REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 07 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ESAU WEKESA MAKHOHA & 4 OTHERS.....ACCUSED

Coram: Hon. Justice Reuben Nyakundi

Mr. Meroka for the state

Mr. Githuka Advocate for the 1st, 2nd and 5th Accused Persons

Ms. Mageto Advocate for the 3rd Accused Persons

Mr. Waiganjo Advocate for 4th Accused Persons

JUDGMENT

The accused persons were charged with the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code.

Briefly stated, the accused persons are alleged that jointly on 4.3.2016/5.3.2016 in the wee hours with others not before court did commit murder against Peter Kimani. Each accused pleaded not guilty. **Mr. Githuka** represented the 1st, 2nd and 5th accused persons, **Ms. Mageto** the 3rd accused person and **Mr. Waiganjo** for the 4th accused person while **Mr. Meroka** the principal state counsel represented the state.

The standard of proof in criminal cases under Section 107 (1), 108 and 109 of the Evidence Act, the burden rests with the prosecution to proof existence of every fact against the accused persons.

In construing the elements of the doctrine of beyond reasonable doubt, except in clear cases under the statute, the burden shifts to the accused persons, the courts in **Woolmington v DPP {1935} AZ 462 and Miller v Minister of Pensions {1947} ALL ER 372** both have a common thread of these principles that:

> ***"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability proof beyond reasonable doubt, does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. If evidence is so strong against a man as to leave only a minute possibility in his favour, which can be discussed with a sentence, of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

In **Byamungu S/o Rusituba v R {1951} 18 EACA 233** the court further stated that:

> ***"The essential question is not the truth or untruth of the defence but whether, the case for the prosecution was proved beyond reasonable doubt, and after a very careful consideration of the record, we are not satisfied that it was."***

The prosecution case and the submissions by the defence counsels would be tested against these principles. I must acknowledge that I appreciate the time each counsel took to provide the court with their legal perspective on the matter. The absence of reproducing their full scale scope of submissions should not denote a sign of insignificance and positive contribution to the decision am about to make. This was a lengthy trial in which some sessions were held as far as Namanga. The legal context between the state and the defence was centered on one

fundamental question, whether any of the accused persons committed the offence of killing the deceased. It is now my singular duty to shoulder the burden of answering this mind grabbling question. I hope I will stand up to the task.

The offence of murder constitutes set of elements as defined in Section 203 of the Penal Code to include:

(1). The death of a human being.

(2). That the death was unlawfully caused.

(3). That in causing the death the accused persons had malice aforethought.

(4). That the accused persons were jointly identified as the persons who killed the deceased.

The evidence adduced at the trial to support the offence:

(1). Ingredient No. 1 – The death of the deceased

The prosecution adduced evidence of **PW2 Monicah,** a landlady to the deceased that on the night of 4.5.2016 she saw him pass by his house with a motorcycle. However, in a short while he left but never to return again to the house. In the morning when she missed the deceased and his motorcycle at the parking, PW2 told the court that she became suspicious. However, it did not take long before she received information from **(PW1) – Samwel Maina,** and **PW3 – Moses Etyang,** one of his supervisor at Radar Security that he was yet to report on duty. According to **PW3**, the deceased was present at work on the 4.5.2016 and logged out at 6.00 p.m. upon finishing his shift. The attendance register of 4.5.2016, was admitted as evidence, in support of this fact.

Further, PW3 adduced that the case of the deceased was and being treated as that of missing person. PW3 further told the court that in the evening of 5.4.2016, speculation of treating the deceased as a missing person ended as he received information that his body has been recovered by Namanga Police. PW3 testimony told the court that he visited the police station where he saw the body of the deceased with multiple injuries to the neck and other parts of the body. Thereafter the police escorted the body to the mortuary for purposes of post mortem examination.

During the process of postmortem examination by **Dr. Ndegwa (PW1), PW7- Joseph Ngigi**, **PW9 – Robert Mburu, PW21 PC Mutinda** all confirmed that deceased was dead. The **pathologist (PW10),** opined that the cause of death to be severe injuries to the cranialcerebral injury due to blunt and sharp force trauma from an assault.

I therefore agree with the prosecution, that there is overwhelming medical and circumstantial evidence to proof the death of the deceased beyond reasonable doubt.

(2). The unlawful act of omission or commission to cause the death of the deceased.

PW2 testified that on the night of 4.5.2016 she saw the deceased alive going about his duties with the company. This was consistent with **PW3 – Moses,** who had earlier seen the deceased drive out of the compound with his motorcycle from Radar Security offices.

According to **PW7 – Joseph Ngige** he testified that on the night of 4.5.2016, the deceased made several calls to him and intimated that he was likely to join him at Namanga – Tanzania for a social evening. However, PW7 confirmed to the court that did not happen and in the morning of 5.5.2016 it was a case of the deceased missing from his residence and place of work.

PW8 – Carolyne Wanjiku, an employee with Platinum Bar – Namanga, and a person well known to the deceased gave evidence that in the night of 4.5.2016 she saw the deceased, in company of PW7 and others having a drink in the said bar. In the same night PW7 stated that they left together to Steers bar which is adjacent to Platinum. In a little while PW8 told the court that they parted ways with the deceased and went back to Platinum bar to continue serving customers.

It was only to occur to her that the deceased had not been seen since, they were last together at Steers bar. During investigation, she was asked to record a statement on the matter.

Her evidence in substantial respects tarried with that of **PW7 – Robert Mburu** who also testified that he spent part of the night with the deceased on 4.5.2016. What PW7, discussed was the chronology of movements he had with the deceased until, a lady asked him to drop her at a direction of Maili Tisa area. That is the last time he saw the accused alive.

It was quite evident from the several pieces of evidence above and as confirmed by **Dr. Ndegwa** at Arch Mortuary, the deceased body of a male person had sustained injuries to the right hip, penetrating wound left lateral scalp muscles, laceration frontal scalp, laceration left frontal scalp commented parietal skull and intracranial hemorrhage. The devices used as concluded by the pathologist were both blunt and sharp.

These evidence provides corroboration of the evidence by other witnesses who saw the deceased, the previous night. That prior to discovery of his injured body, were no signs or complaints of ill-health. The evidence from the post mortem clearly shows that the deceased met his death through unlawful acts of assault. In this respect the prosecution has proved beyond reasonable doubt that proximate cause of the deceased death as being acts fatal attack with an intention to do grievous harm.

(3). Ingredients No. 3 – Malice aforethought

This is the mensrea of the offence. In the case of **Rex v Govan Pazi S/o Mukurisho {1943} 10 EACA** The Eastern Court of Appeal held as follows that:

> ***"In cases of murder the prosecution has to show that the accused had positive intention to kill or cause death. As reiterated in Hamisi S/o Tausi {1953} 20 EACA 176, no lesser intention suffices to convict the accused of the offence.***
>
> ***Malice aforethought as commonly known in murder offences under Section 203 of the Penal Code is as defined under Section 206 of the same code. The elements of its manifestation accrues where there is***
>
> > ***(a). evidence of intention to cause the death of another***
> >
> > ***(b). an intention to do grievous harm to another***
> >
> > ***(c). knowledge that the act of omission causing death will probably cause death or grievous harm to some person, whether that person is the person stated or not, accompanied by indifference, whether death or grievous injury occurs or not or by a wish that it may not be caused***
> >
> > ***(d). an intent to commit a felony.***
> >
> > ***(e). an intention to facilitate the escape from custody or flight of any person who has committed a felony or attempted it.***

For this legal proposition, the case of **Rex v Tubere S/o Ochen {1945} 12 EACA 63** the court stated as follows:

> ***"That in determining existence of malice aforethought the court has to resort to the evidence on the weapon used, the manner in which it is used, the part of the body injured and the conduct of the accused persons."***

In the case of **Ernest Asami Bwire Abang alias Onyango v R CACR Appeal No. 32 of 1990** if the deceased was killed in a brutal manner which was well calculated to cause death or to do grievous harm. The act of unlawfulness and malice aforethought in murder charge should be evaluated that all the accused persons wanted was to cause death or serious bodily harm to the deceased.

As stated in the case of **Chesakit v Uganda CR. App No. 95 of 2004** the connotation has to manifestation of malice aforethought can be deduced from evidence on record when any of the following factors exist, thus:

> ***"In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."***

There might be circumstances where the murder weapon fails to be recovered, although the post mortem findings demonstrates substantial damage to the deceased body and leaves no doubt that the weapon, or device applied was to produce the intended results of death. Taken in perspective, an inference of investigation of malice aforethought is never lessened on the basis that no murder weapon was recovered and admitted in evidence.

It is certainly possible to identify the gravity of the injuries as well as other circumstantial evidence to satisfy the ingredient of malice aforethought.

Guided by the above principles and material aspects of the case, the chain of the evidence from **PW1 – PW23** demonstrates that the deceased was lured from his safety and security at Namanga town to be assaulted to death at Mbikira area.

The identification of the corpse, as later examined by the pathologist shows no discrepancies as to the intention of the perpetrators. A further factor to this court consistent with circumstantial evidence of assault was the testimony of **PW14**. His testimony fortified the position that until the deceased suffered grave injuries as late as midnight on the 4.5.2016 he was alive and his voice was positively identified by PW14. There is credible evidence that the deceased never made it to location of PW14 so that he could take up the assignment of boda boda business. I am therefore persuaded that the element of malice aforethought was proved beyond reasonable doubt.

(4). Finally, the ingredient of participation and placing the accused at the scene.

There is no dispute that the accused persons have been charged jointly with the offence of murder contrary to Section 203 of the Penal Code.

The prosecution case therefore falls squarely under Section 21 of the Penal Code which expressly defines the concept of common intention. It provides as follows:

> ***"When two or more persons form a common intention to prosecute 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 was a probable consequence of that purpose, each of them is deemed to have committed the offence."***

One of the best case I came across on this doctrine is **Ismael Kiseregwa &another v Uganda CA CR Appeal No. 6 of 1978** where the court

said:

> ***"in order to make the doctrine of common intention, applicably it must be shown that the accused shared with the actual perpetrator of the crime, a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and that prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence was murder or manslaughter. It is now settled that an unlawful common intention does not imply a pre-arranged plan, common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault. It can develop in the course of events though it might not have been present from the start. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence. Where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death."***

In the instant case, it was contended by the prosecution that the business dispute between **PW12 Benard Mungai Kimani** and the three accused has a link that he participated in causing death of the deceased. The initial position involved the issue of purchase and sale of potatoes, in which PW12 defaulted in paying the money due to the third accused.

That civil liability ended up being reported to Namanga Police Station but **PW14, Chief Inspector Kulanzi** resolved it out of court by a consent recorded between the third accused and PW12.

There is no other evidence linking the third accused with the offence charged or to bring his involvement within the provisions of Section 21 of the Penal Code.

When apprehended the 1st accused did mention the name of the third accused as one of the conspirators to the offence of killing the deceased. He tried to show that the motorcycle in question was to be delivered to a third party working at Kitale Forest Service with full knowledge of the third accused.

That element of participation of the third accused from the confession statement of the 1st accused is not evidence from a competent witness. There is no other of independent or subsequent accomplice to satisfy the requirement of Section 21 of the Penal Code on common intention.

It was necessary that if the proof of the prosecution case depended on the confession statement of the 1st accused. There be other independent evidence apart from that of the accomplice. This is one piece of evidence which this court cannot warn itself to apply it against the third accused.

On the fateful day and prior to his arrest, the accused gave a detailed account which confirmed that his joint allegation may have been mistaken due to the fact that he was following up his just dues with PW12, the father of the deceased.

Apart from the testimony of PW12 with respect with the first report made to the police the accused had every right to pursue the dispute arising out of the business transaction involving the sale of potatoes. I am of the view that none of it could have been stretched to involve the killing and robbing the deceased of his motor cycle. The use of the word common intention as used in Law denotes evidence capable of taking cognizance of the intention and unlawful act combined together. In this case, there is no evidence that the accused formed the intention or committed the unlawful act to perpetrate the crime of murder at Mbirika area to cause the death of the deceased.

In my considered view the prosecution case fails the threshold test of beyond reasonable doubt against the third accused set out in the **Woolmington and Miller case (supra)**. This court at the end of it all acquits the third accused person of any culpability.

Participation of the 4th and 5th accused persons

As regards the evidence against the accused persons it was mainly circumstantial and emphasis laid by the investigating officer **PW23 PC Makori** which in every way implicated them with the offence. The investigating officer held to the claim on safaricom mobile phone data produced as **exhibit 5**.

However, the 4th and 5th accused persons vehemently refuted the allegations that they were involved in any mobile phone communication to plan an execute the murder of the deceased. Weighing the prosecution case and the respective defences given by the accused nothing of circumstantial nature to discharge the burden of proof to place the accused persons at the scene of the crime.

The Law on circumstantial evidence has now been since settled and there is no dispute as to its applicability. The following cases demonstrate the legal position: in **Teper v R {1952} AC at p 489 Lord Normad** said:

> ***"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another… It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

This same principle is reflected in the case of **Sawe v Republic {2003} KLR 364 at pp 375-6:**

> ***"In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the***

exclusion of all others within the meaning of R v Kipkering Arap Koske & Another 16 EACA 135 where it held, inter alia, that: In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

The fact that there was some communications as alluded by the prosecution does not imply admissibility of criminality on the part of the accused persons. By no stretch of the imagination could the 4th and 5th accused be described as persons being tried jointly with others for the offence of murder without elements under Section 20 and 21 of the Penal Code proved beyond reasonable doubt.

I believe the testimonies of the 4th and 5th accused in this regard owing to the inconsistence and the doubt created by the threads of circumstantial evidence.

Furthermore, the duty to discharge the burden of proof always rests with the prosecution. Therefore, with no evidence other than the call data and that of the investigating officer to convict the 4th and 5th accused persons with the offence of murder would be a travesty of justice.

For the above reasons, the 4th and 5th accused persons indictment remains to be under the watch of scintilla of evidence whose doubt should be resolved for their benefit.

The absence of corroboration to the call data evidence and the inadequacy of the prosecution case, leads this court to one logical conclusion of quashing the charge of murder and order for the acquittal of the 4th and 5th accused persons.

The participation of the 1st and 2nd accused person

The evidence against **Esau** starts with that of **PW6 Jeniffer Hinzano**, a former employer in the charcoal business. As regards her evidence Esau, was on site on the night of 4.5.2016 and early morning of 5.5.2016. According to PW6, Esau asked for time off to be away from work and this necessitated her to facilitate his travel financially. The second piece of evidence was in connection of circumstantial evidence that Esau had fought with the deceased in the night of 4th and 5th.5.2016.

According to PW6, in the course of the fight the deceased suffered fatal injuries. Unfortunately, with regard to PW6 evidence on the occurrence of a fight, the statement made by that other person to PW6 remains to be hearsay under the exclusion rules of evidence, since PW23 did not deem it fit to summon him as a witness.

There is no doubt this evidence on the fight introduced by PW6 is not admissible by the virtue of the rules on materiality, relevance and admissibility of evidence to proof existence or non-existence of a fact in issue.

That brings me to the second line of evidence on the application of the doctrine of recent possession against the 1st and 2nd accused persons jointly. Is there a causal connection between the recovery of the deceased motorcycle with the accused persons and his death at Mbirika.

The court restated the legal position in **Joseph Wafula Mukenya v Republic, Nairobi Criminal Appeal No. 96 of 2005 (UR):**

"Be in possession of" have in possession" includes not only having in own personal possession, but also knowledge having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of one self or of any other person if there are one or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each of them……"on the definition of possession under Section 4 of the Penal Code.

Taken as a whole however, the mere fact of possession alone, does not raise any presumption that the goods came into the accused persons dishonestly or in unlawful manner. The inference to be drawn must satisfy the following criteria in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v R Criminal Appeal No. 272 of 2005:**

"It is trite before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property to the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other"

In this case, the element on possession can be drawn from the evidence of PW2, PW6, PW12 and PW23. Further, circumstantial evidence from PW1 – PW23 sets firmly the sequence of events with effect from the evening of the 4th May 2016 and the early hours of 5th May 2016 when the deceased body was discovered minus the motor cycle.

Besides the incident of death, there is prima facie evidence identifying the motorcycle positively identified with registration numbers of KMDU 218Q. The motorcycle was recovered with the 2nd accused person at Kitale on 15.5.2016. His explanation was to the effect that the motorcycle had been borrowed from Esau, his brother, the 1st accused. This motorcycle was duly admitted as an exhibit in support of the prosecution to prove a causal connection between the murder and theft of the motorcycle.

The 1st accused answer on the recovery is to be found in his confession statement. According to the confession statement the 1st accused

introduced new actors as to how he came to be in possession of the motorcycle. To this end he alleged the involvement of **Fredrick Kioi, Moses Kibet and David** as having knowledge on the source and conveyance of the motorcycle to Mois Bridge. In his statement the 1st accused specifically alludes to the mission he undertook was an instruction from **Fredrick Kioi** to deliver the motorcycle apparently to be handed over to some other person in Kitale. Further, the 3rd accused, was said to have facilitated financially in ensuring the motorcycle has been safely transported from Namanga to Kitale.

The explanation on the motorcycle according to the 1st accused person did not end there; he was asked to keep it by the 3rd accused because the telephone number of the beneficiary in Kitale was unreachable. In his defence that is how he came to be in possession of the motorcycle.

In my view, out of the well settled principle in **Isaac Kahiga case (supra)** the doctrine of recent possession is applicable to the accused persons for their explanation advanced does not create in my mind a reasonable doubt as to his source and prove of possession of recently stolen motorcyle. In the first place, he had no lawful right of access and the explanation on possession does not place him in the category of innocent handlers of the goods or property which came into possession in good faith. The second onus passed to the accused persons is the drawing of the inference that the motorcycle was found while in use and running errands for their benefit. Therefore, the deceased was already deprived of his right to ownership permanently.

A careful perusal of the charge on the circumstantial evidence by the prosecution amounts to prima facie evidence that the motorcycle was illegally obtained under an adverse inference of murder committed before the theft. In absence of any true explanation under Section 111 of the Evidence Act the prosecution case supports the finding of guilty against the two accused persons.

Possession, of recently stolen property as an element of the offence denotes an unlawful act upon which the court can draw an inference that the one found with the stolen goods is either a thief, or did participate directly in its acquisition or a manifestation of knowledge may be drawn in the event no satisfactory explanation is given in rebuttal.

The 1st accused in this case appear to pass the blame to other persons i.e. **Kioi**, **Kibet** and **Kariuki** as the mastermind of the plot on acquisition and delivery of the motorcycle to Kitale but regrettably, the strong circumstantial evidence establishes an adverse inference as to his involvement to the crime.

Furthermore, the restatement by PW6 that the 1st accused was within the surroundings of the scene from where the alleged murder took place and the element of an opportunity to commit the crime cannot be ruled out.

There is sufficient evidence of common intention and unlawful act in terms of Section 21 of the Penal Code against the 1st and 2nd accused persons to commit the crime.

There is a huge corpus of evidence that the 1st and 2nd accused despite inherent denial they participated jointly in committing the offence against the deceased. There is a presumption under Section 119 of the Evidence Act. This evidence on seizure of motorcycle in use with the 1st and 2nd accused showed credible traces of evidence linking them to have only obtained the property by virtue of using actual fatal violence against the deceased.

The upshot of all these is that the prosecution discharges the burden of proof against the 1st and 2nd accused persons under the doctrines of common intention and recent possession of stolen property. Accordingly, each of them is found guilty and convicted of the offence of murder contrary to Section 203 of the Penal Code as punishable under Section 204 of this Code.

As regards the 3rd, 4th and 5th accused persons, fortunately for them, the prosecution has lost the plot of establishing the offence of murder as initiated and prosecuted beyond reasonable doubt.

The Law therefore demands of me to resolve the benefit of doubt in their favour and each is hereby acquitted and set free forthwith unless otherwise lawfully held.

Judgment, written, signed by me on this 27th day of February 2020

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R. NYAKUNDI

JUDGE

Delivered By In Open Court At Kajiado This 8th Day of July 2020

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CHACHA MWITA

JUDGE