



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 55 OF 2018
REPUBLIC...PROSECUTOR
VERSUS
BRIAN SAVA.....ACCUSED
RULING

The Charge

Brian Sava, whom I will refer to as “the accused” in this ruling, was arraigned in court on 5th October 2018 on charges of murder contrary to Section 203 as read with Section 204 of the Penal Code (Chapter 63 Laws of Kenya) contained in an information dated 5th November 2018. However the charge was not read to him on that date. On 7th November 2018 the charge was read to the accused. The particulars of the charge are that on the night of 31st August 2018 at about 11.00pm in Gishagi area of Kangemi within Nairobi County, jointly with others not before the court murdered James Njoroge. The accused denied the charge. The accused is represented by Ms Julie Soweto. Various prosecution counsel, including Mrs Kinoti and Ms Ikol have led the prosecution with Ms Ongweno concluding the prosecution.

Prosecution Case

The evidence by the prosecution witnesses show that Protus Induswe Musina (PW1) was drinking with Henry his friend and Njoroge, the deceased, at a bar known as Mogotio Wines & Spirits situated in Bottomline in Kangemi Nairobi on the evening of 30th August 2018. Henry and Njoroge left Protus drinking. After a short while, about 20 to 30 minutes it was time to close the bar necessitating Protus to leave. He saw three (3) people struggling outside the bar. The deceased was one of the three people. Protus asked what was happening (*iko nini?*). At that time he was hit on the head and also stabbed. He did not know what happened after this. He did not identify any of the other two (2) people. He found himself in hospital together with the deceased.

Mogotio Wines & Spirits belonged to Stephen Musee Ngunia (PW3) and his wife Lilian Muthoni (PW4). Both Stephen and Lilian confirmed that Protus, whom they called Santos, and the deceased were drinking at their bar on the evening of 30th August 2018. Both also confirmed learning of the attack on Protus and the deceased the following morning.

One of the people that took the deceased and Protus to hospital is Oliver Kanyeke Lijodo (PW2). This witness told the court that on 30th August 2018 he was at a funeral gathering when, on leaving the gathering at 1.00am he heard screaming. He went to the place of screaming. He found the deceased and Protus, whom he called Santos. He said Protus had been stabbed on the neck and the deceased, who had been stabbed on the abdomen, was crawling on the ground. With help of other people they took Protus and the deceased to Lianas Hospital where the deceased died. Jonathan Thuo Irungu (PW5) the father of the deceased received information about the death of the deceased on 31st August 2018. He found the body of the deceased at Lianas Hospital. He observed that the body had three (3) stab wounds on the head and one stab wound on the side below the ribs. He moved the body to Chiromo Mortuary where post mortem was performed. The deceased was buried in Kinangop.

The circumstances leading to the arrest of the accused person were narrated by Boaz Kennedy Obima (PW6), his son Clinton Obima (PW9) and Alvin Mukalambe Mwambili (PW13). Boaz told the court that towards the end of August 2018 (he also said it was at the beginning of September 2018) on a date he did not tell the court, he was drinking in a place near Kawangware 56 in Nairobi. The accused went to the place in company with another person. He called Boaz outside where he showed him a phone. The accused told him that he wanted to sell the phone at the price of Kshs 1000. After bargaining they agreed to take Kshs 800 which Boaz paid to the accused. Boaz identified the phone (Ex. 1) before the court as the phone sold to him by the accused in company of another person because of the cracks on the screen on the side and on the front. When Boaz got home, he gave the phone to his son Clinton Obima (PW9) to use but Clinton was not able to operate the

phone because it had a PIN which he was unable to crack. Boaz tried looking for the accused to help him with the PIN issue but he was unsuccessful. Father and son decided to sell the phone. Clinton sold it to Alvin. From what I can gather from the evidence of Alvin, the phone was sold to him on 31st August 2018 in the morning. He said he paid Kshs 600 but according to Clinton it was sold for Kshs 700.

There is also the evidence of Patrick Mwambili, PW14. He is brother to Alvin. He testified about buying the phone in question from his brother Alvin for Kshs 1000. When Alvin was arrested he mentioned Patrick as the last person to buy the phone. The phone was recovered by the police from Patrick. Patrick told the court that he and his brother Alvin were arrested on 15th October 2018. Alvin mentioned Clinton as the person who had sold the phone to him and Clinton mentioned his father Boaz as the person who had given him the phone. Boaz mentioned the accused as the person who, in company with another person, sold the phone to him. All of them, save the accused, were treated as witnesses. The accused was charged with this offence.

The phone tracked down to the accused was subjected to investigations through Safaricom service provider. This evidence was adduced by Daniel Hamisi (PW15) who at the time of his testimony was working with Safaricom Law Enforcement Liaison Office. Hamisi identified the phone through its IMEI number No. 861639038427720. He told the court that this phone was in active use on Safaricom line 0712167080. He testified that this is a Safaricom line and the user was James Irungu of Kenya National Identity Card No. 23732583. According to Hamisi the last transaction on this line was on 30th August 2018 at 19.56hrs.

There is further evidence that the accused confessed to the crime he is charged with. The statement of the accused, the alleged confession, was produced in court as Ex. 3. The defence did not object to the production of the statement. It bears the thumbprints attesting to the signature of the accused. In the statement the accused talks about robbing a drunk customer outside Generation Bar in Kawangware on the 31st August 2018 at 8.00pm. He talks about doing this in company of his two friends he identifies as Roba and Allano. He talks about selling this phone for Kshs 800 without saying to whom he sold the phone. This is the statement that PC Rogers, PW16, relied on to charge the accused with this offence. PC Rogers and PC Judith Agoro, PW17, investigated this case. PC Rogers admitted in cross examination that the confession by the accused refers to the scene of crime as Generation Bar in Kawangware while the charge sheet refers to the scene of crime as Mogotio Bar in Kangemi.

The evidence by PC Judith Agoro is that the phone was found with the accused after he was arrested by PC Rogers and other police officers. She further testified that the accused confessed to having taken the phone from James Irungu. She also told the court that she took the phone and showed it to the accused who confirmed that it was the phone he had taken from the deceased.

Submissions

The case for the prosecution came to a close after 17 witnesses had testified. This was on 14th January 2021. Ms Ongweno, the Prosecution Counsel appearing for the prosecution on that date, told the court that the prosecution did not wish to make submissions at the conclusion of its case. Ms Soweto, learned counsel, for the accused made her submission. She submitted on the charge as drawn to emphasize on the date the offence is alleged to have been committed, 31st August 2018 at 11.00pm, the alleged scene of the crime being Gichagi area in Kangemi Sub-county and the victim of the offence as James Njoroge. She submitted that these sets of facts are crucial and relevant to the prosecution case and that no evidence has been adduced to prove these facts. She submitted that the entire case for the prosecution rests on the evidence that the accused person stole a mobile phone belonging to the deceased and sold this phone to someone else and that it is this alleged phone that is the link between the accused person and the murder of the deceased. She submitted that the entire prosecution case rests on the mobile phone and that the prosecution is relying on circumstantial evidence.

Counsel submitted that the Constitution under Article 50 (2) (a) refers to rights of accused person to fair trial which includes right to be presumed innocent until the contrary is proved and the right to be informed of the charge with sufficient detail to answer it as well as the right to remain silent during trial. That it is presumed that the evidence of the prosecution has all the details that an accused person relies upon to answer to the charge and defend himself. That it is trite law that at the close of the prosecution case, the prosecution must establish a prima facie case beyond reasonable doubt that the accused committed the offence he is facing. That the Evidence Act Section 107 provides that the party that wishes court to find in the party's favour must prove that the facts the party is relying on exist and that this is the basis upon which the burden of proof rests. That the burden of proof in a murder trial is beyond reasonable doubt (see **Republic v. Juliana Wambui Thiong'o [2018] eKLR and Republic v. Kandege Katana Kazungu [2020] eKLR**).

It was further submitted that if at this stage of the trial the prosecution has not discharged the burden of proof and proved the elements of the offence, then the court has no basis for putting the accused on his defence and must set the accused free at this stage and should not wait for the accused to fill in any gaps left by the prosecution case in his defence.

It was submitted that the only issue for determination is whether the prosecution has established a prima facie case. Counsel cited the case of **R. T. Bhatt v. R [1957] E.A 332** on the issue of prima facie case. That there is no evidence linking the accused with the charge. It was submitted that there is no dispute that a person known as James Njoroge was murdered and that the attack was outside Mogotio Bar in Kangemi. That evidence points to the scene of crime being outside Mogotio Bar and this is the place the scene of crime officer visited. That PW1 who was with the deceased on the night of the alleged attack confirmed that they were drinking with the deceased at Mogotio Bar in Kangemi and that they were attacked outside that bar but there is no reference of the accused being robbed of a phone. That in the entire testimony of the prosecution there is no direct evidence that the deceased had a mobile phone at the time of the attack or he was robbed of the mobile phone or that he was the owner of the mobile phone that has been presented as the main exhibit in this case. That there is no testimony linking James Njoroge the deceased and the mobile phone before this court which according to Safaricom records presented by PW15 belonged to James Irungu. That this is a material fact and failure to prove such material fact conclusively raises a reasonable doubt. That even if this court were to assume that the mobile phone belonged to the deceased, there is evidence of PW15 that the last activity on the mobile phone was on 30th August 2018 at 19.56pm and that from the evidence of PW15 there is a pattern showing that the mobile phone was being used from 1900hrs to 2300hours. That when this evidence is juxtaposed against evidence presented in court that the deceased was attacked on the night of 31st August 2018 at 11.00pm or 2300hrs this evidence becomes relevant. That there is also a 24 hours gap between the last activity on the mobile phone and the time it is alleged the deceased was attacked and robbed of the mobile phone. That it is reasonable to presume that in that space of time anything, including the deceased losing his phone in the normal circumstances, could have

happened to the phone excluding robbery. It could also be that the deceased sold his phone. That the prosecution has not presented any evidence that the loss of the mobile phone and the robbery of the phone are connected. It was submitted that the two events are not connected and that there is a reasonable doubt that they are not connected. That the law is clear that any doubt or any inconsistency in evidence must be resolved in favour of the accused person.

It was submitted that the case for the prosecution is based on circumstantial evidence. That the Court of Appeal in **Musili Tulo v. Republic [2014] eKLR** stated that three requirements must be established where a case is based on circumstantial evidence:

- a. That the circumstances from which the inference of guilt must be drawn must be cogently and firmly established;**
- b. That those circumstances should be of a definite tendency unerringly pointing to the guilt of the accused;**
- c. That 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 and that before drawing the conclusion it is necessary to ensure that there are no other co-existing circumstances that would weaken or destroy the inference.**

It was submitted that the evidence of the prosecution does not satisfy the requirements of circumstantial evidence. Counsel submitted that if the accused were to remain silent the issues raised by the evidence of the prosecution, that is the identity of the mobile phone owner and connection to the deceased and the time lapse between when the phone was lost and connection with the robbery alleged to have caused death of the deceased, cannot be resolved. That on that ground alone, the prosecution case must fail.

It was submitted that the evidence of the Investigating Officer adds more confusion to the evidence of the prosecution and casts more doubt to prosecution case. She testified that the mobile phone found in possession of the accused and which is alleged to belong to the deceased relates to an Airtel mobile subscriber number alleged to belong to the deceased. That this evidence is contrary to the records presented in evidence which show that the line was a Safaricom line further casting doubt between what is alleged to belong to deceased and what is presented to the court and that this would explain why the deceased is James Njoroge and the records belong to James Irungu.

Counsel submitted on the doctrine of recent possession. That in order for the prosecution to succeed in convincing this court that the accused person caused the death of the deceased based on the doctrine of recent possession they must establish the following as stated in **Isaac Ng'ang'a Kahiga & another v. R [2005] eKLR**: a) That there must be positive proof that the property was found with the suspect; b) That the property was positively that of the complainant; c) That the property was stolen from the complainant; and d) That the property was recently stolen from the complainant. It was submitted that the mobile phone was not found in possession of the accused and that although the prosecution attempted to show that the phone had gone through several hands but it had originated from the accused person, PW5 who said he bought the phone from the accused did not positively identify the make of the phone. That there is evidence that PW5 said he bought the phone on 6th August 2018 several weeks before the alleged robbery. It was submitted that the prosecution has failed to meet the threshold in the **Isaac Ng'ang'a case**. That there is no evidence to prove that the deceased was the owner of the phone; that no one identified the phone owned by the deceased.

Counsel submitted that there are material inconsistencies in the prosecution case which inconsistencies are significant in considering the propriety of the charges laid against the accused and that any inconsistency that goes to the root of the matter or tends to cast doubt on the guilt of the accused must be resolved in favour of the accused. Counsel took issue with the evidence of the Investigating Officer that she contradicted other witnesses. Counsel concluded her submissions by stating that given the totality of the evidence before the court that put together with the discrepancies and inconsistencies of the evidence before the court and negative inferences that must be made on the conduct of the investigations, credibility of witnesses, failure to call relevant witnesses all put together leads to a conclusion that there is no prima facie case against the accused worthy of an answer.

Determination

It is the duty of this court at this stage of the trial to determine whether the prosecution has established a prima facie case to warrant the accused to be put on his defence. This is a requirement of law under **Section 306 of the Criminal Procedure Code** which provides as follows:-

- 1. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit record a finding of not guilty,**
- 2. When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence...**

But what is a *prima facie case*? The *Black's Law Dictionary 18th Edition* defines a *prima facie* case in the following terms:

“A case sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it makes later to be proved to be untrue”

In *Mozley and Whiteley's Law Dictionary 11th edition* defines prima facie case as follows:

“A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to

be called on to answer it. A prima facie case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side”

In defining what a prima facie case is, the case of **R.T Bhatt -Versus- Republic (1957) EA 332 - 334 & 335** keeps popping up. In this case, the Court of Appeal of Eastern Africa stated that:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gap in the prosecution case. Nor can we agree that the questions whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.”

My careful reading of all the evidence adduced by the prosecution witnesses shows that the case for the prosecution is based on circumstantial evidence. The only witnesses who saw the deceased on the evening of 30th August 2018 are Protus Induswe, Oliver Lijodo, Stephen Musee and his wife Lilian Muthoni. Protus identified the deceased with one name, Njoroge. Protus found three people struggling outside Mogotio Bar in Bottomline Kangemi. As he was trying to find out what was happening, he was hit on the head and stabbed. He fell down. He did not identify the other two people struggling with Njoroge. Oliver Lijodo found the deceased whom he identified in court as Njoroge crawling on the ground with injuries. This was outside Mogotio Bar in Bottomline Kangemi. He did not see the assailants. Stephen Musee and his wife Lilian Muthoni, the owners of Mogotio Bar, confirms seeing the deceased whom they identified as Njoroge inside their bar drinking but did not know what happened after the deceased left the bar. From the evidence of these witnesses, they did not see or identify the person(s) who attacked and fatally injured the deceased on the evening of 30th August 2018. None of these witnesses testify to seeing the accused that evening or knowing him.

It is clear to me from the evidence of the prosecution witnesses that the only evidence linking the accused with this crime is the phone, Ex. 1, alleged to belong to the deceased and which was sold to Boaz Obima by the accused and another person not before the court. This is the phone that is said to belong to the deceased and which the police claim that it must have come to the possession of the accused after he robbed the deceased on the night of 30th August 2018. I totally agree with the defence that the evidence against the accused is circumstantial. I also agree that the doctrine of recent possession is relevant in this case. This court in determining whether the prosecution has established a prima facie case against the accused will be considering these two: circumstantial evidence and the doctrine of recent possession.

The Court of Appeal in **Musili Tulo case** cited above was faced with similar circumstances where the evidence linking the Appellant in that case was circumstantial. In dealing with the issue of circumstantial evidence, the Court of Appeal in that case had to determine whether the evidence recorded satisfied the requirements of circumstantial evidence. The Court stated thus:

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:

- 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.**

Those principles were set out in the case of GMI v. Republic [2013] eKLR which echoes the locus classicus case of R. v. Kipkering Arap Koske & Another, 16 EACA 135.

In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke v. R [1958] EA 715 citing with approval Teper v. R [1952] AL 480, thus:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

The circumstances of this case are that the deceased was attacked outside Mogotio Bar in Bottomline Kangemi where he had been drinking in company of Protus and another man called Henry. It is alleged that his phone was stolen in the course of that attack. The phone whose IMEI is given as 861639038427720 changed hands about 4 times. The evidence is that the trail left behind as the phone changed hands from the accused to Boaz; from Boaz to Clinton; from Clinton to Alvin and from Alvin to his brother Patrick led police back to the accused. He was arrested. There are contradictions from the evidence of PC Rogers as to who was the last person to be found with the phone. He testified that the last person to be found with the phone was Alvin. However from the evidence of Alvin and his brother Patrick, it is Patrick who had the phone last after Alvin either sold it to him or gave it to him. The trail led police to Clinton and to his father Boaz and finally to the accused.

The dates as to when the phone changed hands are not clear. Boaz told the court that he bought the phone towards the end of August 2018. He also said it was the beginning of September 2018. Clinton said it was September 2018 when his father gave him the phone. After being

pressed in cross examination Clinton said he was given the phone by his father sometime between 1st to 10th September 2018 and that he stayed with it for one week before selling it to Alvin. Alvin was equally confused on the dates. He said he was working on 30th August 2018 and went home following day, which would be 31st August 2018. This is when he says he bought the phone from Clinton. He said he stayed with the phone for one week before police caught up with him. On cross examination, Alvin confused the dates all the more. He said he had bought the phone on 1st September 2018 and was arrested on 15th September 2018. On re-examination he said he bought the phone on 30th August 2018 but was arrested on 15th October 2018. Alvin's brother Patrick said he bought the phone on 10th October 2018 and was arrested on 15th October 2018.

The second set of evidence with contradictions is that relating to the scene of crime. The evidence of Protus who was in company of the deceased on the evening of 30th August 2018. Oliver who assisted in taking deceased and Protus to hospital after the attack on them, Stephen and Lilian who are owners of Mogotio Bar and who has seen the deceased and Protus in their bar that evening, agree that the scene was near Mogotio Bar in Bottomline Kangemi. The statement by the accused which the police refer to as a confession and which the investigating officers in this case relied on to charge the accused refer to an alleged offence that had occurred near Generation Bar in Kawangware near Stage 56. All the witnesses including the investigating officers agreed that Generation Bar and the Mogotio Bar are two different places. The scene of crime officer PC Joseph Gathecha, PW10, who visited the scene and took photographs of the same confirmed to the court that the scene was at Mogotio Bar. It is obvious to me that the police had two scenes and two crimes which they mixed up in their attempt to prove this case.

There are also the contradictions and inconsistencies contained in the evidence of the two investigating officers PC Rogers, PW16 and PC Judith Agoro, PW17. The latter was more dramatic in her contradictions. She testified that the phone in issue was found in possession of the accused. She further testified that the accused confessed to having taken the phone from one James Irungu. She went further to testify that she showed the accused the phone and he admitted that it was the phone he had taken from the deceased's pocket. She testified that she recorded statements of several witnesses and from these statements she was able to know what had happened. This cannot be true because if it were she would have known that the deceased was attacked near Mogotio Bar and that Mogotio Bar and Generation Bar are two different places.

My careful analysis of all the evidence leads me to the conclusion that the investigations, if any, were poorly conducted; that the investigating officers contradicted themselves to the extent that I doubt if they conducted any investigations at all. It is my view that they relied on the so-called confession of the accused to charge him.

It is my considered view that the evidence by the prosecution does not meet the threshold of circumstantial evidence. The evidence adduced by the prosecution witnesses is not cogently and firmly established. The evidence, especially that of the two investigating officers, is full of contradictions and inconsistencies leading this court to doubt that this case was investigated at all. The circumstances of this case are not of a definite tendency unerringly pointing towards the guilt of the accused and that the circumstances of this case taken cumulatively do not form a chain so complete that there is no escape from the conclusion that within all human probability the crime in this case was committed by the accused and none else. The issue of contradicting scenes of crime, the failure to identify the phone as belonging to the deceased, the failure of adducing evidence to prove that James Njoroge cited as the victim of this crime in the charge sheet is the same as James Irungu, the owner of the phone whose IMEI number was given to his court as well as failure to confirm the dates when the phone was stolen from the deceased and whether it is the same phone mentioned in the statement by the accused all go to show that the prosecution is standing on shaky ground in trying to pin this crime on the accused without adducing evidence to lead this court to the conclusion that the accused and none else is culpable. It is my finding that the evidence raises other co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused.

Can the prosecution find solace in the doctrine of recent possession? I have read and considered the authorities cited by the defence. In the case of **Isaac Ng'ang'a Kahiga & another** the Court of Appeal considered the doctrine of recent possession and stated thus:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that, the property is positively the property of the complainant; thirdly, that property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property,, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses,”

From the above citation it is clear to me that the prosecution must prove that the accused was in possession of the phone. Under **Section 4(a)** of the **Penal Code**, **“be in possession of”** or **“have in possession”** includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person. Court of Appeal in **Kinyatti v R [1984]eKLR** held that in defining **“being in possession”**, full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It further held that in order to prove possession, it is enough to prove either that the accused was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The Court further explained that knowledge that the item is in actual possession or in one's custody or of another person may be inferred from the circumstances or proved facts of the particular case.

The evidence shows that the accused was not found in actual possession of the phone. It was found with Patrick who told the court that he had bought the phone from his brother Alvin. Alvin said he had bought the phone from Clinton and Clinton told the court that his father Boaz had given him the phone to use. The accused was mentioned by Boaz. This evidence is shaky. Even if this court were to believe that the prosecution has proved ownership, which in my view it has not, there has to be proof that the phone was stolen from the complainant. I have stated in this ruling that there is no proof that the phone, Ex. 1 was stolen from the deceased in this case. There is no such evidence. I find no

evidence on record that James Njoroge had a phone with him and that he lost that phone when he was attacked outside Mogotio Bar. The evidence is not clear that James Njoroge is the same as James Irungu who was said to be the owner of Ex. 1. I find no proof in the evidence before me that the phone allegedly stolen by the accused near Generation Bar in Kawangware is the same phone said to belong to James Njoroge who was attacked outside Mogotio Bar.

An accused person enjoys the protection of the law through the right to remain silent and not to testify during the proceedings. An accused person also enjoys the right to be presumed innocent. This means that an accused person can choose to exercise the right not to testify. This cannot be taken to mean that by doing so he would be jeopardizing his case or is guilty. He has no duty under the law to prove his innocence. The burden of proof does not shift from the prosecution. It is the duty of the prosecution to adduce evidence to prove beyond reasonable doubt that an accused person is guilty of the offence he is charged with. His silence at trial should he choose to remain silent cannot be taken against him. To my understanding therefore, at the close of the prosecution case, the prosecution case should be cogently and firmly proved against the accused so much so that even if the accused were to opt to remain silent, the court trying him can without hesitation find the crime proved beyond reasonable doubt.

The prosecution in this case has failed to establish its case against the accused person. The threshold of circumstantial evidence has not been reached. The prosecution has equally failed to prove recent possession. Proceeding to place the accused on his defence is akin to expecting him to fill the gaps left by the prosecution case, hoping that he will say something incriminating. I find the evidence shaky, contradictory and inconsistent. The investigating officers did a poor job and relied on the statement of the accused to charge him. They did little to prove that the James Njoroge is the same of James Irungu; they failed to prove that James Njoroge had a phone with him on the night he was attacked and that this phone is the one before the court; they failed to prove that the accused is the one who attacked James Njoroge, fatally injured him and stole his phone in the course of that attack; they failed to tender evidence to show that Mogotio Bar is the same of Generation Bar which obviously is not the case. One of the investigating officers, Judith Agoro contradicted herself in material facts and seemed to want to force irrelevant evidence to this case to incriminate the accused and that there is no evidence to prove recent possession.

In conclusion, it is my finding that the prosecution has failed to establish a prima facie case against the accused to warrant this court to call upon him to tender evidence in his defence. With that conclusion, I have no other choice than to comply with Section 306 (1) of the Criminal Procedure Code and record a finding of not guilty. It is my finding therefore that the accused has no case to answer. He is hereby acquitted. He is free to go and enjoy his freedom unless for any other reason he is held in custody. Orders shall issue accordingly.

DATED AND SIGNED THIS 26TH DAY OF MAY 2021 BY HON. LADY JUSTICE S. N, MUTUKU.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF MAY 2021 BY HON. LADY JUSTICE C. W. GITHUA