



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CRIMINAL CASE NO. 52 OF 2012**

**REPUBLIC .....RESPONDENT**

**VERSUS**

**ANTONY MWANGI MUCHIRI .....1<sup>ST</sup> ACCUSED**

**GEOFFREY KAMAU MUIRURI.....2<sup>ND</sup> ACCUSED**

**JOHN JOSEPH KAMAU.....3<sup>RD</sup> ACCUSED**

**SIMON NJUGUNA GACHINGA.....4<sup>TH</sup> ACCUSED**

**JUDGEMENT**

1. The Accused persons were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that, on the 5<sup>th</sup> day of July 2012 at Kangemi within Westlands District in Nairobi County jointly murdered **NJIRAINI THUO alias TOSTI**. They first appeared in court on 20/07/2012 when their plea taking was deferred to 26/07/2012. On 30/07/2012 they took their plea before Lady Justice Muchemi J. when a plea of not guilty was entered for all of them.

2. After several appearances before Muchemi J. on 22/04/2013 they appeared before Lady Justice Korir who by a Ruling dated 11/07/2013 released the 4<sup>th</sup> accused on bond. The matter then went back before Muchemi J. who by a Ruling dated 19/12/2013 admitted the remaining accused persons on bond.

3. After several adjournments their trial commenced on 9/07/2014 before Muchemi J. who heard three (3) prosecution witnesses before proceeding on transfer. On 10/03/2015 the Presiding Judge of the division Justice Lesiit issued directions under **Section 201 (1)** of the **Criminal Procedure Code** for the matter to proceed from where it had reached before the previous Judge and that is how the matter found its way to my docket on 1/02/2016. For record purposes I must state that I did not have the advantage of hearing and seeing three (3) of the prosecution witnesses.

**PROSECUTION CASE**

4. The deceased was a taxi operator employed by one **Reuben Kinyanjui** to drive and operate his motor vehicle. On 5/07/2012 he came home at about 4.00 p.m. when according to the evidence of **PW2 JELIUS WANJIRU WARUTUMA** his wife, he was called by one Tony who had a customer who allegedly wanted to use his motor vehicle for two weeks. At that time the motor vehicle was with **PW1** his brother and the deceased gave the caller the said information but he kept on calling the deceased. It was her evidence that **PW1** finally brought the motor vehicle to the deceased at 1.00 a.m. and the deceased left to go meet with the caller. He did not come back home until 6.00 a.m. when she decided to call him but was offline. She therefore decided to go to **PW1** and since the motor vehicle had a car tracking system they decided to activate the same which showed it moving at Komarocks. They reported to Kayole Police Station and started to search for the deceased only for his body to be found at city mortuary.

5. It was her evidence that she knew **Tony** the 1<sup>st</sup> accused as a colleague of her husband. In cross-examination she confirmed having not known the 2<sup>nd</sup> accused, neither did he call him on the material day. She further stated that **PW1** later informed her that the motor vehicle had been recovered and one **Mutisya** arrested. She confirmed that she knew the 4<sup>th</sup> accused.

6. **PW3 PETER KARIU WAMBUI** corroborated the evidence of **PW1** and stated that on 5/07/2012 he was using motor vehicle registration number **KBP 306M** owned by **Reuben Kinyanjui** whose other driver was the deceased. He had taken a customer to Nyahururu using the said motor vehicle and at 3.00 p.m. the deceased called him requesting for the car since he had secured another job for it. He handed over the car to the deceased in his home at 1.00 a.m. and later on called him at 6.00 a.m. to find out where he was but he could not be reached. Since the car had a tracking system it showed that the same was along Juja Road in Nairobi. He then contacted **PW2** who said the deceased had not contacted her either. The matter was reported to the police who tracked the motor vehicle to Karuta in Kayole. He

confirmed knowing the 1<sup>st</sup> accused who was also a taxi driver at Westlands but did not know the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused.

7. In cross-examination he stated that they used to co-drive the motor vehicle with the deceased. He confirmed that the motor vehicle was found at Shylocks office at Kayole and that the man who had the car was a General Service Unit (GSU) officer who was not charged in court and that he had taken the car as security for a loan he had advanced to the deceased.

8. **PW1 MOSES BARAGU THUO** a brother to the deceased was called by **PW2** his wife on 8/07/2012 at 11.00 a.m. with information that he had gone missing for three days having been called by the 1<sup>st</sup> accused whom he knew as **Tonny**. He then obtained the 1<sup>st</sup> accused's telephone number and called him. It was his evidence that the 1<sup>st</sup> accused told him that the deceased did not go to pick the customers he was supposed to pick. He called him again on 10/07/2012 on the whereabouts of the deceased and suggested that they meet but he would not be reached on phone and never talked with him again. He confirmed that through **PW3's** phone, the motor vehicle was later on found parked at a building in Kayole and was towed by the police to the station. He further stated that the motor vehicle was in the possession of one **Mutisya** who assisted the police in arresting the 4<sup>th</sup> accused who said he was given the motor vehicle by the 1<sup>st</sup> accused who was subsequently arrested.

9. In cross-examination he stated that the 1<sup>st</sup> accused specifically stated that he wanted a Probox and that when he spoke with him he told him that the deceased did not pick up the customers as agreed who became very annoyed. He confirmed that the deceased and **PW2** were working for the same person. He further confirmed having known the 1<sup>st</sup> accused very well who had a car hire business at a Petrol Station in Westlands and that he disappeared for one year after the incident. It his evidence that **Mutisya** the Shylock told them that he had advanced Kshs.60,000/= to one **Mutuma** and others who used the motor vehicle as security and he assisted the police in arresting the 4<sup>th</sup> accused who said he had been given the motor vehicle by the 1<sup>st</sup> accused.

10. **PW4 REUBEN KINYANJUI GITU** confirmed being the owner of the motor vehicle registration number **KBP 306M** which he was using as a taxi and had entrusted the same to **PETER KARIU PW3** as a driver thereof who told him that the person he had left with the motor vehicle had gone missing with the same and was later on found dead. He confirmed that only **PW3** was his driver but had a lot of freedom on the operations of the business. He later on identified the said motor vehicle at Kayole Police Station. In cross-examination he stated that **PW3** kept the car and would use it for taxi business deducting his expenses and remitting the balance to him at the end of every month. He confirmed that the same was recovered on 10/07/2012.

11. **PW5 SHASIA MAMETI** then a police officer based at Nairobi Area county Headquarters while on duty on 6/07/2012 was called to attend to a scene at Kyuna Area where a body of a male adult had been found lying on one side of the road without any visible injuries. Besides the body was empty roaster cigarette packet, 200 ml of Afya milk and two rubber gloves. He processed the scene and took photographs and collected the items found at the scene. In cross-examination by Mr. Kihanga he stated that there was no mark of strangulation on the body.

12. **PW6 PC KOBUCHOR KIPASANG** was on 22/07/2012 requested to take photographs of motor vehicle registration number **KBP 306M** and took three (3) photographs thereof at Kayole Police Station. **PW7 DR. JOSEPH MAUNDU** produced P3 form on behalf of **Dr. Kamau** on the 2<sup>nd</sup> accused **GEOFFREY KAMAU MUIRURI** who was alleged to have carjacked the deceased who was robbed and killed. He had a soft tissue injury on the lower limb, and right side of chest aged five days caused by blunt object and found him fit to stand trial. The 4<sup>th</sup> accused was also examined and found with decreased ability on the right ear with soft tissue injuries and was found fit to stand trial. The 1<sup>st</sup> accused was also examined with soft tissue injuries but fit to stand trial and so was the 3<sup>rd</sup> accused.

13. **PW8 PAULO MUKILYA MUNGUTI** stated that on 5/07/2012 while at a car was at **KARIA SUPER MARKET** at about 6.30 a.m., a white Probox was brought to him to clean by five people at a cost of Ksh.200/= since it had lots of mud on the seats. He knew the 4<sup>th</sup> accused as a mason '*fundi*'. It was his evidence that after 30 minutes the motor vehicle was taken by one person who was not charged with the 4<sup>th</sup> accused promising to pay the balance of the agreed price later. The 4<sup>th</sup> accused gave him his number but when he called him the following day he was '*mteja*'. He was later on called to the police to record his statement Njuguna having told him that the motor vehicle was on sale and he would pay upon the same being bought. He confirmed having known the 4<sup>th</sup> accused for seven (7) years. It was his evidence that the 4<sup>th</sup> accused was not originally with the three people who had the motor vehicle but joined them at the car wash.

14. **PW9 CP OBADIA KOBIA** on 6/07/2012 was called to attend to a scene where members of the public had reported a case of a dead body. He confirmed that the body had no visible injuries then took it to the mortuary. He stated that there were members of the public looking at the body and it was possible that the scene had been interfered with. **PW10 CORP. SAMUEL KOMO** stated that on 17/07/2012 while on duty he received the relatives of the deceased for purposes of identification of his body for post mortem examination which was carried by **Dr. Ndegwa**. **PW11 PC TOM NDOLO** on 13/07/2012 recorded statements from **PW3** on how the deceased was called by the 1<sup>st</sup> accused who allegedly had customers to be taken to Thika and how he handed over the motor vehicle to the deceased before walking to his residence.

15. He testified that after taking the statement, he noticed that there was an arrest already made on the case and interrogated one **Chrispin Muthenya** who was a police officer with the GSU who informed him on how the subject motor vehicle came to his possession, being a money lender who gave Kshs.100,000/= to three people on security of the same. It was his evidence that the said **Chrispin Muthenya** was to be charged with abduction to murder but was recalled since the missing person had been found killed. He then called the people who had taken the motor vehicle to him through which the 4<sup>th</sup> accused was arrested. He interrogated the same who confirmed that he had approached the 1<sup>st</sup> accused who was his friend to assist him get a motor vehicle which he wanted to buy.

16. He testified further that the 4<sup>th</sup> accused took them to a house in Dandora belonging to the 1<sup>st</sup> accused and later pointed out the 1<sup>st</sup> accused who was arrested. They then proceeded to Naivasha with the 1<sup>st</sup> and 4<sup>th</sup> accused where they pointed out the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons who were subsequently arrested. Upon interrogation the 2<sup>nd</sup> accused stated that they did not use a gun to kill the deceased but was

brought to them by the 1<sup>st</sup> accused and they grabbed him by the neck while the 1<sup>st</sup> accused sat on his legs before they threw his body out of the car before proceeding back to Dandora. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused then agreed to take him where the body had been left which was a road under construction with red soil. He later on attended to the post mortem examination at city mortuary where the body had been booked as unknown male.

17. In cross-examination he confirmed that according to the car wash guy who testified as **PW8**, the 4<sup>th</sup> accused was not in the car and that it is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused who killed the deceased and therefore the 4<sup>th</sup> accused should have been treated as a witness. He confirmed that the person found with the motor vehicle **Chrispus Muthenya Mutisya** was arrested and released as a witness but he later disappeared. It was his evidence that he had said that the motor vehicle was brought to him by one **Edward Mutuma** who left him with his national identity card and it is him who assisted them get the 4<sup>th</sup> accused who then led them to the other three accused persons since he needed to buy a car. He confirmed that the 3<sup>rd</sup> accused gave him an account on how they killed the deceased. He stated that the accused persons did not sustain injuries while in police custody. He stated that the 1<sup>st</sup> accused person was the last person seen with the deceased by his wife. He stated further that the car wash guy told him that the car was brought to him by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused before they called the 4<sup>th</sup> accused.

18. **PW12 DR. PETER NDEGWA** performed post-mortem examination on the body of the deceased and confirmed the cause of death as asphyxiation due to manual strangulation. He stated in cross-examination that the body had a protruding tongue and confirmed that he examined the body after twelve days.

## DEFENCE CASE

19. When put on their defence the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused gave unsworn statement of defence while the 4<sup>th</sup> accused gave sworn statement of defence. **DW1 ANTONY MWANGI MUCHIRI** the 1<sup>st</sup> accused stated that on 5/07/2012 he was called by one of his customers called '**Edu Waito**' who wanted a motor vehicle for one week – a Probox or Station Wagon which he did not have. He then called his friend the deceased who had a Probox which was then not available. At 1.00 a.m. he called the deceased on phone who informed him that the motor vehicle was then available. He then sent him to the customers and they entered into an agreement. The following morning he was called by **PW2** who asked him whether he had given the deceased work since his phone was off. He then called **Peter Kariu** who told him that the motor vehicle had a tracking device. He was later on called by a brother of the deceased **PW1** on the same story. On 11/07/2012 his friend called **Njuguna** called him in the evening and sent him bus fare when he was arrested.

20. **DW2 GEOFREY KAMAU MUIRURI** the 2<sup>nd</sup> accused stated that he used to sell charcoal in Naivasha. On 15/07/2012 he had been brought charcoal from Nakuru and as he was transporting them, a motor vehicle closed his way and people came out and started to beat him saying they were police officers. They covered his face with a polythene bag upto Mai Mahiu where they asked him to give them Kshs.10,000/=. He stated that it is **NDOLO PW11** who asked for the money. He was then taken to Mwiki Police Station where he was again asked for Kshs.10,000/= which he did not have. He was later on locked in the police cell for two days where he was assaulted on account that he had killed someone. He was given photographs of two people whom he did not know to identify before being produced in court where again **PW11** asked for Kshs.40,000/= to release him which he did not have.

21. **DW3 JOHN JOSEPH KAMAU** the 3<sup>rd</sup> accused stated that on 18/07/2012 he was from work at Kimbo Estate and went for a drink before going home when he met the police who arrested him and took him to Kayole. On 19<sup>th</sup> he was brought to court. He stated that he did not know the deceased and had not met with his co-accused and denied making any admission. He stated that he was assaulted and framed to sign a statement.

22. **DW4 SIMON NJUGUNA GACHINGA** the 4<sup>th</sup> accused stated that on 11/07/2012 he was called by **PW8** on phone whom he met and was told to take him to Naivasha. He then met two people who told him to take them to Naivasha where there was a construction to be undertaken. They found two motor vehicles thereat and police officers came out and started to beat them up. They were then taken to Kayole Police Station. He stated that he did not know the deceased. On 14/07/2012 he met the wife and brother of the deceased who said they did not know them. The family of the deceased took the number of the 1<sup>st</sup> accused from his phone book who he spoke to and agreed to meet later on. He confirmed having known the 1<sup>st</sup> accused who was in taxi business. He was assaulted by the police and on 17/07/2012 court issued an order that he be taken to hospital. He stated that while being taken to court he heard the police say that the case had a problem since the person who had the motor vehicle was arrested and killed by the police while on a robbery in Lavington. He denied having gone with **Ndolo** to Naivasha to arrest his co-accused.

23. In cross-examination he stated that he was arrested at Kayole. He confirmed having known the 1<sup>st</sup> accused but denied knowledge of the 2<sup>nd</sup> and 3<sup>rd</sup> accused.

## SUBMISSIONS

24. At the close of the defence case the 4<sup>th</sup> accused filed written submissions while the 1<sup>st</sup> and 2<sup>nd</sup> accused made oral submissions. The prosecution relied upon evidence on record. On behalf of the 1<sup>st</sup> accused it was submitted that the prosecution failed to prove a case against him as none of the witnesses saw him kill the deceased. It was submitted that the investigators failed to carry out proper investigations on the case. It was submitted that the prosecution failed to call **Chrispus Muthenya Mutisya** who was found with the subject motor vehicle in his possession, who stated that the motor vehicle was brought to him by one Edward Mutuma who left him with original identity card. He recorded a detailed statement but was not called to testify. The court was urged to make an adverse inference against his evidence. It was submitted that the investigating officer and **Chrispus Muthenya Mutisya** and **PW8 PAUL MUNGUTI** came from the same County and therefore there was a deliberate attempt to protect them. It was submitted that the scene of crime was not secured and no inventory taken. It was submitted that no evidence pointed to the 1<sup>st</sup> accused. It was stated that the prosecution had left a hole in their case the benefit of which should be given to the accused. In support thereof the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** was submitted.

25. On behalf of the 2<sup>nd</sup> accused it was submitted that the case was premature and investigations shoddy. It was stated that the case was based purely on circumstantial evidence which was uncorroborated and disjointed. It was stated that the person who was found with the motor vehicle was not called to testify. The 3<sup>rd</sup> accused opted to go with the record before court.

26. On behalf of the 4<sup>th</sup> accused it was submitted that a prime suspect a GSU Officer called **Chrispus Muthenya Mutisya** was arrested and released. It was submitted that it was only through **PW8** that the accused persons were joined to the offence and that he was paid money by the 4<sup>th</sup> accused through M-pesa but his phone was not secured. It was submitted that there was no evidence linking the 4<sup>th</sup> accused with the crime and should be acquitted.

27. Finally the prosecution submitted that **PW8** assisted to arrest the 4<sup>th</sup> accused. It was stated that all the accused persons had common intention and that they should all be found guilty.

#### **ANALYSIS AND DETERMINATION**

28. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

*a) The fact and cause of death.*

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

*c) That it was committed with malice aforethought - mens rea on the part of the accused as defined in Section 206 of the Penal Code.*

29. The fact and cause of death of the deceased is not in dispute. According to **DR. NDEGWA** the cause of death was asphyxiation due to manual strangulation. **PW9 CP OBADIA KOBIA** went to the scene where members of the public had reported a case of a dead body. He was accompanied with **PW5 SHASIA MAMETI** a scene of crime officer who took photographs of the same which were produced in court. **PW10 CORP. SAMUEL KOMO** attended to the post mortem at city mortuary and confirmed that the same was indeed dead. I therefore find that the fact and the cause of death was established beyond reasonable doubt.

30. On whether the said death was caused by unlawful act on the part of the accused persons either jointly or singly:- Whereas from the evidence tendered before the court, there was no independent eye witness to the killing of the deceased, the prosecution case is therefore solely based upon circumstantial evidence. The law on circumstantial evidence in Kenya is now well settled as was stated by SIR ALFRED WILLS in "**WILLS ON CIRCUMSTANTIAL EVIDENCE**":-

*"The following rules are to be specifically observed relating to circumstantial evidence:-*

*"(1) The facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;*

*(2) The burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;*

*(3) In all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;*

*(4) 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;*

*(5) If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".*

31. The Court of Appeal in **SAWE v REPUBLIC [2003] KLR 364** had this to say on circumstantial evidence:-

*"1. In order to justify on circumstantial evidence 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.*

*1. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*

*2. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*

....

*7. Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."*

32. In **ABANGA alias ONYANGO v REPUBLIC, CRIMINAL APPLICATION NO. 32 OF 1990 (UR)** The Court of Appeal set out the following principles:-

*“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-*

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,*
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused*
- iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”*

33. As regards this case the following circumstantial evidence stands out:- The 1<sup>st</sup> accused had on the material night called the deceased on phone which he put on speaker phone, in need of a motor vehicle for hire. His wife **PW2** was present with him all this time. She knew the 1<sup>st</sup> accused. Her evidence was corroborated by that of **PW3 PETER KARIU** who was at that time using the said motor vehicle who took it to him at 1.00 a.m. According to **PW2** the deceased left to meet with the 1<sup>st</sup> accused to hand over the motor vehicle to him and that was the last time the same was seen alive. The 1<sup>st</sup> accused in his defence confirmed having spoken to the deceased in respect of an intended hire and stated that he connected the deceased with those who wanted to hire the said motor vehicle, but his evidence in chief contradicts the statement which he recorded with the police.

34. Having therefore confirmed being the last person with the deceased on the night he was last seen, he brought himself within the doctrine of the last seen which I have discussed excessively in the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG (supra)** referred to by the 1<sup>st</sup> accused where I quoted with approval the case of **ANJAN KUMAR SARMA v STATE OF ASSAM , CRIMINAL APPEAL NO. 560 OF 2014 thus:-**

*“18. The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence . . . There must be something more establishing connectivity between the accused and the crime.*

*21. It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”*

35. From the evidence tendered before me, I find and hold that the 1<sup>st</sup> accused was the last person to had been seen with the deceased while alive and he was therefore under a legal obligation to offer some explanation as is stipulated under **Section 111** of the **Evidence Act**. In his attempt to discharge this burden, he testified that he connected the deceased with the intended customers and they agreed to meet. This evidence is contrasted with what he told the Investigating Officer, that the deceased did not meet the intended customers and therefore find and hold that he failed to discharge the said obligation and was therefore responsible for the death of the deceased.

36. The other circumstantial evidence linking the accused persons with the death of the deceased is how they were arrested:- The evidence tendered before me is that the motor vehicle had a tracking device which was used to track the same to the yard of one **Chrispus Muthenya Mutisya** who explained on how he came into possession of the same. He called the persons who had given him the said motor vehicle and this led to the arrest of the 4<sup>th</sup> accused whose explanation was that he had approached the 1<sup>st</sup> accused to assist him purchase a motor vehicle. He then called the 1<sup>st</sup> accused who was duly arrested. It is the 1<sup>st</sup> accused who led to the arrest of the 2<sup>nd</sup> and 3<sup>rd</sup> accused who confessed to the killing of the deceased and throwing his body out of the motor vehicle.

37. The evidence on the participation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused in the murder of the deceased was corroborated by that of **PW8 PAULO MUKILYA MUNGUTI** who placed them together on 5/07/2012 at a car wash place with the subject motor vehicle. He knew the 1<sup>st</sup> accused as “*fundu*”. He confirmed that the said motor vehicle had red soil mud all over which was wet. The 1<sup>st</sup> accused who was known to him promised to pay for the car wash charges but later on went off line thereby corroborating the evidence tendered before me of the conduct of the 1<sup>st</sup> accused immediately after the deceased went missing. The place where the body of the deceased was found had red soil thereby completing the link between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused with the murder.

38. This evidence is corroborated in material particular by that of **PW11 TOM NDOLO** the Investigating Officer who interrogated the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons upon their arrest and who confessed to having killed the deceased through strangulation which was corroborated by that of **PW12 DR. NDEGWA** who performed post mortem examination on the said body and confirmed that the cause of death was manual strangulation. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons placed the 1<sup>st</sup> accused together with them as the driver of the subject motor vehicle.

39. The 2<sup>nd</sup> accused corroborated the evidence of **PW11** in his defence when he confirmed that he was arrested in Naivasha. This was further corroborated by the 4<sup>th</sup> accused who in his defence confirmed that he led to the arrest of the 1<sup>st</sup> accused. Whereas the prosecution failed to call as a witness one **Chrispus Mutisya** in whose possession the subject motor vehicle was found, the nature of his evidence was covered by **PW11** and I therefore hold that failure to call him was not fatal to the prosecution case. I am further not persuaded that failure to produce the call logs linking the 1<sup>st</sup> accused and the deceased cast doubt on the prosecution case as the same did not deny calling the deceased.

40. From the chain of circumstantial evidence stated herein, I find and hold that the death of the deceased was caused by unlawful act on the

part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. Whereas the 4<sup>th</sup> accused was arrested together with the three, I have taken into account the evidence of **PW8** weighed with **PW11** and find that the prosecution has failed to prove that he participated in the killing of the deceased. It is clear that he wanted to buy the said motor vehicle and there is a doubt created as to whether he killed the deceased or whether having killed the deceased the 1<sup>st</sup> accused delivered the said motor vehicle to him which he used to secure credit for **Chrispus M. Mutisya** using false documents as it is through his telephone contact which he had left with the Shylock which led to his arrest.

41. I therefore find and hold that he is entitled to the benefit of doubt as there is no evidence that he was in a joint enterprise with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused to kill the deceased. The 2<sup>nd</sup> and 3<sup>rd</sup> accused did not put him together with them when they strangled the deceased and **PW8** stated that he went to the car wash after the car had been delivered to him. I would therefore acquit the same and discharge him of the charges.

42. The final issue is whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons had the necessary malice aforethought as defined in **Section 206** of the **Penal Code** thus:-

*“Malice aforethought shall be deemed to be established by evidence proving one or more of the following circumstances:-*

*(a) An intention to cause death or to do grievous harm to any person, whether that person is the person actually killed or not.*

*(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be caused.*

*(c) Intention to commit a felony.”*

43. There is evidence tendered before me that the 4<sup>th</sup> accused had approached the 1<sup>st</sup> accused to assist him purchase a motor vehicle of the type which the deceased was driving. The 1<sup>st</sup> accused then approached the deceased who delivered the same to him and he led him to the 2<sup>nd</sup> and 3<sup>rd</sup> accused who assisted in killing him. It is therefore clear that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons had the necessary motive in causing the death of the deceased. I therefore find and hold that malice aforethought was proved beyond reasonable doubt.

44. The final issue is the participation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused in the killing of the deceased. **Section 20 (1)** of the **Penal Code** states as follows:-

*“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.”*

45. Each of the accused persons made statements. In their defence they denied knowing each other save for the 1<sup>st</sup> and 4<sup>th</sup> accused persons. The 2<sup>nd</sup> and 3<sup>rd</sup> accused further denied knowing the deceased. The 1<sup>st</sup> accused however confirmed that he had a customer called “Edu” Edward Waite who needed a motor vehicle which the deceased had. He confirmed that he was arrested when the 4<sup>th</sup> accused called him. The evidence of **PW11 INSPECTOR TOM NDOLO** is that he interrogated the 2<sup>nd</sup> and 3<sup>rd</sup> accused on the gun they used to kill the deceased. They told him that the 1<sup>st</sup> accused was driving the motor vehicle with the deceased on the co-driver with the 2<sup>nd</sup> accused directly behind the deceased. They then strangled the deceased before dumping his body at the Bypass road under construction before proceeding to Dandora to the car wash.

46. Justice M. Odero has stated that:-

*“In CRIMINAL LAW – THE FUNDAMENTALS 1<sup>ST</sup> Edition by Mcalhone & Huxley-Binns a joint enterprise is defined as follows:-*

*“A joint enterprise is where two or more parties embark upon the commission of a criminal offence with a common purpose. Essentially under the doctrine of joint enterprise, participants in such an enterprise are liable not only for their own acts committed in furtherance of the enterprise but also for the acts of other participants even if the consequences of such acts are unforeseen. The common purpose involves agreement consensus between the parties. This does not mean there has to be any formality involved. Consequently, although in many instances there will have been a plan to commit an offence, this is not required. Agreement may arise on the spur of the moment, with nothing being said at all. It can be made with a nod and a wink, or a knowing look or even inferred from the behaviour of the parties involved. . .”*

47. Having taken into account the evidence of **PW11** and having taken into account the defences by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, I am satisfied that the three accused persons jointly participated in the killing of the deceased in a well planned and pre-mediated manner so as to steal the motor vehicle from him which was later on delivered to the 4<sup>th</sup> accused and therefore find them jointly guilty as charged.

48. In the final analysis, I find and hold that the prosecution proved beyond reasonable doubt all the elements of the offence of murder against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused and find the same guilty as charged and accordingly convict them. The prosecution failed to prove its case against the 4<sup>th</sup> accused whom I accordingly acquit.

**Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of October, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Okeyo for the State*

*Mr. Ongaro for Opolo for the 1<sup>st</sup> Accused*

*Mr. Kariu for the 2<sup>nd</sup> Accused*

*Mr. Kihanga for the 3<sup>rd</sup> Accused*

*Mr. Ongaro for the 4<sup>th</sup> Accused*

*Accused 1, 2, 3, & 4 – present*

*Court assistant- Karwitha*