



**Republic v Mukhwana & 2 others (Criminal Case E041 of 2021)
[2024] KEHC 14987 (KLR) (29 November 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E041 OF 2021
DK KEMEL, J
NOVEMBER 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL MUNIALO MUKHWANA 1ST ACCUSED

EVANS KHAEMBA 2ND ACCUSED

BEATRICE NANJALA 3RD ACCUSED

JUDGMENT

1. Daniel Munialo Mukhwana, Evans Khaemba and Beatrice Nanjala herein have been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on unknown dates between 3rd January 2016 and 9th January 2016 in Musembe Sub-Location in Bungoma North Sub-County within Bungoma County, jointly with another not before this Court, they murdered Patrick Mukhwana. Initially, the deceased’s youngest son Joseph Majani had been charged alongside the rest of the accused herein but he was discharged after he entered into a plea bargain with the prosecution and that he was made a prosecution witness.
2. The accused persons herein pleaded not guilty to the charge and its particulars. The Prosecution called seven (7) witnesses in support of its case.
3. The evidence adduced by the Prosecution witnesses is as follows: PW1, Joseph Majani, told the Court that he had been charged herein together with the rest of the accused herein and that on 7th March 2022, he entered into a plea bargain with the State and undertook to be a State witness against the accused persons herein. According to him, the deceased herein was his father; the 1st accused is his elder brother; the 2nd accused is his other brother who is older than him; the 3rd accused is his mother. He recalled in July 2015, the 3rd accused herein summoned him to come back home from Eldoret where he resided and that he joined the 1st, 2nd, 3rd accused herein and one Job Simiyu at home. A meeting was held for



the purposes of seeking the services of a witchdoctor so as to eliminate the deceased herein who was their father. A cow was sold for that purpose and that the 1st accused promised to contact a witchdoctor from Eldoret. The witchdoctor was given Kshs. 25,000/= and he left. After some days of waiting, the deceased did not die as promised. He told the Court that the deceased herein had allocated each of his sons land and that he remained with a portion for himself and his young wife. The 3rd accused had indicated that it was necessary to eliminate the deceased so that the younger wife did not benefit from the sugar proceeds. Upon failure by the contracted witchdoctor to deliver, the 1st accused suggested that they could organize to kill the deceased. The 3rd accused suggested that they all congregate in the kitchen and that when the deceased was available then they should eliminate him. It was agreed that they would execute the plan in January 2016. The 3rd accused was to take away the lamp and then leave him while the rest of the accused to execute the job. As soon as the 3rd accused left, the 1st accused got hold the deceased and wrestled him on to the ground while beckoning them to join him. The deceased complained as to why they wanted to kill him. They were successful in pinning him down and that the 1st accused went for some weapon to be used. He came up with a huge stick and placed it on the deceased's neck as they stepped on it. After a while, the deceased passed on. They removed his jacket while Job Simiyu went for his motorcycle where they loaded the deceased onto it. The 1st accused snatched his cap and placed it on the deceased's head so as to conceal the fact that the wearer was dead. The 1st accused suggested that they take the body to Kibisi River where they were to toss it. Later, the 3rd accused approached him and requested that he does not divulge any word of what occurred and that he would be given Kshs. 200,000/= from the sugar proceeds since the other accused were each given cows. He told the Court that he did not accompany the accused persons to the river to dispose of the deceased's body but agreed to the 3rd accused's request of keeping silent on the matter. He told the Court that when the incident occurred, he was merely aged 19 years old. After dumping the deceased's body, the 1st and 2nd accused herein returned back home where the 3rd accused prepared some concoction which was used by them to wash off any potential curses. The 2nd accused took the deceased's jacket and threw it into a toilet and the following day the 1st and 3rd accused advised that they all agree that deceased had disappeared and that they were searching for him. After three days, he decided to go to Eldoret and on his return back home, he learnt from the villagers that they were concerned with the disappearance of the deceased. He told the Court that some fishermen stumbled upon the body of the deceased in the river and that the same was retrieved and a post mortem was conducted on it. The accused herein later harvested the sugarcane but did not give him the promised Kshs. 200,000/=. He told the Court that he was also filled with guilt over the death of the deceased and that the spirit of the deceased kept on visiting him on several occasions. This prompted him in December 2021 to reveal to his sister, Catherine Nangina, what they had done to the deceased wherein she suggested that they engage the Assistant chief over the same so that a meeting would be called for him to reveal the matter. The meeting was held at Lunyu Police Station with the accused persons herein being present and that he revealed all the information about them killing the deceased and how they killed him. They were all apprehended and held in remand but that Job Simiyu managed to sneak away. He told the Court that it was not due to the fact that they did not give him the promised Kshs. 200,000/= that he revealed on what they did but it was due to the fact that the guilt was wearing on him.

On cross-examination by Counsel for 1st and 3rd accused, he told the Court that his testimony is nothing but the truth and that he did take part in the planning of the demise of the deceased. He told the Court that he never accompanied the 1st and 2nd accused, and Job Simiyu to the river to dump the deceased's body and that the 3rd accused promised to give him Kshs. 200,000/= from the sugarcane proceeds.

On cross-examination by Counsel for the 2nd accused, he told the Court that during the attack on the deceased, there was a full moon and that they all had torches as there was no electricity. He concurred



that together with the 2nd accused they held the deceased down by his neck while Job Simiyu held his hand and that the 1st accused rushed to fetch a stick and suggested that the same be held on the neck of the deceased and that during that incident he was already married with a child. He reiterated that they participated together with the accused persons herein in killing the deceased.

On re-examination, he told the Court that he was with all the accused and that they all participated in the killing of the deceased.

4. PW2 Wycliff Macheso Nabibia testified that the deceased herein was his brother and that he had two wives namely, the 3rd accused and another. According to him, on 1st January 2016, he had arranged with the deceased to visit some parcels of lands but on that day, he had to sort out an issue of a missing cow. He requested that they meet up on 6th January 2016, with the agenda of the meeting being the missing cow. On that day, the other family members showed up but that the deceased was a no show and on sending for him, the errand boy informed him that the 3rd accused had indicated that her husband had left on Monday heading towards Sangalo but was yet to return. He was forced to postpone the said meeting and on 7th January 2016, he proceeded to Sangalo area where he met the deceased's second wife who informed him that the deceased never visited her home. This prompted him to commence a search for the deceased with the help of the 1st accused and that they ended up lodging a report at Lunyu Police Station. On 8th January 2016, he received a tip off from the Assistant Chief that the body of the deceased had been discovered and that he rushed to the river where some fishermen had stumbled upon a body and in the company of the 1st accused and Nelson Lusenganga, they went to Kibisi river and on viewing the body, it was that of the deceased. He informed the Assistant Chief of the latest developments and that he immediately reached out to the police who came to collect the body and took it to Kiminini Hospital mortuary. After the burial of the deceased, on 26th November 2021, the deceased's daughter, Nangina, reached out to him stating that PW1 wished to speak to him. On meeting up with PW1, he informed him that he and his brothers were involved in the death of the deceased and that he requested a meeting to be arranged for him to reveal everything. On 30th November 2021, he proceeded to the office of the Assistant Chief, Joseph Nyongesa, who briefed him that he had been alerted on the same and who proposed the meeting to occur on 3rd December 2021 at Lunyu Police Station. That PW1 presented himself on that day and who confessed that together with the accused persons and one Job Simiyu herein they killed the deceased.

On cross-examination by Counsel for the 1st and 3rd Accused, he told the Court that, between 1st January 2016 to 7th January 2016, he was with the deceased and that he learnt from the second wife of the deceased that he did not show up at her home prompting him to begin the search for him. According to him, the body of the deceased was found at Kibisi River and that he was present during the first and second autopsies.

On cross-examination by Counsel for the 2nd Accused, he told the Court that he was the last person to see the deceased before he disappeared and was the first person to be alerted of the discovery of the body of the deceased.

On re-examination, he told the Court that he did not cause the arrest of the accused persons herein but rather it was by PW1 and his confession.

5. PW3 Thomas Maina Wafubwa testified that the deceased herein was his paternal uncle and who had two homes one in Mbakalo and another in Sangalo. According to him, the deceased died sometime on 8th January 2016, and that he was alerted by another uncle about the incident. He told the Court that he went to the river where the remains of the deceased had been discovered. It was his testimony that the deceased had disappeared for a long time but prior he had requested him to assist in harvesting his sugarcane crop. On enquiring from the 3rd accused on the whereabouts of the deceased and who



informed him that he had been called by someone but was yet to return back. Later, he learnt from the deceased's second wife that her husband had not been seen. They began the search for him in mortuaries and contacted several relatives. After the body of the deceased was discovered, a post mortem was conducted on the deceased. He told the Court that he was present during the exercise. He added that the accused herein were not willing to participate in the exercise. After the burial of the deceased, they held a family meeting where they confronted the 3rd accused who still claimed that the deceased had been called by someone on phone and that he went never to return back. They lodged a report with the police and that six persons including the accused herein were arrested for questioning. Police later informed us that there was no sufficient evidence and then released the suspects unless new evidence was found. Later in 2021, he received a call from his relative one Nabibia that he had been informed by one of their sisters that PW1 had informed her that he wished to make a confession over the death of their father and wanted the family members to have a meeting. The meeting took place but he did not attend it.

On cross-examination, he told the Court that two post mortem examinations were conducted and that he also organized for the second autopsy. He confirmed that he was present during the retrieval of the body of the deceased from the river and that he was not present when PW1 made his confession. He confirmed that the deceased did distribute his land to his children.

6. PW4 Joseph Wasike Nyongesa testified that he is the chief of Musembe Location and that on 26th November 2021 while in his home he received a call from Clare Nangina Mukhwana, who claimed that she was residing with PW1 and that she requested him to call the clan for a meeting over the demise of the deceased. He directed her to alert her family members about the meeting to be held at his office but the venue was later changed to Lunyu Police Patrol Base. At the meeting, the accused persons herein were present plus other family members and that PW1 proceeded to make a confession over the killing of the deceased.

On cross-examination, he told the Court that he called for a meeting with a change of venue to avoid breach of peace. He confirmed that a secretary was present to record the minutes but he has not seen the said minutes in Court. He told the Court that the implicated people were quickly remanded and their statements recorded. He told the Court that the deceased was buried in 2016 but the revelations surfaced in 2021.

On re-examination, he told the Court that he opted to change the venue to Lunyu Police Patrol Base due to security concerns for the implicated and that he only chaired the meeting but did not record the minutes.

7. PW5 Dr. Dickson Mchana testified that he was in Court to produce the deceased's post-mortem report. He told the Court that the exercise took place at Kiminini Hospital mortuary and that his observations were that the deceased had lacerations on his left scalp; his nails were dark blue in nature; there no signs of ill health; both his ears were eaten away; internally, there were changes on his right lung and blood vessels; his stomach had food meaning that he died within four hours of taking his meal; he had an injury on his head as there was a blood clot and that his brain was decomposed; there were no signs of manual strangulations and hanging. He formed the opinion that the cause of death was head injury secondary to blunt trauma. He produced the post mortem report dated 9th January 2016.

On cross-examination, he told the Court that he conducted the post mortem examination and that it was not true that the injuries on the deceased's body were as a result of a fall. He observed that he did not see any other external injuries on his body.

8. PW6 Leah Nanjala Barasa testified that the deceased herein was her father and that on 3rd January 2016, he disappeared and was later found on 8th January 2016 in a river. She told the Court that she was no



present when his body was recovered, According to her, it was much later when PW1 visited her in Eldoret, informing her that in cahoots with other family members they had killed the deceased herein. A meeting was held on 3rd December 2021, wherein PW1 confessed everything accusing the accused persons herein of the death of the deceased.

On cross-examination, she told the Court that she is only recounting what she heard and that the deceased was found inside a river on 8th January 2016. She told the Court that it was PW1 who briefed him about the incident and that she could not tell if there was an inheritance issue in the family.

9. PW7 N0. 70715 Sgt Joseph Gatimu testified that he is the investigations officer in this matter and that after an alert from the DCI CIP Wambua of the murder incident, he took over the investigations. He recorded the statements of the family members and proceeded to hold in custody the accused persons herein. That PW1 recorded a confession about everything and that he instituted charges against the accused persons.

On cross-examination, he told the Court that he did not pursue the matter as one of the suspects confessed but that he recorded the statements of the accused persons herein. On the post mortem examination, he concurred that the same was conducted twice and that his evidence is in regard to the second post mortem. Also, He relied on the confession of PW1 wherein he admitted to hitting the deceased on the head and maintained that all the accused persons herein were involved in the death of the deceased.

On re-examination, he told the Court that he was not present when the post mortem was conducted but that he only saw the report.

10. Upon the closure of the prosecution case, this Court found that the prosecution has made out a prima facie case against the accused persons. They were thus found to have a case to answer and subsequently they were placed them on their defence.
11. DW1 Daniel Munialo Mukhwana testified that the deceased herein was his father and that he is aware of the charges against him and that he denies them. According to him, on 3rd and 9th January 2016, he was in Eldoret as he worked at a certain hotel there and that he was not at home when the incident occurred. He told the Court that PW2 invited them to a meeting on 27th November 2021 and that the said meeting occurred on 3rd December 2021. According to him, he agreed to attend the meeting at the Chief's office but the venue was later changed to the Police Station wherein he arrived to find his co-accused persons and PW1. He added that PW1 was directed to recount how the deceased had died and once he was done, he and his co-accused persons were apprehended and taken to the cells. He told the Court that the confession by PW1 are mere allegations and that after the death of their father, PW2 refuted having involved them in the succession process. He told the Court that it was PW2 who notified him of the discovery of body of the deceased and led him to the said river and that he was present during the first post-mortem examination but that the second autopsy was done in secrecy without their information and involvement.

On cross-examination by the counsel for the prosecution, he told the Court that he was in Eldoret from 3rd to 9th January, 2016. According to him, he moved to Eldoret on 18th March 2014 but lacks the proof of the same information of receipts and works at a certain hotel and started working on 19th March 2014. He alluded to the fact that all these are as a result of the succession of his late father's estate with PW2 being in the background instigating PW1 to sell his portion allocated to him by the deceased. He confirmed that there is nothing wrong for any family member to sell their portions of land. He added that he has not availed witnesses from Eldoret to back his alibi.



On cross-examination by Counsel watching brief for the family of the deceased, he told the Court that he the deceased had planted sugarcane and that the same was up for harvesting when he disappeared and that the testimony of PW1 is false. He told the Court that he learnt of the disappearance of the deceased on 6th January 2016 via PW2 and that it is PW2 who is influencing PW1 to frame the accused persons in this matter. He finally stated that it was PW1 who made the claims implicating him and the rest of the accused persons.

On re-examination, he told the Court that his employment records were destroyed when his house was demolished and that only five of them showed up at the police station during the first appearance and that PW1 was not amongst them. He added that he was not at home when the deceased disappeared.

12. DW2 Evans Khaemba Mukhwana testified that he is the 2nd accused herein and that the deceased was his father. According to him, on 3rd January 2016, the 3rd accused visited him and informed him that PW2 had visited home and then left with the deceased for Sangalo area in Bungoma. They stayed until 6th January 2016 at 2:00pm that's when PW2 informed them that they had parted ways with the deceased at Sangalo but that he could not reach him. They informed him that the deceased was yet return home and that he proceeded to alert his bother in Eldoret who confirmed that PW2 had also alerted him. Later, he reported the matter to the police and after one week, while still searching, PW2 arrived and claimed that the chief had received reports that the body of a person had been spotted in the river. They rushed to the river to check and confirmed that it was the body of the deceased. The body was taken to Kimilili Hospital Mortuary where a post mortem was conducted in his presence. That the pathologist confirmed that there was nothing to show that the deceased had been killed and that a report of the same was generated. He told the Court that he learnt that a second post mortem examination was done in his absence. That five of them were later interrogated by the police and released after two days. In 2021, the area clan elder sent letters directing them to go to the chief's office on 3rd December 2021 but that the chief moved the meeting to the police station. He told the Court that it was only the three of them who turned up at that meeting and that PW1 implicated them in the killing of the deceased. They were arrested and escorted to the office of the DCIO where he was ordered to sign some document which were unknown to him. He told the Court that he heard the evidence of PW1 regarding his claim that the spirit of the deceased haunted him. He told the Court that PW1 was leasing his portions as he did not have a wife or children and that they were opposed to him getting the land and that angered him prompting him to show up with PW2 to harass them. He denied the allegations that they had promised PW1 Kshs. 200,000/= from proceeds of sale of sugarcane on deceased's parcel of land.

On cross-examination, he told the Court that PW2 picked up the deceased on 3rd January 2016 while he was away at the farm, and that it was the 3rd accused who informed him. Also, he told the Court that it was PW2 who called him to tell him that the deceased was missing and could not tell if PW2 disagreed with the deceased and that PW1 had reported them to PW2 about denying him from selling land and who decided to go against them.

On re-examination, he stated they thought that the meeting at the police station was in regard to PW1's matters of selling his portion of land. That PW2 was working clandestinely in the succession matter.

13. DW4 Beatrice Nanjala testified that she is the 3rd accused herein and that she denies the charges against her. She recalled on 3rd January 2016, PW2 visited her home to see the deceased over the issue of family land as they were to look for a title deed. She alerted the 2nd accused about the visit and how the deceased left the home with PW2. That the 1st accused was not around as he resided in Eldoret. According to her, her husband never returned and that she was not worried as she assumed that he was at his other wife's home in Sangalo. It was on 6th January, 2016 that is when she learnt of the disappearance of the deceased and that he was not at Sangalo as she had believed. She went in search of her husband but



could not find him. Later, PW2 informed her of the alert that he had gotten from the chief concerning recovery of a body from Kibisi River and they rushed there and found it was the body of the deceased herein. The body was taken to Kiminini Hospital Mortuary where a post mortem was conducted and the reported given to PW2. She told the Court that she was not aware of the second post mortem examination. That the deceased was later buried and it was not until 2021 when she was summoned to attend a meeting at the office of the assistant chief on 3rd December 2021 and which was changed to Lunyu Police Station. That she was not aware of the agenda but on arrival she found PW1 there who informed those in attendance that the deceased had confronted him in a dream about those who killed him. She told the Court that they were rounded up and placed inside police cells. She denied plotting to kill the deceased on 3rd January 2016, since on that day she was at home alone and that the allegations by PW1 were simply as a result of them being against him selling his parcel of land as the whole family objected and that he was colluding with PW2 to disinherit them.

On cross-examination, she told the Court that she does not know what caused the death of the deceased herein and that prior to 3rd January 2016, the deceased was at her home and who never mentioned that he had any places to visit. She insisted that on 3rd January 2016 at 10.00 AM the deceased left home in the company of PW2 and that she was not worried as she knew he could spend time at the home of his second wife. That it is not true that she planned for the murder of her husband. That she had no differences with PW1 who is her last born son as well as her other sons.

On re-examination, she told the Court that the deceased had only shown his sons the portions of land.

14. At the close of the defence hearing, this Court directed the Parties to file their written submissions. The Prosecution informed the Court that they will be relying on their evidence while the defence opted to file their submissions.
15. I have duly considered the evidence tendered herein by the prosecution and defence together with submissions filed. I find the issue for determination is whether the prosecution has proved its case beyond reasonable doubt.
16. The offence of murder is prescribed under section 203 of the Penal Code thus; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” From this definition, the prosecution was expected to prove the following ingredients beyond reasonable doubt:
 - a. The death of the deceased and cause of that death;
 - b. That the accused committed an unlawful act or omission that led to the death; and
 - c. That the accused committed the unlawful act with malice aforethought.
17. Throughout a criminal trial, an accused bears no duty to prove his innocence. The burden is on the prosecution to prove their case beyond reasonable doubt.
18. In *Stephen Nguli Mulili v Republic* [2014] eKLR this is what the Court had to say;

“...it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V WOOLMINGTON*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *FESTUS MUKATI MURWA V R*, (2013) eKLR”



19. In the famous case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 Lord Denning stated with regard to the burden of proof of beyond reasonable doubt.
- “That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that shall suffice.”
20. In the Nigerian case of *Bakare v State* (1987) INNLR (PT 52) 579, the Supreme Court stated;
- “Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”
21. The fact of the deceased’s death is not in question. To prove the cause of his death, the prosecution relied on a post mortem report produced by PW5. In the report, Dr. Dickson Mchana, indicated that the cause of death was due to severe head injury secondary to blunt trauma to the head.
22. In the case of *Kyalo Kalani v Republic* Criminal Appeal No. 586 of 2010 [2013] eKLR, the Court of Appeal cited with approval its decision in the case of *Ekai v Republic* (1981) KLR 569 where the Court found that even though the murder weapon had not been produced, the post mortem examination had established beyond all reasonable doubt that the fatal injury had been caused by a sharp bladed weapon.
23. I therefore find that the prosecution proved that the deceased died due to a severe head injury secondary to blunt trauma to the head. In the circumstances, this court is convinced that this element of the charge was sufficiently proved by the prosecution beyond any reasonable doubt.
24. Regarding the second ingredient that the deceased’s death was as a result of an unlawful act by the accused, this court must consider the manner in which the deceased was killed. The deceased was found to have been severely injured with a blunt object on the head leading to his death. The attack was vicious leading to the death and that the body of the deceased was later tossed into Kibisi River where it lay there for some days before it was discovered by some fishermen. The evidence tendered showed that the accused persons met and discussed and planned to eliminate the deceased so as to prevent the deceased from allowing the deceased’s second and younger wife access to proceeds from sugarcane that was about to be harvested. It is trite that all homicides are deemed unlawful unless authorized by law. I find that the injuries inflicted on the deceased were meant to ensure that the same were to cause his death and hence the killing of the deceased was unlawful.
25. As regards the element of malice aforethought, it is important to consider the provisions of section 206 of the Penal Code. The same defines malice aforethought in the following terms:
- “Malice aforethought shall be deemed to be established by evidence proving any one of the following circumstances:-



- i. 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,
- ii. Knowledge that the act or omission causing death will probably cause the death 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 harm is caused or not, or by a wish that it may not be caused.
- iii. An intent to commit a felony.
- iv. 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.

The Court of Appeal in the case of Nzuki Vs R [1993] KLR 171 that the act must have been committed with the following intentions:

- a. An intention to cause death.
- b. An intention to cause grievous harm.
- c. Where the accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

The facts and the nature of death the deceased suffered have been vividly presented by the witnesses and confirmed by the evidence of the pathologist (PW5) who produced the autopsy report. The deceased was viciously attacked with a blunt object and later his body was dumped in Kibisi River. Hence, the nature of injuries and the body parts targeted by the assailants can only point to one thing namely, that there was a clear intention to kill the deceased. It transpired from the evidence that the accused persons held a meeting some days prior to the incident with the aim being to eliminate the deceased so as to prevent the deceased from giving proceeds of sugar cane set to be harvested to his younger wife who resided in Sangalo. It is thus quite clear that there was malice aforethought on the part of the assailants.

26. As regards the issue of identification of the accused persons as the perpetrators of the crime, the prosecution's star witness was PW1. He told the Court that the accused persons herein are his family members and that that the 3rd accused herein summoned him to come back home from Eldoret where he resided and that he later joined the 1st, 2nd, 3rd accused herein and one Job Simiyu at home. A meeting was held wherein to seek the services of a witchdoctor so as to eliminate the deceased herein, their father. A cow was sold for that purpose and that he promised to contact a witchdoctor from Eldoret. The witchdoctor was given Kshs. 25,000/= and who left. After some days of waiting, the deceased did not die as promised. He told the Court that the deceased herein had allocated each of his sons land and that he remained with a portion for himself and his young wife. The 3rd accused had indicated that it was necessary to eliminate the deceased so that the younger wife did not benefit from the sugar proceeds. Upon failure by the contracted witchdoctor to deliver, the 2nd accused suggested that they could organize to kill the deceased. The 3rd accused suggested that they all congregate in the kitchen and when the deceased was available then they should eliminate him. It was agreed that they would execute the plan in January 2016. The 3rd accused was to take away the lantern and then leave him and that the accused persons to execute the job. As soon as the 3rd accused left, the 2nd accused got hold of the deceased and wrestled him onto the ground while beckoning them to join him. The deceased complained as to why they wanted to kill him. They were successful in pinning him down and that the 2nd accused went for some weapon to be used. He came up with a huge stick and placed it on the deceased's neck as they stepped on it. After a while, the deceased passed on. He told the Court that



they all participated in the killing of the deceased. He added that the body of the deceased was taken to Kibisi River where it was dumped.

27. From the evidence on record, it is manifestly clear that this case turns on the accomplice evidence of PW1 who is the only eye witness to the alleged crime. The other material evidence available is that of PW2, PW3 and PW 4 which only goes as far as showing the existence of a relationship between the accused and PW1 and the fact that they were not aware of any issues with regard to inheritance or the planted sugarcane that was close to being harvested.
28. PW1 was the sole eyewitness of the crime. Depending on the facts, a witness to a crime can be taken to be an accomplice. This was the finding of the Court of Appeal in the case of Antony Kinyanjui Kimani v Republic Criminal Appeal 157 of 2007 [2011] eKLR which defined an accomplice thus;

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:

“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case.”

29. I have critically considered the evidence before this Court. From his evidence, PW1 actively participated in the crime and fit the above description of an accomplice. Section 141 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.
30. PW1 admitted knowing and participating in the plotting and execution of the killing of the deceased herein which was a criminal offence. I must, accordingly, treat his evidence as that of an accomplice. I warn myself of the dangers inherent in relying on such evidence. I have considered the facts, the law and practice that Courts are to bear in mind when confronted by accomplice evidence.
31. In Benard Munungi Njau v Republic [1979] eKLR, the Court of Appeal in a coherent, authoritative and plain manner laid down the law on accomplice evidence. The Court stated;

“Section 141 of the Evidence Act lays down that an accomplice shall be a competent witness against an accused person; and conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice. It was said by Scott J in Emperor v Maganlal, 14 Bom 119 that though there may be cases of exceptional character in which an accomplice’s evidence alone convinces the judge of the fact required to be proved the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons, namely: (1) because the accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because as a participator in the crime he is an immoral person who is likely to disregard the sanctity of an oath; and (3) because he gives his evidence under promise of pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution.



In *Canisio s/o Walwa v The Republic* (1956) 23 EACA 453, after reviewing a number of decisions and dicta in years gone by, the judges concluded their judgment with a compendious statement of what they regarded as the true rule of law as to convicting on the uncorroborated evidence of an accomplice and the proper manner of applying that rule to any given case. On page 458 the said passage reads as follows: “Generally speaking it is a practice, founded upon prudence when applying the rule as to the onus of proof, not to convict without any evidence corroborating that of accomplices. But there are exceptional cases in which a departure from that general practice is justified. The criterion as to whether such an exceptional case has arisen is the credibility of the accomplice or accomplices combined with the weight to be attributed to the facts to which they testify. The principal factors to be considered when assessing their credibility are not only their demeanor and quality as witnesses but also their relation to the offence charged and the parts which they played, in connection therewith, that is to say, the degree of their criminal complicity in law and in fact. A departure from the general rule of practice is only justifiable where, on applying that criterion in that manner, it clearly appears that the accomplice evidence is so exceptionally cogent as to satisfy the Court beyond reasonable doubt, and where accordingly the judge or judges of fact, while fully conscious of the general inherent danger of any such departure, is or are convinced that in the particular instance concerned the danger has disappeared.”

32. In *Haroon Haji Abdulla v State of Maharashtra* (1968 SC), the Court laid down that an accomplice is a competent witness and his evidence could be accepted and if the Court feels there is enough evidence to support the testimony of the accomplice then a conviction can be based on such testimony.
33. Thus, the Court must take caution not to base a conviction on the uncorroborated evidence of an accomplice for reasons that; firstly, the accomplice is likely to swear falsely in order to shift the guilt from himself; secondly, a participator in the crime is an immoral person who is likely to disregard the sanctity of an oath; and thirdly he gives his evidence under promise of pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution. (See *Emperor v Maganlal*, 14 Bom 119). That is not to say that a conviction shall be illegal merely because it proceeds from the uncorroborated evidence of an accomplice. It is the duty of the Court to weigh the evidence and make a finding whether an exceptional case is made to warrant a departure from the general rule not to convict on the uncorroborated evidence of an accomplice. In doing so, care must be taken at all times not to shift the burden of proof to the accused.
34. I have reviewed the evidence of PW1. He was clear on what transpired on the material day up to the point when he was in the company of the accused herein and that they attacked the deceased to his death despite his pleas and concerns on why they wanted to kill him. He gave evidence that the deceased had allocated each of his sons’ land and that he remained with a portion for himself and his young wife, and that 3rd accused pained by the deceased’s move, indicated to them that it was necessary that they eliminate the deceased so that they young wife would not benefit from the harvested sugarcane proceeds. PW3 corroborated the fact that the deceased had requested his assistance in the harvesting of his sugarcane crop.
35. On their part, the accused persons denied any involvement in the death of the deceased and alluded to the fact that PW1 was been negatively influenced by PW2 due to the succession of the estate of the deceased and that he is on a witch hunt mission because they prevented him from selling his parcel of land, which according to them was being instigated by PW2. The 1st accused testified that on the day of



the alleged incident he was at Eldoret while the 2nd and 3rd accused alluded to the fact that the deceased had left with PW2 and that he was not seen again.

36. In raising such an alibi defence, the 1st accused did not assume any responsibility of proving his innocence. It was held in the case of *Mwamusi & Another v Republic* [2003] eKLR that an accused person who puts forward an alibi did not in law, assume any burden of proving his defence. It was sufficient if an alibi introduced into the mind of a Court a doubt that was not unreasonable.
37. Ultimately, the duty to prove the case lies squarely on the shoulders of the prosecution based on the evidence adduced, the strength or lack of which would displace or fail to displace the alibi raised by the defence.
38. From the above paragraph, it is clear that PW2 was not in the company of the deceased on the day of his alleged disappearance as alluded to by the 2nd and 3rd accused since on the same day he proceeded to Sangalo area where the 3rd accused had told him that the deceased was at his second wife's home. On arriving there, the said wife informed him that she had not seen the deceased and that this made him to be worried and that he alerted his family.
39. Having considered the evidence as a whole including the defence and the defence submissions made and upon directing myself on the law and practice, it is clear in my mind that PW1 spoke the truth when he testified that together with the accused persons herein they attacked the deceased leading to his (deceased's) death. He spoke the truth when he confirmed that they plotted the killing of the deceased from July 2015. I believe his evidence. The fact that the 3rd accused did not want the young wife of the deceased to benefit from the sugarcane proceeds and in which PW3 told the Court that he was due to have a conversation with the deceased on the harvesting of the sugarcane confirms that there was existing hostility from the accused persons and thus the successful plot to eliminate the deceased indicated that they all had interests in the proceeds from the sugarcane. Indeed, the influence of the 3rd accused who is the mother of the rest of the accused including PW1 is quite powerful especially where there is a co-wife in the picture. I am satisfied that the accused persons planned and executed the plan to eliminate the deceased so as to ensure the deceased's second wife did not get the sugar cane proceeds.
40. To the extent of PW1's participation in the commission of the crime, he was an accomplice and that his evidence must be treated with caution.
41. I am, however, satisfied that this is a case that merits a departure from the general rule of practice as I am satisfied that the accomplice evidence by PW1 is so exceptionally cogent, devoid of malice against the accused and based on no gain on the part of the accomplice as to satisfy me that the accused persons truly participated in the hitting and/or attacking on the deceased on the left side of his head leading to his death.
42. Lord Morris of Borthy-Gest in *Director of Public Prosecutions v Hester* [1972] 3 WLR 910,919,920 said the following:

“Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion surer than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because of its essential nature and indeed because of its virtue. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.”



- 43. On the material before Court, it is clear that PW1 participated in the unfortunate incident leading to the death of his father. He was later pricked by his conscience and the disturbing spirit of his late father to reveal the truth. There’s nothing to show that he stood to gain anything from framing the accused persons as each of them had been shown their respective lands and neither is there any iota of evidence that the failure by the accused herein to give him the alleged Kshs. 200,000/= motivated him to hurt the accused persons by framing them with the offence. 1st and 3rd accused disputed the said promise to be paid the alleged money while the 3rd accused who made the promise failed to make any rebuttal on the alleged payment of Kshs. 200,000/=.
- 44. As regards the question of the existence of malice aforethought, as stated above, the accused persons held a meeting in July 2015 after they were called by the 3rd accused wherein they actively plotted the elimination of the deceased through witchcraft and when the witch doctor failed in his mission, they met yet again, to organize the elimination of the deceased by themselves. PW1 was present in the meeting. In light of the evidence on record, the accused person’s assertion that they never plotted any killing of the deceased nor did they kill the deceased herein and trying to insinuate that it was PW2 who had the motive due to succession matters and who was just instigating PW1 is unbelievable and unsustainable when juxtaposed with the evidence on record. I do not believe the version of the defence and that it is my finding that the evidence tendered by the prosecution is quite overwhelming against the three accused persons herein. The defence evidence did not shake that of the prosecution and further did not cast any doubt on it.
- 48. In view of the foregoing observations, i find and hold that the Prosecution has proved the information of murder contrary to Section 203 as read with Section 204 of the Penal Code as against all the accused persons herein beyond reasonable doubt. Consequently, i find the accused persons herein herein, Daniel Munialo Mukhwana, Evans Khaemba and Beatrice Nanjala guilty and convicted accordingly.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF NOVEMBER, 2024

**D. KEMEI
JUDGE**

In the presence of:

- Daniel Munialo.....1st Accused
- Evans Khaemba.....2nd Accused
- Beatrice Nanjala.....3rd accused
- Olonyifor 1st, 2nd and 3rd Accused
- N/A for MwangiWatching brief for family of deceased
- Mnishifor Prosecution
- Kizito/Ogendo.....Court Assistant

