Republic v Langat (Criminal Case 12 of 2018)
[2023] KEHC 1174 (KLR) (24 February 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL CASE 12 OF 2018

RL KORIR, J

FEBRUARY 24, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JOSEPH KIPYEGON LANGAT ..... ACCUSED

JUDGMENT

1. Joseph Kipyegon Langat (Accused) is 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 30th day of May 2018 at Chepkosa Location, Chepalungu sub-county within Bomet County murdered John Kipsang Cheruiyot.

2. The Accused was arraigned before Muya J. on 12th July, 2018. He pleaded not guilty and went to trial in which Prosecution called 12 witnesses, eight of whom testified before Muya J. I took over the case at its tail end and heard only the last four prosecution witnesses.

3. A summary of the Prosecution evidence follows. It was the Prosecution case that the deceased John Kipsang Cheruiyot was attacked on his way home on the night of 30th May, 2018. He was in the company of Zephania Mutai (PW1) and one Julius Kipsang Kirui who was the motor cycle rider. On the way along Kaptarakwa-Transmara road around Chepkosa area, they were confronted by the Accused who attacked them with pieces of wood. That the rider lost control and they all fell and it was then that the Accused who had dogs descended on them and assaulted them. They scattered in different directions into the bushes where they hid till morning. PW1 said that the next morning he went to a nearby house in the village and talked to a lady (PW2) and asked her to direct him to the village elder to report the incident. They found the motor bike at the place where they had left it but the rider was missing.

4. Zeddy Mutai (PW2) escorted PW1 to the scene and found the Accused and one Charles around 10.00am. Lenus Kirui (PW3) was the area Assistant Chief of Chepkosa location. He received a call from Joseph Langat (Accused) that two youths had been threatened in the area and that he advised him to go and record a statement. PW3 went to the scene and found the Accused and other members of the Public. Zephania (PW1) told them that the deceased had jumped into the river about 600metres away from where they were attacked. PW4 was the wife of the Accused and she declined to testify after being sworn.

5. Ruth Sigei (PW5) a resident of Chepkulo said that she was in her house on the night of 30th January, 2018 when she heard the sound of a motor cycle and then somebody screaming while uttering the words that they were strangers. She opened her house and saw two men who were asking for help. The following day at about midday she saw a huge crowd and Zephania who was said to have been together with the deceased was arrested. She saw a motor bike was on the footpath and was also aware the deceased's body was later retrieved from the river.

6. Samwel Sigei (PW6) said that he heard screams at around 10.00PM on 30th May, 2018. That the screams were coming from the direction of the river. He got out to check but could not see the person who was screaming so he went back to his house. The following day he got information that one of the two people who were screaming had been killed and later the body was retrieved from the river.

7. Nicholas Kiprono Ngeno (PW7) said that he heard screams on 30th May, 2018 at about 10.00pm and on checking didn't see the person who was screaming. He went back into his house and the following day learnt that one man had gone missing.

8. PW8 was one Kipyegon Caleb of Chepkosa who worked as a security guard at Vinscott. He told the court that he was at home in Chepkosa village taking lunch at around 2pm on 4th June, 2018 when he heard screams from direction of Nyangores River. He ran towards the river and saw something floating. He entered and pulled out a person towards the bank where he was assisted by other members of the public. The body was that of a man. The hand was whitish and the face had scars and was bleeding. PW8 said that he did not recognize the body which was removed to the mortuary by the police.

9. Obadiah Kiprono Cheruiyot testified as PW9. He told the court that on 4th June, 2018 he was in the company of Bernard, Nichodemus and Leonard. They drank at Sigor Marende club from 7pm-to 12.00 midnight. The court observed that (PW9's) voice trailed off when he started telling the court what Bernard had told them. He then stated that he was drunk and didn't know anything about the case. That he did not witness the murder. He said that Bernard (the rider) had Joseph's daughter called Tetyo with whom he had a sexual relationship. He said that might be the reason why they were called to the police station to write statements.

10. Dr. Kimutai Nickson Kiplangat (PW 10) conducted the post mortem on the deceased's body at Longisa County Referral Hospital on 6th June, 2018 at 11.00am. He observed 2 cut wounds and a bruised cut in the intestines collapsed lungs, and injury to the spinal cord. Dr. Kimutai found the cause of death to be lung collapse due to injury to the spinal cord and lungs. He produced the post mortem report as Prosecution Exhibit 1.

11. APC Allan Grano Adede (PW11) was the arresting officer. He testified that he re-arrested the Accused Joseph Lagat at Chebunyo police station where he was handed over by members of public.

12. The Investigating officer No. 885234 PC Evans Nyabuga testified as PW12. His testimony ran as follows:

> On 30th May, 2018 the deceased John Cheruiyot was riding a motor cycle with Zephania Mutai on their way from Marishoni towards Dikiir, Transmara. On their way at Chepkosa they found a stranger on the road who had 2 dogs. The stranger assaulted them with a rungu and the two scattered into the bushes around. They came to know that the assailant was Joseph Langat. The following morning Zephania Mutai (PW1) went to Mama Sigei's (PW2) house to seek help and she directed him to Nyumba Kumi chairman who escorted him to the chief. The Nyumba Kumi chairman turned out to be the Accused. The chief in turn escorted PW1 to Lukumek Police Station to make a report where upon the police sent a missing person signal. The deceased's body was recovered by the members of the public four days later on 14th June, 2018 from Nyangores River in Chebunyo. It was about 4 kilometers downstream from the scene of attack. The Investigation officer concluded his testimony by stating that he didn't know if the deceased jumped into the river. In re-examination, he said that the deceased was thrown into the river.

The Defence Case

13. At the close of the prosecution case, the court found a *prima facie* case against the Accused. He elected to make an unsworn statement. He told the court that he was at his home on 30th May, 2018 and went to sleep around 9.00pm. On the morning of 31st, one Charles Tanui informed him that there was a boda boda motorcycle on the road and on going there, they were joined by Zephania and Zeddy Mutai who told them that Zephania and a rider had been threatened the previous evening and each one ran their way. DW1 said that he called the chief and the chief came with one Linus Kirui. That Zephania showed them where they had passed and also said that there was a person in the river. When they called John's home, they were informed that he did not arrive home the previous night. The Accused further stated that they later recovered John's body 4 kilometers downstream in River Nyangores. That he was arrested after a few days. DW1 told the court that he did not know how John died.

Submissions

14. The Prosecution filed submissions on 31st March, 2022 after the close of their case on 17th March, 2022. The gist of their submissions was that they had established a prima facie case which the accused. Secondly, the Prosecution summarized and proved each of the 4 ingredients of murder under section 203 and 206 of the *Penal Code* and narrowed in on the evidence of PW1 which stated that he was with the deceased when the Accused attacked by hitting them with a rungu. The Prosecution further submitted that there was circumstantial evidence to link the accused to the offence. They relied on *Ahmed Abuffathi Mohammed and Another v Republic* [2018] eKLR

15. The Prosecution adopted these submissions at the close of the defence case.

16. The Defence filed submissions dated 29th March, 2022. The gist of their submission is that the prosecution did not prove their case to the required legal standard. They relied on *Miller vs. Ministry of Pensions* [1947] 2 ALL ER 372. The defence submitted that the cause of death was drowning and that the Accused was not identified as the person who had attacked the deceased and PW1. They urged the court to return a verdict of not guilty. The defence adopted and relied on these submissions at the close of their case on 14th July, 2022.

The Law

17. Section 203 and 206 of the *Penal Code* sets out the following ingredients of murder:-

    i. The fact of death of deceased

    ii. The cause of such death

    iii. The fact that the death resulted from the unlawful act or omission on the part of the accused.

    iv. That in causing such death, the accused acted with malice aforethought.

18. Each of the ingredients above must be proved by the prosecution beyond reasonable doubt. In *R v Weldon Kipyegon Langat*, Criminal Case No 8 of 2018 (2022) eKLR, this court cited Lord Denning in the case Miller v Ministry of *Pensions*,(1947) 2 ALL ER 372 which held thus:-

> " 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 the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a 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 will suffice."

    See also *Dickson Mwangi Munene & another v Republic* [2014] eKLR.

19. Having set out the law and principles above I now examine the evidence to confirm whether or not the prosecution proved each ingredient of the offence to the required legal standard.

Fact of death

20. The deceased in this case was in the company of PW1 when they were attacked and they ran in different directions. His body was found four days later in River Nyangores. PW8 retrieved the body which was moved to Longisa County Referral Hospital Mortuary where Dr. Kimutai Nickson Kiplangat (PW10) conducted the post-mortem and produced the post-mortem report, Exhibit 1. The fact of death was therefore proven.

Cause of death

21. The prosecution called PW1 who told the court that when they were attacked near Chepkosa, he ran and hid in some shrubs, while the deceased who was the rider was left behind. He described that they were attacked near the river and the body of the deceased was later recovered from the river, while the next morning he found the motor bike at the same place on the road where they had been attacked. The pathologist (PW10) found the cause of death to be rapture of cervical column and spinal and lung collapse due to assault.

22. The defence disputed that the cause of death was injury occasioned by assault. They argued that the deceased must have drowned. The theory of the defence was evident throughout the cross-examination of witnesses. Under cross examination, PW1 said that they were attacked near a bridge and that they did not run towards the river. PW3 said in his testimony that the scene was near the River Chepkulo and that the bridge had been swept away. PW8 retrieved the deceased's body from the river and pulled it to the river bank.

23. The defence submitted that the prosecution did not clearly demonstrate the cause of death. That PW3 told the court that he received information from PW1 that when PW1 and the deceased were attacked, they ran for safety and the deceased jumped into the river. The defence submitted that the deceased must have drowned because it was the rainy season and the river had burst its banks and the bridge had been swept away. Further, they submitted that the pathologist PW10 stated in cross-examination that the severe injuries which he observed on the body of the deceased were caused by strong running water. The defence concluded that the post-mortem findings were neither convincing nor conclusive as no further tests were done to corroborate the findings of the pathologist PW10.

24. I have considered the evidence on the cause of death. I accepted PW1's testimony that the deceased and PW1 were attacked in the night and that they ran for safety. It is also not in dispute that the deceased's body was retrieved from the river 4 days later. Did he die as a result of injuries or from drowning in the river or of both?

25. The evidence of PW1 that they were riding a motorcycle in the locality which turned out to be the scene was credible. He told the court that the hid in shrubs and in the morning approached a nearby house where PW2 directed him to the house of the village security elder popularly known as *Nyumba kumi* to report the incident. The said *Nyumba kumi* called the chief and when they all went to the scene, they found the deceased's motor cycle. I therefore find the evidence of PW1 regarding the fact that they were attacked sufficiently corroborated and proven.

26. The fact of attack was also supported by the evidence of the other villagers PW2, PW5, PW6 and PW7. They told the court that they heard screams from the direction of the road and river which later turned out to be the place where the deceased and PW1 were attacked. PW5 even went further to say that she heard the person screaming words to the effect they were strangers and pleaded for help.

27. It is clear to this court therefore that the deceased and PW1 were assaulted. PW10 the pathologist found 2 cut wounds on the frontal region, a bruised cut in the small intestine and fracture of the spine at the foot of the neck. He opined that the cause of death was rapture of the spinal and collapse of the lungs. In cross-examination PW5 explained that injury caused by falling on stones cannot make a sharp cut wound. PW5 further explained in cross-examination that drowning was not the cause of death because there was no water in the deceased's lungs. He opined that the deceased was already dead when he was thrown into the river.

28. PW10 was an expert witness and his evidence was therefore receivable by the court under Section 48 of the *Evidence Act*. Expert evidence is not binding to the court and can be rejected. In the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal No 203 of 2001 (2007) 1 EA 139 the Court of Appeal, held that:-

> " Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

29. Expert evidence should be considered alongside other evidence. I am persuaded by Mativo J. (as he then was) in the case of *Stephen Kinini Wang'ondu v The Ark Limited* (2016) eKLR where he held that:-

> " .....While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use

to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not "trump all other evidence".7 It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.12 A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."

30. In *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR), the Court of Appeal held that:-

> "……Secondly, there is also need for the court to subject such expert testimony to vigorous in-depth analysis, weigh it along with all other evidence bearing in mind that the duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise with regard to issues in controversy before the Court."

31. In this case, it was the evidence of PW5, PW6 and PW8 that they did not see the person who were screaming but that those persons were screaming for help. They placed the person screaming at the scene. This corroborated PW1's evidence that they were assaulted. The evidence corroborates that of PW1, that the deceased and himself were assaulted. I therefore find the expert evidence of the PW10 credible. I accept the findings of the pathologist that cause of death was injury to the spinal cord and lungs. I also have no reason to reject his explanation that the deceased would have had water in the lungs if he had drowned.

32. There can be a supervening cause of death. Section 213 of the *Penal Code* provides that:-

> "A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—
>
> (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the

treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied"

33. In *Rex v Okule s/o Kahect* (1941) 8 EACA 78, the Court of Appeal stated that:-

> " a person who inflicts injury on a person who is already in a weak state, whether by reason or illness or a previous assault by another is guilty of murder if death results from such injury, supervening upon the weakness of the victim, even though, the last injury would not by itself have killed a healthy person."

34. In Re: *Jayaraman v Unknown* 1967 CriLJ 776, the court held that:-

> " .....The simpler case would be where death results directly from the act itself. When death results from consequences naturally or necessarily flowing from that act, then also there need be no hesitancy in saying that the act caused death. For the "thirdly" of Section 300 to apply the requirement is, that the injury inflicted is sufficient in the ordinary course of nature to cause death, a high degree of probability in the ordinary way of nature that death would ensue on the injuries. The difficulty comes in when there are recognisable contributory causes leading to the ultimate, and the Court is called upon to consider in such a case the relative effect and strength of the different causes in bringing about the effect and then to find whether the responsibility for the result could be assigned to a particular act or not as the proximate or efficient or effective cause.
>
> But the theory of causation has to be kept within reasonable limits at both ends. The question when there are latter complications would be, whether the complications are the natural or likely consequences of the injury, the ordinary course it takes before death causes. That the consequences are labelled as a supervening condition or disease, given a name and shown as the immediate cause of death will not efface from the train of events and causes the original injury, if death is its ultimate result....."

35. The deceased in this case may therefore have breathed his last when his already assaulted body hit the rocks in the river causing him fatal injuries. The rocks may have accelerated the death. The initial fatal injuries inflicted upon him by his assailant on the road near the bridge occasioned his death and the injuries sustained in the river were but a supervening cause. There is therefore no dispute that the deceased died an unlawful death. I dismiss the suggestion by the defence that the deceased jumped into the river when alive. His death was clearly unlawful.

36. The next issue is whether the accused was linked to the unlawful death of the deceased. Lord Kenyon C.J. in *Fowler v Padget* (1798) 7 T.T. at, 514 stated that, "To constitute a crime, there must, as a rule, be both a guilty mind and a criminal act."

37. Similarly, Odgers in '*The Common Law of England*', (2nd Edn. Smith and Maxwell Ltd, 1920) p.106 stated as follows:-

> " Every common law crime consists of two elements: first, the voluntary commission of an act which is declared by the law to be criminal; second, the existence in the offender of a state of mind which is declared by law to be consistent with criminality."

The intent and the act must concur to constitute the crime.

38. Simply put, the offence of murder is comprised of *actus reus* (the act itself) and *mens rea* (the criminal mind or intention). The *actus reus* in this case is the unlawful taking of another's life. Mens rea on the other hand denotes malice aforethought which is a condition of the mind in which one unlawfully and voluntarily does a serious bodily injury to another. In the case of In the case of *Joseph Kimani Njau vs. Republic* (2014) eKLR the Court of Appeal stated:-

> " In both criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution ..."

39. In this case the person who placed the accused at the scene of the attack was PW1. At the time of the attack, PW1 did not know or recognize the accused. On being attacked he sought refuge in the bushes and in the morning ventured to a nearby house to seek assistance. He said that he was referred to a *nyumba kumi* man who later turned out to be the accused.

40. A closer look at PW1's evidence shows that he did not in the first instance identify the accused. He stated that "We met a man near a bridge. It was dark but there was moon light when he started beating us, we were frightened. He hit me from the back. I was carrying a bag at the time. It helped to soften the blows. I did not sustain serious injuries. It is not true that owing to fright I was unable to see the accused clearly. The following day I saw the accused properly. I did not see the face. I agree that there are look alike. He is the one who said Transmara people are not good. What I have told the court is the truth. This is the man who beat me up. Upon report the accused was later arrested. I did not know him before..."

41. From the above, it is clear that PW1 did not know the accused previously. It is also clear that the incident happened at night making the conditions of identification unfavorable. The Court of Appeal in the case of *Cleophas Wamunga v Republic*(1989) eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

42. I have therefore tested the evidence of identification given by PW1. From his evidence, they seem to have spent some time with the assailant. He says that their assailant accosted them around 9.00 P.M. They saw with the aid of the head lights of their motor cycle that he was armed with two pieces of wood and had two dogs. He said that the road was stony and raining that when they were hit the driver lost control and they fell and while trying to lift the motor bike, the assailant approached them and he asked him why he was attacking them and at that point the assailant started making calls on his phone.

43. From the evidence above, I find it believable that PW1 and the deceased were able to see their assailant using not just the moon light but also the head lamps of their motor cycle. The fact that the road was stony means that they were not speeding which made them see the assailant. Further, PW1 said that when the assailant approached them after they fell, he (PW1) asked him why he was beating them. This shows that their engagement with him was not fleeting. They ran away when he started making calls without answering them.

44. PW1 identified the accused in court and stated that he was the one who had assaulted them and who also said that Transmara people are not good.

45. I would be prepared to accept the dock identification of the accused particularly because PW1 had shown the court that their engagement at the time of the attack was not fleeting. However what I find disturbing is that PW1 was not able to recognize the accused the following morning when he first encountered him. According to PW1 he approached a homestead in the morning and found a woman who gave him direction to the place where they had left the motorbike. He went to the scene and found three people whose names he came to learn were Joseph, Charles and Nicholas.

46. The record does not show that he recognized the person who had assaulted them. When he asked to be shown the village elder, it turned out that the one named Joseph was the village elder and he was the same person who later turned out to be the accused. It is my view that if PW1 had clearly identified the accused, he would have recognized him or remembered his face or any notable features when he encountered him again in the morning.

47. Secondly PW1 told the court that he did not know the accused before. This admission makes it improbable PW1 would recognize the accused as person who had told them that "Transmara people are not good". For the voice identification would only be believable if the accused was known to him before and he was familiar with his (accused) voice. In the case of *Choge v Republic* (1985) KLR 1 the Court of Appeal held that:-

> "Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual recognition. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it....."

48. Similarly, the Court of Appeal in *Safari Yaa Baya v Republic* (2017)eKLR, held that:-

> "With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the appellant, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the

conditions prevailing at the time of the recognition were favourable and it should also be borne in mind that voices may at times resemble……"

49. It is my conclusion therefore that the identification of the accused by PW1 required corroboration as it was not free from possibility of error.

50. I have looked at the evidence of the rest of the witnesses with respect to identification of the accused. PW2 told the court that PW1 came to their homestead about 6.00 a.m. in the morning and informed that they had been accosted and chased in the night and he needed the assistance of the village elder and to be shown the place where they had been attacked. She took her to the area and found the village elder Joseph and one Charles. PW3 was the assistant Chief named Lenus Kirui. His evidence was that he was informed by Joseph Langat the *Nyumba kumi* through a phone call at 6.00 a.m. that two youths had been threatened (meaning attacked) in the night. He went to the scene and found PW1 and Joseph Langat (accused) who was later arrested as a suspect. PW5 Ruth Sigei. PW6 Samwel Sigei, and PW7 Nicholas Kiprono Ngeno were all residents of Chepkosa village. Their testimony was that they heard people screaming in the night and dogs barking. They neither saw the people who were screaming for help nor the attacker.

51. PW8 Kipyegon Caleb also another resident of Chepkosa village retrieved the deceased's body from the River. PW9 told the court that he knew nothing about the murder though he was aware that his friend Bernard was involved with the accused's daughter. PW10 was the pathologist, while PW11 was the arresting officer who only rearrested the accused who had been frog marched to the police station by members of the public as a suspect.

52. It is clear from the evidence outlined above that the witnesses who were close to the scene did not see the accused assault PW1 and the deceased. And that if they did or if they learnt that he was the one, they censured their testimony so as not to mention his name. It was not lost to the court that these witnesses were the neighbours of the accused while PW1 and the deceased were strangers in that locality.

53. The testimony of PW9 Obadiah Kiprono Cheruiyot was particularly telling. He seemed to suggest that the deceased was assaulted by the accused on a case of mistaken identity. PW9 told the court that on the evening of 4th June, 2018 between 7 pm to 1200 midnight he was drinking with his friends Bernard, Nicodemus and Leonard at Sigor, Marende club. That they left with Bernard who was the motorcycle rider and first dropped Nicodemus that Bernard was with Joseph's (Accused) daughter called Tetyo with whom he had a sexual relationship. PW9 however changed his mind in mid – testimony and stated that they were drunk and that he did not witness the murder and he knew nothing about the death of the deceased. It was the observation of the court that PW9 was not candid in his testimony and that the prosecution ought to have had him declared a hostile witness and be cross-examined. Nonetheless his evidence then did not identify the accused as the person who attacked PW1 and the deceased.

54. The Investigating Officer No. 885234 PC Evans Nyabuga told the court that his investigations showed that the deceased and Zephaniah Mutai (PW1) were riding from Marishoni towards Dikiir Transmara when they found a stranger who had 2 dogs on the road at Chepkosa and that the stranger attacked them with a rungu. That the stranger turned out to be *Nyumba kumi* elder who later turned out to be the accused. He testified that the accused surrendered himself to the AP station Sigor and reported that he was the one who killed the deceased. PW 12 further told the court that the accused attacked the deceased because he thought that the deceased was the person who was coming to pick this daughter. He also told the court that the accused used to rear dogs.

55. It appears to this court, from the testimony of the Investigating Officer that he knew more than the witnesses told the court. He was aware that the witnesses knew who assaulted the deceased. However, as

I have already found, no witness actually told the court that they saw or were aware from circumstantial evidence that it was the accused who fatally assaulted the deceased. The Investigating Officer also referred to information he had gathered from the accused's son and the Chief, one David Tulmet. However, the two were not presented as witnesses by the prosecution thus making the statements attributed to them hearsay.

56. It is evident to this court from my assessment of the testimonies of prosecution witnesses that there was a successful attempt by the witnesses to shield the accused from direct identification as the person who attacked PW1 and the deceased leading to the deceased's death. The evidence of identification therefore remained scanty and fell far short of the required legal standard. All that the evidence accomplished was to raise a very strong suspicion that it was the accused who fatally assaulted the deceased. This court is however bound by law to grant the accused the benefit of doubt as suspicion alone cannot found a conviction. This was the edict the Court of Appeal in *Sawe vs. Republic* (2003) KLR 364 where it categorically held that:-

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

57. In *Mary Wanjiku Gichira vs. Republic*, Criminal Appeal No 17 of 1998, the Court of Appeal also held that:-

> " suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."

58. In the end, it is my finding that the prosecution has proved the death and cause of death to the required legal standard but failed to prove beyond reasonable doubt that the accused was the person who caused the unlawful death of the deceased. Consequently, I return a verdict of not guilty for lack of sufficient evidence linking the accused to the death of the deceased. That being my finding, I find no reason to discuss the element of mensrea.

59. The accused is acquitted of the charge of murder under section 210 of the *Criminal Procedure Code*. He is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF FEBRUARY, 2023

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Accused, Mr.Kenduiwo for the Accused, Mr. Njeru for the State and Siele (Court Assistant)**