REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO. 9 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

SULEIMAN MWAGANDI KIPONDA.....1ST ACCUSED

TONY MWAGANDI KIPONDA alias MUMBA.....2ND ACCUSED

SAFARI MWALIMU alias NGONYO.....3RD ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the State

Ms. Aoko Advocate for the accused persons

JUDGMENT

The accused persons **Suleiman Mwagandi Kiponda, Tony Mwagandi Kiponda, Safari Mwalimu**, are all charged with the offence of murder contrary to Section 203 and 204 of the Penal Code. The particulars of the charge are that the accused persons jointly on 20.2.2016 at Kandahar area, Langoni – murdered **Fauz Abubakar**.

Each of the accused denied the charge. **Ms. Aoko** Learned counsel led the defence whereas **Mr. Mwangi** prosecution counsel appeared on behalf of the state. It followed therefore the prosecution had a duty to discharge the burden of proof beyond reasonable doubt.

By way of background, the case for the state to disapprove innocence of the accused persons, conceptualized the following elements from the following witnesses: **(PW1) – Charo James** – testified on oath that on 20.2.2016 together with his wife **Wanjiku** had gone to the club to sell liquor. On the way, they met a person wielding a panga, but managed to take flight. Before living, there were other four people who decided that they be served with liquor but without a word started beating them.

(PW2) – Flora Gathoni testified that on 20.2.2016, she was at Liquor club when she met someone armed with a panga pointing it at **Nyar-Kisumu**. In a little while some other people joined in the fray and started to destroy **Nyar-Kisumu's** property.

(PW3) – Rusalia Adhiambo, gave evidence that she sells *Mnazi* liquor. On the material day of the 20.2.2016, she woke up to go and pick that liquor from the *Wagema* comprising of fourteen (14) bottles. As she walked back, a boy emerged armed with a panga. On arrival at home, some boys set in and started inflicting harm. According to **(PW3),** she later learnt that the boy she had encountered armed with a panga had been killed.

(PW4) – Jaffar Agoi Miheso told the Court that on 20.2.2016 while at the market he heard that someone had been killed. He went to the scene where he confirmed the victim as his own step-son. When the police completed their inquiries, the body was released to the family for burial.

(PW6) – Dr. Swaleh Hassan, a medical officer attached to Lamu County Hospital conducted a postmortem examination on the deceased body and the positive findings were injury to the occipital, neck, gastric area, superficial injury to the skull. Upon correlating the injuries, **(PW6)** opined the cause of death to be bleeding due to deep cut wounds.

(PW7) was **PC Mbwana** at the time based at Lamu Police Station. He recalled that while at the police station he received three men at the

police station and one of them was holding a panga by the name **Suleiman**. It emerged from their side of the story that they encountered a man with a panga when they confronted and snatched the panga from him. According to **(PW7),** the incident as narrated was entered in the occurrence book. He kept the panga as an exhibit. The same men who submitted themselves to the police station were placed in custody as suspects. The panga which had been kept as an exhibit became part of the physical evidence admitted at the trial of the accused persons.

(PW8), Lawrence Aguda – testified as the government chemist with regard to Forensic examination analysed on the exhibits being white sheet, panga, T-shirt, short trouser, blood sample of **Suleiman, Safari, Mwalimu, Tonny Mwagandi.** Through, the analysis **(PW8)** demonstrated to the Court that the DNA profile generated showed a match with the blood sample of the deceased.

(PW9) – Cpl. Daniel Ole Shakei, the investigating officer based at Lamu Island was assigned duties to investigate the incident of 20.1.2016 involving the accused persons. He visited the scene and took photographs. It emerged from the investigations that the fracas involved building of Giriama houses. From the scene visit photographs were taken and the recovered exhibits produced before Court as evidence in support of the allegations against the accused persons.

According to **(PW9)**, the samples of blood and other exhibits collected were to be subjected to Forensic analysts which gave rise to a positive match of the DNA profile with blood sample of the deceased.

Defence case

The first accused gave his sworn statement of defence and denied any involvement with the alleged incident of 20.2.2016. He described the incident as a fracas involving an assault against **Jakisumu**. He also happened to be a victim as he suffered bodily harm.

(DW2) – Tony Mwagandi Kiponda – testified and recalled the events of 20.2.2016 when he left home for wine tapping. It was at that time he received a telephone call about the attack. He denied being an accessory of the fact of death.

(DW3) – Safari Mwalimu told the Court that he is a wine tapper and on the material day, he went about his normal duties. He denied any participation with the alleged crime of murder.

It was the contention of the defence counsel **Ms. Aoko** that the prosecution failed to discharge the burden of proof of beyond reasonable doubt contrary to Section 203 and 204 of the Penal Code.

Determination

It is trite that the prosecution must prove the guilt of accused person beyond reasonable doubt. This burden of proof rests on the prosecution and never shifts to the accused person at anyone time save on specific instances as stipulated under Section 111 of the Evidence Act. The Court in **Woolmington v DPP {1935} AC 462** articulated on the issue of the burden of proof, stated as follows:

> ***"Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution and subject to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or what the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."***

In **Miller v Minister of Pensions {1947} 2 ALL ER**

> ***"the degree of beyond reasonable doubt is well settled. It need not reach certainty but must carry a high degree of probability of beyond reasonable doubt…."***

In the instant case, the prosecution must prove all the ingredients of the offence contrary to Section 203 of the Penal Code which include:

(a). That the deceased is dead.

(b). That the death was caused unlawfully.

(c). That there was malice aforethought.

(d). And the accused persons directly or indirectly caused the death of the deceased.

Given that background, with respect to the preferred charge, it is the duty of the Court to make a determination whether accused persons jointly prosecuted the crime of murder against the deceased. That the deceased is dead. It is not in dispute that the deceased on 20.1.2016 suffered personal injuries from which he succumbed to death.

As to the unlawful acts which caused the death. It is clear from the prosecution witnesses that a fracas occurred on the material day. It was at that incident the deceased was attacked sustaining serious injuries as particularized in the postmortem examination report produced by **(PW8).** There is no doubt that the death of the deceased was unlawfully caused.

Whether malice aforethought was proven beyond reasonable doubt, this Court has to be guided by the provisions of Section 206 of the Penal Code. It is expressly stated that malice aforethought occurs when the prosecution leads evidence to proof an intention to cause death of any person, whether such person is the one actually killed or not or to cause grievous harm on knowledge that the act or omission causing death will probably cause death of a person, whether that person is the one killed or not, though such knowledge, is accompanied by indifference whether, death is caused or not or by a wist that it may be caused.

The element of malice aforethought is stated to be sufficiently proven where there is evidence to show that the accused persons did an act which was dangerous and did endanger right to life. Where intention is proved, the Court has looked at the surrounding circumstances as illustrative of the principles in **R v Tubere s/o Ochen 12 EACA 63, Ernest Asami Bwire Abanga alias Onyango v R Nairobi CACRA No. 32 of 1990, Moms Aluoch v R CCRA No. 47 of 1996.**

The circumstances depicted by the Court in the above include:

(a). The weapon used, whether lethal or not,

(b). The part of the body targeted to inflict the fatal injuries,

(c). The manner in which it was used by the perpetrators,

(d). The conduct of the assailants before, during and after the attack.

(e). The brutality of the injuries inflicted.

In the instant case, the deceased was attacked on 20.2.2016 with a gang of accused persons systematically sustaining multiple injuries to the neck, occipital region, deep cut wounds to the thighs, carotid artery and the skull.

In my view, the injuries against the deceased were not isolated but evidence shows deep injuries targeted at vulnerable parts of the body. In my view, the persons who used the weapons to inflict those injuries on the deceased's body clearly had no other intention but to kill or to do grievous harm. I therefore find that malice aforethought sufficiently proven by the prosecution consistent with the principles in **Miller (supra)** and **Woolmington cases** beyond reasonable doubt.

Whether the accused persons directly or indirectly participated in the killing of the deceased, the same is to be found in the evidence of **(PW1), (PW2), (PW3), (PW4)** and **(PW7)**. The witnesses confirmed occurrence of a fracas which ultimately saw the deceased sustain the serious injuries in which he succumbed to death.

The accused persons are charged jointly with the offence of killing of the deceased. On review of the prosecution case their criminal acts fall within the scope of Section 20 of the Penal Code which stipulates that:

"when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence charged:

(a). Every person who actually does the act or makes the omission which constitutes the offence.

(b). Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence."

Similarly, Section 21 of the Penal Code inputs the doctrine of common intention which provides that:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed, of such a nature that its commission the prosecution of that purpose each of them is deemed to have committed the offence."

The overriding element demonstrated by the prosecution evidence is that the accused persons had formed a common intention in the course of the event of 20.2.2016 to prosecute an unlawful purpose jointly and severally. In this regard, the deceased was killed.

The defence version on the chronology of events does not exonerate the accused persons that they had shared a common intention to pursue a specific unlawful purpose.

I think the question as who among the three accused persons actually hit the fatal blow against the deceased is of little consequence. The natural and primary meaning of the term accomplice connotes *particeps criminis*. That means any person whether a principal, or accessory before or after the fact is guilty of the offence charged.

Considering the matter as a whole, there is merit in the prosecution case against the accused persons. I accept that the prosecution has discharged the burden of proof of beyond reasonable doubt and correctly so, the defence alibi or non-participation to the crime fails the threshold of creating a doubt to be resolved in favor of the accused persons.

Accordingly, that each of the accused persons is found guilty of murder contrary to Section 203 as read with 204 of the Penal Code and in

every respect convicted of the alleged offence.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Accused person
2. Mr. Mwangi for the DPP