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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMIAL CASE NO. 1 OF 2017

REPUBLIC.....PROSECUTOR

versus

BENARD OTIENO SINOGO.....1st ACCUSED

SILAS ORWA AWITL.....2nd ACCUSED

RACHEL VELLY ODHIAMBO.....3rd ACCUSED

KEFA OTIENO.....4th ACCUSED

KELVIN OTIENO AWIDHI.....5th ACCUSED

JUDGMENT

The five (5) accused persons namely, (1) **Bernard Otieno Sinogo**, (2) **Silas Orwa Awidhi**, (3) **Rachel Velly Odhiambo**, (4) **Kefa Otieno** and (5) **Kelvin Otieno Awidhi** (at large) were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (See charge sheet of 17/5/2018)

The particulars of the charge are that on 15/12/2016 at Winyo Area Kanyigoro Village Kon’gudi Sub Location East Kamagambo Location in Rongo Sub County, they unlawfully murdered **Meresa Aketch**.

The accused denied the charge and the case proceeded to full trial with the prosecution calling a total of thirteen (13) witnesses.

After close of the prosecution case, the accused persons were called upon to defend themselves. After giving his defence Accused 5 Kelvin Otieno, absconded and had not been arrested by the time the trial was concluded. A warrant of arrest remains in force for Accused 5.

On 11/3/2019 during the trial, the Court was informed that the then 1st Accused Brian Okombo Odenyo had died and the case against him was withdrawn. After that, the accused persons were listed as follows: Bernard Otieno Sinogo Accused 1, Silas Orwa, Accused 2, Rachel Velly, Accused 3. Kefa Otieno, Accused 4 and Kelvin Otieno Awidhi Accused 5.

The prosecution was led by **Mr. Kimanathi**, Senior Assistant Director. Accused 1 and 4 are represented by **Mr. Kisia**; **Mr. Gembe** for the 3rd accused, accused 2 and Accused 5 opted to act in person.

The Prosecution case:

David Ochieng Otieno (PW1) testified that on 15/12/2016 about 6:30p.m, the deceased who was, his aunt, had been at the rural home and was going back to Rongo where she lived, but that their family wanted to resolve an issue between Lilian who was the wife of his late uncle, Charles Oonyo and one Ernest; that the said Ernest was in a relationship with Lilian and was interfering with Lilian’s children. He met the deceased who was with Isaiah Otieno (PW7) and the deceased asked PW1 to call her if he saw

Ernest. On his way home while in company of his uncle Isaiah PW7, he saw lights of motor cycle heading to Lilian's home and Ernest was the rider. They followed and found Ernest had parked the motor cycle at Lilian's home. PW1 called the deceased to inform her that Ernest was at Lilian's house and the deceased promised to be going to get police and asked PW1 to call the Assistant Chief and the grandfather to proceed to their home; that the deceased and one Joseph Okumu arrived and said that they had decided that they should discuss the matter as family before involving the police. PW1 was sent to call Lilian to go to the grandfather's house but instead his grandfather Martinus Oyoo, went to call Lilian but he found Lilian's door locked. They dispersed and went to deceased's home leaving their two grandfather. They then went outside deceased's house. He then heard Ernest asking Brian, a son to Lilian where his motor cycle was; that Lilian came out of the house, came to deceased's home with a torch searching for the motorcycle which PW1 had parked in the deceased's compound at the deceased's suggestion, so that Ernest would not leave; that Lilian threatened that they would get the motorcycle by force. As PW1 was returning to the grandfather's home, he saw motor cycle lights heading into their home. The riders stopped where PW1 and PW7 were, and one of them informed them that they were looking for his motor cycle which he was told was in their home. PW1 told the person to wait for Ernest to come and sort out the issue with the family and the motorcycle would be released but they refused. PW1 called the deceased to find out what they would do and just then, Lilian passed by talking on phone asking why only weak people had been sent. Soon thereafter, other riders arrived hooting, making noise. He was hit on the hand and shoulder with a blunt object. He ran to hide into the nearby maize and watched what was happening from there; that he saw deceased being pulled from where she stood as all family members scampered for safety; he went out pushed his motor cycle into safety as the group went to deceased's homestead.

PW1 met PW7 after the noise had subsided and on walking to deceased's homestead, found her dead and she had cuts on the head and hands. Police later arrived took the body, took photographs of the scene next day. Later, he was called to an identification parade at Kamagambo Police Station where he identified three (3) people, i.e. Accused 2, Accused 3, Accused 4 and the late Ernest; that Kefa (Accused 4) was one of the first lot of motor cyclists who arrived at their home; that he saw Accused 3 among the people who came to the home but did not know if she was with the riders. PW1 denied that there was any form of light in the home that night. He relied on moonlight to see the intruders. He also attended another parade at Nyamataro police station where he identified a person in dreadlocks who was the 2nd accused, now 1st Accused.

PW2 Clifford Omondi Aketch, a son to the deceased recalled that on 15/12/2016 about 11:00 p.m, while in Nairobi, he received a call from Moses Ogada and he asked if the mother was all right. He called home to enquire and his sister in Rongo informed him that the mother was at their rural home in Winyo. He called their Rongo home and learnt of the demise of the mother. He informed his father who was also in Nairobi and they travelled to Kisii the next day and found the deceased's body at the mortuary. He later attended the post mortem.

PW3 George Otieno recalled that on 15/12/2016 about 8:30 p.m he was at the Rongo stage when he was informed of theft of a motor cycle and together with Kaumba, they left for Winyo area. They were directed to the home where they found a lot of noise and banging on roofs. They found very many people in the home and upon making enquires, were informed that Brian and Ben had cut a woman. He identified Brian and Ben as Accused 1 (deceased) and Accused 2. He saw the body of the deceased in the home. According to PW3, the home was lit with electricity. He said that he met Accused 4(Kefa) leaving the homestead and it is him who directed them to the home.

PW4 Philip Aketch Ayoo is the husband of the deceased. He was in Limuru marking National Examination when he received information of the death of his wife. He saw the deceased's body at the mortuary.

PW5 Chief Inspector Rabia Ali, then of Kamagambo Police Station visited the scene after the incident with other police officers. She saw the deceased's body which had several injuries. PW5 identified the photographs taken at the scene. She took the body to the mortuary. Later she was requested to conduct identification parade in respect of **Kefa Otieno Owour (Accused 4)** at Kamagamba police station where the said suspect was identified by three witness, David Ochieng (PW1) Isaiah Otieno (PW7) and one Patrick Owour Okongo. The second parade was of Silas Orwa Awidhi (Accused 2) but none of the three witnesses identified him. On the third parade done on 19/2/2018 of Kelvin Otieno Awidhi, the suspect was identified by (PW7) Isaiah. In cross examination, PW5 stated that deceased's the home was connected to electricity but she did not know if there was electricity at the home at the time of the incident. Later, she said she could not confirm the source of light in the home when she was there.

PW6 Chief Inspector Kenneth Akiruai of DCI Gucha South was requested to conduct an identification parade for one Bernard Otieno Sinogo (Accused 1) at Nyarambane Police Station; that the was identified by three witnesses David (PW1), Isaiah (PW7) and one **Patrick Owuor Okongo**.

PW7 Isaiah Owuor Otieno recalled that he visited his nephew PW1 on 15/12/2016 at about 6:00p.m. He greeted the deceased's father in law and found the deceased in her kitchen; that the deceased was preparing to leave and so he helped her carry her luggage from the homestead to the bus stage; that PW1 found them at the stage; that a motor vehicle came from Rongo and entered their home and that PW1 identified the rider as the person (Ernest) disturbing their home; that the deceased said that she wanted to talk to Ernest since he had caused problems in the home and she sent PW1 to go and confirm it was Ernest. PW1 and PW7 went and found that the motor cycle was packed about 40 meters from Lilian's compound and they confirmed it to the deceased who suggested that they move the motor cycle to her compound which they did; that soon after, Lilian came out of the house and enquired where the motor cycle was; that then they noticed it was in the deceased's compound; that the deceased returned after about an hour, asked PW7 to call the Assistant Chief and one Okumu a brother to the father in law. The Chief could not be found; that a lady from Lilian's house went where they were and threatened them; that the deceased's father-in-law went to call Lilian but found Lilian's house it was locked. Suddenly motor cycles started arriving at the home hooting and stopped at Lilian's house; that the cyclists came where they were outside Martinus house shouting that they wanted their motor cycle and the deceased told the worker to keep it inside her house; that one person claimed to be the owner of the motor cycle but when asked for documents, could not produce them. It is then the riders drew weapons and PW1 and PW7 moved away' that another group of cyclists arrived one who was limping, holding a panga and wooden rod held the deceased while another bald-headed person pushed deceased; that both hit the deceased on the stomach alternatively, that by then PW1 had ran off when a panga was thrown at him and so he also ran for his life and lay near deceased's house from where he watched the events. He saw the person walking with a limp cutting the deceased on the legs using a panga and he fainted. When he came to, he saw cyclists riding round deceased's house and he ran towards the sugarcane plantation where he met PW1. They ran towards the river where they raised alarm. He then went to stand at a fence from where he saw a man dreadlocks with a panga threaten to cut the worker's wife as she ran; that another lady came with a bottle and hit the deceased with it; the cyclists then threw stones at villagers and the roofs and of the houses. PW7 was the first to reach where the deceased lay but found that she was dead and soon thereafter, police arrived and took the body to the mortuary. PW7 later attended an identification parade where he identified the 5th Accused (Kelvin Otieno) who claimed to be the owner of the motor cycle. He also identified the 1st accused whom he saw cut the deceased. According to PW7 there were electricity lights on in the said compound on that night.

PW8 Dr. Awinda Victor Omollo performed postmortem on the deceased's body on 18/12/2016 whereby he found cut wound on in right ear, 4cm; deep linear cut wound 6 x 4cm on the forearm; with radial ultra fracture; haematoma around the wound; wound on left thumb with fracture of phalange, multiple contusions' on the abdomen, bleeding under the skin, intra peritorial haemorrhage on the head and abrasions to the lower back. He formed the opinion that the cause of death was severe head injury secondary to blunt trauma to the head and compound right tibia- fibula fractures with multiple injuries (PEXMO4).

PW9 Richard Kimutai Langat of the Government Chemist Kisumu received some specimens from PC Mutegi of Kamagambo Police Station for analysis and determining the DNA relationship. They were a Blood sample of deceased, Pangas H2A (11), H2B, H2-D, H2C; Blood stained T-shirt – Gor Mahia H2A (iii); Brown skirt H2E (II), stained jacket Blue stripped H2E (i), walking stick H2A (iv), Blood sample of Brian Okombo H2E (i), Blood sample from Rachel Velley H2E2 and Blood sample of Bernard Otieno Sinogo H2A (iii). PW9 found that H2A (ii), H2B, H2C, H2E, H2E2 and H2A (iv) matched the DNA profile of the deceased and that profile from panga H2D matched DNA of Brian Okombo (1st accused deceased) but the DNA profile of Accused 3 (Racheal) and Accused Bernard Otieno did not have any DNA relations with the submitted exhibits.

PW10 was the Officer Commanding Station of Rongo Police Station in December, 2016 and was asked to conduct identification parade in respect of Rachel Velly (Accused 3), Ernest Odhiambo Okeyo; and Brian Okombo Odenyo; that Accused 1(Brian) was identified by PW7 but PW1 did not identify him; that Ernest Odhiambo was identified by all the three witnesses. As regards Rachel Velley, she was identified by two witnesses but not the third.

PW11 Joshua Chwanya Ochogo, Senior Chief Homabay Location stated that on 17/12/2016, about 10:00 a.m, he got a call from Moses Odhiambo Otare, Chief of Kadera Kwoyo in Awendo Sub County who informed him that two suspects of murder in his area were in the home of Kennedy Okota. PW11 went to the said home with his people, found the owner with two visitors who identified themselves as Samuel Onyango Obonyo and Bernard Otieno Sinogo. He arrested them and took them to HomaBay Police Station.

PW12 PC Thomas Mutegi, the investigating officer in this case, recalled that on 15/12/2016 he was called to a murder scene at Winyo area where they found the deceased's body in a pool of blood. They made enquiries of what had transpired and they found PW1 David and PW27 Isaiah who narrated what had happened prior to the attack. The Police observed the scene, and noticed deceased's house had been damaged. They went to the home of Brian (now deceased) former Accused 1, and found him asleep in

the same house with Accused 3. In that house, they recovered a blood-stained panga; and a walking stick, which Brian used to as he walked with a limp – a blood stained T-Shirt, a Brown skirt, a blouse and both were arrested. The Police also went to the home of three suspects and they arrested Sila Orwa Awiti (Accused 2) under his bed, and recovered a blood stained panga. In the house of Bernard Onyango who adoned dreadlocks, the house was locked but there was a panga at the door which they took possession of; that Bernard was arrested in Homa Bay on the same day and was collected from there; that Kefa alias gear Lever (Accused 4) was arrested in Rongo; that out of the ten (10) arrested suspects, seven (7) were positively identified. He forwarded a sample of the deceased's blood and the recovered items to the Government Analyst; that it was established that the motor cycle KMDX 124K which Ernest used on the fateful night belonged to Kelvin (Accused 5) who had fled but resurfaced and was arrested on 15/2/2018; that he was identified on an identification parade. PW12 produced all the recovered items as PEXO1 -20. According to PW12 when they arrived at the scene, there were electricity lights in the home.

PW13 Dr. Maurice Ouma Otieno performed mental assessment on all the accused persons whom he found to be mentally fit to stand trial. He produced the assessment reports in evidence.

The defence:

When called upon to defend himself, the **1st Accused** gave unsworn testimony. He denied the charge and stated that he herds his father's cattle but a friend called and asked him to go to Homa Bay and help plant. He went and after a week, he was arrested, taken to the police station where he was asked for Kshs. 40,000/= which he did not have. His brother who was with him, paid and was released.

The 4th Accused, Kefa Otieno who represented himself denied the charge. He said that on the date of the incident, he was at work at Rongo in the morning and went home at 5:00 p.m to plough in his sugarcane and later slept. He went to work next day where he was arrested for a murder, he knew nothing about.

The **3rd Accused Rachel Velley Odhiambo** also gave unsworn testimony in which she denied the charge and stated that on 15/12/2016, she stayed home till 6:00p.m. She left home with her husband, Brian Okombo Odenyo (deceased) and went to the centre to buy meat. While there, the husband received a call and he informed her that he had been informed of theft of a friend's motor cycle and was required to assist. He took her back home and left; that he returned about 11:00p.m and she enquired if the motor cycle was found. He became angry and went out of the house and returned at 5:00a.m.; that the husband did not want to be questioned. She left for the shopping centre and on returning home, police officers arrived and arrested Brian and demanded for his phone. She too was arrested; that she attended a parade where she was the only woman and she protested. She denied having been arrested with any clothes but that it is her husband who had the clothes.

The **2nd Accused Silas Orwa Awiti**, unsworn stated that he works as a Disc Jockey and was in HomaBay on 15/12/2016 where he went to play music. He returned home on 16/12/2016 and went to sleep. He was woken up by a police officer, handcuffed was taken to Rongo police station and then Migori police station. He attended a parade at Rongo police station but nobody identified him.

In his defence, the fifth Accused, Kevin Otieno Awidhi stated that he went to Mombasa in February, 2016 for a course, returned to his home in Sakwa in July 2016, sold his sugar cane, bought a motorcycle and gave it to George Otieno Nyasango, a rider who got an accident; that in October he gave the motor cycle to Ernest Odenyo Japolo as a rider and returned to Mombasa in November, 2016, where he remained till 16/12/2020. He noticed missed calls from Brian. He called Ernest who told him he had something to tell him but would travel to Mombasa but his mother called to tell him that Ernest had been arrested on his way to Mombasa; that Ernest called him in March 2017 promising to repay for his motorcycle and on 10/12/2017, he learnt that Ernest died in an accident. He came home in February, 2018 and went to Rongo police station to enquire about his motorcycle when he was arrested. He took part in a parade but he was bare foot and that some members had helmets while others had jackets; that the witness did not identify him but after the witness talked to the investigating officer, he came back to touch him.

DW6 Rose Achieng Silas is the wife of Accused 2 Silas. She recalled that on 16/12/2020, Silas who works as a DJ came back home from HomaBay where he had gone to play music. He refreshed and slept. Later, two police officers arrived and picked Silas out of the house. When pulling him, she asked Accused 2 if he had done any wrong, but she was told that Silas was going for interrogation and would be released if nothing was found on him. She later learnt of somebody having been burnt.

DW7 Everlyne Achieng Otieno is the wife of Kefa Otieno (Accused 4). She recalled that on 15/12/2016, the husband, left the house in the morning but did not return and she learnt that he had been arrested.

Save for Mr. Gembe, counsel for Accused 3, Mr. Kisia, Counsel for Accused 1 and Accused 4 did not file any submissions at the close of the defence case. Accused 2 did not wish to submit.

Mr. Kimanathi filed his submissions in reply.

In brief **Mr. Gembe's** submissions were that PW1 and PW7's evidence as regards the light at the scene on the fateful night was contradictory i.e. was it moonlight or electricity; that PW1 who purported to identify Accused 3 on the parade could not tell if she came to the scene with the riders or by herself and that he never saw her attack the deceased; that since PW1 admitted to have been terrified at the parade, there was possibility of him making errors. Counsel also submitted that the clothes allegedly found on Accused 3 or in the house where she lived with her husband (now deceased) was not the same one sent to the Government analyst as the description differed. Counsel relied on the decision of **Francis Kariuki Njiru v Republic Criminal Appeal No. 6 of 2001 and Bethwel Maina Juma & Another v Republic (2019) eKLR** on what evidence is required for identification. He further submitted that there is no direct evidence linking accused 3 to the murder and malice aforethought cannot be established.

On the alibi defence, Counsel urged that Accused 3 said she was at home when her husband left to attend to a friend whose motor cycle was allegedly stolen to attend to a friend where motor cycle was allegedly stolen and that the alibi was not dislodged.

In reply, Mr. Kimanathi, argued that Accused 3 was properly identified by PW1 and PW7, and was placed at the scene of murder by the evidence of PW10 and PW12. As regards contradictions in the evidence of PW1 and PW7 on identification, counsel argued that witnesses can never give similar evidence and if there were any discrepancies, they did not go to the substance of the case.

Analysis and determination:

I have now considered all the prosecution evidence, the defence evidence, adduced in this case and submissions of both counsel. The first issue I will consider is whether the charge was defective.

Whether the charge sheet was defective.

Mr. Gembe, Accused 3's counsel argued that the charge sheet was defective because it indicates that the offence was committed on "15th 'day' of December 2016" yet the evidence adduced is to the effect that it occurred at night. In response Mr. Kimanathi argued that the charge complied with Section 134 of the Criminal Procedure Code. Section 134 of the Criminal Procedure Code provides as follows:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The test whether the charge is defective is a substantive one. The court should consider whether the charge with which the accused is charged discloses an offence known in law and is disclosed sufficiently to give the accused notice of the case he is facing. In this case, the charge discloses an offence known in law and contains all the particulars. The reference to 'day' instead of 'night' does not go to the substance of the charge as all the elements of the offence were disclosed to the accused. That ground has no basis.

This being a murder charge, the prosecution is required to prove beyond reasonable doubt, the following ingredients:-

1. **that the death occurred;**
2. **that the accused persons caused the act or omission that caused in the death;**

3. that the accused possessed malice aforethought.

Death:

There is overwhelming evidence confirming the death of the deceased. PW1 and PW7 witnessed the attack and saw the deceased's body soon after the death. PW2, PW3, PW4, and PW5 also saw the deceased's body soon after death. PW8 performed the post mortem on the body after the body was identified by PW2. PW8 corroborated PW1, PW2, PW4 and PW7's evidence as to the injuries that were inflicted on the deceased. PW8 formed the opinion that the cause of death was severe head injury secondary to blunt trauma to the head, compound right tibia- fibula fractures and multiple injuries.

Whether the accused persons caused the death:

No doubt the only witnesses to the incident in which the deceased met her death are PW1 and PW7. It is not in dispute that the incident occurred at night, at about 8:00 p.m to 8:30 p.m. The case therefore turns on the question of identification under unfavourable conditions.

PW1, a resident of the said home where the incident took place said that though their home is connected to electricity, there had been no electricity for some days and there was a general electricity blackout on the said night. In fact, he was very explicit, that he relied on moonlight to see what was happening in the homestead. On the other hand, PW7 who was visiting the home that day was adamant that there was electricity in the home.

As regards PW5, who visited the scene soon after the incident, she could not confirm if there was electricity in the home, though she said that the home was connected to electricity. She said however that there was light in the home but she did not know its source. PW12 also said that the home was well lit when he arrived there. He also stated that there were lights from motor cycles. Later in re-examination, he said the home was well lit with electricity. PW5 and PW12 arrived after the murder and therefore their evidence is not helpful as to the state of lighting at the time of attack.

Who does the court then believe, as to the state of lighting in the deceased's home at the time of the attack?"

Since the prosecution failed to call another witness who was at the scene to clarify the contradictions in PW1, and PW7's testimonies as regards the lighting at the scene, I am inclined to believe PW1's testimony, because he lives in that homestead and was aware of the lack of electricity in that home before that date and on that night. I find that there was no electric power in the home at the time of attack. If the witnesses were able to see, it was by way of other sources of light.

The offence having occurred in the night under conditions unfavourable to positive identification of the suspects, the court has to test the evidence with the greatest care because of the danger of relying on such evidence to found a conviction. The Eastern African Court of Appeal set down some of the guiding principles that will guide courts in considering such evidence. In the case of **Abdallah Bin Wendo & Another vs Republic (1953) EACA 166**. The court said:-

"Although Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult In such circumstances, other evidence circumstantial or direct pointing to the guilt is needed".

Though there are two witnesses who purported to identify the accused persons yet I have just found above that they contradicted each other as to the source of lighting at the scene. The said contradictions cannot be ignored. It is core to identification of the accused persons considering the added fact that the attackers were many.

The case of Republic vs Turnbull (1971) QR 227 provides useful guidelines in so far as identification is concerned. The court stated:-

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be

made. How long did the witness have with the Accused under observation" At what distance" In what light" Was the observation impeded in any way....." Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" how long elapsed between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance"..... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Since the testimonies of PW1 and PW7 on identification are already questioned due to contradictory evidence on the lighting of the scene on the material night, the court has to consider whether there is other direct or circumstantial evidence to support the evidence of the two. Identification parades were mounted on which the witnesses identified some of the accused persons. I will therefore consider the said evidence.

In the case of **Kariuki Njiru & 7 others vs. Republic** (supra) the court held inter alia that:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

Guidance has been given to the courts on how parades should be conducted to avoid errors and miscarriage of justice. In the case of **Samuel Kilonzo Musau vs. Republic Criminal Appeal No. 153 of 2013** the Court of Appeal held as follows:-

*"The purpose of an identification parade, as explained in **KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60**, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."*

PW1 and PW7 allegedly identified Accused 1. I note from PW1's testimony that he never mentioned in his evidence in Chief that he identified any of the attackers. It is in cross examination that he claims to have identified Accused 1. He then admitted that two of the members of the parade had dreadlocks while others did not; that some of the suspects were unkempt. It means that the parade did not comply with the guidelines provided under the Force Standing Orders No. 6 specifically Force 6(iv) (d) which requires that the members should as far as possible be of similar age, height, general appearance and class of life. By allowing only two people with dread locks on the parade, clearly offended the above provision. Further, to the above, I note that at no time during his testimony did PW6, the officer who Conducted the parade, indicate that he complied with the guidelines and specifically Order 6 (iv) (k), warning the identifying witnesses that the parade may or may not contain the suspects. The witnesses should not be told to pick out the suspect nor should the witness be influenced in any way. By placing only two people with dreadlocks on the parade was in my view, directing the identifying witness at the two as the possible suspects.

In my view, the identification parades conducted by PW6 did not conform to the Police Force Standing Orders and were unfair to the accused persons.

PW5 conducted identification parades where Accused 2, 4 and 5 were allegedly identified by PW1 and PW7. Again PW5 did not explain to the court how she complied with the Force Standing Order No. 6 to ensure that the parades were fair and free.

The evidence of PW5 will therefore face the same fate as that of PW6. The parade was conducted in a shoddy manner and not in accordance with the Force Standing Orders.

PW10 conducted the identification parades in respect of Ernest and Brian who are now deceased and Accused 3. Like the

identification parades conducted by PW5 and PW6, PW10 did not fully comply with Police Force Standing Orders and especially Order 6(iv)(k) whereby the officer is required to warn the identifying witness that the suspect may not be on the parade. The court has no idea what the Police Officers told the identifying witnesses. For the process to be fair, the police officers conducting the parades must scrupulously comply with the procedure in the Police Force Standing Orders. In the end, I find that the identification on the parades was of no evidential value to this case.

The question then is whether there is any other direct or circumstantial evidence connecting the accused persons to the offence.

Circumstantial evidence has been said to be the best evidence. The court of Appeal in **Neema Mwandoro Nduzuya vs. Republic (2008)** in reiterating the probative value of circumstantial evidence stated as follows:-

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R V TAYLOR WEAVER AND DONOVAN (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”

In Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990, the court set out the test to be applied in considering whether circumstantial evidence can support a conviction. The court said:-

“It is settled that when a case rests on circumstantial evidence, such evidence must satisfy three tests-

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

(ii) those circumstances should be of a definite tendency unerringly pointing towards the 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”

In **Mwangi & Another vs. Republic (2004)2KLR 32**, the court further stated:-

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example Rep vs. Kipkering Arap Koske & Another [1949] 16 EACA 135.”

As respects Accused 1, PW1 told the court that he identified Accused 1 as one of the first riders who arrived at the deceased's home and that accused spotted dreadlocks. He even described how he was dressed, in a jacket. Although PW1 said that he managed to see the assailants using the moonlight, he also said he saw motor cycles arrive with their lights on which means that there was light in the homestead from motorcycles. PW7 also told the court that he saw Accused 1 who had dreadlocks and saw him cut the deceased. PW1 and PW7 told the court that they were able to talk to the people who first arrived at the home and therefore came into close proximity with them. PW7 also told the court that at one time the riders were riding round the deceased's house. That being the case, then the witness were able to see the assailants using lights from the motor cycle. I am satisfied that PW1 and PW7 satisfactorily identified accused as one of the assailants.

The other evidence tending to connect the accused 1 to the offence was that of the investigation officer, PW12. He said that on 16/12/2016, he went to Accused1's home but he was nowhere to be found but that he managed to recover a blood-stained panga outside the door to the house. Accused 1's inventory was prepared in respect of the recovery PEX19(1). Though PW12 said that the panga (H2B) was recovered outside the house, yet the inventory indicates that the panga was inside the house. Be that as it may, PW12 did not lead any evidence to prove that the house belonged to Accused 1. Although the panga was said to be blood stained and the blood matched the deceased's DNA, failure to confirm that the house belonged to Accused 1 leaves doubt in the court's mind. Anybody could have left the panga at the door and the said panga does not connect Accused 1 to the offence.

Accused 1 raised an alibi defence to the effect that he had been in Homa Bay for a week when the offence was committed. Having raised an alibi defence, it remains for the prosecution to disprove the alibi. In *Kiarie vs. Republic (1984) KLR, 740* the court said:-

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

In this case, both PW1 and PW7's evidence placed the accused's at the scene and he stood out having had dreadlocks. There was no good reason why he would be sought all the way from Homa Bay. I believe that Accused 1 was one of the assailants and he fled to Homa Bay where he was smoked out on the second day. His defence was an afterthought and did not dislodge the testimonies of PW1 and PW7 which I believe were truthful. I am satisfied that Accused 1 is one of the cyclists who went to the deceased's home demanding a motor cycle and caused the death of the deceased.

Accused 2, Silas Orwa was not identified on any parade. The evidence against him is that of PW12 who, acting on information, went to Accused 2's house where he found him hiding under the bed and recovered a blood-stained panga (H2C). The recovered panga was taken to the Government analyst and found to have the deceased's DNA. Accused 2's defence is an alibi, that he had gone to play music in Homa Bay on 15/12/2016 and returned on 16/12/2016. His wife DW6 said that Accused 2 had gone to play music in Homa Bay and on 16th while in the house, was arrested. It is a fact that Accused 2 was arrested in his house.

The defence being an alibi, it is still the duty of the prosecution to disprove it. The burden does not shift to the Accused 2. If there is a reasonable possibility that the alibi could be true, then the prosecution has failed to discharge its burden of proof and accused must be given the benefit of doubt. See the case of *Kiarie's case supra*.

Accused 2's alibi is as an afterthought. His wife could not confirm whether he was playing music in Homa Bay on that night or not. I find no reason why PW12 would frame him that he was found under his bed. His conduct raises questions on why he could hide under the bed in his own house. Besides, no explanation was given for the presence of the blood-stained panga in his house and the blood matched the deceased's DNA. I am satisfied that the alibi did not dislodge the prosecution evidence. The recovery of the blood-stained panga whose DNA matched the deceased's placed Accused 2 at the scene of crime and I am satisfied that he was one of the assailants.

Accused 3 is the wife of (Brian) who was the first Accused who died during the pendency of these proceedings. PW1 told the court that he saw Accused 3 at the home of the deceased. He could not tell whether she came with the riders or not nor did he say at what stage he saw her or what role she played. PW12 told the court that they visited Accused 3's house where they recovered a blood-stained Green T-shirt, a blood stained of blue/ brown blue striped skirt, a blouse worn by Accused 3 with blood stains, a blood-stained jacket with blue stripes, as per inventory EX19(a). After subjecting the items to analysis for DNA, PW9 found that the brown / green sported skirt was found to have human blood matching the deceased's DNA. According to Accused 3, when her husband was called on phone and was informed that his friend's motor cycle had been stolen, he took her back home and left her there only to return at 11:00p.m Her defence is that she was at her home when the incident occurred. As observed above, it is the duty of the prosecution to disprove the truth of that alibi. The question is whether Accused 3 had the items found in their house or was it her husband who brought them. Although PW12 at first said that he found Accused 3 wearing the skirt and jacket, on further cross examination by the counsel, he told the court that he found the things in the house. It is a fact that in the said house, was found a blood-stained panga and a blood-stained walking stick belonging to Accused 3's husband Brian, now deceased. PW7 specifically identified the said Brian the person who walked with limp as being one of those who first assaulted the deceased. There is overwhelming evidence that the said Brian was at the scene of the murder with a walking stick which was stained with blood stains which matched deceased's DNA and his. In view of the contradictions in PW12's evidence as to where exactly the skirt and jacket were found, it is possible they may have been stained if they came into contact with the walking stick and panga belonging to Brian. I am inclined to give Accused 3 the benefit of doubt that the skirt and jacket that were found to have deceased's blood were worn by her. There are doubts in the court's mind as to whether Accused 3 was one of the assailants.

Accused 4 Kefa Otieno's defence is an alibi, that he worked during the day but returned home at 5:00p.m on the fateful day. I adopt the same principles on how the court should consider an alibi defence, that it is not for the accused 4 to prove its

truth but the burden remains with the prosecution to disprove it.

PW1 told the court that Accused 4 (then 5) was among the first cyclists to arrive at the deceased's home demanding release of a motor cycle and that he actually spoke to him before the rowdy cyclists arrived. In addition, PW3 a motor cycle rider at Rongo stated that after he heard of the incident, he proceeded to the scene and that he met accused 4 on a motor cycle near the scene and he is the one who directed PW3 to the home of the deceased. I find that the evidence of PW1 and PW3 placed Accused 4 at the scene of crime. In addition to the above Accused 4 called his wife, DW7 Everlyne as a witness. Her evidence was totally at variance with his testimony, that after work he went home at 5:00p.m and did some work before going to bed. DW7's testimony however is that, when Accused 4 left for work in the morning, he did not return home and she later learnt of his arrest. That evidence goes to corroborate PW1, PW3 and PW7's evidence who placed him at the scene. His defence is a mere denial. Accused 4 was one of the cyclists at the deceased's home on the fateful night.

Accused 5 Kevin Otieno Awidhi admitted to being the owner of the motor cycle which was detained in the deceased's home and that he had given it to a rider Ernest (deceased) His testimony refers to 15/12/2017 as the date of the incident, but this incident occurred on 15/12/2016. PW7 told the court that Accused 5 was in the first group of riders who arrived at the home and that they had a conversation with him as the Accused 5 demanded the alleged stolen motorcycle which he claimed was his and he even told them the registration number. The accused 5 came into close proximity with PW7 and they conversed. Having found that there was light from motor cycles, I am satisfied that he was properly identified by PW7. PW12 also told the court that he went to Accused 5's house which was in the same home as that of his brother accused 2 and that though there was nobody in the house, they recovered a panga which was later subjected to DNA analysis and found to have the deceased's blood. However, just as I found in respect of Accused 1, the prosecution should have adduced evidence to prove that indeed the panga was found in Accused 5's house. Without that evidence to connect Accused 5 to that house, it is not conclusive evidence that the house was his. The above notwithstanding, I am satisfied that PW7's evidence placed the Accused 5 at the scene.

Whether there was common intention:

The next question is whether the accused had common intention; Common intention is defined under Section 21 of the Penal Code as:-

“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 purposes an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purposes, each of them is deemed to have committed the offence.”

The above definition was well articulated in the case of *Njoroge vs. Republic (1983) KLR 197* where the court held:-

“If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not; provided that the death was caused by an act of someone of the party in the course of the endeavours to effect the common object of the assembly.”

In *Wanjiru d/o Wamario vs. Republic 22 EACA 521*, the court stated:-

“Common intention generally implies premediated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”

In a more recent case of *Eunice Musenya Ndui vs. Republic Criminal Appeal No. 534 of 2010 (2011) eKLR*, the Court set out the following ingredients as forming common intention:-

- 1) *There must be two or more persons;*
- 2) *The persons must form a common intention;*
- 3) *The common intention must be towards prosecuting an unlawful purpose in conjunction with one another.;*

4) An offence must be committed in the process;

5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose.

The riders who stormed the deceased's home on the fateful night had one intention, to get back the motor cycle which they alleged had been stolen when in actual fact it had not. PW1, PW7 and the deceased tried to reason with them and asked to talk to Ernest instead but they became violent.

Theirs was a common intention intended to prosecute on unlawful act.

Whether malice afterthought was proved.

Malice afterthought is defined in Section 206 of the Penal Code as:-

“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, 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 facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

*Malice aforethought was defined in **Rex v Tubere s/o Ochen (1945) IZ EA.CA63**, where the Court of Appeal said:-*

“In determining an existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and the part of the body injured.”

*In **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990**, the court said:-*

“The question of intention can be inferred from the consequences of the unlawful acts or omissions of the initial killing which was well planned and calculated to kill or to do grievous harm upon the deceased.”

In this case, the deceased, a defenseless woman was attacked by many armed men who brutally and indiscriminately assaulted her with sharp and blunt objects. She received many serious injuries all over her body and head. The injuries were obviously meant to end her life. I find that the prosecution has proved the charge of murder against Accused 1, 2, 4, and 5 as charged, and I hereby convict them as charged under Section of the Criminal Procedure Rules. the prosecution failed to prove their case against Accused 3 to the required standard. Accused 3 is acquitted of the charge and set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 25TH DAY OF FEBRUARY, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Maatwa holding brief for Mr. Kimathi for the Respondent.

Mr. Kisia for Accused 1 and Accused 4

Mr. Gembe for Accused 3

Accused 2 in person

Nyauke Court Assistant



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