



**Republic v Isaiah (Criminal Case E039 of 2021)  
[2024] KEHC 9209 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E039 OF 2021**

**DK KEMEL, J  
JULY 29, 2024**

**BETWEEN**

**REPLIC ..... PROSECUTOR**

**AND**

**EDWIN KIPKORIR ISALAH ..... ACCUSED**

**JUDGMENT**

1. The accused herein Edwin Kipkorir Isaiah has been charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 6<sup>th</sup> day of November, 2021 at Kaptama Location in Mt Elgon sub County within Bungoma county he murdered Samson Chepkoy Cheminingwa.
2. The accused denied the charge. The hearing kicked off in earnest on the 28<sup>th</sup> February 2022. The prosecution called thirteen (13) witnesses in support of its case. Jane Seber (PWI) recalled on 6<sup>th</sup> November 2021 at around 7.41 AM her neighbour and PW2 herein alerted her of the presence of a stranger in their area and who was snoring beside the road. She warned her about approaching him and reached out to the area assistant chief who later alerted the police. Upon the arrival of the police, she joined them at the scene where they found the said man lying on the ground with blood over his face. They observed that he was already dead and that he had injuries on his head. On clear inspection of his frame, she was able to recognize him as the deceased herein and that he resided in the village opposite hers. According to her, the deceased was found a few meters away from the accused person’s compound. She stated that the accused person hails from her village and who is like a grandson to her. On cross-examination, she testified that the accused person’s compound is fenced with barbed wire and that there had been an increase of theft cases by young people in the area recently. On re-examination, she testified that there used to be robbery incidents in parts of the village near the town centre and that there were no stones nearby where the deceased lay.



3. Emily Jeruto (PW2) a business lady, recalled that on 6th November 2021 she closed her business at 7.00 pm and proceeded to the toilet. She told the Court that her toilet is near the road leading to the river. She heard groaning sounds and on lighting her torch and pointing towards that direction, she saw a man lying next to the road. She noticed the man was bleeding from his head and appeared to be about to die. She quickly rushed to borrow a mobile phone that she used to alert PW1. She told the Court that the accused person is her neighbour.

On cross examination, she testified that her home is about fifty meters from that of the accused person and that she can be able to see the accused person's home from hers. According to her, it was not possible for her to hear noises from the house of the accused.

On re-examination, she told the Court that the deceased lay about seven meters away from accused's gate and that the road towards the river is laced with small pebbles and which could not have caused the injuries on the deceased.

4. Patrick Kwemoi Motum (PW3), a cousin to the deceased herein, testified that on 6<sup>th</sup> November 2021, at 3.00 pm, he met with the deceased at Kaptama market and that they agreed to head to Bondeni area for a drink. They indulged in some Chang'aa and at 6.00 pm, he advised him that they should move along to a drinking joint closer to their respective homes, as it was getting dark. According to him, they proceeded to the house of the accused herein where they bumped into the deceased's old friend. The deceased and his friend chatted for a while as they drunk until he requested that they should leave for their homes. The deceased declined to leave the house of the accused and informed him to proceed alone as he still had a lot to catch up with his buddy. The deceased only escorted him to the road to hail a motor bike and who went back to the accused's house, and that the following at about around 8.00 am he learnt about his demise. He told the Court that he used to drink alcohol at the house of the accused and that the accused is a known Chang'aa dealer in the area.

On cross-examination, he told the Court that he left the accused's house at 6.00 pm and left the deceased in the company of his friend and another person.

5. Gladys Samson (PW4), the wife to the deceased herein, stated that she recalled on 6<sup>th</sup> November 2021, she was with her husband up to 3.00 pm when he left for the market to repair his shoe but that he never returned. According to her, her brother-in-law informed her that her husband had been assaulted by the accused herein and that he received the same information from the area chief.

On cross examination, she told the Court that the deceased had injuries on his head, face and hands and that his body was retrieved not far from the house of the accused.

6. No. 259934 Amos Kimutai Cheminingwa (PW5) a police officer based at Isebania Police Station, testified that the deceased herein was his father. According to him, on 6<sup>th</sup> November 2021, he was at home but only arrived at the scene after his father had passed on. He observed that his body was lying on the ground, a short distance from the accused's house and that there was a lot of blood on his face and head. His body was collected and taken to Kaptola mortuary where a post mortem was conducted in his presence. He identified the postmortem report dated 13<sup>th</sup> November 2021 which was marked as Mfi-1.

On cross-examination, he told the Court that he found the body of the deceased lying on the road about one meter from the accused's house.

On re-examination, he told the Court that the police showed him a small blood-stained stone which they claimed had been recovered from the accused's home.



7. Bera Kapkiror Karungai (PW6) a businessman, testified that on 6<sup>th</sup> November 2021, at 7.00 pm he was on his way home from his business activities as usual he found his wife, PW2, and others outside the verandah. He was informed by his wife that on while she was on her way to the toilet she spotted a body of someone lying along the road nearby. He parked his motorcycle and rushed to the clan elder and on his way, he met with the police who briefed him on everything. Together they proceeded to the scene where they found the body but could not recognize it. More police officers from the area arrived and that the are chief was able to recognize the deceased.

On cross-examination, he testified that he arrived home at 7.00 pm but did not proceed to the scene and that it was his wife who alerted him of the events. He told the Court that there were blood stains from the toilet to the place where the body lay.

On re-examination, he told the Court that he concluded that the body had been moved from the toilet to the road due to the bloodstains and a pair of sandals near the toilet.

8. Edwin Chepkurui Sewiy (PW7) the area assistant chief of Kaptama sub-location, stated that on 6<sup>th</sup> November 2021 at 7.00 pm he received a call from PW1 alerting him of an incident where somebody had been assaulted along the road. He quickly reached out to the police and proceeded to the scene. On his way there, he received a report that the police had arrived and found the person already dead. On arriving at the scene, he was able to identify the deceased herein as he was one of the residents in his sub-location. He observed that there was blood all over the body of the deceased and that he was not able to identify the perpetrator. He told the Court that he knows the accused as he is a resident in his area

On cross-examination, he told the Court that he knew the accused very well and that he has never been presented to his office over criminal activities. He told the Court that he did not witness the incident and does not know who killed the deceased. He testified that there was evidence that the deceased's body was dragged along the road and that there have been no incidents of robbery in the area.

9. Moses Mutei Ngeiywa (PW8) a neighbour to the accused, testified that on 6<sup>th</sup> November 2021 he went to purchase some Chang'aa from the home of the accused and take it home with him when he found the accused and his wife. He purchased his alcohol and left. He told the Court that he saw three other customers outside the home including a police officer. He stayed for five minutes and left. He told the Court that his wife alerted him of the incident and that on that day he did not see the deceased.

On cross-examination, he testified that he went to the home of the accused at 6.20 pm and then went back to his house at 6.30 pm after he had purchased his alcohol. He insisted that he did not see the deceased at the home of the accused and that he did not meet him on his way home after purchasing his liquor and that he knew him prior to this incident. He told the Court that he did not know who killed the deceased person.

10. Dr. Edward Wafula (PW9) testified that he conducted the postmortem examination at Dreamland Hospital mortuary on the 13<sup>th</sup> November 2021, and noted presence of multiple stab wounds on the left side of the scalp. He also noted a large swelling on the left side of the face. He also confirmed that there was a large bruise on the abdominal wall. He also noted that there were bruises on the small intestines. He formed the opinion that the cause of death was severe anaemia due to excessive bleeding due to deep stab wounds. He produced the report as exhibit No.1.

On cross-examination, he stated that the deceased had injuries on the left side of the head and that the weapon was likely to be a knife as the deceased had more than three stab wounds.

On re-examination, he stated that it was possible for a panga to inflict such injuries especially the tip.



11. Godwin Amala Waliama (PW10) government analyst based at Kisumu Laboratory, testified that he was in Court to produce a report he prepared with regard to samples as forwarded to him by No. 87087 PC Kennedy Kipsoi of DCI Mt. Elgon. According to him, the request was placed on 30<sup>th</sup> December 2021 for a DNA analysis on the 14 exhibits as submitted. He established that the bloodstains on the recovered items matched with the DNA profile of the deceased with that DNA profile generated from panga (“H”) being mixed with that of unknown person. He also established that the DNA profile of the accused herein did not match with any DNA profile generated from the 14 listed items. He produced the report dated 18<sup>th</sup> April 2023 as exhibit No.12.

On cross-examination, he testified that the exhibits analysis did not match with the DNA profile of the accused herein, and that he did not analyse the finger prints on the panga as the same was not within his docket.

12. No. 70814 PC Samuel Koech (PW11) police officer based at Kaptama Police Station, recalled on 6<sup>th</sup> November 2021 at 7.30 pm while at the station he received a report from a member of the public that there was someone lying on the road. He also received a call from PC Mutua who had also received a similar report. In the company of one PC Kiprotich, they proceeded to the scene and on arrival they found members of the public around the deceased’s body. The deceased’s body lay on the roadside and that there was evidence that he had been dragged to the place where he was found. They suspected the body had been dragged from the home of the accused herein and on entering his compound, they found the accused who had a panga in his possession. They noted that the panga had blood stains on the handle. They apprehended the accused and took him to the station. He also noted that there were blood stained stones near the body which they gathered as evidence. He identified the accused before the Court as the one they apprehended.

On cross-examination, he testified that they arrived at the scene of crime at 7.30 pm and that it was dark. He told the Court of the possibility of the deceased raising an alarm to attract the neighbours. He told the Court that he could not differentiate from the exhibits what belonged to the deceased and what belonged to the accused.

On re-examination, he testified that he saw injuries on the face and head of the deceased indicating that he had been injured by a sharp object.

13. No. 231987 ACP Wilson Yegon (PW12) DCIO Kigumo Sub-County, testified that he was previously based at Kimilili as DCIO and that on 10<sup>th</sup> November 2021 while at the office he received a report from DCI Mt. Elgon who alerted him of an apprehension of a murder suspect and that he was to record his statement. According to him, the accused notified him of his intention to record a confession with regard to the murder of the deceased and that he preferred to do so in English. He appended his signature on the same. He also inquired if the accused wished to have any third party present eg relative and that he declined. He inquired if he had been threatened, tortured, coerced or forced to record the confession to which he denied. He inquired if he wanted his legal counsel to be present but he declined. He confirmed that he was arrested on 6<sup>th</sup> November 2021 in Kaptama area Mt. Elgon and that he had no medical complaints. He was warned about commenting on the murder incident and that he stated that he wished to comment on the same. He proceeded to record the accused’s confession statement and after he wrote a certificate to which the accused thumb printed on it and he also made his own certificate as the recording officer. He sought to produce the confession statement and certificates as exhibits but which was objected to by the defence counsel.

14. The Defence counsel objected the production of the confession statement and certificates on the grounds that the same was obtained unprocedurally since the accused was threatened and forced to make the same. Counsel for the state insisted that the defence failed to demonstrate to this Court that



the accused was forced to enter into the confession and urged this Court to allow the statement of confession in evidence. This Court vide its ruling delivered 31<sup>st</sup> October 2023, found that the statement of confession by the accused was not only obtained involuntarily but also unprocedurally and that the same should not be admitted into evidence. The court directed the prosecution to mark the document for identification.

15. No. 78205 PC Martin Mutunga (PW13) DCI Mt. Elgon and investigating officer in this case, testified that on 6<sup>th</sup> November 2011 at 8.00 pm he was alerted of the murder of a person in Kaptama area and in the company of his colleagues they proceeded to the scene where they found the accused and another not before Court already apprehended. They picked them up plus the collected exhibits and booked the suspects. He told the Court that they visited the home of the accused and collected some blood-stained soil (mFI-3) and they later established that the accused was selling Chang'aa and that the deceased was with him on that material date. The exhibits were forwarded to the government analyst. He produced in Court two pieces of blood-stained stones as exhibit 2; soil with blood-stains as exhibit 3; one small sharp stone as exhibit 4; a short-sleeved shirt as exhibit 5; a knee quarter short trouser as exhibit 6; one black trouser as exhibit 7; one panga with a black rubber handle as exhibit 8; one brown shirt with stripes as exhibit 9 and one black trouser as exhibit 10. He identified the accused in Court as the suspect they apprehended.

On cross-examination, he told the Court that exhibits 6,7 and 9 belong to the accused herein. He told the Court that he recorded the witness statements but could not tell which of the witnesses pointed out the accused as the assailant.

On re-examination, he testified that the incident occurred on 6<sup>th</sup> November 2021 and that Kaptama police officers arrived at the scene at 1900hrs. He also told the Court that all the exhibits were recovered from the scene on 6<sup>th</sup> November 2021.

16. The prosecution then closed its case. A prima facie case was later established to have been made and that the accused was placed on his offence. He opted to tender a sworn testimony.
17. Edwin Kipkorir Isaya (DW1) is the accused herein. His case is that on the material date he had come back from performing various tasks at 6.30 pm and after making some detours he got home at 6.40 pm where he changed from his rain soaked clothes, as it was raining, only for the police officers to apprehend him, take him to Kaptama police station claiming that they had received a report from someone that he had threatened someone's wife. He told the Court that it was at the station that he learnt of the death of the deceased herein. He told the Court that he is not aware of how the body of the deceased ended up near his compound.

On cross-examination, he told the Court that earlier that day he went to work at a certain farm as a maize loader and that his evidence did not mention the individuals he was doing that work with. He denied the claims that his wife brews Chang'aa and that he was not at home during the alleged incident.

On re-examination, he told the Court that he was not at home when the incident occurred and that he only got home at 6.40 pm.

18. At the close of the defence hearing, the Court directed that submissions be filed and exchanged by the parties. None of the parties complied with the Court directions.
19. Having considered the evidence on record, the issue for determination is whether the prosecution proved its case to the required standard of proof. It is trite that the burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all instances save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that



only a little doubt is left in his favour. (See *Miller V Minister of Pensions (1947)* ALL ER 372.) In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

20. Section 203 of the Penal Code provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

21. In *Anthony Ndegwa Ngarivs Republic [2014]* eKLR the Court of Appeal sitting in Nyeri held:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a) the death of the deceased and the cause of that death;
- (b) that the accused committed the unlawful act which caused the death of the deceased and
- (c) that the Accused had the malice aforethought.”

22. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 206 of the Penal Code are as follows:

- i. That the deceased is dead;
- ii. That the death was caused unlawfully;
- iii. That there was malice aforethought; and
- iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

23. On whether there was proof of death and the cause of the said death, the post mortem report on the examination of the body of the deceased was duly produced as no objection was raised by the defence. Dr. Edward Wafula (PW9) who conducted the post mortem confirmed the presence of multiple stab wounds on the left side of the scalp. He also noted a large swelling on the left side of the face. He also confirmed that there was a large bruise on the abdominal wall. He also noted that there were bruises on the small intestines. He formed the opinion that the cause of death was severe anaemia due to excessive bleeding due to deep stab wounds. He produced the report as exhibit No.1. To that extent, the first ingredient of the offence has been proved.

24. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. Article 26 of *the Constitution* is clear that every person has the right to life and that a person shall not be deprived of life intentionally except as authorized by law. See *Republic V Boniface Isawa Makodi (2016)* EKLRL that referred to the case of *Guzambizi Wesonga V Republic (1948)* 15 EACA 65 where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defense or in defence of property.”



25. The deceased herein was found to have died from deep stab wounds, which caused severe anemia leading to his death as detailed in Prosecution exhibit 1. There is therefore certainty as to the cause of death. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further evidence presented before Court irresistibly points to an unlawful act that led to the death of the deceased following an assault. Accordingly, I find and hold that the death of the deceased was caused by an unlawful act.
26. On whether the prosecution have proved beyond reasonable doubt that it was the accused herein who committed the unlawful act which caused the death of the deceased, the accused has denied committing the unlawful act leading to the deceased's death. The question is, who caused the unlawful act that led to the demise of the deceased?
27. What does the evidence adduced by the Prosecution reveal? From the onset, the burden of proof lies on the Prosecution throughout the trial and that burden does not shift to the accused even if the accused chose to remain silent as that is his constitutionally guaranteed right. See Article 50(2)(i) of *the Constitution*. In addition, the accused has the right not to give any self-incriminating evidence. See Article 50(k) of *the Constitution*.
28. From the evidence on record, the Prosecution did not adduce direct evidence. No witness testified before the Court that he had seen the accused assault the deceased. PW3 the cousin to the deceased herein, testified that on 6<sup>th</sup> November 2021, at 3.00 pm he met with the deceased at the Kaptama market and they agreed to head to Bondeni area for a drink. They indulged in some Chang'aa and at 6.00 pm he advised him that they should move along to a drinking joint closer to their respective homes, as it was getting dark. According to him, they proceeded to the house of the accused herein where they bumped into the deceased's old friend. The deceased and his friend chatted for a while as they drank until he requested that they should leave for their homes. The deceased declined leaving the house of the accused and informed him to proceed alone as he still had a lot to catch up with his buddy. He told the Court that he was alerted of the demise of the deceased the next day and did not witness the incident. PW8 on the other hand, testified that he did not see the deceased at the home of the accused, he did not meet him on his way home after purchasing his liquor and that he knew him prior to this incident. PW2 confirmed that from her compound she could hear noises from the compound of the accused but she did not avail any evidence in Court indicating that she heard noises of the deceased crying for help as a result of assaults from the accused but she only heard groaning sounds and saw somebody lying on the road. It was the evidence of PW7 that the accused was never presented before him for doing any criminal activity and as the area chief he was in a better position to confirm if the accused was a Chang'aa seller. That evidence by the defence was that he does not sell Chang'aa and on the day of the incident he was out working and only managed to get home at 6.40 pm. The prosecution was under duty to ensure that the allegation that the accused assaulted the deceased was with malice aforethought and not excusable. From the evidence of the witnesses availed, it was not established and that the same failed to prove that the accused assaulted the deceased.
29. From the evidence tendered before Court, it is clear that none of the Prosecution witnesses saw the accused person or any other person assault the deceased. The accused in his defence testified that he was at work and he only got home at 6.40 pm and that no Chang'aa is sold at his house. Accordingly, I find no direct evidence to prove that the accused indeed caused the death of the deceased.
30. The question therefore is whether there was circumstantial evidence linking the accused person with the death or murder of the deceased. The conditions for circumstantial evidence to sustain a conviction



in any criminal trial were laid down in *Abanga alias Onyango –vs- Republic* CR. App NO. 32 of 1990(UR) where the Court of Appeal held:

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

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

31. In *Sawe vs Republic* [2003] KLR 364, the Court of Appeal stated that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

32. In the instant case, PW3 testified that he advised him that they should move along to a drinking joint closer to their respective homes, as it was getting dark. According to him, they proceeded to the house of the accused herein where they bumped into the deceased’s old friend. The deceased and his friend chatted for a while as they drank until he requested that they should leave for their homes. The deceased declined leaving the house of the accused and informed him to proceed alone. The deceased escorted him to the road to help him hail a motorbike and then he headed back to the accused’s house. He told the Court that the accused was known in the area as a Chang’aa seller. It was the evidence of PW2 that the accused herein is her neighbour and that it was not possible for her to hear noises at the accused’s house, from her house. According to PW1, the accused herein was a neighbour and that he used to do odd jobs on the farms in the area and that when the police visited the home of the accused the next day after the incident, they carried away a 20 litre jerrycan full of Kangara and that he used to sell brew within the compound. PW13 the investigating officer in this case, testified that on 6<sup>th</sup> November 2011 at 8.00 pm he was alerted of the murder of a person in Kaptama area and in the company of his colleagues they proceeded to the scene. He told the Court that they visited the home of the accused and collected some blood-stained soil (mfl-3) and they later established that the accused was selling Chang’aa and that the deceased was with the accused on that material date. They also recovered a panga with blood stains. The exhibits were forwarded to the government analyst. He produced in Court two pieces of blood-stained stones as exhibit 2; soil with blood-stains as exhibit 3; one small sharp stone as exhibit 4; a short-sleeved shirt as exhibit 5; a knee quarter short trouser as exhibit 6; one black trouser as exhibit 7; one panga with a black rubber handle as exhibit 8; one brown shirt with stripes as exhibit 9 and one black trouser as exhibit 10. He identified the accused in Court as the suspect they apprehended. On cross-examination, he told the Court that exhibits 6,7 and 9 belong to the accused herein. PW10, a government analyst based at Kisumu Laboratory, testified in regard to samples as forwarded to him by No. 87087 PC Kennedy Kipsoi of DCI Mt. Elgon. According to him, the request was placed on 30<sup>th</sup>



December 2021 for a DNA analysis on the 14 exhibits as submitted. He established that the bloodstains on the recovered items matched with the DNA profile of the deceased with that DNA profile generated from panga (“H”) being mixed as that of unknown person. He also established that the DNA profile of the accused herein did not match with any DNA profile generated from the 14 listed items. He produced the report dated 18<sup>th</sup> April 2023 as exhibit No.12. In his report he concluded that, the DNA profile of the accused herein did not match with any DNA profiles generated from the above listed items and that blood stains on the panga were mixed DNA profiles of the deceased and an unknown person.

33. It was upon the Prosecution to prove their case against the accused beyond reasonable doubt and that burden does not shift to the accused to exonerate himself. In my humble view, the evidence adduced by the Prosecution witnesses fell short of linking the accused herein with the death of the deceased herein.
34. Failure by the Prosecution and the investigating officer to collect and to collate evidence linking the accused to the offence as charged leaves this Court with no other finding other than that the Prosecution has not proved its case against the accused beyond reasonable doubt. For avoidance of doubt, there is no evidence whether direct or circumstantial connecting the accused with the death of the deceased herein. This is what Section 111 (1) of the *Evidence Act* (Cap 80 of the Laws of Kenya) demands (as was held in *Miller vs. Ministry of Pensions*, [1947] 2 All ER 372)).
35. Where the Prosecution fails to prove the guilt of the accused beyond reasonable doubt that the accused is the person who with malice aforethought killed the deceased, then the accused is by law entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused in respect of that offence.
36. The accused in his sworn statement of defence denied committing the offence and that there was no contrary evidence that he committed the offence, not even that of unlawfully killing the deceased herein. Therefore, in the absence of any evidence that suggests that the accused could be held culpable for manslaughter, this Court must return a verdict of not guilty. This is because mere suspicion however strong that the accused was at home selling Chang’aa to the deceased and whereas there would have been chances that the deceased was assaulted by the accused, there are also very high chances that another person who was not the accused, could have assaulted the deceased and left him for dead. As authoritatively observed by the Court of Appeal in *P.O.N. v Republic* [2019] eKLR (Ouko, (P), Gatembu & Murgor, JJ.A):

“.....no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not....”
37. From my analysis of the Prosecution and defence evidence tendered, albeit the Prosecution proved that indeed the deceased died as a result of the injuries he sustained on his face, head and abdominal area and which injuries were caused by an unlawful act, I find no evidence adduced by the Prosecution to prove beyond reasonable doubt that the accused herein is the person who in fact caused the death of the deceased.
38. Therefore, the Prosecution having failed to prove the fact that the accused caused the death of the deceased, it would be an act in futility and an academic exercise to consider the issue of presence or otherwise of malice aforethought.
39. In the end, I find that the prosecution has failed to prove its case against the accused herein beyond any reasonable doubt. Consequently, I find the accused herein Edwin Kipkorir Isaiah not guilty of the



charge of murder contrary to section 203 as read with section 204 of the Penal Code. He is hereby ordered acquitted of the said charge. He is to be set at liberty forthwith unless otherwise lawfully.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 29<sup>TH</sup> DAY OF JULY 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

Edwin Kipkorir Isaiya Accused

Wanjala for Accused

Miss Kibet for Prosecution

Kizito Court Assistant

