REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 25 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

THOMAS MUCHANGI MUGA.....1ST ACCUSED

MORRIS MUCHANGI NJOKI.....2ND ACCUSED

PETER MWENDWA JOHN.....3RD ACCUSED

HUMPHREY MUKUNDI MARIGU.....4TH ACCUSED

JUDGMENT

A. Introduction

1. The four accused persons herein face the charge of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the offence are that; on the night of 13.06.2014 at Runyenjes Township in Embu County jointly with another not before the court murdered Robert Mutwiri Mugo.

2. They were arraigned in court and wherein they all pleaded not guilty to the charges and a plea of not guilty entered against each of them.

B. Prosecution's case

3. At the hearing of the case, the prosecution called a total of six (6) witnesses. Caroline Njeri Njeru testified as PW1 and wherein she gave evidence that she was the wife to the deceased and that on 13.06.2014 she was admitted at Runyenjes Sub-District hospital and three women came and asked her whether the deceased had visited her on that day and when she said "no" the women left. That on the same day at around 10.00am, she left the hospital ward and went to (Runyenjes) Town and she heard people say that one Thoma (the 1st accused) had beaten the deceased and that the 2nd and 4th accused herein were also mentioned as having attacked the deceased. That she went back to the hospital and was discharged on the 15.06.2014 and on reaching home, the deceased was not there.

4. That on 13.07.2014, the deceased's body was found at Ena River and that she went there with the neighbours and she was able to identify the body and after two days his clothes were recovered from the place where the body was found later. She produced a blood stained vest and orange/red t-shirt they were marked as MFI-1 and MFI-2 respectively. Her testimony was consistent during cross examination by the learned counsel for the accused persons. In re-examination, she testified that she did not know the official names of the accused persons but she knew them by their nicknames (Thoma, Watuchiu, Mwendwa and Mukundi) and that those were the names she was given in Runyenjes Town.

5. Rosemary Ruguru testified as PW2 that the deceased was her son and that she did not know the accused persons in the dock. That on 14.06.2014 at around 7.00am she was called by her sister one Karimi who asked her where the deceased was and she (PW2) told her that he had been arrested by the police. That the sister called her later and informed her that she had been to the police station and the deceased was not there. That she went to Runyenjes town and found a group of people talking about the deceased and that they wanted to go and look for him at the river. That she followed them and they were able to recover white vest and red t-shirt both blood stained (MFI-1 and MFI-2), a black shirt with white squares and a grey sweater but the shirt and the sweater were not in court.

6. Dr. Joseph Thuo testified as PW3 that he was a psychiatrist at Embu Level 5 hospital and that on 16.07.2014, he conducted mental assessment on each of the four accused persons herein separately and found them fit to stand trial. He produced the reports in that regard as PExbt 3, 4, 5 and 6 respectively.

7. Dr. Godfully Njuki Njiru testified as PW4 that on 18.07.2014, he conducted autopsy on the body of the deceased having been identified by

PC Rotich of Runyenjes Police station and two relatives of the deceased. That the body had fracture of tibia and fibula of the left leg and a cut wound on the same leg. That there was a communite fracture of the skull parietal bone which was depressed and multiple linear fractures on the skull bones. He formed an opinion that the deceased died of severe head injuries due to a blunt force. He produced the report in that respect as PExbt 7. In cross examination, he testified that the death was caused by severe head injuries on the left side of the head and the nature of the said injuries were not consistent with a fall. That the respiratory system was full of water but this could not be the cause of the death.

8. PW5 – Salesio Nguo Njuki testified that he used to run a bar called Sunset Bar and restaurant until 2016 when he was involved in an accident. That on 14.06.2014 at 12.00 midnight, he was at the Bar doing reconciliation of sales and he heard people shouting outside and a person calling for help and when he went out, he found the 1st, 3rd and 4th accused persons standing there and each was armed with an off-cut and one Kariuki was lying on a man who was screaming. That the 1st, 3rd and 4th accused person said that the man on the ground had stolen a phone and he advised them to call the police. He went back to the bar and came out after a short while and found that the said Kariuki and the accused persons had left and he went to sleep. That the following day he saw people gathered and saw the 1st accused person holding a jacket and when he asked him who the man they were beating the previous night was, he was arrested by the members of the public before he could answer.

9. PW6 - Chief Inspector Wang'ombe testified that on 14.06.2014 he noticed an OB made on the same day that one Robert Mutwiri (deceased herein) had gone missing and that in the night of 13.06.2014, he was spotted outside Sunset Bar being attacked by unknown persons. That later, members of the public went to the station and reported that one Peter Mwenda alias Rasta a suspect in the assault was in his house and he, together with PC Rotich went to the said house and arrested the said suspect after he was identified by the members of the public. That they were shown the house of one Joseph Kariuki, another accused person and they found his wife who told them that Kariuki had come in the morning changed clothes and left. That they searched his house and found a muddy jeans trouser with blood stains. He produced the said trouser as exhibit 8.

10. PW5 was not cross examined by the defence on the 20/01/2020 when he testified as he fell sick in court. When he was recalled for cross-examination on the 20/01/2021, he stated that he could not recall anything as he was involved in an accident and was injured on the head. The witness was subsequently stood down by the prosecution and the prosecution proceeded to close its case. Vide a ruling delivered on 10.02.2021, this court found that the prosecution had established a *prima facie* case against the four accused persons herein and they were subsequently placed on their defence.

C. <u>Defence's case</u>

11. The 1st accused gave sworn evidence and whereby he testified that on the night of 13.06.2014 – 14.06.2014, he was at home sleeping and that he did not murder the deceased herein and neither did he know him. That he was not with the other accused persons on the night of 13.06.2014 and 14.06.2014 and he did not know why he was arrested. In cross examination, he testified that he did not have a family and that he did not know the deceased or his wife.

12. The 2nd accused gave sworn evidence and denied having murdered the deceased herein and testified that on the material day, he was asleep in his house at Runyenjes and that he did not know the deceased or who murdered him and further that he did not know his co-accused persons. In cross examination, he testified that he did not have a family and that he could not call his neighbours as witnesses as they had moved from the plot where he spent the night on the material day.

13. The 3rd accused gave sworn evidence that on the material night he was at his house in Mashariki Estate where he stayed with his family and that he did not know the deceased or his co-accused. Further that, none of the witnesses mentioned him. In cross examination, he testified that he had no nickname by the names "Watusiu" and that he could not call his wife as witness as she left the matrimonial home and that he did not know how to reach his neighbours. He denied hitting the deceased with a metallic bar as alleged.

14. The 4th accused person gave sworn evidence that he was a shoe shiner at Runyenjes and that on 13.06.2014, he closed his business for the day and went to a video shop after which he went home where he slept until the following day. That he reported to his work place on 14.06.2014) and when he went to fetch water at around 11am, he found a mob and one of the persons in the mob (one Njiru) pointed at him and told the police that he (4th accused) was among the people who beat the deceased and he did not know why the said person pointed at him until when he was taken to court. He denied knowing the deceased or being involved in the murder. In cross examination, he testified that he could not call his wife as his witness as she had left the matrimonial home and neither could he call the video shop's owner as he had died in an accident.

15. The defence then closed their case.

16. The accused persons proceeded to file their respective closing submissions and essentially, the said submissions were to the effect that the prosecution did not prove the elements of the offence of murder against them.

D. <u>Issues for determination</u>

17. I have considered the evidence tendered before this court by both the prosecution and the defence. I have also considered the written submissions filed on behalf of the accused persons. As I have already noted, the four accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

18. It is trite law that the prosecution has the burden of proving every element of the offence an accused person is charged with. In this case, the prosecution had the burden of proving that the four accused persons committed the offence of murder (see **<u>Woolmington –Vs- DPP (1935) AC 462)</u>**. The standard of proof which was required of the prosecution is that of "beyond any reasonable doubt" (See **<u>Miller vs.</u>**

Ministry of Pensions, [1947] 2All ER 372).

19. It is my view therefore that the main issue for determination is whether the prosecution did prove the offence of murder against each of the accused persons herein.

E. Analysis of the law and determination

20. Section 203 of the Penal Code defines murder in the following terms; -

> ***"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."***

21. In the case of **Anthony Ndegwa Ngari –vs- Republic [2014] eKLR** the Court held that for the offence of murder to be proved, the prosecution must prove; -

> ***i the death of the deceased and the cause of death;***
>
> ***ii that the accused committed the unlawful act which caused the death of the deceased; and***
>
> ***iii that the accused had malice aforethought.***

(See also **Daniel Nzioka Mbuthi & another –vs- Republic [2021] eKLR** and **Nyambura & Others-vs-Republic, [2001] KLR 355).**

22. The question therefore is whether the above ingredients were proved to the required standards.

23. As for the proof of the death of the deceased and the cause of the death, PW1 and PW2 both testified to the effect that they saw the lifeless body of the deceased which was retrieved from River Ena. PW4 testified that he conducted autopsy on the body of the deceased herein and which was identified by PC Rotich and the deceased's relative. As such, the death was proven.

24. As for the cause of the death, PW4 produced a Post Mortem Report which he had prepared upon conducting the autopsy on the body of the deceased. He testified as to the findings he made and further that from the same, he concluded that the deceased died of severe head injuries due to a blunt force. He produced the report in that respect as PExbt 7. As such, the cause of the death was proved.

25. As to whether the act or omission causing the death was unlawful, the evidence by PW4 demonstrated that the deceased herein did not die as a result of natural causes. The witness formed an opinion that the deceased died of severe head injuries due to a blunt force. Article 26 of the Constitution of Kenya protects the right to life. Under this article, life can only be taken away as authorized by the Constitution or any other written law. Therefore, every homicide is unlawful unless authorized by law or excusable under the law. In **Guzambizi Wesonga –vs- Republic [1948] 15 EACA 63** it was held that: -

> ***"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."***

(See also **Sharm Pal Singh [1962] EA 13** and **Daniel Nzioka Mbuthi & another –vs- Republic (supra)}.**

26. The cause of the death of the deceased herein was not excusable or authorized by law and thus the same was unlawful.

27. As to whether the accused persons herein committed the unlawful acts which caused the death of the deceased herein, I note that none of the prosecution witnesses witnessed the incident in which the deceased herein was killed save for PW5. PW5 testified that he saw 1st, 3rd and the 4th accused persons attack the deceased while one Kariuki was lying on him. The prosecution did not tender any evidence as to whether the 2nd accused person was with the 1st, 3rd and 4th accused persons at the scene. As such, and without much ado, it is my view that the prosecution did not tender any evidence to link the 2nd accused to the incidence which caused the death of the deceased herein.

28. As for the 1st, 3rd and 4th accused persons I still note that the evidence which was linking them to the offence was that of PW5. However, in their defence, the accused persons raised a defence of alibi to the effect that they were all not at the scene. Despite the said witness having testified in that respect, he nonetheless testified that he was not able to recall anything in relation to the offence herein and as such he was not cross-examined by the defence counsels. The prosecution proceeded to stand him down as "he was not useful to any of the parties".

29. Since he was a single identification witness, this court has to warn itself of the danger of relying on the evidence of a single identification witness to convict the accused persons. This is more so considering that his evidence was not tested by way of cross-examination. In **Wamunga –vs- Republic (1989) KLR 424** the Court of Appeal held as thus in relation to identification generally; -

> ***"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

30. In **Ogeto –vs- Republic (2004) KLR 19** the court of Appeal held that; -

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."

31. The law on identification and particularly on identification by a single witness is well set out in our jurisprudence. The Court of Appeal for Eastern Africa in **Abdalla Wendo –vs- Republic [1953] 20 E.A.C.A 166** held on this issue as follows:

"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or/direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility

of error."

32. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria –vs- Republic (1967) EA 583** where the court stated that: -

"A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

33. The need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness was discussed by the Court of Appeal in **Paul Etole & Reuben Ombima -vs- Republic** Criminal Appeal No. 24 of 2000 where the court held as thus; -

"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

34. The factors that ought to be considered when the evidence turns on identification by a single witness were discussed in the English case of **R v Turnbull & Others (1976) 3 ALL ER 549** where it was held that; -

"....The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with 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 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 may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

35. In the instant case, the evidence is that the incident occurred at night and wherein the only eye witness was PW 5. However, the prosecution did not lead any evidence as to what lighting was there at the time that the said witness was able to see the incident or even the distance he was at when he saw the same. Further there was no evidence as to the intensity of the said light.

36. Further, it is on record that PW1 did not know the deceased before the incident that took place on 14/06/2014. The prosecution did not adduce any evidence to connect the deceased with the person who was allegedly attacked by 2nd, 3rd and 4th accused persons herein on the said night. Though PW1 stated that the 1st, 3rd and 4th accused persons talked to him that night and told him that the men on the ground had stolen a phone, when he was recalled for cross-examination on the 20/01/2021 he told the court that he could not remember anything.

37. On identification it is worth noting that when he first testified on the 21/01/2020, the Judge noted and recorded that he had a problem of sight and that he had to go very near a person to identify them. This also raises a serious problem in my mind as to whether his alleged identification of the accused 1st, 3rd and 4th was beyond doubt more so considering that the alleged incident took place at night.

38. As I have already stated, the prosecution's burden to prove a case is discharged when the evidence is sufficient to prove a case beyond any reasonable doubt. In this case however, it is indeed in doubt as to how the witness was able to identify the 1st, 3rd and 4th accused persons herein at night. It is my considered view that the prosecution failed in discharging this burden.

39. I appreciate that our jurisprudence recognizes that where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a proper consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. (See **section 21, Penal Code**). In **Rex –vs- Mikaeri Kyeyune & 4 Others 8 EACA 84** the Court observed that:-

> ***"Any person identified as having taken part in the beating must be regarded as linked by a common intention."***

(See **Daniel Nzioka Mbuthi & another –vs- Republic (supra)}**

40. However, the above notwithstanding, it is my considered view that this court cannot convict accused 1st, 3rd and 4th herein based on the evidence presented by the prosecution herein. The prosecution failed to prove that they committed the unlawful act which caused the death of the deceased.

41. It therefore means that the prosecution having failed to prove that, it failed to prove the elements of the offence facing the accused persons herein. It would therefore be an academic exercise for this court to proceed and consider the issue as to malice aforethought.

42. In view of the foregoing, each and all the accused persons are acquitted and are hereby set at liberty unless otherwise lawfully held.

43. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF MAY, 2021.

L. NJUGUNA

JUDGE

…….for the accused persons

……..……..for the Prosecution