



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 68 OF 2012

REPUBLICPROSECUTOR

VERSUS

SAMUEL WAIHAKA NDUATI1ST ACCUSED

FRANCIS MAINA WANYUMBA2ND ACCUSED

ISAAC WAICUGO MONOTI3RD ACCUSED

JUDGMENT

1. **Samuel Waithaka Nduati, Francis Maina Wanyumba and Isaac Waicugo Morote** hereinafter referred to as 1st, 2nd and 3rd accused respectively are jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars are that on 31st July, 2012 within Gatundu Township Kiambu County the 1st, 2nd and 3rd accused murdered **Peter Gatura Kangethe**. All the three accused denied the charges and the matter proceeded to full hearing with the Prosecution calling a total of fourteen (14) witnesses. This is the case that was presented to the Court by the Prosecution.

3. **PW5 Naomi Njeri Kangethe** who is the mother of the deceased was at their home on 31st July, 2012 when the deceased visited her at 8 pm. This was after work. They talked and he told her they were having great problems at work. They parted and he told her he was going to take a bath at his house which was about 100m away. After about 30 minutes, she heard screams from the deceased, his wife and son. She ran upto her door and found somebody standing by the door holding a panga. She was grabbed, pushed and abused. It was dark and she could not recognize anyone. She heard the person with the panga ask the deceased if he wanted to die by the sword, panga or gun? He answered that his blood would be on them. PW5 ran away and later heard a gunshot. She went back screaming but the attackers had gone. She found the deceased fallen at the door bleeding.

4. **PW3 Jane Wanjiku Karanja** is the deceased's wife. She was at home when around 9 people came to their home in Gatundu. She was with the deceased in the kitchen. Their daughter and son were present but the boy was in the big house doing homework. The people who came had pangas and one had a gun. They entered the kitchen and told the deceased they wanted him. He pleaded with them not to kill him as he would give them money. One shouted asking if he wanted to die by the gun or the panga. He responded that they could kill him but his blood would be upon them. He was immediately shot in the forehead. She was held and dragged outside the house as they ran away. She was taken to hospital and later learnt of her husband's death. She did not recognize the assailants. On request, of the defence, she was recalled for further cross examination. She stated that she had been called a second time to identify

the phone. The phone the deceased was using was new and about 3 months old but the one in Court was old. She said his phone was grey and the one in Court was black. Further that his phone had one sim card while the one in Court had two simcards with an Airtel number. She was certain the phone in Court was not the deceased's phone. However, she did not know if he had another phone.

5. **PW6 K K** is a son of the deceased and was aged 12 years at the time of incident. He testified that on 31st July, 2012 he arrived home from school and rested before embarking on doing his homework from his bedroom. He heard screams at the back of the house. It was PW3 who was screaming and he saw armed men in their kitchen. They had pangas. They accosted his father and told him they would kill him. He heard a gunshot and the deceased was there lying on the floor. The attackers left and people came to their house. He too could not identify those who attacked his father.

6. **PW4 John Kuria Mutura** is a Chairman of a Sacco. He testified that the deceased was the Sacco's operations manager. The deceased's duty entailed checking on the routes, drivers and conductors of the vehicles. On 31st July, 2012 he received a report that the deceased had been shot. This witness and deceased had talked that day and the deceased told him there was a conflict between him and the rival Sacco group, who had brought their matatus, where their Sacco was operating from. He informed the police about the killing. At the station, he met Cpl Mutua who asked him about a phone. He explained to him that the sacco had bought the deceased a Nokia phone and he also had a personal phone which was also a Nokia. He identified the phone in Court as the deceased's Nokia phone. His original statement was produced as **DExhibit 1**.

7. In cross-examination, he denied seeing nor identifying the phone at the station. He could not tell any identifying marks on the phone and neither did he have its receipt. Since the deceased had only given him one number, he could not know if the phone had 2 sim cards. He however, confirmed that the deceased's other number was also safaricom. The phone he identified in Court has 2 sim cards, one being an airtel one.

8. **PW7 Abdi Simba Musa** a station Manager at Ngara Total Station testified that in early August, 2012 two gentlemen came to his station. One was **Pius Kimani**. They asked him for space for picking their matatu passengers. After consultation, with the Proprietor Mr. Noor, their request was approved with a condition that their vehicle is fueled at that station. He learnt later that the matatu people were having a dispute, and sometimes the matatu would fail to pick passengers from there. One day, the deceased demanded to see him. He had introduced himself as the Chairman of the Gatundu sacco. He informed him that the people he had allowed to use the station were a group that wanted to break away from the sacco. PW7 promised to talk to them for an amicable solution. Unfortunately the deceased never returned to him, until he learnt of his having been shot.

9. In cross examination, he said none of the three accused persons was among those who had come to see him for space at the station. It was the deceased and taxi operators who had told him about the rival sacco.

10. **PW1 Peter Kimani Mbote** was on 2/8/2012 in Githurai for treatment and was also in need of a phone. He went to a seller Peter Njoroge Kariuki (PW2) who sold him a Nokia phone at Kshs.1,050/= and he issued him with a receipt. On 11th August, 2012, he received a call from an unknown person who requested that they meet at Githurai. He went and he met the caller before being joined by four (4) police officers. They took his phone and asked him where he had bought the phone and he told them. He identified the phone in Court (**Exhibit 1**) as his phone by the broken surface and he also produced the receipt (**Exhibit 2**). He took the officers to (PW2) and both of them were arrested and taken to Gatundu Police Station.

11. **PW2 Peter Njoroge Kariuki** is a business man in Githurai. He sells cars and gives soft loans. On 2nd August, 2012 he was approached by Franco for a soft loan of shs.800/= and he left his Nokia phone as surety. He was to bring back the money the same day by evening, but he defaulted prompting him to sell the phone to PW1 at shs.1050/=. After he was arrested, he showed the police the home of the 2nd accused

as the person who had borrowed money from him. The 2nd accused was then arrested.

12. In cross examination, he said he had known the 2nd accused for 2 years and he denied buying the phone from him. He denied receiving the phone on 25th July, 2012 as alleged nor having known PW1 before.

13. **PW9 Raphael Kanaro** is a psychiatric nurse and he examined and assessed the 3rd accused for his mental status and found him to be mentally fit to stand trial. He produced the report as **Exhibit 3**. He did not assess the mental status of the 1st and 2nd accused.

14. **PW10 No. 70562 Cpl Nicholas Kitonga** was on patrol with his colleagues on 13th September 2012 when they were called by members of the public who informed them of a suspect who had been spotted. They went and were shown the 3rd accused whom they arrested and took to the Criminal Investigation Department (CID) offices.

15. **PW11 52157 Sgt. John Wahome** of CID Headquarters and other officers were investigating a crime of murder and were tracing the deceased person's mobile phone. They proceeded to Githurai where they arrested two suspects i.e. Peter Njoroge Kariuki and Peter Kimani Mbote (PW1 and PW2). They received a Nokia 101 phone serial no. 059G7P1 IME 357916/04/024766/6IME 2357916/04/024767/14. They were assisted by the service provider to get these details. The people they arrested were not among the accused persons before this Court. He did not arrest or know any of the accused persons before the Court and neither did he know what happened to PW1 and PW2.

16. **PW11 (b) Dr. Francis Ngugi** conducted the post mortem on the deceased's body. He found the body to have bullet entry wounds below the left eye, left lumber region below the rib and on the space near the kidneys on left side; the stomach had blood and the kidney and brain tissue were completely shattered; there were multiple fractures with egg shape fractures on the base of the scalp. He found the cause of death to be "*multiple injuries on the head and abdomen caused by high velocity penetrating missiles caused by bullets.*"

17. **PW12 No. 51700 Snr. Sgt. Jeustimor Malit** is gazetted as a scene of crime officer No. 5853 of 31st August, 2001. He went to the scene of crime and took photos of the deceased on 31st July, 2012. He took the negative and printed it himself and produced the photos **Exhibit 5a-d**; certificate and report **Exhibit 6**.

18. **PW13 No. 234262 Inspector Isaac Tenai** was the officer in-charge investigations at Gatundu police station. He received a report of a shooting incident at Itweku in Gatundu South. The OCPD and other officers visited the scene and photos were taken and he embarked on investigations. A spent cartridge was recovered from the scene and forwarded to the ballistic expert. Investigations revealed that nothing was stolen from the deceased. The National Intelligence Services (NIS) were called in to assist in the investigations. Peter Kimani was found in possession of the deceased's phone, Nokia 101, which had been stolen at the time of incident. The number of the deceased was given to him by CT &T sacco. The Chairman of the sacco (PW4) identified the phone. The phone receipt was not traced but the IMEI was matched to the sim card used by the deceased. The intelligence verified it.

19. The witness interrogated PW1 and PW2 and produced the receipt issued by PW2 (Exhibit 2), and the phone (Exhibit 1). The interrogation led to the arrest of the 1st and 2nd accused. The 1st accused explained how he got the phone. He led the officers to the arrest of the 2nd accused at the barber shop. The 2nd accused mentioned the 3rd accused as the owner of the phone. The 3rd accused was arrested later. He informed PW13 that the phone was his and he had received it as a gift from his aunt. He did not produce the aunt to verify the information. The accused persons were eventually charged.

20. In cross examination, he confirmed that no information was received on anything stolen from the deceased during the incident. The recovery of the phone was entered in the OB but the inventory has

gone missing. He also stated that besides the phone, there was information from intelligence connecting the 3rd accused to the murder. He confirmed that the phone had a dual sim card but he denied that PW3 had said the phone of the deceased had a single sim card and she still had it. He denied getting any information from Safaricom. He said that though the accused persons were not involved in the matatu business, they were directly involved in the murder.

21. In re-examination, he said it is possible for the wife not to know about the husband's phone but each of the accused knew about it. Though he did not produce safaricom records, the NIS who were leading in the investigation had access to the data.

22. **PW14 No. 231165 Mr. Alex Mudindi Mwandawiro** testified that on 3rd August, 2012, **PC Duncan Kingori** brought to their lab at DCI Headquarters two spent cartridges for examination. Their calibre was 5.56 x 45 mm. Upon carrying out microscopic examination on them, he found both to bear identification markings that are consistent with mentioned firearms. He found them to have been fired by one gun. He was of the opinion that they were fired in a M/6M rifle manufactured by Colt Company in the US or an SAR 89 rifle manufactured in Singapore. He produced his report (**Exhibit 8**) and 2 spent cartridges (**Exhibit 9a & b**).

23. Each of the accused persons gave unsworn statements for their defence and called no witnesses. The 1st accused stated that he lived in Githurai doing barber work. On 14th August, 2012 two men came to the barber shop and introduced themselves as CID Officers who had come to arrest him. He took them to his house as per their instructions. They searched his house and found nothing. He was then taken to Gatundu Police Station. He explained to them how his friend Isaac Waisiko (A3) had left his Nokia phone for charging in his shop on 27th July, 2012 and left with his Siemens phone. He had promised to pick it after work but he did not. He stayed with it until 28th July, 2012 when Francis Maina came and asked for a phone to make a call. He gave him the Nokia phone and he went out with it to make the call.

Upon finishing with his customer, he went out but did not find Francis who did not come back. He then borrowed a phone to call Francis who promised to come but he did not. Upon being charged he found three (3) people in cells i.e. PW1, PW2 and 2nd accused. He stated that PW3 and PW4 told the Court that the phone in Court did not belong to the deceased.

25. The 2nd accused stated that he comes from Githurai. He was a trainee at Kenya Polytechnic. On 14th September, 2012 at 5.30 am, he was arrested at the gate as he left for college and taken back to the house. The house was searched but nothing was recovered. He took those who had arrested him to his father's house which they also searched. His father was informed of the phone he had sold. He explained that it was the 2nd accused who had given him the phone. He then took them to 2nd accused's house but they found it closed. He was taken to the CID offices and shown the phone. He admitted having given the phone to PW2 as security for Kshs.800/=, on 28th July, 2012 and he was to pay Kshs.1000/= on Monday (30th July, 2012). When he went to pay the money on 30th July, he found the phone sold. He agreed with 1st accused on how to buy him another phone. He was placed in the cells where he met PW1 and PW2.

26. The 3rd accused stated that he stays in Githurai 45. He works as a Mason and at a barber's shop. On 13th September, 2012, he went to do construction work and at around 1.30 pm, he saw a police officer come to his place of work and greeted him and his boss. He was handcuffed and told of a person who was complaining about him having stolen certain items. At the station, he was booked for murder. Later he was arrested by officers from Gatundu police station and he handed over his Samsung phone and Kshs.5,400/= cash to them. He was asked if he knew 1st accused and he admitted. He was also asked about the phone and he said it was his.

27. Mr. Kingori an officer told him the phone belonged to a person who had been killed on 31st July, 2012. The phone was shown to him and he confirmed it was his. He had taken the phone to the 1st accused on 25th July, 2012 morning for charging. The 1st accused gave him his phone to use as his

remained charging. When he returned to pick it, he had closed. After two (2) days, he met him but he told him he had given the phone to Francis who could not be traced. Later, he learnt that the 1st accused had been arrested at his place of work.

28. He too was arrested on 13th September, 2012 and taken to Court on 14th September 2012. The phone and cash that was taken from him have never been returned to him. That PW3 described the people who killed the deceased as huge, dark people and that the phone produced in Court was not the deceased's phone. He also added that PW4 who gave the deceased money to buy the phone had said the phone before the Court was not the deceased's.

29. Both **Mr. Ayora** and **Mr. Mututi** for the accused persons filed written submissions. In highlighting, Mr. Ayora for 1st and 2nd accused submitted that there was no evidence to show that the accused persons operated a matatu business or were used or hired by other associates to kill the deceased. He submitted that they were before the Court because of circumstantial evidence. A Nokia phone 101 suspected to be the deceased's property was recovered yet no inventory was made. No transcript was tendered to confirm ownership of the phone. He submitted that PW3 and PW4 did not identify the phone as belonging to the deceased and no witnesses identified the attackers. The phone in Court, he said, could be belonging to one of the accused persons.

30. **Mr. Mutitu** for 3rd accused adopted the submissions by Mr. Ayora. He submitted that none of the accused persons were said to have been at the scene. That the deceased's phone had one sim card while the one before Court had 2 simcard slots and one was an Airtel simcard which the deceased did not have. He further submitted that PW14 tended to say he had intelligence information implicating the accused. No witnesses confirmed this. He further submitted that the accused had explained how they had come to possess the phone. In conclusion, he argued that there was nothing to show that the phone was ever owned by the deceased.

31. Mr. Okeyo for the Prosecution submitted that they had proved their case beyond reasonable doubt. That death had been proved (**Exhibit 4**). The accused had been arrested through the tracking of a phone belonging to the deceased. Contrary to the submissions by the defence, he said that PW4 identified the phone. The way the phone moved from one person to another, was explained by the witnesses. He further submitted that the 2nd accused in his defence, did not explain that he did not go for the phone from PW2. He wondered why the 2nd accused was mortgaging the phone with 1st accused giving it out to the 3rd accused if the phone did not belong to each one of them. The 3rd accused did not avail the particulars of his aunt who had given him the phone as a gift.

32. He further submitted that the accused persons knew each other well and they were in possession of the deceased's phone a day after his murder. It was his submission that the accused did not explain their possession of the phone and so the doctrine of recent possession should apply. In response to Mr. Ayora's issue of the inventory, he said the phone was recovered from a buyer and not the thief. There was also no contention about the phone and so the lack of an inventory was not fatal.

33. He submitted that PW8 had tracked the phone using the deceased's mobile number with the help of safaricom. He said the phone does not belong to any of the accused persons as no evidence had been adduced to support that.

In closing, he submitted that the accused had knowledge of the phone, and wanted to dispose of it as fast as possible. That having failed to explain their possession of the phone, then they should be taken to be the killers.

DETERMINATION

I first of all wish to point out that there is no PW8 in the proceedings and we have two PW11. The second PW11 is now referred to as PW11 (b). I am mentioning this to avoid any confusion since the Prosecution case was taken by my sister Korir Judge, who was transferred.

34. Murder is defined under Section 203 Penal Code as

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

Malice aforethought is defined under Section 206 Penal Code as follows;

“a. an intention to cause the death of 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, or by a wish that it may not be caused;

c. an intent to commit a felony;”

For a charge of murder to succeed, the Prosecution must prove the following;

- i. The fact of death;
- ii. That the death was caused by the accused person (*actus reas*); and
- iii. The presence of malice aforethought/intention/*mens reus*.

35. Majority of the witnesses have confirmed that indeed the deceased died. In particular, is the evidence of PW3 – PW7, PW11 and PW12. PW11 who conducted the post mortem on the body of the deceased found the cause of death to be multiple injuries on the head and abdomen caused by bullets. He produced the post mortem report as Exhibit 4. The gun that was used in the murder was never recovered.

36. The next issue to determine is whether the accused persons are the ones who killed the deceased person. This unfortunate incident occurred at the home of the deceased where he lived with his wife (PW5), his son (PW6) and a daughter who did not testify. His mother (PW3) lived nearby. The incident took place at night and the eye witnesses, PW3, PW5 and PW6 testified that they were not able to identify any of the attackers who were about ten (10) in number. The reason was that it was dark. There is therefore no direct evidence linking the accused persons to this offence.

The evidence of the recovered phone Nokia 101 IMEI No. 357916040247666 and IMEI No. 357916040247674 is the only evidence there is against the accused persons. It is therefore circumstantial evidence and for it to be the basis of a conviction, must point to the culpability of the accused persons.

In the case of **Musili Tulo –vs- Republic, Criminal Appeal No. 30 of 2013**, the Court of Appeal stated;

“... the chain must be so complete that it establishes the culpability of the appellant, and no one else without reasonable doubt. This is because, circumstantial evidence is as good as any evidence, if it is properly evaluated and, as it is usually put, it can prove a case with the accuracy of mathematics.”

38. For circumstantial evidence to form the basis of a conviction, it must satisfy certain conditions. The same were stated in the case of **Abanga alias Onyango –vs- Republic, Criminal Appeal No. 32 of 1990**. The Court of Appeal stated thus;

“it is settled law that when a case rests entirely on circumstantial evidence, such evident 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; and (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.”

39. In the case of *Republic –vs- Kipkering Arap Koskei (1949) EACA 135 at 136* the Court stated;

“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 burden of proving facts which justify the drawing of this inference from the facts of the exclusion of any reasonable hypothesis of innocence is on the Prosecution and always remains with the Prosecution. It is a burden which never shifts to the party accused.”

This Court must keenly evaluate this evidence to establish whether the accused persons are culpable.

40. The Prosecution has explained how this phone produced as Exhibit 1 was handled by PW1, Pw2 plus the three accused persons. The phone was found in possession of PW1 on 11th August, 2012. He said he had bought it on 2nd August, 2012 from PW2. It was not a new phone and was broken with a crack on the surface. The defence does not deny the handling of this phone by the accused persons. The case of the defence is that the Nokia phone (Exhibit 1) did not belong to the deceased but to the 3rd accused. They argue that PW3 and PW4 did not identify the phone as belonging to the deceased.

41. Upon cross examination by the defence, PW3 (deceased’s wife) told the Court that the phone which the deceased had, was new and was about 3 months old. On further cross examination, she stated that the phone Exhibit 1 was grey in colour while the deceased’s phone was black. His phone had one sim card and did not have an Airtel number. She therefore concluded that the phone (Exhibit 1) was not her husband’s phone. In re-examination, she said she had only been to her husband’s office once and did not know if he had an office phone.

42. PW4, the sacco chairman in cross-examination, denied identifying the phone (Exhibit 1) at the police station, but he identified it in Court. The phone (Exhibit 1) has two simcards (one for safaricom and another for airtel). PW4 did not have any receipt for the phone. In his statement, (Dexhibit 1), he mentioned that the phone had been bought from ***Luska Communications*** within Gatundu Township. The said phone used simcard number 0729 099987. It is therefore clear that PW3 did not know anything about the phone produced as Exhibit 1. How did PW4 then identify the phone (Exhibit 1) as belonging to the deceased? Besides not having the receipt, he did not even say when the phone was bought. Evidence from Luska Communications would have assisted in confirming that indeed that was the phone bought by the sacco for the deceased. The phone (Exhibit 1) is a very old phone.

43. The Court is therefore left with the evidence of PW4 on identification of the phone. This is what he says of the phone on cross examination by counsel for 3rd accused at page 12;

“I cannot tell any identifying marks on the phone. I do not have the receipt for it because I told him to keep it. He gave me only one number so I am not sure whether it had 2 sims. His other number was also Safaricom. I do not know what make his personal phone was. The office one was Nokia 101. I am not aware if the phone had 2 sim cards (shown the phone). It has 2 sim cards, one is an Airtel simcard.”

44. PW5 had told the Court that it was the sacco which had bought the deceased this phone. Apparently, the said sacco besides buying the phone did not keep any further details of the phone.

The other crucial witness who testified on the phone is PW13 who was the investigating officer. This is what he says at page 56 line 12 – 13;

“From the evidence, the deceased was shot by a group of thugs who were 10 in number and had assorted crude weapons. Nothing was stolen from the deceased.”

45. At line 19 he says;

“We did not trace the receipt where the phone had been bought. The IMEI of the phone was matched to the sim card used by the deceased. This information was verified by intelligence.”

Further at page 59 lines 1 – 3, he states in cross-examination;

“the report was made by the police. They did not say anything had been taken from the deceased.”

Page 59 lines 18 – 19;

“No it is not just the phone that connects 3rd accused to the murder. We had information from intelligence.”

Page 59 line 23;

“No. we did not get information from Safaricom.”

In re-examination, at page 60 lines 9 – 10, he states;

“I was not able to get safaricom records because NIS was leading the case and could access the information on data.”

46. A critical analysis of the evidence by PW4 and PW13 on the identification of this phone (Exhibit 1) shows how the said witnesses were so casual. In the first place, if the report to the police was that nothing was stolen from the deceased, how did they start tracing the phone? PW13 ought to have explained this. Secondly, from the evidence of PW13, there is crucial evidence allegedly linking the accused persons with this murder which in their wisdom they found not material for this Court to know. This is what he has referred to as intelligence information. This same witness has also told the Court that he as an investigating officer did not get any information from safaricom records, because NIS were dealing with safaricom to get data. This must be part of the “intelligence information” because there is no data from safaricom that was produced here.

47. It was important that evidence be laid before this Court to establish how the Investigating Officer came to know about the phone serial number which is indicated as IMEI No. 357916040247666 and 357916040247674. PW4 and PW13 did not state whether this phone (Exhibit 1) was only for office use and remained in the office or the deceased used to go home with it. His wife (PW3) already said she knew nothing about it and it did not belong to the deceased. No witness has confirmed that the deceased had two phones. Pw13 hinted that the deceased had two phones but did not know the line that he used in the other phone. The phone before the Court (Exhibit 1) has 2 sim cards inside of it. One is clearly airtel while the other is a safaricom line. Whose sim cards are these? Are they for the deceased person? And if they are, are they the lines the deceased was using before he died? Are they the lines that PW1, 1st, 2nd and 3rd accused were using? I am asking all these questions because no data was provided to this Court on this.

48. Had any Safaricom data been availed, it could have shed more light in this matter by showing for example the last time the deceased used that phone and any other numbers that may have been used on the phone (Exhibit 1). All this information was deliberately kept away from the Court by the investigating officer as it was “intelligence information”. The accused persons have denied killing the deceased or taking his phone. The 3rd accused lays claim to the phone produced herein (Exhibit 1). He

has produced nothing to prove that the phone is his. The Prosecution too has produced nothing before this Court to prove that the phone was bought by the sacco and it belonged to the deceased.

Proof of the ownership of this phone (Exhibit 1) was key to confirming the link of 1st, 2nd and 3rd accused persons to the death of the deceased.

49. The moment the 3rd accused told PW13 that the phone was his and it was his aunt who had given it to him, the burden shifted back to the Prosecution to confirm the ownership of the phone. In the case of Sawe –vs- Republic [2003] KLR 364, the Court held;

“3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any hypothesis of innocence is on the Prosecution. This burden always remains with the Prosecution and never shifts to the accused.”

The doctrine of recent possession could only be considered upon the element of ownership being established. PW13 said he did not get any information from safaricom. How was he able to link the mobile number to the IMEI number without that information?

50. Before a Court can draw from circumstantial evidence inference showing that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. PW7 Abdi Simba Musa informed the Court of a Mr. Pius Kimani and another who came to see him over space for them to be picking passengers for their matatu. After consultation with the proprietor, Pius and the other person were allowed to utilize the space with a condition that they be buying fuel from the Ngara Total Station. Later, on a day, he does not mention, (though he also appeared confused about dates) the deceased came to him and inquired from him of people who had been allowed to use PW7’s petrol station. It was then that the deceased told him of people who wanted to break away from the Gatundu sacco. He never saw the deceased again until he heard he had been shot dead. He was categorical that the three (3) accused persons were not among those who sought his permission to use the petrol station.

51. In his recorded statement (DExhibit 1) PW4 mentions that on this 31st July, 2012, he sent the deceased with instructions to go and oversee operations of their matatus at Ngara stage. The deceased telephoned him in the course of the day and told him he had visited a stage which was to be opened by their rival matatu sacco within Ngara area. At about 7.30 pm he received a call from Ben Githu informing him of the shooting of the deceased. Mr. Okeyo for the Prosecution submitted that the inference to be made was that the accused were hired to kill the deceased. Is there evidence to confirm this?

Besides the inference that there had been a rivalry between two matatu saccos, there was no evidence led to show that the three accused persons or any one of them was hired to kill the deceased. The accused persons were not members of the Gatundu sacco or its rival sacco. None of the members of the rival sacco are suspects in this case. Even Pius Kimani of the rival matatu sacco did not testify. It is not clear if he was ever interrogated, yet he was the one leading the rival sacco and he went to PW7 to look for space for their matatus.

52. From the above narrative, there is a possibility that from the happenings at Ngara petrol station, there were people who were not happy with what the deceased was doing. They may have had reason to kill him, but how were the accused persons connected with this? That to me is what the Prosecution had to establish. Had ownership of the phone been established, this Court would now have expected the accused to give an explanation on how they came to possess a dead man’s phone. Thereafter, the inference sought would be made, against the accused persons. Since that is missing, my finding is that the evidence does not irresistibly point to none other than the accused persons as the perpetrators of this heinous crime. The prosecution ought to have done more than they did especially in establishing the ownership of this phone.

53. In finishing, I wish to bring out the fact that a mental assessment report of an accused person is a

requirement before plea is taken or before the case proceeds. In this case, the only mental assessment report produced by PW9 was that of the 3rd accused. There is no report of an assessment done on the mental status of 1st and 2nd accused persons. That is unprocedural and the Prosecution should take note of that.

54. For my part, I find the Prosecution case not proved beyond reasonable doubt and acquit 1st, 2nd and 3rd accused under **Section 322 (1) Criminal Procedure Rules**. They shall all be released unless otherwise lawfully held under a separate warrant.

Orders accordingly

Delivered, signed and dated this 10th day of June 2017 at NAIROBI

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE