REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.70 OF 2009

LESIIT, J.

CALVIN OUMA.....……..…..…….....1ST ACCUSED

JACOB OWINO OTIENO.....2ND ACCUSED

STANLEY ODUOR OTIENO.....3RD ACCUSED

VERSUS

REPUBLIC…….…..…….……. PROSECUTOR

JUDGMENT

1. The accused persons **CALVIN OUMA,** hereinafter referred to as the 1st Accused, **JACOB OWINO OTIENO**, the 2nd Accused and **STANLEY ODUOR OTIENO**, the 3rd Accused are jointly charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

2. The particulars of the offence are:

Count 1:

All three accused on the 21st day of July 2009 at Dandora

Estate within Nairobi Area murdered RAPHAEL MUSYIMI.

Count 2:

All three accused on 21st day of July 2009 at Dandora Estate within Nairobi Area murdered DANIEL KYALO.

3. Just by way of background, this case was heard by three Judges before I took over the case. These were Mwilu, J (as she then was), Kimaru, J and Muchemi, J who heard two witnesses (PW1 and 2), three (PW2 to 4) and five witnesses (PW5 to 9) respectively. I took over the case under **Section 201(1)** and **Section 200** of the **Criminal Procedure Code** and heard PW10 to PW19 and one additional witness in the trial within trial.

4. In total the prosecution called nineteen witnesses for the trial and two for the trial within trial. The defence on the other hand relied on the unsworn statements made by each of the accused persons.

5. The brief facts of the prosecution case were that on the 21st July, 2009 S.P.Ogero, the O.C.P.P.DandoraPolice Station received an anonymous caller through cellphone who informed him that the deceased Police Officers were under attack by members of public within Dandora Phase IV. The two deceased were officers working under him and performedspecial duties in civilian clothing, and also normal duties in police uniform.

6. PW3 S.P. Ogero proceeded to the scene where he learnt that P.C. Kyalo, hereinafter referred to as Kyalo had been rushed to Provide International Hospital. He went to the said hospital and found Kyalowith the windpipe severed and the officer speaking only through hand signals. He died some days later at Kenyatta National Hospital where PW1 had transferred him for treatment.

7. PW3 proceeded to Dandora Phase IV Darfur building where he recovered a sheath and knife both stained with blood and lying on top of the stairs on the third floor of the building. He identified both in the photographs booklet – ***P. Exh 4***. The knife was produced as***P.Exh.5***. PW3 found blood all over the third floor starting from Room No.23 into the bathroom on same floor. On the floor of the bathroom was the dead body of the 1st deceased, herein after referred to as Musyimi. Outside the door of the bathroom were handcuffs produced as***P.Exh.6*** and a shoe,***P.Exh.7*** belonging to Musyimi.

8. After the scene was photographed the body of the deceasedMusyimi was removed from the scene.

9. PW1 who transferred Kyalo to Kenyatta Hospital told the court that the said deceased spoke to him in signs showing that his throat was slit by a bhang smoking man who had rasta hair. PW1 testified that he knew the three accused persons before the date of incident. He said that he later learnt that the three accused supplied bhang to police officers within DandoraPolice Post. However PW1 did not give any details of how he came to know the accused persons, neither did he give any names of the police officers allegedly supplied bhang by the accused persons, nor did he disclose the source of his information.

10. PW2 and other police officers including PW5 received a cellphone No.0724589954 from their seniors and were informed that it was the number belonging to the persons who murdered both deceased persons. The officers used the cellphone number to track the suspects from 22nd July, 2009 at 3.00 a.m. upto the 24th July 2009.

11. PW2 testified that the Safaricom Data provider helped them track the said line by use of radio signals which took them from Nairobi to Kericho, then to Rabour andAhero and finally to Awendo. On 24th July 2009 they arrested the 2nd and 3rd Accused and recovered a mobile phone Motorola C115 produced as***P.Exh.1*** and a simcard for No.0724589954 produced as***P.Exh.2***.

12. The following day the 2nd Accused led them to Kamagambo Village to the house of the 1st Accused where they arrested him at 4.00 a.m. onthe 3rd August, 2009. PW2 and his colleagues brought the three accused to Nairobi where they took samples from them for DNA sampling.

13. PW4 was the Landlord's Agentfor Darfur building in Dandora Phase IV where the murders in this case were committed. He helped the police arrest the caretaker that he had employed to collect rent from the tenants of that building. The caretaker was known as Lewis Aoko. PW4 said that the blood found on the 3rd floor of that building had started outside the door to Room No.23 where the caretaker lived. The caretaker was eventually released without charges. He was not called as a witness even though he was an important witness being the person responsible for the welfare of tenants and visitors to that building.

14. The evidence of PW6, a Police Officer from Dandora Police Postwas that he was one of the investigating officers in this case. He said that on the same day of the incident he and other officers arrested six people near the scene of the incident. None of those arrested were charged, neither were they called as witnesses. If they aided in the investigations, the same was not disclosed.

15. PW6 testified that he knew the 3rd Accused before the date of the incident in this case. He testified that on the 22nd July 2009, one day after the incident, he led his boss the O.C.P.P.,DandoraPolice Post, PW3 and other police officers to DandoraArea, to a house he said belonged to the 3rd accused. PW6 said that they found a woman who identified herself as the wife of the 3rd accused. From that house, PW6, PW5 and the other officers recovered a red jacket and a pair of blue jeans – ***P.Exh. 10*** and***11***respectively, both of which had blood stains.

15. The red jacket and the blue jeans were analyzed by the Government Chemist PW14, Dr. Mungai, among other exhibits and samples. He found that the red jacket – ***P.Exh.10*** had the blood which matched the DNA profile of the 3rd accused. The rest of the results were not of any significance in regard to establishing a nexus between the deceased DNA and the accused persons before court.

16. PW17 CIP Shamalla produced the Safaricom Data for two cellphones, No.0724589954 used to track the 2nd and 3rd Accused and No.0712716913. The connection between the latter number and this case was not disclosed. The communication data for both lines were produced as ***P.Exh.17*** and ***18*** and a certificate as***P.Exh.21***. PW17 testified that both cellphone numbers were unregistered as at the time they were bought it was not mandatory to register cell phone numbers. He testified that it was therefore unknown to whom the two numbers belonged. The findings by PW17 after he analyzed the Safari com Data were not significant in terms of establishing any nexus between the accused persons and the two numbers. Through the Data the witness was not able to establish any case against the accused persons or a nexus between the accused persons and the deceased persons or their death.

17. PW18 CPL Ndegwa collected various pieces of clothing belonging to the deceased at City Mortuary, which were produced as ***P.Exhs.13, 5*** and ***7*** from the 1st deceased, and ***P.Exhs.8, 14, 16*** and ***15*** from the 2nd deceased. He also took the handcuffs from the scene of murder**,** ***P.Exh.6*** and the dagger and sheath ***P.Exh.5***from the same scene. He then forwarded the items to the Government Chemist for analysis.

18. PW18 testified that he took statements from witnesses who later turned hostile blaming it on the long delay it took to have the DNA results.

19. PW19 was a Pathologist. He produced the Post Mortem Reports on behalf of Dr. Oduor who conducted the post mortem examination on both deceased. In regard to the 1st deceased, Raphael Musyimi, Dr. Oduor found multiple incisive cuts on the head, face and neck on the right thigh and left thigh involving vascular injury, incisive wound on back of neck through both ears with skull fractures and subdural hematoma. In Dr. Oduor's opinion, the cause of death of the 1st deceased was multiple injuries due to penetrating and blunt force trauma. His report was ***P.Exh.18***.

20. On the body of the 2nd deceased,Kyalo, Dr. Oduor found evidence of medical intervention ECG pad marks and others. The injuries he noted as per his report were multiple facial bruises or contusions, contusions on right knee, multiple face and neck contusions on deep neck muscles. He formed the opinion that the cause of death was neck injuries due to penetrating and blunt force trauma. The Post Mortem Report on the 2nd deceased, Kyalo was ***P.Exh.19***

21. The court placed the three accused persons on their defence after the prosecution closed their case.

22. All 3 accused persons gave unsworn statements in which they gave the details of how police arrested them at their rural homes. The 1st Accused said his home was surrounded by a group in the company of the 2nd Accused and he was arrested. He was then brought to Nairobi and after being kept for 14 days with leave of the court, he was charged with this offence. He denied the charges.

23. The 2nd Accused said that he was arrested at his friend's parent's home by people who included the Area Chief. He said that he was arrested together with his brother the 3rd Accused in this case. After the arrest he stated that he led police to the home of the 1st Accused where he was arrested. He stated that they were all three of them transported to Nairobi where they were eventually charged with the two

counts of offence. The 2nd Accused stated that his arrest was instigated by the local Chief over a claim of land. He said he did not know what the case was all about.

24. The 3rd Accused in his unsworn statement was partly much like that of the 2nd Accused. He said that initially he was in Nairobi at Donholm where he works when his younger sister called him and told him that he was required home very fast because his grandmother had been involved in an accident and had broken both her legs. That is how he went home on 14th from where police arrested him on the 24th, 10 days later.

25. After the close of both the prosecution and defence cases, no submissions were given by either parties to the case, despite many adjournments for that purpose occasioned by the defence.

26. The accused face two counts of the charge of **murder** contrary to **section 203 as read with section 204** of the **Penal Code. Section 203** defines murder as follows:

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

27. Malice aforethought is an important ingredient to a charge of murder. The circumstances which constitute **malice aforethought** are set out under **Section 206** of the **Penal Code** as follows:

> ***"Malice aforethought shall be deemed to be established by evidence providing 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."***

28. The accused were charged jointly with the two counts of offence. Being a joint charge the prosecution is required to adduce evidence to prove that the accused had formed a common purpose and that in the execution of that purpose they caused injury to the deceased persons as a result of which the deceased died. Common intention is defined under **Section 21** of the **Penal Code** in the following terms:

> ***"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."***

29. The burden lies with the prosecution to prove the charges against the accused persons beyond any reasonable doubt. There are three ingredients for the offence of murder, one that the accused persons carried out an unlawful act or omission; two that in the execution of the unlawful act or omission they caused injury to the deceased persons out of which the deceased persons died; and three that at the time of the unlawful act or omission was executed, the accused persons had formed the intention to either cause death or grievous harm to the deceased persons.

30. Since the accused are charged jointly for the offence, the prosecution must adduce evidence to prove a fourth ingredient which is the fact that the accused persons were executing a common purpose at the time

the injuries leading to the deceased's deaths were caused.

31. I have set out in full all the evidence adduced by the prosecution and the defence in this case. As I have stated, none of the parties' advocates gave any submissions in this case. That notwithstanding it is my view that the issues for consideration are:

a) Whether the prosecution has adduced any circumstantial evidence against the accused persons, and if so whether it was sufficient to establish the charge against them.

b) Whether the prosecution has established that the accused persons formed a common intention to cause death or grievous harm to the either or both the deceased persons.

c) Whether the prosecution has proved motive for this attack.

d) Whether the prosecution failed to call material witnesses, and if so whether it was fatal to the prosecution case.

32. There was no eye witness to the murders in this case. Ordinarily in such a situation the prosecution would rely on circumstantial evidence to prove the case against the accused persons. In**ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)**the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

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

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

33. The investigating team of the police in this case seemed to have certain information which enabled them track down the three accused to their rural homes. They did a good job of tracking the accused persons and in four days they had arrested the 2nd and 3rd accused persons, and on the fifth day they arrested the 1st accused.

34. The accused were tracked down by police officers, PW2, PW5, one PC Kiema and PC (Dr.) Njonjo. Throughout the tracking these officers were in constant communication with Safari com service provider which had the gadget that aided in tracking the signal of the mobile cellphone number 0724589954. None of the investigating officers disclosed where they got this cellphone number from, except to say that it was their bosses who gave it to them. It was important to show the significance of the number to this case, how it is connected either to the deceased persons or to the murder. That aspect does not seem to have been addressed by the investigation team.

34. PW17 who prepared the Data on this cellphone line told the court that he received an official request from DCIO Buru Buru to provide call records on two lines 0724589913 and 0712716913, showing the IMEA history, current location of the callers and the particulars of the registered owners for the period between 1st July and 22nd July 2009. He said that he prepared the information required including the M-pesa transactions which he gave to the DCIO. He gave all the information he gathered except the M-pesa transactions.

35. PW17 did not supply the actual locations where the cellphone number was used, or the locations the cell phone could be found during the period under scrutiny. That means that what PW2 and PW5 said, that they were able to track down the cellphone line from Kericho to Rabuor to Ahero, to Migori and finally to Awendo, with information given to them by Safaricom, that information could not be authenticated using the Data produced in court by PW17.

34. Even though there is no dispute that the 2nd Accused was arrested with the sim card bearing the mobile cellphone line in question, no evidence was adduced to show any nexus between that cellphone number and the deceased persons in this case. Neither was any evidence adduced to show any connection between the cellphone line and the deceased persons'cell phone lines, nor were such allegations made. Consequently, the evidence of possession of that cellphone line by the 2nd Accused was of no significance to the prosecution case. And even the evidence that it was used to help the police track and arrest the 2nd and eventually all three accused persons could not be verified.

35. There was other evidence which the police adduced. PW6 testified that he led police officers including PW5, the OCPP to a home he claimed belonged to the 3rd Accused. Indeed the bloodstained red jacket – ***P.Exh.10***, which the group recovered from that house was found to contain the DNA of the 3rd Accused. There was no other DNA found in that jacket or on the blue jeans***P.Exh.11*** also recovered at the same time from the same house. The recovery did not serve a useful purpose because apart from proving that 3rd Accused bled at some point, there was no evidence adduced to connect the bleeding to the murder of the deceased. The police did not also adduce any evidence to show from what kind of injury the 3rd Accused may have bled from.

34. The investigating officer PW18 testified that most of the witnesses he got during his investigations became hostile due to reason that Government Chemist took long with the exhibits. While this may be a reason for witnesses to develop fatigue, no efforts were ever made to have witnesses either summoned or arrested in order to get them to testify. In fact no mention was made that the police was having difficulties availing witnesses in this case.

35. Indeed no application was ever made to have witnesses compelled to come and testify nor was any indication ever given in court that witnesses had declined to come and testify. The allegation by PW18 was therefore not substantiated or demonstrated in any way.

36. It is the duty of the prosecution to call witnesses to adduce evidence sufficient to enable the court to know the truth. Where the prosecution has difficulty to compel their witnesses to attend court, it has an obligation to inform the court in order to solicit the court's assistance. The court has sanctions it can impose to enforce attendance including warrant of arrest for the defaulting witnesses, as long as it is proved that they are deliberately avoiding court.

37. This is not just the holding of this court, the duty to call witnesses was elaborated in the celebrated case of **Bukenyaand Others Vs. Uganda*(1972) EA 549*,** where the court held that the prosecution was duty bound to avail all witnesses necessary to establish the truth, even if their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

37. The prosecution did not disclose that there was need to call witnesses who were proving difficult to avail. Nineteen witnesses were called but these did not quite adduce any evidence how the deceased met their death. It was not apparent that the prosecution had any other evidence to call by the time the case was concluded. The prosecution is squarely to answer for the state of events.

37. There was a trial within trial declared after an attempt to produce two statements one made by the 2nd Accused to PW10 and the other made by the 1st Accused to IP Joseph Kisonga,the second witness in the trial within trial.

38. However, the trial within trial was adjourned on the application made by the prosecution to enable that prosecution call other witnesses in the trial within trial. The prosecution eventually did not bring any additional witnesses for the trial within trial. The prosecution closed its case before calling these witnesses. This action was proof in my view that the prosecution had abandoned the idea of producing the two alleged confessions by the 1st and 2nd Accused.

39. Even supposing that the two statements were produced in evidence and were found to be confessions, having been retracted, no conviction could successfully be mounted on the basis of such confession. It would have been the burden of the prosecution to adduce other evidence to either implicate the accused who made the confession of having been involved with the deceased death, by means of cogent and material evidence. This was held in**ANYANGU AND OTHERS V. REPUBLIC [1968]EA 239.**by the court of Appeal for East Africa stated at pg. 240

> **".....It is the treatment of the statements [of co accused] by the learned trial judge that has caused us some concern. The learned judge treated all the statements as evidence, albeit accomplice evidence against each appellant. With respect in doing so he was in our view in error. A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial, be "taken into consideration" against that co-accused. It is, however, not only accomplice evidence but evidence of the "weakest kind" (Anyuna s/o Omolo and Another V.R (1953), 20 EACA 218; and can only be used as lending assurance to other evidence against the co-accused (Gopa s/o Gidambenya& Others V.R. (1953), 20 EACA 318."**

40. In relation to the alleged confessions, I have considered the entire evidence by the prosecution and find that the prosecution has failed to adduce any evidence to implicate the 1st and 2nd Accused with the deceased death. There was therefore no evidence adduced by the prosecution, which could have been used to support a finding that the two accused had anything to do with the deceased persons' death. The retracted confessions by the 1st and 2nd Accused were the weakest form of evidence. Even if admitted in evidence the prosecution would still have had the evidential burden to prove the case against the accused persons beyond any reasonable doubt.

41. Likewise, the retracted confession of an accused person can only be evidence against the maker who made the confession. It cannot be used to found a conviction against a co-accused.

42. I wish to commend the efforts made by the police officers in tracking down the accused persons in this case. However, they missed out on the link between the accused persons and the deceased persons in life or in death. The prosecution has failed to show any connection between the Accused persons and the cause and or execution of the deceased.

43. The motive for the attack was not demonstrated. PW1 testified that he knew the three accused persons and that they supplied bhang to police officers at Dandora Police Post. He did not however mention that the death of the deceased had anything to do with supply of bhang, or that the Accused had any connection to their deaths for whatever reason.

45. Even though it is clear the 2nd and 3rd Accused were hiding at the time of their arrest inside sheep and goats pen that action merely proves suspicion. It was the duty of the prosecution to show that the cause of the suspicion had anything to do with the deceased death.

46. I have come to the conclusion that the prosecution has failed to prove the case against the accused persons to the required standard of proof of beyond any reasonable doubt.The circumstances from which an inference of guilt was sought to be drawn was not be cogently and firmly established; the circumstances relied upon if any were not of a definite tendency unerringly pointing towards guilt of the accused; and finally, there were no circumstances established which if taken cumulatively, would form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused persons and none else.

47. The prosecution therefore failed to establish *mens rea* and *actus reus* against all the accused in this case. It was the duty of the prosecution to prove the accused persons guilt. As exemplified in the in the famous House of Lords case of **Woolmington V DPP (1935) AC 462** Viscount Sankey made his famous "Golden thread" speech as follows;

> **"Through the web of the English Criminal Law one golden thread 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 and subject 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 prosecution 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 where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused.'**

48. The above is the position in our jurisdiction as well. In the much celebrated Eastern African Case of **Okale Vs R (1966) E.A at 555** the Court of Appeal stated.

> "**Inevery Criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerousand inadvisable to put forward a theory not canvassed in evidence or in counsels' speech. ……the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial to look at the evidence as a whole"**

49. Accordingly, I find that the charge of murder contrary to **Section 203** of the **Penal Code** has not been proved against the accused persons. I therefore give the three accused persons the benefit of doubt and acquit them under **Section 322** of the **Penal Code.**

DATED AT NAIROBI THIS 6TH DAY OF OCTOBER 2016

LESIIT J

JUDGE