REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 79 OF 2005

LESIIT, J.

REPUBLIC.....PROSECUTOR

VERSUS

PETER GITHONGO MAINA.....1ST ACCUSED

ELIZABHAN NJOROGE KURIA…….2ND ACCUSED

DUNCAN THUKU MWANGI *ALIAS* KIMANI….3RD ACCUSED

JUDGMENT.

1. The accused persons **PETER GITHONGO MAINA, ELIZABHAN NJOROGE KURIA** and **DUNCAN THUKU MWANGI ALIAS KIMANI,** hereinafter the 1st, 2nd and 3rd accused respectively are charged with one count of Murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

> **"On the 2nd day of April, 2005 at Kibera Slums in Nairobi Area within Nairobi Province, jointly with others not before court murdered STEPHEN MUGO MUTOTHORI."**

2. This case was started by Ombija, J, as he then was on 3rd March, 2011. The honourable judge heard the entire 12 witnesses for the prosecution before he recused himself from the case. Only PW12 was on his feet in exam-in-chief when I took over the trial under **section 201(1)** and **section 200** of the **Criminal Procedure Code (CPC),** on the 30th June, 2015. The accused persons, in exercise of their right under **section 200** of the **CPC,** applied to have two witnesses re-called, that is PW6 and PW9, and to have one John Mbogo and one Peter Muoki who were in the witness statements bundle supplied by the prosecution called to testify. None of these witnesses were traced. Therefore after PW12 was examined both in-chief and in cross-examination, the prosecution closed its case.

3. The accused persons gave unsworn statements. Only the 3rd accused called one witness, the rest called none.

4. The prosecution case was to the effect that on the 2nd April 2005, the deceased was shot dead by one person who was in company with another. The deceased had just entered his vehicle ready to drive off when a man knocked at the driver's window where he was seated and ordered him out. When the

deceased came out of his vehicle, he was asked why he was causing trouble before he was shot. That incident took place at around 7.30 to 8 pm outside the bar owned by the deceased. He died at the scene of attack.

5. There were three eye-witnesses of this attack. PW1, 2 and 3. Of these only PW1 and 3 identified the 3rd accused in an identification parade conducted later, as the one who shot the deceased.

6. The other evidence by the prosecution was that on 23rd September 2004, the deceased reported at CID Central Police Station in company with PW9 and another. The deceased reported that his life was in danger and that some people were conspiring to kill him. The deceased, a Co-Director of Kiambu Land buying company named his would be killers to PW7 as **Samwel Ngugi, Kariuki Njoroge, Peter Mungai, Peter Macharia Wambugu, Njagi Gatambia** and *alias* **Badii.**

7. PW7 who was one of the CID officers who received this report said that on 30th September, 2004 he visited the offices of the company and arrested **John Maina Kabere** *alias* **Badii** and **Peter Kanyangi Kianguki**. On 1st October 2004, PW7 arrested **Kariuki Njoroge** at the offices of Dandora Farmers Co. Ltd. On the same day the 1st and 2nd accused were arrested in Kayole. Eventually all these people were released without charge. PW7 claimed that he forwarded the file to the ODPP but that the deceased was murdered before investigations could be completed.

8. The accused persons gave unsworn statement. The 1st accused admitted that on 1st October 2004 he and the 2nd accused were arrested by officers from Central police Station in connection with threats on the life of the deceased. The 1st accused said that he and 2nd accused were implicated of conspiring to kill the deceased by two young people, one Peter Maina Mwangi and one John Mbogo Kangati. The 1st accused stated that after their release they sought the two young men through the Area Chief of Soweto where they live but they disappeared from the village.

9. The 1st accused stated that he was arrested on the 28th June 2005, following the death of the deceased. He denied being involved, either in planning to have him murdered, or in executing the murder.

10. The 2nd accused, just like the 1st accused, gave details of their arrest on 1st October 2004. The 2nd accused stated that he knew the deceased in 2002 when a former Councillor one Kamau Ngotho took him to the deceased's place. The 2nd accused said that he had gone to the deceased office to buy land which he did and was given documentation, an Allocation Plot document which he produced as D. Exht. I.

11. The 2nd accused stated that the Chief of Soweto village made him Chairman of Operations and gave him very difficult work, to keep order in the village. It included wiping out the use and sale of illicit brew, bhang and drugs and other illegal activities, a work he undertook with zeal. The 2nd accused said that those behind the illicit brew and drugs included Peter Maina Mwangi (PW9) and John Mbogo Kangati. He said that when he was arrested on 1st October 2004, he knew the two were the ones behind the allegations and that they were fighting back for the efforts he had made to wipe out their illicit trade in Soweto. He said that they disappeared from the village never to be seen again.

12. The 2nd accused stated that he requested to see the DCIO after he and the 1st accused had been held in Police custody for 2 days. He said that it was only after he saw him that he secured their release from custody. He stated that he was not questioned again about the matter until his arrest in connection with this case. He denied involvement

13. The 3rd accused in his defence stated that he was employed in Kayole, in an office where his duties entailed cleaning and welcoming the customers. He said that the office sold and bought plots. The 3rd accused stated that his wife, DW4, was sick and expectant and that he had requested his boss to allow him leave office by 4:30pm so that by 5pm he would be home. He stated that his wife delivered on 17th March, 2005 and that he continued helping her as she was too weak to work.

14. The 3rd accused stated that on the 2nd April, 2005 he woke as usual, prepared breakfast then left for work. At 4pm he left office for home. That on reaching home, he found there was no water and so he drew some until 6:30pm. He then cooked, saw news before the family ate and slept. He said he did not leave his house again that night. The 3rd accused stated tha he was arrested on 18th July, 2005. He said that on 22nd July, 2005 an ID parade was conducted where PW1and 3 identified him by touching. He said that he did not know the deceased, did not carry out any murder against him and that he was innocent.

15. DW4, the wife of the 3rd accused told the court that she had a very difficult pregnancy from the 7th month, was very weak and that it was her husband who took care of all her needs. She testified that the 3rd accused went home at 5pm on the 2nd April, 2005, and that he did not leave again until the next day as he cooked supper and washed clothes before they retired to bed for the night.

16 The accused persons are charged jointly with one count of murder contrary to section 203 of the Penal Code. Murder is defined under that section thus:

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

17. The burden of proof lies with the prosecution to prove that the accused person attacked the deceased causing him injuries as a result of which he died. The prosecution must prove that at the time the accused attacked the deceased he had formed an intention to either caused death or grievous harm to the deceased.

18. 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 constitutes malice aforethought under **section 206** of the penal code. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms:

> **"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**
>
> > **(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;**
> >
> > **(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."**

19. The accused are charged jointly for the offence. The prosecution must adduce evidence to establish that they acted with a common purpose as provided under **section 21** of the **Penal Code** which provides as follows:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

20. I have carefully considered the evidence adduced by the prosecution and also the defence in this case. Let me start with what is not controversial which is that the deceased was shot dead outside his bar and restaurant in Kibera, Nairobi as he prepared to go home. PW4, the village area of Kibera slums said that

he collected spent cartridges at the scene and handed them over to the OCS Kilimani Police Station. The OCS was not a witness. The cartridges were not shown to PW4 to identify them.

21. There was however the evidence of PW5, CIP Langat the Ballistic expert who said that he received the cartridges vide Exhibit Memo Form, P. Exh. 3. He identified them in court as P. Exh. 1 and 2. He however never made any report as the firearm was never recovered.

22. An autopsy on the body of the deceased was carried out by Dr. Wasike, but the report produced in court by Dr. Ndegwa, PW11 in the case. PW11 testified that according to the Post Mortem Report the body had the following injuries:

(i) one entry wound on the occipital region measuring 0.5 cm in diameter;

(ii) exit wound on the fore head measuring 1 cm in diameter;

(iii) entry wound on the right neck, posteriorly measuring 0.5 cm in diameter; and

(iv) an exit wound on the right cheek measuring 1.0 cm in diameter.

(v) Internally the deceased was found to have multiple fractured skull, brain laceration and brain haemorrhage.

23. PW11 testified that after the examination the doctor formed the opinion that the cause of death was head injury following gunshot wound.

24. The other evidence adduced which is of importance is the P3 Form on the examination of the 3rd accused after his arrest. Dr. Kamau examined the 3rd accused and assessed his age as being 21 years old and as having no physical injuries on his body. He also found him to be mentally fit. The 3rd accused age is significant because of descriptions made of the assailants by the eye witnesses. They said that the gunman and his accomplice were in their twenties. That description fits the 3rd accused age bracket. The report was P. Exh. 9.

25. I have also considered the submissions by all counsels. From the submissions and the evidence adduced before me I find that the issues in this case are as follows:

(i) Whether PW9 was an accomplice, and whether the evidence of PW9 was sufficient to sustain a conviction against the 1st and 2nd accused.

(ii) Whether the prosecution proved a common intention between the accused persons to commit this offence.

(iii) Whether the prosecution has proved the motive to have the deceased murdered, and whether that motive is proved as against the accused persons.

(iv) Whether the evidence of identification by PW1 and 3 was safe and correct for a positive identification of the 3rd accused, and whether that evidence could sustain a conviction.

(v) Whether the 3rd accused alibi defence creates doubt in the veracity of the prosecution case.

(vi) Whether the prosecution failed to call crucial witnesses to testify, and if so, whether that is fatal to the prosecution case.

26. I will begin with the case against the 1st and 2nd accused. The evidence against the 1st and 2nd accused was given by a single witness who was PW9 in this case. PW9 identified himself as a hawker

within Huruma Estate. He also identified himself as a member of Kiambu Dandora Farmers Society. He testified that on 31st September, 2004 at about 6 p.m. he was in a meeting where 8 elders attended. Those elders included one Daton, one Gatabia Njoroge, one Peter Githango *alias* Cuba, one Njoroge who was identified as 2nd accused and one Githongo who he identified as the 1st accused, together with others he said he could not remember. He said that he knew the 1st and 2nd accused for one year prior to that meeting.

27. PW9 testified that the agenda for the meeting was to remove the chairman of the company, the deceased in this case because he was selling some parcels of land without the knowledge of the members. He said that the conclusion that was reached at that meeting was that the deceased will be requested to relinquish the chairman's post and that if he declined he will be killed.

28. PW9 stated that on the next day which was on the 22nd September, 2004 he accompanied the deceased to Central Police Station where they reported the matter. He testified that he was also in the company of the police officer that on the same day proceeded to the land company offices in Kayole and arrested one *alias* Cuba, Gatambia Njoroge and Badii. PW9 testified that later on all of those who had been arrested were released by the police without charges. PW9 stated that on the 4thof April, 2004 at 9.am. the 2nd accused called him outside Badii's office and that he informed him that the bull that was refusing them to enter the shamba was removed. PW9 testified that he asked the 2nd accused for details. The 2nd accused told him that the bull was the deceased and that he had been removed by use of a gun. He said that he later learnt of the death of the deceased through local newspapers and following that incident he relocated from Kayole to Huruma.

29. In cross-examination, PW9 stated that there were actually two meetings held and that Badii was the one who organized both meetings. In cross-examination PW9 said that the 3rd accused was sent to call the people to the meeting. PW9 however denied being present at the meeting where the actual plan of elimination of the deceased was settled.

30. Apart from PW9 was the evidence of PC Mutemi, PW7 who was a CID officer from Divisional CID Central Police Station. PW7 stated that he was at the police station on 23rd September, 2004 when the deceased reported to them about the threat to his life. That report was recorded in OB no.50 of the same day.

31. PW7 testified that he recorded a statement from the deceased and in that statement the deceased named the would-be killers as former Directors of Kiambu Land Buying Company. PW7 stated that the deceased gave the names of those conspiring to kill him as **Samuel Ngugi**, **Kariuki Njoroge, Peter Muigai, Peter Macharia Wambugu, Njagi Gatambia** and alias **Badii**.

32. PW7 stated that on the 30th September, 2004 he visited the offices of Kiambu Land Buying Company and arrested two people Peter Githongo Maina and Njoroge Kirua. The same witness later changed his story after being recalled to testify and said that on the 30th September 2004, he arrested John Maina Kiabere *alias* Badii and Peter Kanyangi Kianguki. He stated that on 1st October, 2004 he arrested the directors of Dandora Farmers Co. Ltd i.e. Kariuki Njoroge and later the same day in Kayole he arrested the 1st and 2nd accused. PW7 testified that he sent the file to the office of DPP but before they could complete the investigations the deceased was murdered.

33. The names of the company associated to the deceased differed from the evidence of PW3, PW7, PW9 and indeed the accused persons. I did not find that inconsistency material to the prosecution case.

34. That was the only evidence against the 1st and 2nd accused. So the question is whether that evidence of PW9 was strong enough to sustain a conviction? PW9 told the court that he was in a meeting where discussions, inter alia, of eliminating the deceased were hatched. He claims that he did not attend one other meeting where the actual details of the elimination plan were perfected. PW9 is an accomplice, in my view. An accomplice is described in Thesaurus English Dictionary as, '***partner in crime; assistant;***

collaborator; co-conspirator; accessory'. Having sat at the meeting where deceased death was discussed makes PW9 a co-conspirator.

35. PW7 the Police Officer who received the deceased and also recorded a statement from him first of all contradicted PW9 as to the date the deceased reported the incident to them. While PW9 said he accompanied the deceased to make the report on the 22nd September, 2004, PW7 said that the report was made to his station on 23rd September, 2004 and entered in the O.B. of the same day. He produced the OB extract as P. exh. 6.

36. The other contradiction is really more a variation in evidence. While PW9 said he was with the deceased when he made the first report of the threat on his life to Police, PW7 who received the report could not re-call the names of the two people who accompanied the deceased to the station.

37. The other difference I noted in regard to the report made to the police by the deceased was pertaining to the names of those alleged to have conspired to cause the deceased death. PW7 testified that the names the deceased gave him were: **Samwel Ngugi, Kariuki Njoroge, Peter Mungai, Peter Macharia Wambugu, Njagi Gatambia** and *alias* **Badii.**

38. PW9 must have been the source of these names to the deceased as according to his evidence he took the deceased to the police to make a report concerning those conspiring to murder the deceased. In his evidence he said he attended only one of two such meeting, and that it was the very first one. He then gave the list of those present as eight (8) elders, then gave the following as their names: **Daton, Gatabia Njoroge, Peter Githongo** *alias* **Cuba,** and the rest that he could not recall.

39. A comparative examination of the two lists shows that there is no similarity in the names given to PW7 by the deceased and those given by PW9 to court.

40. The law on accomplice evidence is clear. The evidence of an accomplice must be treated with caution and would require corroboration in order to base a conviction on it. In the case of **NGUKU VERSUS REPUBLIC [1985] KLR 413** the Court of Appeal had this to say about accomplice evidence:

> **"In dealing with the evidence of an accomplice, the court should first of all establish whether the accomplice is a credible witness and thus look for some independent evidence as corroboration connecting the accused person with the offence."**

41. I have analysed the evidence of PW9 and evaluated it against the other prosecution evidence. I find that the credibility of PW9 is in doubt for reason of the inconsistency between his evidence and that of PW7.

42. I noted the remarks of the trial judge Ombija, J. after taking the evidence of PW9 to the effect that in his observation PW9 was a truthful witness. That conclusion cannot bind this court. It was made at trial, as the evidence of the prosecution was being given in evidence. The finding of this court after evaluating and analyzing the entire evidence is more conclusive in my view. I find that the evidence of PW9 was that of an accomplice and required first to be treated with caution, then to look for corroboration to support it. I have done both. I find no evidence which corroborates that of PW9.

43. The other issue was whether the prosecution proved a common intention between the accused persons to commit this offence. The prosecution evidence, in particular that of PW9 shows there was a conspiracy to have the deceased murdered. The conspirators were many as the evidence suggests. The failure to charge any of possible accomplices does not lessen the accused persons' culpability. Where there is evidence to show an accused person's involvement in actions by others acting in concert with him leading to the death of a deceased, in such circumstances an accused would be held individually responsible for the acts that were committed by any of the accomplices in furtherance of the joint action. As **section 21** of the **Penal Code** provides:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in**

conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

44. In this case I have found that the evidence of PW9 standing on its own was not credible, and that there was need for other evidence to corroborate his. Further, as I stated above, the names of the conspirators as given to PW7 by the deceased were different from the list given in court by PW9. Yet PW9 was the supposed source of the names. That alone creates doubt as to the reliability of the evidence of PW9 relating to those involved in the conspiracy. There was need for corroboration to prove this fact, and having found none, I find that the prosecution has failed to prove common intention as against the 1st and 2nd accused.

45. The other issue was that of motive to commit this offence. The court in the case of **Libambula v Republic [2003] KLR 683** reasoned that point thus:

"Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime." (Emphasis added)

46. The lack to prove motive is not fatal to the prosecution case. I am guided by the court of appeal case of **Choge vs Republic (1985) KLR1** , where the Court of Appeal held as follows:

"**Under section 9(3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.**"

47. In this case the motive was alluded to in the evidence of PW3, the deceased son, and PW9. It is clearly demonstrated in the evidence of PW3 that the deceased was facing rebellion in the leadership of the land buying company in which he was a Co-Director. The rebellion was so bad that there were two factions, one on his side and the other with different leadership of the same company. The deceased informed PW4, the Village elder of Kibera where he had a business, and three Chiefs and Assistant Chief of the same area on the afternoon of the day he was murdered, that he was facing rivalry in the land buying company and that due to that his life was in danger. There was clearly a motive for his death. That motive did not however attach on the 1st and 2nd accused.

48. As for the 3rd accused, if satisfied he was one of the two who shot the deceased, then the fact they used a firearm is proof of malice aforethought and also transferred motive to ensure the deceased died from this attack. It would be irrelevant, if these facts are proved, that the 3rd accused had nothing personal against the deceased.

49. The evidence of PW9 was the only evidence implicating the 1st and 2nd accused to the case. Having failed to meet the legal threshold, and there being no evidence to corroborate his evidence, I find that the prosecution case against the 1st and 2nd accused must therefore fail.

50. The evidence against the 3rd accused was direct evidence of eye witness account of the shooting of the deceased on the evening of the 2nd of April, 2005. Those present at the scene of shooting were PW1, the manager of Annex Club in Kibera owned by the deceased. The other witness was PW2 who was a

pump attendant at Maya Filling Station which was located on the ground floor of Annex Bar. The 3rd one was PW3 who was the son of the deceased.

51. PW1 testified that he was in the club in the material evening with the deceased. At about 7.30 p.m. the deceased paid for his drinks and then walked downstairs to his vehicle. He then saw deceased enter his vehicle. PW1 stated that he saw a man knock the window of the deceased with a gun. He then saw the deceased come out of the vehicle and immediately the man caught the deceased by the coat and asked him in Kiswahili "***why are you disturbing us***". PW1 testified that he had the deceased telling the man in same language "***do what you came to do***". The man then shot the deceased on the right side of the head and threw the deceased down. At the same time PW1 saw another person enter the vehicle of the deceased and after trying in vain to start the vehicle, he came out.

52. PW1 said that he saw the gunman at a distance of 3 to 4 meters away while standing at the door of the bar. The bar was upstairs on first floor according to PW2 and 3. PW1 said that there was electricity on and that he clearly saw the gunman. He said that he identified the 3rd accused at an ID parade at Kileleshwa Police Station, in July 2005, three and a half months after the incident. PW1 also said that he had never seen the 3rd accused person before and that the attack took 4 minutes. He described the assailants a young men.

53. PW2 told the court that he was chatting with the watchman when the deceased came downstairs out of the bar which was in the first floor. PW2 said that the deceased asked him to call his son Mathenge which PW2 did, referring to PW3. After calling, PW3, the son of the deceased from the bar, PW3 came with the keys and a jacket which he gave to the deceased. As the deceased and the son chatted, the son received a phone call which he picked and started talking. It was at that point that the deceased entered his vehicle and as he tried to start the engine, PW2 saw a man coming from behind the vehicle.

54. That person told the watchman to go away. PW1 confirms that bit of evidence that the gunman sent away the watchman before the attack. The same person went to the window of the car where the deceased was seated and with a pistol the man sharply knocked at the window and ordered the deceased to get out of the car. PW2 testified that he was gripped with fear and he moved 50 meters away from the scene. He then heard a gunshot and on hearing it he lay down. He then heard a second gunshot and then heard more gun shots as if one was shooting as they run away. PW2 said that he was not able to identify the gunman, and in fact did not describe him in his testimony.

55. The 3rd eye witness account was by PW3 the son of the deceased. His testimony was that his father was the chairman of Danduri Farmers Co. Ltd. He stated that on the material day the deceased was at his bar and restaurant at 3 p.m. in order to have lunch which he had ordered PW3 to prepare. PW3 stated that the deceased ate that lunch with two male Chiefs and one female Chief and one village elder all from Kibera. PW3 testified that he left the group eating and that he saw his father again at 7 p.m. when he took the keys and a coat to him by his vehicle.

56. PW3 testified that he was 2 or 3 meters away from the deceased vehicle when he saw a man approach the deceased and speak to him. He said that he saw the deceased come out of the vehicle and as he did a second man entered the vehicle. PW3 said that he could not hear the conversation between deceased and the man. PW3 stated that he crossed the road and started shouting "***thieves***". He said that one of the men shot the deceased three times after which the deceased fell down. PW3 stated that after one person tried to start the deceased vehicle in vain, he came out of the car, and joined his accomplice flee on foot while shooting in the air to scare people from the scene. The pair then hijacked a *matatu* which was coming from Town direction and they drove away in it.

57. PW3 said that he was able to identify the 3rdaccused in an identification parade at Kileleshwa Police Station. PW3 stated that there were twenty bulbs outside the bar and restaurant all which were working. He said the place was well lit, and that he was able to see the person who shot his father. He said that he identified him at Kileleshwa Police Station three weeks after the incident, as the 3rd accused in this case. PW3 fully described the two assailants of his deceased father as two young men in their twenties (20's).

58. The first issue to consider is that of identification of the 3rd accused by PW1 and 3. The 3rd accused was a total stranger to both PW1 and 3. In **Kinyua and another Vs. Republic Criminal Appeal No. 11 of 2013 (Nyeri)** the Court of Appeal held:

> **"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded is worthless."**

59. In this case there was an ID parade carried out by the Police as part of their investigations. The 3rd accused in his defence admitted that an ID parade was indeed conducted. That is therefore not in dispute, even though the prosecution did not bring the parade officer as a witness. The evidence of PW1 and 3 was not that of dock identification.

60. What this court has to determine is whether the identification of the 3rd accused person was free from any possibility of error or mistake. In the Court of Appeal case of **Wamunga Vs. Republic 1989 eKLR** it was held:

> **"What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.**
>
> **Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.**
>
> **..it is trite law 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 a conviction."**

61. I have examined the evidence of identification by PW1 and 3 carefully and with caution. I have considered first of all the nature of the lighting at the scene and whether it was sufficient to enable a correct identification. The evidence of PW3 was that there were 20 electric bulbs on outside the bar where this incident occurred. He describes the light as very clear and bright. PW1 likewise described the light at the scene as well lit with electric bulbs.

62. I considered the direction and the distance from which PW1 and 3 saw the assailant. PW1 described that he was standing at the door of the bar, three (3) to four(4) meters from where the incident occurred, which he said is how far the assailant stood from him. PW1 was watching the scene from upstairs, which in my view was a good vantage point giving a clear and unobstructed view of the scene. He described the gunman as having worn a farmer's hat and white jacket. Same description was given at the scene to PW6, in addition to further description that the gunman was also of medium height.

63. PW3 testified that he was two (2) to three (3) meters from the gunman. This witness saw every happening from the time the deceased walked to his car, as he stood with PW3 to take his keys and jacket, up to the time the assailant appeared and the shooting of the deceased. His description of the scene from the time the deceased walked to his car to the time of incident and the escape of the culprits is consistent with the evidence of PW1 and 2.

64. The only difference is that PW2 got scared when he heard the first gunshot and lay down immediately. On PW3's part, he was briefly distracted by a phone call he received, but he did notice when the two men ordered his father out of his vehicle, shot him and fled. PW3 was distracted, even

though he does not mention it in his evidence, and that explains why he could not hear the conversation between the deceased and the gun man, which PW1 and 2 heard clearly even though the two were a little further than him from the scene. None the less I am satisfied that PW3 witnessed the incident, and his evidence is clearly consistent with that of the other two eye witnesses, PW1 and 2.

65. I did consider the length of time the incident took. PW1 described the incident and said that it took four minutes to execute. PW3 did not state the time it took for the offence to be committed and completed. He however describes the events that took place with clarity, and how he gazed at the gunman in full view during that time. PW3 testified that when he saw his father being forced out of the vehicle, he immediately crossed the road and started shouting 'thieves'. He said that at that moment his eyes met with those of the man who shot his father. He then described him as a young man in his twenties. He also followed the two assailants on foot until where they hijacked a *matatu* and fled from the scene.

66. In regard to PW3 I find that even though he does not give a time frame, he had the opportunity to look and see the assailants for a considerable period of time, from the time they pulled his father from his vehicle, to the time they shot him, to the time they started walking away from the scene with him following them, up to the time they hijacked a vehicle. That period of time was sufficient for PW3 to make a permanent impression of the assailants in his mind, especially recalling that it was his own father under attack. The same goes for PW1 he had the assailants at his gaze for four minutes. Four minutes is a long time and therefore PW9 cannot be said to have had a fleeting glance of the assailants.

67. Finally I considered the time it took for the two witnesses to identify the 3rd accused at the ID parade. PW3 said it was after three weeks. PW1 and also the 3rd accused in his defence say it was on 22nd July, 2005. That was three and a half months after the incident. I do not consider the lapse of three and a half months inordinate or too long as to affect the identification of the 3rd accused by these two witnesses.

68. I find that the circumstances of identification, the conditions of lighting at the scene, the distance at which PW1 and 3 saw the assailant, the length of time it took them to see the assailant and the ability to identify him in the ID parade, all together were safe and positive for a correct identification of the 3rd accused as the one who fatally shot the deceased. I am satisfied that the 3rd accused was properly identified as the one who shot and caused the deceased death.

69. I must however mention that there was issue of the shots fired at the scene. PW1 heard

70. The 3rd accused put forward an alibi as his defence. In the case of **KARANJA VS. REP 1983 KLR 501** it was held as follows:

> **"The word "alibi" is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.**
>
> **In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see it the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.**

71. The Court of Appeal in the case of **LEONARD ASENATH VS REP (1957) EA 206** adopted with approval an English decision, **REP VS JOHNSON 46 CR. APP. R. 55[1961] 3ALL E.R. 969** which held as follows:

> **"Though an alibi is commonly called a defence, it is to be distinguished from a statutory**

defence such as insanity or diminished responsibility and is analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case."

72. The East African Court of Appeal in **UGANDA V. SEBYALA & OTHERS [1969] EA 204** adopted a decision made in the same year by Georges, CJ in **TANZANIA CRIMINAL APPEAL 12 D68** thus:

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is then an alibi which is not particularly strong may very well raise doubts."

73. The 3rd accused has denied any involvement in the deceased death. He put forward an alibi as his defence and brought one witness, his wife to support his defence. I considered the 3rd accused defence. The accused 3 has no burden to prove that his alibi is true. All he needed to do is to raise a doubt in the veracity of the prosecution case against him. Although the 3rd accused person put forward an alibi as his defence, he has not succeeded in creating doubt as to the strength of the prosecution case. The evidence of PW1 and PW3 places him at the scene of crime which took under the glare of strong electricity lighting, and in the glare of PW1 and 3.

74. The incident took some time as the assailants intercepted the deceased from his car, held a conversation with him, shot him, tried to start his vehicle, gave up and started walking for some distance to where they hijacked a *matatu*. That was sufficient time and in good conditions of lighting to enable positive identification of the 3rd accused.

75. The 3rd accused person's defence denying any role in the deceased death was obvious lies. I find that the evidence against the 3rd accused was strong and safe to sustain a conviction. Consequently I reject the 3rd accused alibi defence in total.

76. I will not end this judgment before I deal with one more issue, that of failure by the prosecution to call important witnesses. The defence made an issue of certain characters either named or whose statements were included in the bundle of prosecution witnesses. Some were required to be called as witnesses by the accused persons in exercise of their right to make an election under **section 200** of the **CPC**. The principle which applies on the question of what constitutes sufficient witnesses to sustain a prosecution case is well settled.

77. The important rule is that the prosecution should call evidence to meet a certain threshold as set out in the celebrated case of **BUKENYA & OTHERS VERSUS UGANDA 1972 EA 549** where the court held:

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence maybe inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

78. It is the defence that alleged that eye witnesses of the incident, including those from whom the *matatu* used by the gunmen to escape from the scene was hijacked from ought to have been called as witnesses. That is not the correct position in law. The correct position is that the prosecution is required to make available all witnesses necessary to establish the truth even if their evidence maybe inconsistent. Some witnesses were not called, for instance the ID parade. That was a crucial witness but since the ID parade was not an issue in this case, failure to call him was not fatal.

79. There were those from whom the *matatu* used by the gunman and his accomplice to flee from the scene was stolen from. They could have had important evidence to offer, even if not about the murder, but

about the ones who stole/hijacked the vehicle. Failure to call this was not deliberate as the prosecution was given time, especially when I took over the case, to call them. They were unable to trace and avail them. In that regard, I cannot say from the number of witnesses and the nature of the evidence adduced that the witnesses called by the prosecution were inadequate to establish the truth.

80. Besides, the witnesses referred to by the defence alleged to have stated that they could identify the gunmen were never traced by the prosecution. Given the length of time this case has taken to be concluded, the prosecution can hardly be blamed for the difficulties it has experienced trying to avail them. Nothing turns on this point.

81. Having considered the entire evidenced by both sides in this case, I find that the prosecution was unable to prove the case against the 1st and 2nd accused persons. Accordingly I give them the benefit of doubt and acquit them of the charge of murder contrary to **section 203** of the **Penal Code,** under **section 322** of the **CPC**.

82. For the 3rd accused, I find that the prosecution has proved the case against him beyond any reasonable doubt. I therefore find him guilty of murder contrary to **section 203** as read with **section 204** of the **Penal Code**, under **section 322** of the **CPC**.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF SEPTEMBER, 2016.

LESIIT, J

JUDGE