REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE (MURDER) NO. 42 OF 2009

REPUBLIC……..…….....PROSECUTION

VERSUS

1. DANIEL MUSYOKA MUASYA

2. PAUL MUTUA MUASYA

3. WALTER OTIENO OJWANG……..……ACCUSED

JUDGMENT

The three accused persons **DANIEL MUSYOKA MUASYA** (hereinafter referred to as the 1st accused), **PAUL MUTUA MUASYA** (hereinafter referred to as the 2nd accused) and **WALTER OTIENO OJWANG** (hereinafter referred to as the 3rd accused) jointly face two counts of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars are that on the 14th day of October, 2009 at an unknown place in Mombasa District within the Coast Province the three accused persons jointly murdered **NORMAN ANTHONY JOEL** (the 1st deceased) and **RITA MARION JOEL** (the 2nd deceased). All three accused persons pleaded *'Not Guilty'* to the charge and their trial commenced before me on 6th October, 2010. The prosecution led by **MR. ONSERIO** state counsel called a total of sixteen (16) witnesses in support of their case. **MR. MAGOLO** Advocate represented the 1st and 2nd accused persons whilst **MR. ADHOCH** acted for the 3rd accused. The brief facts of the case are as follows.

The two deceased persons were an elderly married couple who were both British citizens. The couple often came to Kenya for holiday. In the month of October, 2010 they came to Mombasa and were booked in at the Neptune Beach Hotel. This fact has been confirmed by **PW1 MOSES AMBANI** who handled their holiday bookings. It is not in dispute and has even been accepted by the 1st accused that the British couple were very well known to him. They were his friends and during their visits to Kenya they always met and visited the 1st accused in his home in Bombolulu. During this visit in October, 2010 the deceased did meet up with the 1st accused as they often did. On 15th October, 2009 police from the Bamburi police station received information that two bodies of a Caucasian male and female had been sighted by members of public along the Bamburi/Kaloleni road. **PW8 CHIEF INSPECTOR JOEL CHESIRE** the OCS of Bamburi police station went to the scene. He found the two bodies lying naked about ten (10) metres from the road. **PW8** caused the bodies to be removed from the scene to Pandya

hospital mortuary where autopsies were conducted.

Meanwhile on the same night 15th October, 2010 police acting upon information proceeded to the Summit Guest House in Bombolulu along the Mombasa-Kilifi road. They found a motor vehicle registration KAU 435F parked there. Police checked the vehicle and noted that it had stains of blood in the rear seat.They enquired from the hotel management about who had come in that car. Police were directed to room numbers 11 and 5 in the Guest House. They went to the two rooms and knocked. Upon entering room No. 11 they found it occupied by the 1st accused. Room No. 5 was occupied by the 2nd accused who is a younger brother to the 1st accused. **PW5 CORPORAL JOSEPH KOECH** who was one of the officers who went to the Summit Guest House enquired about the blood in the vehicle. The 1st accused told them that the vehicle had been involved in an accident and that he had ferried the victim of the said accident who was bleeding in that same vehicle to the police station. Police made enquiries at the main hospitals but were told that no accident victim had been received in any of the main hospitals. The police arrested the 1st and 2nd accused and took them to the station for further investigation. With regard to the 3rd accused he was arrested and detained by police at Central police station when he went to make an enquiry about the vehicle. Police continued with investigations and finally concluded that there was a link between the accused persons and the death of the two tourists. All three accused were therefore arraigned in court and charged with the two counts of murder.

At the close of the prosecution case all three accused persons were found to have a case to answer and were placed onto their defence. They each gave sworn statements denying any and all involvement in the murder of the deceased persons. It is now the duty of this court to analyze the evidence on record and reach its determination on whether the two charges of murder have been proved to the standard required in law.

The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows

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

The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder

1. Proof of the fact as well as the cause of the death of the deceased persons.
2. Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.
3. Proof that such unlawful act or omission was committed with malice aforethought.

With regard to the first ingredient there appears to be little controversy. **PW6 OMAR BAKARI LUMWE** as Assistant Chief based at Shanzu Chief's Camp told the court that on 15th October, 2009 he was informed by a Village Elder called **KARISA** that two bodies of a male and a female Caucasian had been sighted near Nguutatu Hussein Dairy. **PW7** immediately phoned the OCS of Bamburi police station to report the matter. **PW8** who was by then the OCS of Bamburi police station confirms that he received that report. He went to the scene where he found the naked bodies of a male and a female of Caucasian extraction. **PW8 t**old the court that he noted bruises, cuts and wounds on the bodies. The clothes were placed next to the two bodies. **PW12 CORPORAL HARRISON MWEGIRI** is a scenes of crime officer who accompanied the police to the scene. He took several photographs of the bodies where they lay which photographs were produced in court as exhibits **Pexb20**. The court has viewed the photographs which clearly depict badly bruised bodies of two elderly Caucasians – one male and one female. **PW1** who told the court that he knew the deceased persons for over two (2) years well as he is the one who had handled their visits to Kenya went to the mortuary at Pandya Hospital after the bodies had been taken there. He identified the deceased persons as *'Joel'* and *'Rita'* a British couple.

Evidence regarding the cause of death was given by **PW5 DR. K. N. MANDALYA** a consultant pathologist who conducted the autopsies on both bodies. With respect to the 1st deceased **PW5** testified

that he noted

- A deep stab wound behind the right ear
- Perforated wind pipe
- Fractured ribs

He concluded that the 1st deceased met his death as the result of *"haemoraghic shock due to multiple cuts on the neck and body plus internal injuries to the trachea and ribs"*. With respect to the body of the 2nd deceased **PW5** noted the following injuries

- Fracture of thyroid bone
- Fracture of upper cervical spine

He opined that the cause of death was **"haemoraghic shock due to neck and head wounds as well as injuries to the spine and trachea"**. **PW5** filled out and signed the post mortem reports in respect of both deceased persons which reports were duly produced in court as exhibits **Pexb5** and **Pexb6**. The evidence adduced by **PW5** is expert medical evidence and has neither been challenged and/or controverted by the defence. I therefore find that the two deceased persons met their untimely deaths as a result of being unlawfully and fatally attacked.

The next crucial question is whether it was the three accused or any one of them who so unlawfully attacked and fatally wounded the two deceased persons. There was no eyewitness to the attack. No witness saw the deceased persons being assaulted and/or attacked by any person. The evidence upon which the prosecution seeks to rely on in this case is purely circumstantial. Circumstantial evidence is that evidence which conclusively links the accused(s) to the commission of an offence without leaving room for any other possible hypothesis. In the oft quoted case of **REPUBLIC VS. KIPKERING ARAP KOSKE and ANOTHER (1949) 16 page 135**, the Court of Appeal for Eastern Africa held as follows:-

> **"(1) That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

In the latter case of **MWANGI – VS. REPUBLIC [1983] KLR 75,** the Kenya Court of Appeal sitting in Nairobi held that

"2. In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference ……"

It is with this in mind that I will now proceed to examine the evidence on record.

As stated earlier it is not in dispute that the deceased persons were well known to the 1st accused. Several of the witnesses knew them to be friends. Indeed in his defence the 1st accused confirms that he had known the elderly British couple for about ten years. He stated that they were his friends and would bring gifts for him and his family whenever they came to Kenya. The couple often visited the 1st accused in his home in Bombolulu. **PW2 SHUBERT MATANO** told the court that on 13th October, 2009 at about 11.00 a.m. the 1st accused came to the Neptune Hotel where the deceased's were staying to meet them. He recalls that on that day the 1st accused came with a baby (who was probably his own child), chatted briefly with the deceased and then they all left the hotel together. **PW1** did later positively identify the 1st

accused at a police identification parade as the man whom he saw leave with the two British guests. The bodies of the deceased were recovered on 15th October, 2009 two (2) days **after** this meeting witnessed by **PW1**. This fact raises no suspicion. As friends it would have been quite in order for the 1st accused to come with his baby to the hotel to meet with his foreign friends. **PW1** did not notice anything amiss during this meeting and the time lapse of two (2) days would not lead to any presumption that the 1st accused was in any way involved in the death of the two deceased.

The prosecution have tabled evidence with respect to a certain motor vehicle registration KAU 345F. **PW13 PC ASHFORD MURIITHI** told the court that on the night of 14th October, 2009 at about 10.30 p.m. police received a call from Summit Guest House informing them of a motor vehicle registration number KAU 345F which had been driven into the parking area of the Guest House which was blood-stained and was allegedly being washed by some men. Police went to the said Guest House to check on the report. **PW13** told the court that his own observation of the vehicle is that it was smelling of blood and he noted blood-stained water around the vehicle. Police took the vehicle to the police station. **PW16 CORPORAL JOSEPH KOECH** the investigating officer who also went with **PW13** confirms that he did smell the oduor of fresh blood from the interior of the vehicle and upon looking inside he noticed blood-stains in the rear seat. I have observed the photographs which were taken of this vehicle after it was taken to Nyali police. Even to the naked eye the blood-stains on the interior of the vehicle are quite visible. It is not usual to have a parked car with blood stains in it. The obvious question that would arise is firstly was this human blood and secondly if so whose blood was it. The answers to these pertinent questions are provided by the evidence of **PW15 JOHN KIMANI MUNGAI** who is a gazetted forensic analyst. Various samples of the blood found in this vehicle were taken to **PW15** for analysis vide the exhibit memo form dated 21st October, 2009. These samples included cotton swabs containing blood samples from the rear of the vehicle, pieces of carpet taken from the vehicle, as well as a swab with blood sample taken from the rear back seat of the vehicle [these being samples marked A, B, C, G, H, K and J]. At the same time the police did also avail to the government analyst samples of blood taken from the two deceased persons for comparison and analysis. From his evidence and his report dated 3rd August, 2010 which was produced as an exhibit before the court **Pexb31(a)**, the findings of **PW15** were that the blood was indeed human blood and upon a comparison with the blood samples extracted from the bodies of the two deceased **PW15** concluded as follows

"1. The DNA profile generated from the blood stains from the left rear seat (Ex-G) matched the one generated from the blood stains on gauze labeled 'Z' deceased 'Anthony'.

2. The DNA profile generated from the blood stains from the piece of carpet marked (Ex-C) was a mixture of profiles from the blood samples marked "Anthony and Rita", both deceased."

A clear reading of this conclusion that the blood stains found on the night on 14th October, 2009 inside the motor vehicle registration number KAU 345F emanated from the two deceased persons. From the autopsy report on the bodies it is quite clear that the two deceased had been visciously attacked. Their bodies were bruised and battered and they obviously must have lost a lot of blood. As such it would be quite safe to conclude that the two deceased persons either being severely injured and bleeding or already dead were both ferried inside that vehicle on the material night. From this conclusion the key question would be who was driving the said motor vehicle and who parked it at the Summit Guest House. Evidence on this aspect was tendered by **PW7 GIBSON GUBE TUNJE** who told the court that during the material time he worked as a receptionist at the Summit Guest House. His evidence was that on the material night there came a customer who sought to hire two rooms. He stated further that he saw some men washing blood from the vehicle whose registration number he noted as KAU 345F. This witness did not however conclude his testimony. The state counsel Mr. Onserio requested that the witness be stepped down in order to obtain the carbon copy of the receipt which he issued to the customers for the two rooms. The witness never returned to conclude his testimony and as such his evidence was never tested by way of cross-examination. He was a crucial witness and the court did reopen the case under section 150 of the Criminal Procedure Code. The prosecution was instructed to avail the said witness to conclude his testimony. Despite having been given several adjournments in order to avail this crucial witness the state failed to do so – the witness was said to have vanished from his home and switched off his phone.

He was clearly in hiding and did not want to be re-called to the stand. As a court I feel that there is more to this than meets the eye – why would a witness who readily came to court and commenced his evidence vanish midway during the trial – I will say no more on this. Since the evidence of this witness was not tested by way of cross-examination this court cannot and will not place any reliance on that evidence in coming to its decision. In any event I note that although the witness spoke of seeing certain men washing a blood-stained and talked to having rented out rooms, he did not identify any of the men of whom he spoke. In short **PW7** did not in his evidence identify either the 1st, 2nd or 3rd accused persons as the men he saw washing the blood out of the car. The failure of this witness to conclude his testimony greatly weakens and I dare say fatally damages the prosecution case.

PW13, PW15 and **PW16** all police officers who went to Summit Guest House told the court that they were informed that the persons who drove in the vehicle were booked into room numbers 5 and 11. The police raided the two rooms and found that they were occupied. The 1st accused was found in occupation of room number 11 whilst the 2nd accused was found inside room number 5. The police officers state that upon entering the room they found that the 1st accused had washed the pair of shorts which he had been wearing and opened the door with only a towel tied around his waist. In the case of the 2nd accused the police witnesses stated that the clothes found on him were blood-stained. Upon being questioned about the car **PW16** told the court that the 1st accused told them that the vehicle was his. He further told police that he had knocked down a lady and that the blood in the vehicle was the blood of this victim from her bleeding in the vehicle as he rushed her to hospital. Police made enquiries but discovered that no traffic accident had been reported in the vicinity on that night and no accident victim had been admitted in any nearby hospital. Their suspicion having been raised by the circumstances the officers arrested the 1st and 2nd accused persons and took them to Nyali police station. It must be remembered that by this time the night of 14th October, 2009 the bodies of the two deceased's had not yet been recovered. These bodies were only recovered the following morning on 15th October, 2009 at about 11.00 a.m. Thus the initial arrest of the 1st and 2nd accused person had nothing to do with any murder investigation. The connection only came later as events continued to unravel.

Upon detention of the suspects at the police station the police submitted blood samples from the vehicle together with the clothes recovered on the two accused persons to the government chemist for analysis. These included a long trouser which the 2nd accused was found wearing, and a T-shirt and rest found on 2nd accused. A short pair of blue jeans and T-shirt both moderately stained with blood and removed from the 1st accused were also submitted for analysis. In their defences the 1st and 2nd accused persons deny that these clothes were theirs. However, **PW12** the scenes of crime officer told the court that at Nyali police station in addition to taking photographs of the vehicle, he also took photographs of the two suspects. This photograph is marked as No. (15) in the bundle. Although no blood-stains are visible in the photo which may be due to the fact that they had faded and in the case of the blue shorts blood-stains may not be visible on a photograph. In the photograph the 1st accused is wearing a pair of blue jeans shorts and the 2nd accused is dressed in a grey trouser and a white T-shirt. These are the very clothes which were taken to the analyst for examination. In his evidence **PW12** who took the photographs confirmed

> **"I took photographs of the suspects at the Nyali police station. They were wearing clothes with blood-stains……"**

The report of the analysis done on the accuseds clothes was submitted in court by **PW15** the analyst. He confirmed that the white T-shirt and blood were *"lightly stained"* with blood and that the short blue jeans was *"moderately stained with blood"*. **PW12** told the court that he could not make a conclusive determination about the source of the blood on the clothes of the 1st and 2nd accused persons. He goes on to explain any use of a detergent on blood-stains would compromise a subsequent analysis. However under cross-examination by defence counsel **PW15** admits that

> **"I did not in my report indicate that there had been an attempt to washout the blood stains**

using detergent."

This aspect of his evidence therefore appears to be an afterthought. Certainly suspicion is raised by the fact that the 1st and 2nd accused had on clothes which bore traces of blood at the material time. However, it is well established in law that mere suspicion no matter how strong cannot form the basis for a conviction. The prosecution has the legal burden to prove each and every element of the offence beyond a reasonable doubt. At no time does this burden ever shift to oblige an accused person to prove his/her innocence. The report of the government analyst is not conclusive with respect to the source of the blood stains found on the clothes he examined. **PW15** stated in his evidence

"The T-shirt and vest had light blood stains. I could not conclusively determine if it was human blood……."

In his final report **PW15** indicates that he was unable to generate any DNA profiles from the blood-stains on these clothes. Thus it is not proved beyond reasonable doubt that these blood-stains emanated from or were in any way connected to the two deceased persons.

The prosecution does also make an attempt to link the 1st, 2nd and 3rd accused persons to the vehicle registration number KAU 345F. **PW4 PETER KARIUKI** told the court that he is the owner of the said motor vehicle which he ordinarily uses for his car hire business. **PW4** testified that on 14th October, 2009 he was approached by the 3rd accused who wished to hire the vehicle. They filled out a hire agreement **Pexb5** and the 3rd accused handed over copies of his identity card and driving license. **PW15** then released the vehicle to him. He stated that as they drove to his **PW4's** offices the 3rd accused said he wished to pick a friend. They picked up a certain gentleman who was present when the car was handed over. However, **PW4** did not see this second man well and cannot identify him. The vehicle was to be returned to **PW4** the next day on 15th October, 2009. However, the 3rd accused phoned and requested to keep it for another day. **PW4** said that he could retain the vehicle at an extra cost of Kshs. 1,500/=. Thereafter the 3rd accused sent **PW4** a message informing him that the vehicle had been involved in an accident and was detained at the police station. They both went to Nyali police station and found the vehicle there. **PW4** said he noted no accident damages on the car save that the bumper had fallen off. He did not examine the interior of his car. The 3rd accused was arrested by police when he went to the police station to check on the vehicle. He was later charged.

In his defence the 3rd accused accepts that he did hire the vehicle in question from **PW4** but he states that he did so at the behest of the 1st accused. The 3rd accused told the court that the 1st accused who was his friend and neighbour requested him to hire a vehicle as 1st accused needed to use a vehicle to ferry some guests. The 3rd accused claims that he hired the vehicle then he picked up the 2nd accused (who was the brother of the 1st accused) and handed over the vehicle to him. The next thing the 3rd accused heard was that the vehicle was being detained by police.

Both the 1st and 2nd accused person totally deny having asked 3rd accused to hire a vehicle on their behalf and also totally deny that the 3rd accused ever handed over the vehicle to the 2nd accused after hiring it from **PW4**. This defence by 3rd accused has certain problems and cannot be relied upon for the following reasons. Firstly **PW4** was categorical that when he hired out his vehicle to the 3rd accused he strictly instructed the 3rd accused **not** to give the vehicle out to any third party. With such instruction why would 3rd accused immediately hand over the vehicle to the 2nd accused? Secondly, although the 3rd accused claims that he picked up the 2nd accused near Tuskys in the presence of **PW4**, this evidence is not corroborated. **PW4** confirms that a second man was picked up near Tuskys but he did not see the man well and is unable to identify the 2nd accused as that man. Thirdly, there is no independent evidence to prove the claim by the 3rd accused that he did hand over this vehicle to the 2nd accused. Apart from **PW4** (who is not able to identify the 2nd accused) no person was present when the vehicle was allegedly handed over. The 3rd accused did not write any agreement with the 2nd accused neither did he demand

copies of the identity card and driving license of the 2nd accused. All the court has to rely on is the word of the 3rd accused. Whilst I do not mean to malign the character of the 3rd accused the truth of the matter is that he is a co-accused who in his defence purports to shift all responsibility for possession of the vehicle to his co-accused. His evidence should be taken with a pinch of salt. In the absence of any independent corroborative evidence the defence of the 3rd accused remains merely a tale with absolutely nothing to back it.

Whilst on the subject of the 3rd accused the evidence against him in connection with the murder of the two deceased persons is in my view scanty. Apart from **PW4** no witness mentioned him at all. Aside from proving that he hired the motor vehicle registration number KAU 345F no other evidence is tendered to link the 3rd accused to the two deceased. There is no evidence that he knew or even met the British couple at any time. The 3rd accused was not seen or arrested at Summit Guest House where his co-accuseds were arrested. Indeed the prosecution concedes that the 3rd accused voluntarily presented himself at Nyali police station when he went to enquire about the car. If the 3rd accused knew of or was in any way involved in the murder he would not have gone to the police station. The actions of the 3rd accused reveal a man who was acting bona fide and who had absolutely nothing to hide. I habour serious doubts about his guilt in this double murder.

Going back to the 1st and 2nd accused persons having failed to prove beyond a reasonable doubt their possession of the motor vehicle KAU 345F the prosecution seeks to advance a possible motive for the murder of the British couple. It is alleged that the 1st accused had been given a sum of money by the 1st deceased to purchase land and that he may have swindled the 1st deceased of this money. As stated earlier the 1st accused readily admitted that he knew both deceased well as his friends. **PW3 MWASHIGADI MOLA** told the court that he was a witness to a sale agreement where the land in the Kwabulo was purchased. **PW3** told the court that on 22nd November, 2008 the accused called him to bring the land agreement to a hotel near the post office. He went there and found the 1st accused with a *'European man'*. **PW3** is unable to confirm if the *'European man'* was the 1st deceased. It cannot be presumed that the only European the 1st accused ever met or dealt with was the 1st deceased. This meeting took place one full year before the couple were killed. **PW3** told court that the 1st accused and the European man spoke in English a language which he does not understand thus he could not tell what they discussed. More pertinently he is not able to testify as to whether there was any disagreement between the two on that day. Under cross-examination **PW3** said the seller of the land was one *'Athumani'*. Upon being pressed by defence counsel he changes and says the seller was a lady called *'Caroline Okanga'*. In short **PW3** does not appear sure who the parties to the agreement he witnessed were. He was a witness who appeared confused and devious. His demeanour was dishonest and in my view his evidence could not be relied upon at all.

Apart from suggestions by the investigating officer there is no tangible evidence to prove the existence of a disagreement or of any bad blood between the 1st accused and the 1st deceased. In his defence the 1st accused states that the 1st deceased considered him a son and voluntarily gave him Kshs. 500,000/= with which to buy land. Whether or not one believes this defence it cannot be dismissed as a total improbability. It is not unheard of for foreigners who develop a relationship with locals to lavish them with gifts in order to better their standard of living. Such philanthropic acts are not totally out of the question. There is nothing to prove that this money if given was given as a loan as opposed to a gift. The possible motive therefore falls flat.

Going back to the test for circumstantial evidence I am of the opinion that the evidence presented to this court lacks cogency and leaves many questions unanswered. The evidence cannot by any means be said to be water-tight. There certainly exists the **suspicion** that the accused persons may have been involved in the death of the deceased persons but our courts have severally held that suspicion alone, no matter how strong cannot form the basis for a conviction. There must exist tangible and concrete evidence adduced to remove issues in dispute from the realm of suspicion and into the realm of proven facts. This standard has not been met in this case. Even on the basis of circumstantial evidence this court cannot find

that it was the three accused (or any of them) who so brutally attacked and killed the two deceased persons. The *actus reus* of the offence of murder has not been proved to the standard required in law. I therefore enter a verdict of *'Not Guilty'* and I acquit each of the three (3) accused persons of the offence of murder under section 306(2) of the Criminal Procedure Code. Each accused to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Mombasa this 5th day of May, 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Mwaura for State

Mr. Magolo for all Accused

Mutisya Court Clerk