 'right time' that is night to go and carry out the assignment. His actions may have been motivated by his relationship with the deceased wife and he could have been embroiled win a larger scheme to rid the deceased, his gain being the selfish interest solely having the deceased's wife."

71. At a glance, this pre-sentence report was extensively and intensively inquired into on the various facets constituting favourable and unfavourable factors to assist the sentencing court in arriving at a fair and just decision on the proportionate sentence for the offence. The tone of the recommendation is even more telling from the perspective of the probation officer to the effect that:

> "Considering the findings of the social inquiry outlined above, we see no justification suggesting a lenient sentence for the grave crime of murder, especially given its particularly brutal nature. Consequently, we find that the offender is not suitable for a non-custodial sentence as it would not be appropriate given the severity of the offense."

72. Given this background, in relation to sentencing of a convict under Section 204 of the Penal Code, the particular circumstances test is as laid down in Francis Karioko Muruatetu v Republic [2017] eKLR:

a. Age of the offender

b. Being a first offender

c. Whether the offender pleaded guilty

d. Character and record of the offender

e. Commission of the offence in response to gender-based violence

f. Remorsefulness of the offender

g. The possibility of reform and social re-adaptation of the offender

h. Any other factor that the court considers relevant.

73. A trial court cannot discuss sentencing verdict without taking into account the accepted rationales for punishment of offenders as follows:

a. Retribution: which is the notion that the guilty ought to be accountable for their actions and suffer the punishment which they deserve.

b. Deterrence: -

i. Specific deterrence: - which aims to dissuade the offender from committing further crime; and

ii. General deterrence which aims to dissuade others from committing the crime in question by making them aware of the punishment inflicted on the offender.

c. Denunciation: - which involved the court making a public statement that behavior constituting the offence is not to be tolerated by society either in general, or in the specific instance.

d. Rehabilitation: - which relies on the philosophy that the offender's behavior can be changed by using the opportunity of punishment to address the particular social, psychological, psychiatric or other factors which have influenced the offender to commit the crime.

e. Incapacitation: - which involves preventing a person from committing further offences during the period of incarceration, with community protection as the justification.

74. In addition to the above objectives of sentencing, certain specific principles are also of necessity predominant in the sentencing scheme individualized as it is in accordance with specific facts of each case. these principles include:

a. Parsimony: - the sentence must be no more severe than is necessary to meet the purposes of sentencing.

b. Proportionality: - the overall punishment must be proportionate to the gravity of the offending behavior.

c. Parity: - similar sentences should be imposed for similar offences committed by offenders in similar circumstances.

75. In the instant case, the speed at which the evidence leading to the arrest of the convicts was secured is highly notable as has been painstaking reconstruction of the events using electronic material along with more old-fashioned methods of investigation. The conduct of the investigating officer efficiently and impartially followed all the available leads resulting in an overwhelming case against the convicts. Given the uncontradicted information, I have considered the aggravating and mitigating factors, the pre-sentence report and the calculation of remand credit under section 333(2) of the Criminal Procedure Code. A criminal homicide is any killing of one human being by another human being which is not justified nor excusable as stated in Art. 26(3) of *the Constitution*. In committing the offence, the convicts acted in constant with a common intention under Section 21 of the Penal code accompanied malice aforethought to voluntarily commit an inherently dangerous felony of murder as defined in section 203 of the penal code. In this case, the only favorable arguments accorded to the convicts is that of enhanced credit remand period in computation of sentence. In my considered view, both convicts are not remorseful, which could have carried sufficient weight to tip the scales in their favor to impact on the sentence imposed. The passing of sentence often requires balancing of mitigating and aggravating factors and requires sufficient amount of weight to be attached to each of these factors. An offender/ convict wishing to rely on mitigating factors must provide sufficient factual basis for that by producing cogent evidence to satisfy the court that the mitigating factors justify a departure from the prescribed sentence. A report from the probation officer is non-responsive on several fronts even though the submissions were made by the respective legal counsels to have the sentences imposed take the route on non-custodial frame. Remorse really is an important factor and is a demonstration of a contrite

heart and taking responsibility for the crime but that is not the case here. In S versus Brand 1998 (1) SACR 296 the court held:

> " True remorse is an important factor in the imposition of sentence as it suggests an offender who firstly, realised that he had done wrong and secondly, undertook not to transgress again. True remorse led to the accommodating punishment by our courts."

76. Similarly, in S versus Matyityi 2011(1) SACR 40 (SCA), the court defined remorse as:

> " A gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error."

77. The authors of Du Toit Commentary on the Criminal Procedure Act in the commentary on s 274 noted that:

> " Even though there is a possibility that a convicted person who has not shown any remorse at the time of sentencing, may do so in future, a sentencing court cannot speculate in that regard and, in effect, downplay the seriousness of the absence of remorse."

78. For the above reasons, I have considered the appropriateness of the sentence by evaluating the seriousness of the crime committed by the convicts, the effect on the victim's family and the circumstances in which it was committed renders this court towards tilting the scale with that of a custodial sentence. The offence was occasioned in very gruesome circumstances, meticulously intentioned, planned and that the convicts and their associates ought to be placed in prison custody as a deep sense of society condemnation of such unlawful act by the convicts against another human being. In the present case, I sentence each of the convict to a term imprisonment of 30 years with residual effect that under section 333(2) of the Criminal Procedure Code, the pre-trial detention period be credited to the overall sentenced to be served by the convicts. I have always encountered a request by legal counsels that in sentencing, I dispense justice with mercy but my answer to the facts of this case is that I am not here to dispense mercy, I am here to dispense justice. In any other case, I may be justified to adopt a course which may bear less heavily upon an offender than not to receive what is rather harshly expressed in our penal code but attach due weight to compassion and mercy. There is no suitable evidential foundation to entitle mercy to the convicts to this heinous crime.

79. Leave to apply and 14 days right of appeal explained

DATED AND SIGNED AT ELDORET THIS 5TH DAY OF JUNE, 2024

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R. NYAKUNDI?

JUDGE