



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 48 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MUIMI TUMA.....ACCUSED

JUDGMENT

INTRODUCTION

1. The deceased **SONAL D'SOUZA** was a young female Kenyan of Asian origin living with her husband an Executive in Agro business, two children and housemaid at Garden Villa Brookside in Spring Valley within Nairobi County an up market gated community. Her life at the time of her death was on the roll having just moved out of her parents in-laws home to establish her own home, their children were also attending Premier Academy along Forest Road where she would drop them before going for shopping being a housewife. She continued with the tradition established from her parents of getting someone working in hotel industries as a chef to be making Indian cuisines for her once in a while and it was so until 16th day of May 2014 when the curtains fell down for her at the hands of gunmen.

2. It is her sad death which invited the accused **JACKSON MUIMI TUMA** to the corridors of justice when on 18/6/2016 he was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 16th day of May 2014 at about 9.30 a.m. with others not before the court murdered **SONAL D'SOUZA**.

PROCEEDINGS

3. He pleaded not guilty and after appearing before several Judges at the Criminal Division, on 17/10/2016 his trial commenced before me with the first prosecution witness being **PW1 BEATRICE MAUTI SAVAYI** who had worked for the deceased as a house help since 2012. Her evidence was that on the material day while in the house with the deceased the gate bell rang to which she responded by checking through the gate and saw the accused who used to cook for them and in line with the by-laws of the Estate they were supposed to give the names to the guard of any expected visitor but on this particular day they were not expecting the accused so his name had not been given to the guards.

4. At the time the deceased was at her bedroom window instructed her to open the gate for the accused but let him stay at the front yard veranda without allowing him to the house as was the norm where he came to cook for them. When she opened for him she saw him with another man who she had not seen before in the house but who he had earlier come with to be employed as a driver while one person was left outside. The deceased then came down to meet with the accused and they spoke shortly only for her to shout "**No no you cannot do this to me,**" causing her to raise the alarm bell from the kitchen. When she returned to where the deceased and the accused were, she found her lying down bleeding. On 12/6/2014 she was able to identify the accused at an identification parade conducted by the police upon his arrest.

5. It was her evidence in cross-examination that the accused initially used to go to the deceased house about three times in a week and would come alone save for the month of April when he came with someone to be employed as a driver and on this date the deceased had also not indicated that the accused would come so as to alert the guards.

6. **PW2 VINCENT MANUEA CONAN D'SOUZA** the husband of the deceased confirmed the procedure at the main gate for allowing people into the compound. He confirmed that the accused used to do some work for the deceased from February 2014 when they moved into the house. He confirmed that there was a time when the accused had brought for them someone to employ as a driver and that on the material day he was away in Tanzania only to be called with the information of his wife's death. It was his evidence that the deceased did not need a driver. He was able to retrieve the copy of identity card and telephone number of the accused from the deceased's cell phone which he handed over to the police. He was able to identify the accused at the police station upon his arrest. It was his evidence that it was not

possible to see someone outside the gate from his house and that **PW1** told him that the deceased spoke with the accused before there was commotion between them with the deceased saying “**Jackson why are you doing this to me.**” He confirmed that the accused used to cook for them once in a while at the invitation of the deceased.

7. **PW3 DHARMESH MAHANDRA BULSARA** was called and informed that there had been a shooting at the residence of **PW2** their Director and went to MP Shah where the deceased had been taken while **PW4 CORP. JENIPHER SIRWA** a scene of crime officer proceeded to the scene and took photographs which were produced in evidence and lifted up finger prints. She later took the photographs of the body of the deceased at MP Shah showing the injuries.

8. **PW5 DR. PETER M. NDEGWA** performed post-mortem examination on the body of the deceased who had a gunshot wound on the left eye brow with blackening meaning that it was at point blank with a resultant fracture of the skull, brain laceration and intracranial hemorrhage. As a result of the said examination he formed an opinion that the cause of death was craniocerebral due to a single gunshot at close range.

9. **PW6 AMOS OLUOCH** the watchman (or soldier as they would prefer to be called) at the main gate of the scene at 9.00 a.m. saw the accused whom he knew together with someone he did not know at the gate who told him that the deceased wanted him but since he had not been notified of his visit he requested him to call the deceased first on phone and he put his phone on his ear and while **PW1** was opening the gate for an incoming car the accused and the man he said he had brought for the deceased as a driver entered into the compound and stood at the deceased gate before calling **PW1**. As the accused and his company who was carrying an envelope in his hand were entering into the house of the deceased another person they were with came to the gate from the left side. After the deceased came to meet the accused and his companion **PW6** left their gate and went back to the sentry box which was next to their house which was house number 1.

10. After about five minutes he heard the deceased shout saying “**Jackson how can you do this to me**” and called him twice “**Amos Amos come**” and “**don’t let them go.**” When he went to check he found the two attacking the deceased from both sides. He closed the gate and heard the accused tell the man who had a pistol “**now shoot**”. The deceased who was crying at that time told him to let them go “**they had shot me.**” He then left the gate and fell down on the ground when he heard the accused telling his companion to shoot all of them to destroy evidence, the man with the accused picked up the key from his pocket and opened the gate with the accused following him. The accused and his group entered into a waiting motor vehicle and drove off in a Nissan registration number KAM 21__ the rest of the numbers he could not remember and that he stayed with the deceased for about thirty (30) minutes. When he got up he blew his whistle as he followed them attracting many people. It was his evidence that he knew the accused and could recognize his voice and that he stayed with the deceased for about 30 (thirty) minutes.

11. **PW7 ANN WANGECHI MURIUKI** confirmed that the accused was employed at 680 Hotel as a vegetarian cook and that the accused was at the time working from 3.00 p.m. – 8.00 p.m. shift and on 16/5/2014 the accused checked in at 2.38 p.m. but did not clock out. He was on duty on Wednesday of that week from 2.15 p.m. to 1.01 p.m. then reported on 1^{5th} May a Thursday at 6.44 a.m. upto 4.03 p.m. He took a break and reported back on Friday 1^{6th} at 2.28 p.m. but did not clock out though he was manually present on 1^{6th} and 1^{7th} since his Supervisor signed the master roll. She stated that she could not confirm whether he was on duty when the shift ended as there was no clock out. She stated that she could not know where the accused was on 1^{6th} before 2.28 p.m.

12. **PW8 THOMAS BII** went to the scene and interviewed witnesses (**PW1** and **PW6**) who gave him the name of the accused before going to MP Shah where post-mortem was conducted on the body of the deceased. He was later on informed that the accused had been arrested at 680 Hotel. **PW9 GLADYS WALIAKO SOITA** finger print expert at National Registration Bureau received a request to verify particulars of identity card number 13781689 which she did and confirmed that it belonged to the accused.

13. **PW10 FRANCIS NZINGILA** was on 28/5/2014 instructed to assist in the investigation herein and requested for the particulars of the accused and cell phone number 0720615448 and requested for the data from Safaricom which confirmed that on 16th May 2014 at 7.07 a.m. the accused made a call to 0720615448 while at Mathare Area 2. He then moved to Ngara Shuraj Plaza at 8.10 when he called 0728109876. He moved to Kabete Area at the scene at 9.54 a.m. and was there upto 10.07 where he moved to Church Road before going back to Mathare at 10.27 a.m. confirming his presence at the scene. He stated that the history of his phone showed that he was also using Airtel number 0787645907 and that the Safaricom number was switched off on 17/5/2014 and inserted the Airtel line on 21/5/2014 which they used to track him leading to his arrest.

14. Under cross-examination he stated that the accused confirmed to him on arrest that he was going to the deceased home and had two people with him one called Kamau but whose number 0728109876 was registered in the name of **Alex Mwakasi**. At the time of his arrest the handset did not have the Safaricom line an indication that he had disposed off the line. **PW11 MARTIN WEKESA** from Safaricom produced the call data details from the accused confirming the movement of the same. **PW12 MR. VINCENT MAMBU** from Airtel produced data record on mobile lines number 0737879619 and 0787645907 which confirmed that on 20th of May 2014 there was a change in the gadget used and from 22nd May to 10th June 2014 it was serial number 357415058914990 Emai.

15. When put on his defence the accused confirmed having known the deceased since October 2012 when the deceased and her husband liked the food he had prepared while working at Slash Restaurant and from that time they would call him to assist prepare meals for them. In the year February 2014 while working at 680 Hotel the deceased informed him that they had moved to Brookside from General Mathenge and they met at Sarit Centre for the deceased to take him to the new home as the deceased was interested in how to make Chinese dishes. He confirmed putting the deceased thereafter in Satrin Kitchen Group Whatsapp where they used to post recipes and every time he showed her to make dishes she would pay her between Kshs.3,000/= - Kshs.5,000/=.

16. He stated that on 19th of April the deceased was expecting many friends in her house so he had gone to her place to prepare for which she had sent him Kshs.9,000/= for purchase. On the 19th April he went to cook for the deceased and in the process she informed him that her driver had refused to work at the instigation of **PW1** who allegedly wanted to bring a driver of her choice which the deceased did not approve of. After the 19th he proceeded home and on 1/5/2014 which was Labour Day on his way to work met with one **Stephen Kyalo**

whom he used to work with but was jobless at that time whom he told that the deceased was looking for a personal driver and having confirmed with the deceased they agreed to go to meet the deceased which they did and he gave his CV to the husband of the deceased. On 2nd the accused stated that he started his twelve (12) off days so he went to his rural home in Kitui and reported back on 14th May 2014 at 3.00 p.m.

17. It was his further evidence that while at home **Stephen Kyalo** called him with information that he was unable to get through to the husband of the deceased and promised to talk to him. On 15th they were told at the place of work to return their ATM cards for new ones which he did but was given a card for one **Jackson Kilonzo** of Elementaita Lodge which he could not use. He was instructed to take back the card the following day which was 16th and on the way received a call from **Alex Mutinda** whom he used to do outside catering with for an order on 18th May 2014 at Lower Kabete. He then proceeded to 680 Hotel at 8.12 a.m. to return the ATM card which he did. While on Kenyatta Avenue the said **Alex** called him again and suggested they meet at Ngara. He proceeded to the meeting through Norfolk Hotel, Museum Hill, Fig Tree Ngara then to Mathare on foot. At 1.40 p.m. he left for work and reported at 2.45 p.m. and as per the company rules switched off his cell phone upto 10.00 p.m. when he switched it on and noticed a missed call from a number which he called back and a lady called Irene answered and told him that they wanted to give him an order.

18. On 17th he reported on duty and switched off his phone upto 2.00 p.m. when he again received a call from the said Irene who asked him to meet with her at Parklands Police Station. When he met her they took him to an office where they asked if he knew the deceased and whether he had taken **Kamau** to her home and he said he had taken **Stephen Kyalo** whose phone was off. His phone was then taken by the police and then on 18/5/2014 he bought another line – Airtel 0787645907. He stated that after giving account of his movement to the police he was released until 22/5/2014 when they called him again and told him that they wanted more information from him but was not called again until 11/6/2014 when he was arrested at his place of work and taken to Pangani Flying Squad office where he was tortured before eventually being taken to court and charged.

19. He confirmed having been identified by **PW1** and **PW2**. He denied killing the deceased. In cross-examination he confirmed knowing the deceased and having gone to the deceased house several times but denied going there on 16th May 2014. He gave account on why he did not use his Safaricom line which had been taken by the police.

ANALYSIS AND DETERMINATION

20. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is under legal and evidential duty to prove the following elements of the offence:-

a) The fact and cause of death.

b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.

c) That the said unlawful act of omission or commission was committed with malice aforethought.

21. The fact and cause of death of the deceased is not disputed. The same was on 16th May 2014 shot dead at her residence at Garden Villa in Spring Valley and confirmed dead at MP Shah where she was rushed after her shooting by a neighbour. Her husband **PW2** confirmed that she was thereafter burned or cremated. **PW5 DR. PETER M. NDEGWA** produced post-mortem report form confirming the cause of death as several craniocerebral injuries due to a single gunshot at close range. I therefore find and hold that the fact and the cause of death was proved beyond reasonable doubt.

22. On whether the said death was caused by unlawful act on the part of the accused person:- Whereas the accused has denied causing the death of the deceased, the prosecution through the evidence of **PW1** who was a house help of the deceased and **PW6** who was a guard at the main gate of the court placed him at the scene. It was the evidence of **PW6 AMOS OLUOCH** that he came to the gate with another person and indicated that he wanted to see the deceased. Since he had not been informed of the intended visit by the accused whom he knew as by the court regulations, he informed him to call the deceased and as the accused was making a call another residence of the court drove to the gate and as he was opening for them the accused and his companion got an opportunity to enter the court.

23. **PW6's** evidence corroborated that of **PW1 BEATRICE MAUTI SAVAYI** who stated that the accused pressed on their gate bell twice and as she went to check she noticed that it was the accused whom she knew very well accompanied with someone. The deceased then instructed her to open for them but let them stay at the veranda. Both witnesses heard the deceased shout the name of the accused in the words to the effect "**Jackson you cannot do this to me.**" It was **PW6's** evidence that the accused then ordered his accomplice to shoot them all as he did not want any evidence before he heard gunshots.

24. The evidence placing the accused at the scene was corroborated through the scientific evidence of the mobile phone data records produced by **PW11 MARTIN WEKESA** which placed the accused cell phone number at the scene on 16th May 2014 which line was switched off on 17/5/2014 before the accused started to use a new Airtel line on the said hand set from 21/5/2014. This evidence was further corroborated by that of **PW10 CORP. FRANCIS SINGILA** the arresting officer whose evidence under cross-examination was that upon arrest the accused confirmed that on 16th he was going to the deceased home in the company of two people one called **Kamau** whom he kept on communicating with but whose number was registered in the name of **Alex Mwakasi** thereby confirming that his information was false.

25. When put on his defence the accused gave an alibi defence to the effect that on 16th day of May 2014 he received a call from one **Alex Mutinda** whom he used to do outside catering with whom he met with at Ngara before going back to his house in Mathare and thereafter went back to work and as per the company regulations switched off his cell phone until the 17th when the said line was taken by the CID officers at Parklands who had called him through one Irene and who questioned him on the death of the deceased and one **Kamau**.

26. The law of alibi defence in Kenya is now settled through judicial pronouncements and it is not necessary to multiply with authorities the principles thereon save as to restated what the Court of Appeal stated in **Criminal Appeal No. 44 of 2015** Mombasa reported in [2016] eKLR had to say as follows:-

“It is trite that by setting up an alibi defence, the Appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. (SENTALE v UGANDA [1968] EA 365). The burden to disprove the alibi and prove the Appellant’s guilt lay throughout on the prosecution (WANG’OMBE v REPUBLIC [1976-80] 1 KLR 1683). As was stated in R. v CHEMULON WERO OLANGO (1937) 4 EACA 46, the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act . . .

The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in REPUBLIC v SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the a decision of the High Court in which it was stated:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

(See also REPUBLIC v AHMED BIN ABDUL HAFID (1934) 1 EACA 76 and WANG’OMBE v REPUBLIC [1976-80] 1 KLR 1683).

The Supreme Court of Uganda, in FESTO ANDROA ASENUA v UGANDA, CR. APP NO. 1 OF 1998 made a similar observation when it stated:-

“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”

Although the Appellant in this case put forth his alibi defence rather later in the trial . . . that defence must still be considered against the evidence adduced by the prosecution. Indeed GANZI AND 2 OTHERS v REPUBLIC, (2005) 1 KLR 52, this court stated that “where the defence of alibi is raised for the first time in the Appellant’s defence and not when he pleaded to the charge, the correct approval is for the trial court to weigh the defence of alibi against the prosecution evidence.”

27. With these principles in mind I will therefore proceed to weight he accused defence against the prosecution evidence. The accused account on the occurrence of 2/5/2014 which he stated was the day he went to see the deceased corroborated the evidence of **PW1** and **PW6** in material particulars save for the date but was contradicted in material particulars by the evidence of the husband of the deceased **PW2** on the material day was in Tanzania and who testified that they did not need a driver. His account is further dislodged by the evidence of the investigation officer. The accused’s account on his arrest is also contradicted in material particulars by the evidence of **PW10** who received instructions to assist with investigations and subsequent arrest on 28/5/2014 against the accused account that he was already with the police on 17th May 2014.

28. The accused account of the events as stated herein weighed against the prosecution evidence and in particular the evidence of **PW7 ANN WANGECHI MURIUKI** the Human Resource Manager with 680 Hotel where the accused was working at the time of the arrest and who did not corroborate the accused’s account and the fact that the accused though not obliged to do so did not call Alex Mutinda and **Stephen Kyalo** to fortify his alibi and further the circumstances leading to the accused arrest, leads to the logical conclusion that his defence herein is an afterthought and lacks merit.

29. The deceased in her last words before being shot mentioned the accused by name and warned **PW6** that they were armed corroborating the evidence of **PW5 DR. PETER NDEGWA** that the deceased died as a result of single gunshot at close range thereby bringing the declaration by the deceased connecting the accused to her death within the legal scope of dying declaration which is admissible under the provisions of **Section 33 (a)** of the **Evidence Act** which provides that:-

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:-

(a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

30. This provision was considered by the Court of Appeal in **PIUS JASUNGA S/O AKUMU v REPUBLIC**, (1954) 21 EACA 333 as cited with approval in **STEPHEN MUTURIA KINGANGA v REPUBLIC** [2013] eKLR thus:-

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval. . . It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R v ELIGU S/O ODEL & ANOTHER, [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused . . . But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

31. In this case the accused was placed at the scene by **PW1** who opened for him and his accomplice the gate and welcomed them to wait for the deceased. She then heard he deceased shout the name of the accused saying **“No no you cannot do this to me”** before the deceased fell down with blood oozing out of the back of her neck. It was further corroborated by the evidence of **PW6** who also placed the accused at the scene and heard the deceased shout **“Jackson, how can you do this to me?”** before seeing the accused and his accomplice attacking the deceased. The accused then shouted **“shoot”** before his accomplice took out his pistol and was ordered to **“shoot them all, I do not want any evidence”** and while closing the gate the deceased asked him to open the same as the accused and his accomplice were armed. The accused had stayed with the deceased for a period of thirty minutes and was known by both **PW1** and **PW6** so his identification was that of recognition. I therefore find and hold that there was no mistaken identity of the accused.

32. The other issue for determination is whether the accused is criminally culpable for the death of the deceased against the evidence of **PW6** that it is the accused accomplice who pulled the trigger and shot the deceased:- It is not in doubt that the accused was in the company of the person who pulled the trigger who from the evidence on record was known as **“Kamau” “Alex Mwakasi”** as per the evidence of **PW10** and **“Stephen Kyalo”** as per the accused evidence. **Section 20 (1)** of the **Penal Code** defines criminal liability as follows:-

“20. (1) 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, and may be charged with actually committing it, that is to say:-

(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;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence;

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.”

33. **Section 21** of the **Penal code** on the other hand provides for offenders in common purposes in the following terms:-

“21. When 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 probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

34. The Court of Appeal in **DICKSON MWANGI MUNENE & ANOTHER v REPUBLIC** [2014] eKLR CRIMINAL APPEAL NO. **314 of 2011** had the following to say on the above provisions:-

“This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

In Njoroge-Vs-Republic, [1983] KLR 197 at p. 204, the Court of Appeal stated that:-

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

As to its proof, referring to its earlier decision in *R-Vs- Tabulayenka s/o Kirya (1943) EACA 51*, it continued to state that:-

“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”

56. As we have stated, common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In *Dracaku s/o Afia Vs R [1963] E.A.363* where “there was no evidence of any agreement formed by the appellants prior to the attack made by each” it was held that “that is not necessary if an intention to act in concert can be inferred from their actions” like “where a number of persons took part in beating a thief.”

35. The Court of Appeal in **CRIMINAL APPEAL NO. 124 OF 2012 NAIROBI, JOHN OUMA AWINO & ANOTHER v REPUBLIC [2014] eKLR** proceeded to set out what the prosecution ought to prove as elements of the offence:-

“(a) a criminal intention to commit the offence charged jointly with others,

(b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and that

(c) the accused was aware of this when he or she agreed to participate in that joint criminal act.”

36. In this case there is evidence before the court that the accused who was known to the deceased went to her home in the company of two people one who according to the evidence of **PW6** remained outside the gate as the accused proceeded with one into the compound of the deceased. The accused as per **PW6** ordered his accomplice to shoot not only the deceased but **PW6** so as to conceal his participation in the commission of the offence and as submitted by the prosecution and supported by the evidence on record sped off in a motor vehicle which was stand by waiting. From the evidence tendered by the prosecution I am satisfied and find that the accused had a common intention and or joint enterprise with his accomplice in causing the death of the deceased with malice aforethought as defined in **Section 206** of the **Penal Code**.

37. Whatever it is the accused had gone to get from the deceased only time will tell and whereas it is not necessary for the prosecution to prove motive, it is clear from the evidence tendered and in particular the evidence of **PW6** that the accused and his accomplice struggled with the deceased and even after the gunman had left the house he remained behind in the compound of the deceased for sometimes. It is clear from the evidence that the accused had the intention to cause death or actual harm to the same thereby proving the ingredients of malice aforethought.

38. I am therefore satisfied that the prosecution has proved beyond any reasonable doubt all the elements of the offence of murder contrary to **Section 203** of the **Penal code** and therefore find the same guilty of the murder of **SONAL D’SOUZA** and convict the same accordingly.

Dated, signed and delivered at Nairobi this 13th day of March, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Ms. Chepkorir for Mrs. Kingori for the Accused

Mr. Juma for the victim’s family

Accused present

Court assistant- Karwitha