REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 32 OF 2015

REPUBLIC.....PROSECUTOR

Versus

DAVID MAKALI MUTISO.....1ST ACCUSED

EMMY MUSIMBI.....2ND ACCUSED

JUDGEMENT

DAVID MAKALI MUTISO and **EMMY MUSIMBI** the two accused persons stand jointly charged with the offence of murder contrary to section 203 of the Penal Code as punishable under section 204 of the same code (Cap 63 of the Laws of Kenya). The brief particulars alleged against the accused persons are that on the night of 8th and 9th of May 2015 at Kamulu Estate in Kitengela Township Isinya, Sub-County jointly with others not before court murdered Nicholas Kamonde Joseph hereinafter referred as the deceased.

Each of the accused pleaded not guilty. Mr. Kivuva represented the 1st accused while the 2nd accused was represented by Mr. Ochieng. Mr. Akula the senior prosecution counsel had the conduct of the case on behalf of the state.

PROSECUTION CASE:

In order to proof the guilt of the accused persons, the prosecution examined thirteen (13) witnesses whose evidence i summarily sift through as follows:

PW1 ASSUMPTA NTHENYA MBATHA and **PW2 JOSEPH MBATHA** testified as mother and father to the deceased. Their evidence is to the effect that they were informed of the deceased death after he went missing from their home at Athi River Prisons. It is through various inquiries that led them to receive information from Kitengela Police Station that a body of a young man was picked on 9/5/2015 next to the slaughter house and taken to the City Mortuary. As this matter was under active investigations by the police PW1 and PW2 were called in to identify the body of the deceased to the pathologist at the City Mortuary.

PW3 SHALON KILEKYA KANINI a resident of Kamulu Estate where the alleged murder took place testified that she was present when the deceased was being beaten. PW3 further told this court that while in her house she heard some screams which made her get out of the house. According to PW3 she was informed by the caretaker that a stranger has passed by the gate without locking. In the course of PW3 conversation with the caretaker a young man she did not know emerged and people started pointing at him and uttering words *'thief'' 'thief'*. This young man PW3 told this court was later to be ordered to lie

down by the 1st accused and the caretaker. In a little while they got hold of a piece of timber and started to beat him. PW3 further deposed that at the same time she saw the 2nd accused emerging and crying out with a loud voice. PW3 in addition stated that in the morning she was to learn that the young man passed away as his body was still lying outside the gate of the plot. In cross-examination by Mr. Kivuva learned counsel for the 1st accused PW3 stated that she recorded three statements with the police. She further deposed that in the first statement she did not mention the name of the 1st accused. This was done at the time of recording the third statement and the name of the 1st accused was introduced to the scene. In the evidence of PW3 there were other neighbours who also came out of their houses because of the commotion between the caretaker and the suspected thief. It is further PW3 testimony that the person he saw holding a piece of timber was the caretaker while the 1st accused ordered the victim to lie down on the ground. As the victim lay down on the ground PW3 testified that the caretaker was beating him using the piece of timber in the presence of accused 1. She could also hear the victim crying out to the assailants that they contact his father who resides at Athi River Prisons quarters. However in the testimony of PW3 the assailants would not hear of it but continued to inflict harm. In cross-examination by Mr. Ochieng for the 2nd accused PW3 told this court that the 2nd accused grabbed something from a man at the gate and hit the deceased. That something and the man were never identified before this court.

PW4 ELIZABETH WAITHERA the government analyst testified on the analysis done upon request by PC John Macharia of CID Kitengela. PW4 told this court that the nature of the examination requested involved a brown trouser and white t-shirt, a brown jumper, a piece of wood and blood sample in a bottle indicated as of the deceased. The examination by PW4 revealed that the piece of wood was stained with blood of human origin which when subjected to DNA profile matched the blood sample indicated as that of the deceased. The analyst report was admitted in evidence as exhibit 3(a).

PW5 DAVID NGALO on his part said that on 9/5/2015 he heard screams with words being uttered of *'thief' 'thief'*. PW5 claimed that he was able to see the caretaker lock the plot and started to beat the suspect. When he was done hitting the suspect with a piece of wood, he dragged the body of the victim and dumped it at a dump site nearby. PW5 denied seeing the two accused person at the scene.

PW6 OGOYE HILDA on her part testified that on 9/5/2015 at about 3 – 4 am he was attracted by some people screaming and raising an alarm within the plot. PW6 further claimed that on coming out he saw the caretaker interrogating someone seated on the ground. In a little while PW6 deposed that she saw the caretaker dragging the person outside the gate. PW6 further testified that prior to that the caretaker had armed himself with the piece of wood which he used to beat the person. In all those circumstances PW6 did not see the two accused persons. According to PW6 testimony in the sequence of events between the screams and dragging of the victim out of the compound she did not see any of the two accused persons in the vicinity.

PW7 FAITH MUTISYA a neighbour occupying one of the houses where the scene of murder occurred testified to the effect the she saw some people beating someone in the plot. PW7 further testified that in the morning she was able to notice blood stains at the gate streaming towards the outer field. PW7 further stated that she did not positively identify the assailants.

PW8 DAVID MUCHASI a watchman in the nearby P.A.G. Center testified on how on the 8th – 9th/5/2015 at 4.00 am he saw the caretaker beating a young man he estimated to be about 25 years until he collapsed. PW8 further deposed that the caretaker besides dragged the victim outside the compound and placed him on a dump site. PW8 further testified that he was able to notice a piece of wood with a nail which the 1st accused and the caretaker were using to beat the deceased. In cross-examination PW8 stated that he heard the voice of the caretaker before moving to the scene. It was also the testimony of PW8 that the piece of wood he saw on that particular morning was identical to the one before court and documented in the exhibit 1(a) photographs. According to PW8 he was able to see the 1st accused join hands with the caretaker to drag the body of the deceased from the compound where he was being beaten to the next plot and dropped it at the garbage dump site.

PW9 EDGAR AMUNGA deposed that he was attached to Machakos Level 5 Hospital in the year 2015. According to his evidence the two accused persons were taken there for mental fitness evaluation. In the reports duly prepared by PW9 he found the two of good mental status able to follow proceedings and advise counsel. The two reports were admitted as exhibit 6(a) and 6(b) respectively.

PW10 PC DANIEL KIENI a police officer gazetted as a scenes of crime officer documented the scene by taking photographs. The photographs processed and developed by PW10 were admitted in evidence as exhibit 1(a) together with a certificate as exhibit 1(b).

PW11 PC BAYA KALUME attached to Kitengela Police Station gave a chronology of events when he visited the scene, the removal of the body to the mortuary and the exhibits recovered like piece of wood used to assault the deceased. According to PW11 the investigations revealed that the deceased was beaten as a suspected thief by the caretaker and his body removed from the scene to a nearby plot. That is where the police found the body when the investigations was commenced and transported to the City Mortuary.

PW12 ELIZABETH NTHAMBI claimed in the testimony that within the plot there was an alleged burglary. The report on the theft was made to the caretaker. PW12 further told this court that in a little while he saw the caretaker having arrested a suspect. According to PW12 the suspect seemed to have been beaten to death as she discovered later when she saw many people gathered within the compound. She was however not able to explain who inflicted the bodily harm to the deceased. She was also not able to tell which of the houses in the estate been broken into by the suspect.

PW13 JOHN MACHARIA was the investigating officer of this case. He told this court that in the month of May 2015 he was attached to Kitengela Police Station. He was entrusted with the investigations of the murder which had occurred at Kamulu Estate. He visited the scene, recovered the murder weapon and a rug, a trouser and t-shirt alleged to be the property of the caretaker. During investigations PW13 deposed that he interviewed and examined witnesses who recorded statements on what they were able to see and perceive of the incident. He also testified that a postmortem was carried out and the report produced as exhibit 7. After considering the investigations PW13 testified that a charge sheet was submitted to the Director of Public Prosecutions to prefer a charge of murder against the two accused persons. These are the witnesses the prosecution examined to prove the charge beyond reasonable doubt.

At the close of the prosecution case the accused persons were placed on their defence to answer the charge as provided for under section 306 (2) of the CPC.

DEFENCE CASE:

The 1st accused person elected to give a sworn testimony. He denied that he participated in the killing of the deceased. The accused made reference to the 9/5/2015 as having heard a series of noises outside but he never came out of his house to confirm the nature or sources of the screams. The accused admitted that he occupied House No. 5 within the plot where the alleged incident occurred. It was his testimony that the evidence by PW8 indicating as having been seen at the scene was a lie. In approaching the defence the accused introduced a new angle to the case by alleging that a bribe of Ksh.100,000 was demanded of him by the investigating officer PW13. According to the accused the bribe was to be paid as an inducement for the investigating officer to tamper with investigations and dismiss the case at that early stage without preferring a charge against him. The accused stated that he even facilitated the investigating officer with a credit airtime of Ksh.20/= for easier communication. In support of his defence the accused summoned the evidence of DW2 – RACHEAL MUSYIMI a sister to corroborate his defence. In the evidence of DW2 the family learnt of the accused arrest and commencement of police investigations. In their quest to find out the nature of the complaint they came into contact with PW13 seized of the file. DW2 further stated that in the ensuing conversation PW13 intimated to them that the case could be dropped on condition a bribe of Ksh.65,000 was paid by the family. According to DW2 the family was unable to raise the demanded amount and what transpired was an indictment of the accused for the offence of murder. This incident involving demands by PW13 to the accused and the family was however not reported to the police.

The rallying call by the accused defence to this court was to demonstrate that the offence against him was a fabrication initiated by the police when he failed to pay a bribe.

The 2nd accused in her sworn testimony denied participating in the killing of the deceased. The accused further told this court that although she was in her house at no time did she venture into the scene of the alleged murder.

SUBMISSIONS:

Mr. Kivuva learned counsel for the 1st accused submitted that the prosecution has not discharged the standard of proof of beyond reasonable doubt. According to Mr. Kivuva in the instant case the prosecution evidence is tainted with serious inconsistencies and contradictions as to the commission of the alleged offence. Mr. Kivuva further submitted and urged the court to pay special attention to the testimony of PW3 and PW8 who appeared to be the star witnesses to advance the case against the accused persons. Mr. Kivuva further contended that the investigating officer PW13 was a man out for a mission to fix the accused who failed to part with Ksh.100,000 as an inducement not to prefer any charge against the accused. It was learned counsel contention that when the accused and his family failed to raise the bribe money, they had to suffer the consequences of being charged with an offence he did not commit. Learned counsel further submitted that the ingredients of the offence of murder contrary to section 203 of the Penal Code have not been proved beyond reasonable doubt. He asserted that the failure by the prosecution to discharge that duty is fatal to the prosecution case. Learned counsel referred and cited the following authorities to buttress his arguments; ***Joseph Kimani Njau v Republic [2014] eKLR, Johnson Njue Peter v Republic [2015] eKLR, United States v Hartsfield 591 F.ed 945 (7th Cir. 2010), Republic v Domorital Lodir alias Lodur [2016] eKLR, Muiruri & Others v Republic [2002] 1KLR 274, John Mwangi Kamau v Republic [2014] eKLR, Karanja & Another v Republic [1990] KLR, Erick Onyango Ondeng' v Republic [2014] eKLR, Nzuki v Republic [1993] 171.***

Learned counsel argued that issue like identification of the accused person was not settled in this case. Learned counsel contended and maintained that real culprit who was caretaker has not been arrested and indicted with the offence. According to learned counsel the possibility that the accused killed the deceased has not been demonstrated by the prosecution to warrant a verdict of guilt or conviction for that matter. Learned counsel urged this court to resolve the benefit of doubt in favour of the accused.

On the other hand Mr. Ochieng counsel for the 2nd accused submitted that the essential ingredients of the offence of murder are non-existent against the accused. In the submissions of Mr. Ocheing the prosecution case is only anchored on the testimony of PW3. Learned counsel contended that PW3 who came out clearly that she lied to the police when recording statement on the incident cannot be trusted. Learned counsel made reference to a series of statements amounting to three which PW3 submitted to the police. The issue relating to these statements according to learned counsel was the variance in their content. The evidence which finds to incriminate the accused person is tainted with inconsistencies incapable of establishing the case beyond reasonable doubt.

SUBMISSIONS BY THE STATE:

Mr. Akula, the learned prosecution counsel appearing for the state submitted and supports the case in favour of the prosecution. According to learned counsel all the prosecution witnesses by corroborative evidence proved that the deceased died in the custody of the accused persons and another not before court. He further submits that the accused persons did not controvert the testimony advanced by the prosecution witnesses on how the deceased died. The prosecution counsel further adds that PW3 and PW8 were some of the eye-witnesses to the scene who saw the accused persons assaulting the deceased. It is further learned counsel for the prosecution argument that the circumstances of the offence proved that the accused persons had the complicity with another in committing the crime. The learned prosecution counsel invited the court to appraise the evidence in totality which places the two accused persons at the scene of the crime of murder. In support of his submissions learned prosecution counsel referred the following cased; ***Republic v Daniel Anyango Omoyo [2015] eKLR, Republic v Godfrey Ngotho Mutiso [2008] eKLR, Morris Oluoch v Republic Cr. Appeal No. 47 of 1996, Republic v Tubere***

S/O Ochen [1945] 12 EACA 63.

In view of the foregoing the learned prosecution counsel urged this court to find that the burden of proof has been discharged beyond reasonable doubt against the accused persons to warrant a verdict of guilty and conviction for the offence charged.

ANALYSIS AND DETERMINATION:

I have considered the prosecution key witnesses, the defence testimony, submissions by Mr. Kivuva and Mr. Ochieng on behalf of the 1st and 2nd accused persons respectively. In the same evaluation the learned prosecution counsel aforesaid submissions in support of their case has also been taken into account. It is therefore important in the case at hand to consider the ingredients of the offence and the relationship with the evidence. It would also be useful to make a finding whether the prosecution have discharged the burden of proof beyond reasonable doubt.

The accused persons are jointly charged with the offence of murder contrary to section 203 of the Penal Code. It reads:

> **"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."**

As stated in the case of ***Republic v Andrew Mueche Omwenga [2009] eKLR:***

> **"It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:**
>
> > **(a) The death of the deceased and the cause of that death.**
> >
> > **(b) That the accused committed the unlawful act which caused the death of the deceased; and**
> >
> > **(c) That the accused had the malice aforethought."**

THE STANDARD OF PROOF:

This principle on the standard of proof of beyond reasonable doubt in cases of this nature is well illustrated in the case of ***Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373*** by none other than **Lord Denning** who stated as follows:

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

In ***woolmington v DPP [1935] AC*** the court held interalia:

> **"The presumption of innocence is the most important thing in criminal law and cannot be ignored. The burden of proof in criminal matters is that the prosecution must prove the defendant's guilt beyond reasonable doubt."**

Lord Sankey stated as follows:

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

In our section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya does provide:

> **"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist."**

The principles elucidated in ***Miller Case*** and ***Woolmington Case (Supra)*** shall apply in this case because Kenya belongs to the English Common Law System. The first shot having outlined the mandate on the prosecution is to consider each singular element of the offence under section 203 of the Penal Code whether the burden of proof has been fully discharged beyond reasonable doubt.

(a) The death of the deceased:

The prosecution is under a duty to prove that Nicholas Kamonde Joseph is dead. The death of the deceased can be proved by medical evidence or other cogent circumstantial evidence. See the principle in the case of ***Republic v Mumbi S/O Ipopo [1996] 13 EA CA, Benson Ngunyi Nundu v Republic Cr. Appeal at Nairobi No. 171 of 1984.*** There is no dispute as to the death of the deceased. The prosecution witness PW1 Assumpta Nthenya, the mother to the deceased narrated to this court how she began the journey of searching for his missing son the deceased. The search led them to the City Mortuary where herself and the family identified the deceased. This was also confirmed by the investigating officer PW13 John Macharia. According to the postmortem exhibit 6(a) prepared on examination of the deceased by PW9 Edgar Amunga, in his evidence the body examined and an autopsy report prepared was that of the deceased aged 24 years. According to PW9 the examination revealed the deceased suffered extensive subgaleal haematoma at the occipital region and fracture of the right occipital. These injuries occasioned massive subdural haemorrhage. The pathologist recorded the cause of death as head injury due to blunt trauma. PW10 PC Kieni visited the scene at Kitengela where he took various photographs of the deceased lying in an open field. The photographs admitted in evidence depicted positively to be that of the deceased person. PW8 David Muchasi a security guard at a nearby plot he alluded to the fact of seeing a body of human being dragged from a gate to the outside field where the residents also dump their garbage.

Going by this evidence i am satisfied that the prosecution has proved the case on the death of the deceased beyond reasonable doubt.

(b) The second ingredient is whether the death of the deceased was unlawful caused:

In the book on Criminal Law [2016] by Law Africa authored by **William Musyoka J pg 300 at 2(a)** – the ***actus reus*** for the offence has two elements:

> **(a) The act or omission; and**
>
> **(b) The result or consequences of the act or omission.** The Hon. Judge goes on to state that **causation is a central issue in the definition of murder.**

Section 213 of the Penal Code does define acts and various circumstances which death can be inferred and accused held responsible to include where:

(a) He inflicts bodily injury on another person and as a consequence of the injury the deceased undergoes treatment which causes his death.

(b) The accused inflicts injury on another which would not have caused death if the deceased fails to get proper meditation and he dies as a result.

(c) He by any act hastens the death of the deceased.

(d) His acts or omission of the person killed or of other persons.

It is trite that death is presumed unlawful unless caused by natural causes, accident, advancement of criminal justice, in defence of property or person or is excusable by law. See ***Guzambizi Wesonga v Republic [1948] 15 EACA 63***. The prosecution is under a duty to prove that the accused person before court is criminally culpable for the act leading to the death of the deceased. That is what i referred to in the opening statement as the *actus reus* of the offence literately translated to English as the act of killing.

The starting point on the aspect that the death of the deceased begins with his sudden disappearance from home on 8/5/2015 as stated by the parents PW1 and PW2 respectively. It is further the case for the prosecution by PW3 a resident of Kamulu Estate who spotted a young man being interrogated by the caretaker as a suspected thief. As at the time PW3 saw the young man, he was pleading with the interrogators to be spared including surrendering his mobile phone so that they could call his father PW2. That plea was never responded to by his tormentors. PW8 who introduced himself as a security guard in the nearby plot to where this death is alleged to have occurred told this court another dimension of the case. The reference date and time as per PW8 was between 8th and 9th May 2015 more specifically at 4.00 hrs in the morning. According to PW8 this hour there was so much commotion from the neighbouring plot which forced him to proceed there and find out whether it's something he could help. PW8 further testified that on arrival at the scene a young man seated down was being interrogated and being beaten with a piece of wood. The young man who was later became the deceased as per PW8 was dragged out of the plot and his body dumped next to the garbage site. PW8 added that the deceased was being beaten at close range by his attackers and when they were done with their mission he was thrown into an abandoned field. The nature of the injuries suffered were multiple injuries targeting the abdomen, face, lumbar region and the head. The government analyst PW4 who conducted DNA profile to determine the origin of the blood stained piece of wood confirmed a connection between the blood stained wood and the blood sample of the deceased. The unlawful acts against the deceased as defined under section 213 (ii) of the Penal Code were multiple serious harm inflicted without any exposure to any form of treatment caused the death of the deceased.

In the case of ***Republic v Tabulayinka S/O Kirya and 3 Others [1943] 10 EACA***, the circumstances of this case were such that the deceased was a suspected thief who was set upon and assaulted by several people. The four appellants moved the Court of Appeal to reconsider their case at the end of it, the court held that it would be sufficient that the cumulative effect of the beating carried out by the different accused was such as would probably result in death or grievious harm. The court held each one of them responsible for the unlawful acts for the other done in furtherance of their common purpose. See also ***Criminal Law by William Musyoka J Law Africa 2nd Edition 2016 at pg 307.***

In the circumstances of this case the assailants were armed with blunt object being a nailed piece of wood. The components of the unlawful acts were such that the victim was severerally hit on target until he took his last breathe. The critical consideration in this can be inferred by the conduct of the assailants before, during and after inflicting bodily harm. The people responsible went to such extent of dragging the body from the actual scene to a garbage dump site. This had the sole purpose of concealing the fact that the crime was committed within Kamulu estate. The use of weapon to inflict injuries as seen by PW3 and PW8 is consistent with the postmortem examination by the pathologist. That the injuries to the head which caused subdural haemorrhage resulted in the death: an act caused death if the death is the direct, natural and probable consequence given are; and that the death would not have occurred without the act.

From the evidence and the legal principles i hold that the prosecution has discharged the burden of proof

beyond reasonable doubt on the 2nd ingredient. The deceased death was unlawfully caused.

(c) The third ingredient is that of malice aforethought:

The final ingredient requiring proof of in a murder charge is that of *mensrea*. This is the mental element and in law is defined as malice aforethought. Malice aforethought is defined under section 206 of the Penal Code as follows:

> **(a) An intention to cause death or to do grievious harm to any person whether such person is the person actually killed or not.**
>
> **(b) Knowledge that the act or omission causing death will probably cause the death of or grievious harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievious bodily harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.**
>
> **(c) An intention to commit a felony.**
>
> **(d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempted to commit a felony.**

As defined under section 206 of the Penal Code intention may be inferred from the facts and circumstances of each particular case. This was the principle in the persuasive authority of ***Stanton v the Queen [2003] 77 ALJR115.*** The court observed as follows in the following passage:

> **"In the circumstances of the present case, bearing in mind the nature of the weapon involved, and the range from which it was discharged, if the appellant intended to shoot the victim, then his intention was obviously to kill, rather than merely to cause grievious bodily harm. Furthermore, although defence counsel at trial put an argument to the effect that the shooting was accidental, in the sense that it was not a willed act, the argument had nothing to commend it. The appellant's best hope was that the jury might regard the case as one of manslaughter."**

In addition the case of ***Pembe v Republic [1971] 124 CLR 107 Barwick CJ*** addressing the issue on malice aforethought and how to infer the accused's state of mind from what the accused has actually done and the prevailing circumstances. The court held:

> **"The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind, that concern as to the accused's state of mind could only be founded on inference including a consideration of what a reasonable man might or ought to have foreseen."**

The principal approach in determining malice aforethought in my view is manifested when a man intends to murder or to cause grievious harm. In doing so he has to have in his mind a fixed purpose to accomplish that desired objective of causing death or inflicting serious harm. Therefore the intention of the accused person must be such that not only did he foresaw but also willed the possible consequences of his unlawful actions.

This case introduces the element of foresight on the part of an offender and his continuation to inflict harm to the victim and the nature of the weapon used to bring his conduct within malice aforethought.

How have we faired in our jurisdiction in giving effect to interpretation on malice aforethought under section 206 of the Penal Code. A sample of a few decisions on this matter will suffice. In the case of Republic Godfrey ***Ngotho Mutiso [2008] eKLR, James Masomo Mbatha v Republic [2015] eKLR.***

This rational set out by the Court of Appeal is that the nature of injuries and part of the body targeted against the victim are other circumstances where malice aforethought can be presumed.

As laid down in the classic case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** it was held that it is the duty of the court in determining whether malice aforethought has been established to consider, ***"the nature of the weapon used, the manner in which it is used, the part of the body targeted and injured, the conduct of the accused before, during and after the attack."***

In the case of ***Isaak Kimautai Kanuachobi v Republic Cr. Appeal No. 96 of 2007 UR*** the Court of Appeal held as follow on malice aforethought:

> **"There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied when it is shown that he intended to cause grievious bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, robbery) or when resisting or preventing lawful arrest even though there was no intention to kill or cause grievious harm, he is said to have constructive malice aforethought."**

On this ingredient i reiterate the submissions by Mr. Kivuva for the 1st accused, Mr. Ochieng for the 2nd accused and Mr. Akula for the prosecution. The question of importance however is whether there is identifiable malice aforethought. In the context of section 206 of the Penal Code and the decisions i have made reference to. It is therefore necessary to highlight the prosecution evidence contended to on this ingredient.

The common feature of the versions by the prosecution witnesses prescribe that the deceased left home on 8/5/2015. PW1 and PW2 confirmed that the deceased stays with them at their residence in Athi River. They did not seem to account how he found himself at Kamulu Estate in the early hours of 8th – 9th/5/2015. PW3 and PW8 confirmed and corroborated the circumstantial evidence that the deceased appeared on the compound and the caretaker spotted him immediately. The caretaker took action by apprehending the deceased under the pretext that he was a suspected thief. It does not appear from the testimony of PW3 that the deceased had been found on any of the houses within Kamulu Estate. How the caretaker came to brand the deceased as a thief and attracted the attention of the tenants at Kamulu Estate did not come out clearly from the evidence. However that as it may be PW2 and PW8 stated to have seen the caretaker arm himself with a piece of wood which he repeatedly used to hit the deceased. There is evidence of PW3 that the deceased kept on pleading to the assailants but nothing was done to spare his life. The murder weapon a piece of wood was recovered from the scene. The piece of wood was subjected to the DNA analysis by PW4 who produced the analyst report. The positive finding of the report was the nexus between the blood stains in the piece of wood with a DNA match with the blood sample of the deceased. That therefore demonstrates that whoever killed the deceased used the piece of wood to inflict grievious harm. PW3 and PW8 evidence points at this piece of wood as the one used to inflict harm against the deceased. The deceased is said to have sustained serious harm to the head. According to the pathologist the cause of death was head injury due to blunt trauma. It is not in dispute that the head injury is a vulnerable part of the body. As stated by PW8 the conduct of the assailants was that the body of the deceased was dragged from Kamulu compound to a dump site next to the plot. The assailants literarily threw the deceased to the site as part of garbage.

The prosecution therefore failed to establish malice aforethought on the part of the accused persons jointly or severally. What emerges from the circumstances of this case is a situation where the 1st accused participated by encouraging and assisting the caretaker in an unlawful act of assaulting the deceased. In reference to the testimony of PW3 and PW8 the 1st accused went out of his house and did join a man identified as a caretaker in a violence attack against the deceased.

In considering the effect of the conduct of the 1st accused he was at a position to recognize the risk of escalating violence to the point that death of the person resulted. It should be clearly understood and do make it abundantly clear that if indeed the investigating officer PW13 demanded a bribe the accused and family had an avenue of reporting to the superiors or any other agency like EACC. This court observed the narrative by the accused and his witnesses on this issue but could not find an iota of truth in it. The fact of the matter is that the accused and his witnesses seemed to understand bribery is a crime but did nothing to report it to the crime agencies. There is no truth or credibility that the accused is in court because he failed to offer a bribe to PW13. The same is therefore rejected by this court as a lie which was neither persuasive nor cogent.

The salient features of this case are that the 1st accused is a tenant of Kamulu estate. He was attracted by the commotion occurring within the compound involving their caretaker and another person. The accused sought and got out of his house to confirm the nature of the disturbance. Essentially at the spur of the moment as supported by the testimony of PW3 and PW8 he joined the other person in beating the deceased. It is clear that the assault resulted in the death of the deceased as confirmed from the postmortem report admitted as exhibit 7. The 1st accused seemed to be responding to a situation under a mistaken belief that the deceased was a suspected thief.

Criminal liability is determined objectively. The relevant acts of omission or commission are that the 1st accused joined another apparently under the impression of punishing a suspected thief. He did not bother to inquire into the background of the incident from the alleged caretaker. He acted and omitted to do any act for the purpose of restraining that other person from furthering his unlawful act of inflicting harm.

A probable consequence of the accused conduct on this material day as i apprehend the law is that he was expected to foresee this particular act was likely to occasion harm. The accused did not withdraw from the prosecution of the unlawful purpose although he was not the original author. He had the opportunity to prevent the commission of the offence against the deceased.

The duty to prove intention and particular knowledge as defined under section 206 of the Penal Code as to malice aforethought is always cast on the prosecution when i review and evaluate the evidence of PW1 – PW13 together with the arguments by the prosecution counsel the same has not been discharged beyond reasonable doubt. The accused person seemed to have proceeded on the assumption of punishing a stranger or purported thief in their estate. It was unreasonable for the accused to use deadly force a suspect based on suspicion. The intrusiveness of seizure by means of excessive force and inflicting physical harm was unmatched to a victim who was not found committing any offence or armed in anyway. A long standing general principle of law is that any one may lawfully use force to repel or arrest a criminal threatening property. The law is clear that there are limits to the use of force in this context.

By analyzing the present case i find the following elements missing to have justified the killing of the deceased through excessive force:

(a) There was no property identified capable of being stolen at that particular day by the accused.

(b) There was no accompanying threat to any person within Kamulu estate from the accused.

(c) The identity between the supposed owner's property and the accused was not ascertained by the assailants.

(d) At common law there are three main forms of attack on property warranting use of forceful defence.

(1) Theft.

(2) Criminal damage.

(3) Criminal trespass such as, house breaking/or burglary.

The law does not envisage that merely crossing a boundary might not be enough to invoke force in defence of property. There has to be an *actus reus* involving breaking, entry, knocking on a door, lifting a latch etc. ***Archbolds Criminal Pleading, Evidence and Practice [1922] Edition*** puts more succinctly:

> **"In defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self defence a man who attacks him personally."**

In reaching a conclusion to attack the deceased none of these elements were present to provoke the accused to act. I have no forcible finding that the use of force was of such a magnitude and lethal against the factor that the deceased posed any immediate danger to the safety or property to Kamulu residents.

The facts of this case in my mind seem to fall within the legal proposition as discussed by the Court of Appeal in the case of ***Nzuki v Republic [1993] KLR 171*** where the court observed:

> **"Malice aforethought is a term of art and emphasized that before: before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:**
>
> **(i) The intention to cause death;**
>
> **(ii) The intention to cause grievious bodily harm;**
>
> **(iii) Where the accused knows that there is a serious risk that death or grievious bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievious harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. See Hyman v DPP [1975] AC 55."**

So when does a charge of murder get substituted to manslaughter? In the persuasive case of ***DPP v New Burry and DPP v Jospres [1977] AC 50*** the Court of Appeal have set out what constitutes the law on involuntary manslaughter or unlawful act in the following passage:

> **"(a) An accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that act in advancedly caused death.**
>
> **(b) That it was necessary to prove that the accused knew that the act was unlawful or dangerous.**
>
> **(c) That the test was the objective whether sober and reasonable people would recognize that the act was dangerous and not whether the accused recognized its danger."**

My reading and understanding of the ***Nzuki case (supra)*** does present analytical difficulties. These problems stems largely from the definition ambiguity surrounding malice aforethought. I am of the conceded view that after going through various decisions by superior courts on what constitutes malice aforethought one can easily see inconsistence application. I also cannot rule out that as a trial court I may have also fallen into the same trap of inconsistency in applying this concept appropriately and with precision.

I still hold the position that despite the development of our jurisprudent on this issue the common law

definition is quite clear and consistent. Under common law malice aforethought encompasses a depraved or evil mental state, or premeditation beyond mere intent to kill or cause grievious harm. It is instructive to observe that from the analysis of the evidence by the prosecution the facts of this case do not manifest malice aforethought. The offence proven conclusively is that of manslaughter contrary to section 202 of the Penal Code as illustrated in the elements from the case of ***DPP v Newbury (Supra).***

(d) The fourth element – placing the accused at the scene:

In the present case I have weighed the testimony of PW3 and PW8 on recognition of the 1st accused at the scene of the murder and his denial that he never ventured out of his house. It is trite that the trial court before relying on the evidence of recognition and identification should thoroughly examine the surroundings circumstances which gave rise to the accused being identified positively.

In a plethora of cases the superior courts have set out clear guidelines and principles on identification of a perpetrator to the crime. The court of Appeal in the case of ***Wamunga v Republic [1989] KLR 426*** stated as follows:

> **"It is trite that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

The identifying characteristics are will illustrated in the case of ***Republic v Turnbull & Others [1976] 3 ALL ER 549*** where the court held:

> **"The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in anyway? Had the witness ever seen the accused before? How often? If only occasionally, had at any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by then and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness purporting to recognize someone when he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

It is trite that where the eye witnesses account of the incident is found credible and trustworthy it remains the best evidence to prove the charge beyond reasonable doubt. There would be no need of pointing to other alternatives or possibilities as to the commission of the offence. The consistency and credibility of PW3 and PW8 as it relates to the 1st accused participation in the assaulting of the deceased has not been rebutted by the defence.

Based on the forgoing principles on the issue of recognition and identification on the case before me it is covered by the evidence of PW3 and PW8. PW3 says that she saw the 1st accused in company of the caretaker dragging the body of the deceased outside the gate. The foundation of PW3 testimony was that she knew the 1st accused as a neighbour within Kamulu estate. It is not disputed by the accused that he occupied house No. 5 adjacent to PW3. According to PW3 during the occurrence of this incident there were screams and noises causing a commotion within the plot where they stayed with the 1st accused. That nature of the disturbances was such that she had to go out of her house to confirm the source. That is when she came into direct contact with the 1st accused and the deceased. That is when she was able to see the person being beaten on the ground and the assailants who included the 1st accused.

I am satisfied that PW3 knew the accused's voice and also his visual features by virtue of the relationship as tenants of the same plot. The testimony by PW8 David Muchasi, a security guard in a plot

neighbouring Kamulu estate likewise states that on the material morning while he was on duty he heard screams which forced him to leave his work station to verify the source. That is when he moved to the scene only to notice the 1st accused in possession of nailed piece of wood beating the deceased. PW8 was able to identify the 1st accused and another referred as a caretaker as the ones involved in the acts of assault upon the deceased.

I have considered the prevailing conditions and the fact that both witnesses were known to the 1st accused prior to this incident each of them recognized the 1st accused positively.

As far as PW3 and PW8 evidence goes there are no surrounding circumstances to impede or obstruct them from clearly identifying the 1st accused and placing him at the scene of the crime. The accused defence that he was in his house but never bothered to go out to the scene has been dislodged by the testimony of PW3 and PW8. This is a case where the accused has been sufficiently and properly identified as one of the perpetrators of the crime. The only missing link being prove of malice aforethought.

In this regard the prosecution has proved beyond reasonable doubt:

(1) The death of the deceased.

(2) That the death of the deceased was done impulsively without malice aforethought.

(3) That the unlawful acts of assault by the accused demonstrated that he cared less as to the sanctity to human life.

(4) That the unlawful acts resulted in causing fatal injuries to the deceased.

In my considered view i am satisfied that the charge of murder contrary to section 203 fell short of the threshold as required by law of prove beyond reasonable doubt. However it is clear that the facts proven are all in the elements of manslaughter contrary to section 202 of the Penal Code.

As a result i find the 1st accused guilty of manslaughter contrary to section 202 of the Penal Code and convict him accordingly.

I now turn to the participation on the part of the 2nd accused in killing of the deceased person:

The scope of the 2nd accused involvement is through the evidence of PW3. According to PW3 she claimed to be an eye witness to the commission of the offence. The evidence of PW3 is to the effect that on 8/5/2015 she was at Kamulu estate where the alleged incident took place. In the course of the early hours PW3 told this court that she heard noises outside which made her leave the house to where the caretaker was with a young man. As a young man cried for help PW3 stated that the 2nd accused emerged and screamed in a loud voice. It is also the evidence of PW3 that she went back to her house. During cross-examination by the defence counsel PW3 admitted recording three sets of witness statements with the investigating officers. In one of the statements PW3 admits lying to the investigating officer as to the circumstances how the deceased met his death. PW3 further testified that in the initial statement she made no positive reference to the 2nd accused until at a later stage during the recording of the third statement. The piece of evidence implicating the 2nd accused by PW3 reads as follows; *(I saw one lady took away something from a man outside the plot and hit the deceased).*

I have carefully considered the substantial part of the evidence by PW3 which turns out to be indirect conflict with evidence of other prosecution witnesses. There is the evidence during examination in-chief where PW3 only refers to the 2nd accused as raising an alarm without any reference to grapping an item and hitting the deceased. The later part of hitting the deceased was introduced by PW3 during cross-examination by Mr. Ochieng learned counsel for the accused. It was highlighted by the learned counsel

that PW3 recorded various distinct statements on the same set of facts. There was no sufficient cause from the prosecution nor the investigating officer why it was desirable for PW3 to record different statements on diverse dates. I agree with learned counsel that PW3 evidence consist of glaring contradictions on materials and facts which go to the core of the prosecution case against the 2nd accused. My take in this piece of evidence differs fundamentally on what PW3 told this court about the 1st accused involvement.

Having examined the entire statement by PW3 on oath I find the whole of examination in-chief evidence to be in direct conflict she gave during cross-examination. What therefore the glaring inconsistencies and contradictions did was to impact on the credibility and reliability of the testimony by PW3 to meet the standard of beyond reasonable doubt against the 2nd accused. The contradictions in the evidence of PW3 are so material that it renders it unreliable to implicate the accused with the offence of murder.

As held in the case of ***Christian S/O Kaate and Rwekiza S/O Bernard v Republic [1992] TLR 302:***

> **"The accused out to be convicted on the strength of the prosecution case."**

In the case of ***Joan Chebicha Sawe v Republic Cr. Appeal No. 2 of 2002*** the court held:

> **"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. As this court made clear in the case of Mary *Wanjiku Gichira v Republic Cr. Appeal No. 17 of 1998 UR:***
>
> **"Suspicion however strong cannot prove a basis for inferring guilty which must be proved by evidence."**

This standard of proof has been well illustrated in the case of ***Miller v Minister of Pensions (Supra)*** and ***Woolmington v DPP (Supra).*** The prosecution case fell below the required threshold of proof beyond reasonable doubt.

The final legal issue which arises in respect with the evidence is that of common intention:

The applicable principle of common intention can be deduced in the case of ***Dickson Mwangi v Republic Cr. Appeal No. 314 of 2011 eKLR*** the court held:

> **"Where there are two or more parties that intend to pursue or to further an unlawful object by unlawful means and so act or express themselves as to reveal such intention it implies a prearranged plan although common intention can develop in the course of the commission of an offence."**

Under section 21 of the Penal Code it states:

> **"Where two or more persons for 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."**

In Republic ***Taburayinka S/O Kirya [1943] EACA*** the court held:

> **"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself with the assault."**

When a criminal act is done by several persons in furtherance of the common intention under section 21 of the Code each of the person is held liable for the result from such acts as if the act was done by him alone.

The facts and issues in David Makali case:

The 1st accused prosecution arose out of a crime that was committed at Kamulu estate. The accused happens to be a tenant in the same estate. The facts were that the accused was awakened by a commotion apparently from the caretaker of the plot. His curiosity made him get out of the house to the vicinity of the incident next to the gate of the estate. In the course he was confronted by a victim being assaulted under the guise that he was a suspected thief. The accused then from evidence of PW3 and PW8 joined in violently attacking the deceased.

At the end of it all when he realised that the victim had succumbed to death he joins another not before court to remove the body from the compound to another location in another plot and dumped it. The accused did not bother to report this incident to the police nor any other law enforcement agency. There is cogent and credible evidence that the accused was present at the scene of the crime not as a by stander but a participant. His participation was of such a sufficient degree that i found him blameworthy as the co-offender.

In a nutshell the four elements of section 21 of the Penal Code –

(1) A criminal act.

(2) Participation in the doing of the unlawful act.

(3) A common intention which developed the moment the accused arrived at the scene.

(4) The unlawful act done by the accused was in furtherance of the common intention to commit the crime.

By following the caretaker the accused signed up to this goal of causing death or grievious harm. There is therefore mental element in complicity.

As regards the 2nd accused i find no satisfactory evidence that she engaged in one common purpose with the 1st accused or the caretaker. The prosecution failed to present evidence that the 2nd accused had the knowledge or consent of the others that an unlawful act was in the making or about to be committed.

What i was looking for from the evidence are acts done in some manner in furtherance of the common intention. There is variance and grave inconsistencies from the star witness PW3 in respect of the 2nd accused that impairs its velacity and reliability. I think somewhere along the way PW3 introduced the 2nd accused to the scene but she never went far enough to prove fault beyond reasonable doubt.

In this regard i resolve the benefit of doubt in favour of the 2nd accused. I hereby acquit her of the offence of murder contrary to section 203 of the Penal Code. She is at liberty unless otherwise lawfully held.

As for the 1st accused i enter a verdict of guilty and convict him for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

Dated, delivered and signed in open court at Kajiado on 14th day of July, 2017.

…….

R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Sekento for Kivuva for the 1st accused present

Mr. Ochieng for the 2nd accused

Mr. Akula for the DPP present

Mr. Mateli – Court Assistant