



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 24 OF 2012

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH MUTISYA MUNYAOACCUSED

JUDGEMENT

1. The accused, **Elijah Mutisya Munyao**, faces the charge of Murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya for which a plea of not guilty was entered. According to the particulars of the offence the accused on the 18th day of July, 2012 at Kilembwa Village, Wamunyu Location, Mwala District within Machakos County, murdered **David Musau Kivuitu** (hereinafter referred to as “the deceased”).

2. In support of its case the prosecution called 10 witnesses. According to PW1, **Solomon Kivuitu Musau**, the deceased, **David Musau Kivuitu**, was his 6th born son. On the 17th July 2013, he was from his place of work at 7.30 p.m. when he found his family members at his home though the deceased was not at home and did not come home. At 9.00 p.m. they had supper and slept. At 4.00 a.m. he got information from **Philip Mutua** that the deceased was lying by the roadside, approximately four (4) kilometres away from his home, across the river. He then went to report to the police. At the scene he found the police and identified the deceased as his son. He had stabs wounds on the back and chest. The body was then taken to Machakos mortuary by the police and on 26th July, 2012, in the company of his daughter, **Eunice**, he identified the body of the deceased for the purposes of post mortem after which the body was released for burial. The accused, he testified, is a son to his cousin and therefore his nephew.

3. PW2, **Felix Mumina Munyao**, testified that the accused was his brother. He also knew the deceased, **David Musau Kivuitu**, who was related to him since they were clan members. On 18th July 2012 at 1.00 a.m. he was at home in the house when he heard screams which he realised were his brother the accused's. He then went to find out what was happening and found him where he was working as a watchman guarding premises at Kilembwa being assaulted by **PW5** and **PW9** who had made him lie down. Upon separating them, he realised that the accused was injured and was bleeding in the face. He however left the three at the scene and went back home since they were no longer fighting. It was his evidence that they were some 400 metres away from his home. According to him he recognised the three by aid of a torch. According to him, all the three (3) were drunk hence he could not talk to them to establish why they were fighting. It was his evidence that **PW5** was known to him previously, being a relative whom he had known for two (2) years. However, **PW9** was not known to him and he did not see the deceased that night. At 6.00 a.m. he was woke up and went to Kilembwa market after breakfast. At the market he saw a group of people gathered and found the deceased dead. He then heard the assistant

chief and police officers asking for the accused and he informed them that after he had separated them following the fight, the accused who was living within the homestead in his own house, did not return home. He did not know how his relationship with **PW5** was.

4. **PW3, Steven Kasese**, the assistant chief Kyawango sub-location was at home on 18th July, 2012 when at 3.00 a.m. the village elder **John Muota** called him on phone and notified him that a person had been killed at Kilembwa market. He proceeded there at 6.00 am and found police officers from Wamunyu sub-location. The person had been covered by a blanket and when he removed it, he realised that he was a person known to him as **David Kivuitu**. He had injuries on the chest and was bleeding from the wounds. His body was collected by police officers from Masii and the witness returned back home.

5. At 10.00 a.m. he received a call from someone that a suspect, who had been mentioned at the scene, **Mutisya Munyao**, and who was working as a watchman guarding a tractor, was seen going to Mwala. He sought assistance of a motor cycle operator and headed for Mwala. Along Kyawango Mwala Road, Miu River he saw the suspect who was known to him and decided to seek assistance from Administration Police officers from Mwala. At the market he found corporal **Langat** and went back with him and found the accused having crossed the river. Upon asking where he was going, the accused told them that he was going to the police station to make a report. They then arrested him and took him to Mwala then Masii police station for further investigations.

6. **PW4, Timothy Ndonye Moni** a businessman and the operator of Kieme Vienne City Bar, was on 17th July, 2012 selling at the said bar when the deceased went there at 8.00 p.m. In the bar there was **Musyimi** and **Wambua** among other people. The deceased ordered for a Pilsner and sat alone while speaking on phone. After being served the second drink, **PW4** asked him for payment and he said **PW5** would pay and continued talking on phone. **PW5** and **PW9** then arrived and sat on the same table with him and were served by **PW4** at the request of the deceased. And they continued talking as **PW4** continued serving them drinks. on the deceased's instructions. In the bar was a lantern lamp was on (hurricane lamp).

7. According to **PW4**, there was a man, **Mutua Muleke**, sitting on a table behind them and as he was leaving he knocked the table where the deceased was and a bottle fell down. As they wanted to harass him, **PW4** intervened and told them to leave him as he was drunk and took him outside.

8. The accused then entered the bar and asked for Keg and was served while seated alone at a table. **PW9** told then told him not to make noise as he would be like the person who **PW4** had taken out. All over a sudden **PW4** noted a scuffle involving **PW5**, **PW9**, the deceased and the accused but he could not tell who started it. He closed the counter and got hold of the accused and with the help of the other three pushed him outside. He then told the other three who had returned to the bar and were drinking that he wanted to close down the bar as he did not want trouble. The accused then returned with his brother **PW1** and one **Chomba** and they sought to know from **PW9** and the deceased who had assaulted the accused. However, **PW4** together with the other three pushed them out and only the three remained inside the bar. **PW4** told them to finish the alcohol to let him close down. The accused then threw a stone from outside but it did not hit anybody and when **PW4** went out to verify he saw him running away since there was moonlight through which he was able to see the accused's clothing that he was wearing. After the three left, he closed the bar before 11.00 p.m. and went to sleep.

9. At about 1.00 p.m. **PW9** woke him up and told him that the deceased had been stabbed by the accused and he wanted **PW4** to assist in taking the deceased to the hospital using **PW4**'s vehicle. **PW4** however told him that he had no fuel and they asked him to call a motor bike operator as the deceased might not survive the attack. That, however, was in vain, and **PW4** went back to sleep. In the morning he was called by the Assistant Chief who informed him that a person had been murdered and he wanted **PW4** to go to the market. Upon going there he found that the person who had been killed was **David Kivuitu**, the deceased whom he knew before. **PW4** stated that he also knew the accused.

10. In cross-examination, **PW4** stated that the deceased took three (3) bottles of beer. According to him, when the accused entered the bar he had no problem with any person. He drunk a cup of keg though he was already drunk. According to him, it is the three who started insulting him comparing him to the old

man that had been thrown out of the bar. According to him, he helped the accused removed out because the three could have injured him as he was alone. Though the stone was thrown, he did not see who did the actual throwing of the stone. According to him, the people had no difference and they had no grudge against each other and none of them threatened the others life. He however did not witness the stabbing of the deceased. When the accused's brother went to find out who had assaulted their brother nobody was injured at that point.

11. PW5, **Peter Musau Benson** was on the 17th July, 2012 at 8.30 p.m. at his home at Wamunyu Kilembwa a place called Tsavo market with **PW9** when he got a telephone call from his nephew, the deceased who wanted to know where he was. They then agreed to meet him at Kilembwa market. They found him at Kilembwa market at a club owned by **PW4** and they sat at a table with other people. The deceased told them that he said he had drunk two (2) bottles of alcohol and ordered for them three bottles each.

12. As they were drinking, a man sitting on a stool fell and in the process hit bottles on their table. The deceased demanded that the person pays for the alcohol but the bar attendant intervened saying that said the person did not have money as there was somebody else paying for his drinks. The person who had been paying then offered to pay but as he had only Kshs 200 the deceased told him to pay and he would pay the difference and they paid as agreed and the person who knocked the beer who was already drunk, left together with the person who was paying for his drinks.

13. After a few minutes some five young men entered the bar asking where the deceased was and started hurling stones. One of them was the accused whom PW5 knew with his brother. The accused then held the deceased and they struggled. After the accused was ordered to leave, they left. According to PW5, the accused entered the bar as the rest stood at the door. According to him the person who separated the deceased and the accused was PW5's brother, Geoffrey. After that they continued staying in the bar. However, the accused returned and told the deceased to find a place where to pass then disappeared. The accused, he stated lived in the same neighbourhood with them.

14. After the club closed they left together with the deceased and Geoffrey and went away at around midnight but there was a pressure lamp which enabled him to see. Along the way they saw some light which seemed to be emanating from a torch and on reaching a junction, the accused emerged and said he wanted the deceased upon which the deceased hastily moved ahead and met the accused and as the deceased ran, he was chased by the accused who stabbed him with a knife. According to PW5, he was able to identify the accused because after he stabbed the deceased, he turned back and faced his brother, Geoffrey, and they struggled and fell down. PW5 then snatched him the torch he had and used it to flash at him thus confirming that it was the accused. He identified the said torch in court.

15. According to PW5, the accused also stabbed Geoffrey's neck before he separated them. Using the torch, he saw the accused holding a long knife with black plastic handle in his hand which he identified in court. PW5 then noticed that the deceased was lying down facing downward some 20 metres from where they were and upon going to check he found that he was already dead. He observed that the deceased was bleeding from the back upper side. The accused then ran where the deceased was held him, lay on him crying out regretting his action.

16. PW5 returned to the club and relayed the information to the owner of the bar, **PW4**, and asked him for assistance to take them to hospital. However, the owner of the club said he had no fuel in the car and advised him to go and see his brother whose son, **Mutinda**, had a motor cycle. On reaching there, the motorcycle had no pressure and **Mutinda** called another lad with a motor cycle who came and they proceeded where he had left the accused but only found the deceased since Geoffrey was with him. The motor cycle operator said he had to report to the police first and rang Masii police station. The police came and after he took **Geoffrey** to hospital PW5 then proceeded to the accused's father's home to pass to them the information. He then went to report to the Sub-chief and on return he found the police and other people having arrived at the scene. The body was later removed by the police and taken to Machakos station. According to PW5, the accused wore a black/grey apron that night with a pair of trousers and he had no difference with him.

17. In cross-examination, he stated that when the deceased called him he was not at home but was at Tsavo where deceased first called him while the deceased was at Kilembwa market where he found him drinking alcohol at the bar. According to him, the person who knocked the drink was not known to him and he knocked all the three bottles. It was however, not the accused who was not at the bar then. According to him, he did not see the accused drinking keg and he did not know what the accused was doing whether he was a watchman. He did not see people hurling insults at each other at the bar. According to him, they were only in the bar for half an hour and he left with **Geoffrey** and **David** going home since all of them lived within the same homestead. It was his evidence here are many routes that go home and he did not know where the accused was prior to the incident. According to him, the deceased moved ahead going towards the accused who was coming from the opposite direction. They however, did not go where the accused was since they were walking home when they encountered him. The accused was with his brother when they met him. At the first instance he only saw the light from the torch. He however did not see the act of stabbing of the deceased. He insisted that he told the police that the accused released words expressing remorse as he cried lying on the body of the deceased though the statement was silent on that particular fact.

18. PW6, **Dr. Okinyi Fredrick**, formerly a Pathologist at Machakos Level 5, on 25th July, 2012 conducted a post mortem on the body of **David Musau** who identified by **Solomon Kivuti Musau** the father and **Eunice Musau** in the presence of a police officer. According to him, externally, he had a blood stained shirt with a stab on the left side pericardium area 2cm. He had stab wound 2 cm on the back. He was 29 years old. The body was well preserved with refrigeration. There was a stab wound 2 cm anteriorly around the heard area. Significant injuries included a stab wound 2 cm through the intercostal space into the right ventricle wall of the heart causing massive cardiac arrest. The cause of death was cardiac temponent caused by stab wound in the right ventricle. He produced the post mortem report that he signed as exhibit.

19. According to him, blood samples were taken for purposes of DNA sampling in order to determine the link between the murderer and the deceased since samples could help as to how many people were involved.

20. PW7, **Eunice Munyiva Kivuitu**, an elder sister of the deceased on 25th July, 2012 attended a post mortem at Machakos Level 5 Hospital where he identified the body of the deceased to the Doctor who performed the post mortem. She was with her father and a police officer.

21. PW8, **AP Langat Stanley** was the one who assisted the Assistant Chief in effecting the arrest of the accused on 18th July, 2012 at Mwala.

22. PW9, **Geoffrey Ngumbi Musau**, testified that on 17th July, 2012 in the evening he was with his brother **PW5** at Ndeini market – Wamunyu at 7.30 p.m. in a club when PW5 received a telephone call from the deceased, their nephew, a son to their elder brother. **PW5** informed him that the deceased had asked him to go to Kilembwa market at the bar as he wanted to buy him alcohol. They found the deceased at **PW4's** bar at Kilembwa shopping Centre with four (4) other people and he bought them alcohol while they sat on the same table with him. According to him, the accused came and touched the table and the alcohol spilled and bottles fell. The accused was with another person who was known to the deceased. The accused then said he had 200/= and the deceased offered to give 200/= and they were given more alcohol. The two (2) then differed and started exchanging bitter words and the accused went out.

23. All over a sudden another group started hitting the door to the bar with stones and the accused told the deceased from outside to know where he would pass. Prior to the stones being thrown he did not see the other people. The owner of the bar ordered them out and the accused then entered the bar with his younger brother. The owner of the bar **PW4** then closed the door and they stayed until about midnight and left together with the deceased and Peter going home. After walking for approximately 100 metres he saw some light approximately some 20 -30 metres away. There was moonlight. He then saw the accused approaching holding a bow, two (2) arrows and a torch. The deceased then attempted to run in the direction of the home but the accused followed him and the deceased fell. The accused, who was wearing an apron and a sweater pink in colour inside, removed the knife from the pocket and stabbed the deceased

in the front and back side of his body.

24. The deceased fell down on being stabbed and PW9 ran and held the accused's right hand which had the knife and in the ensuing struggle, the accused stabbed him in the nape of the neck but he managed to snatch the knife. They then beat him up and he then ran away. They went to **PW4** to seek assistance of the motor vehicle to take the deceased to hospital but the vehicle had a puncture and he referred them to his brother who called a person with a motor cycle. They then went to where the deceased was and the motor cyclist said a report had to be made to the police. **Peter** remained at the scene as PW9 was taken to a private clinic at Wamunyu and the following day to a government dispensary at Wamunyu after which he went to record his statement at Masii. He identified that bow and the arrows, the torch, the knife, the treatment card and the P3 form in court.

25. According to him the accused was well known to him being his classmate.

26. In cross-examination, he stated that by the time they were called by the deceased he had drunk two (2) beer bottles. At **PW4's** bar they drank 3 bottles each at the bar and had started getting drunk. According to him, there were many other people at the bar and it was the accused who hit the deceased's bottle and they started arguing. According to PW9, he could have hit it deliberately or by accident. PW9 stated that the accused was his relative since his grandfather is PW9's father's cousin and they are clan mates. According to him, the accused used to work as a watchman at the place where he attacked them as they were passing by. However, there are many other routes to their home other than the one they used. He however denied that after the disagreement at the bar they followed him at his place of work and he acted in self-defence. He however admitted that they beat the accused because he had stabbed one of them with the knife.

27. PW10, **Alice Mana**, filled in a P.3 on 13th September 2013 for **Geoffrey Ngumba Musau** (PW.9) who was 54 years old and who went to their hospital on 18th 2012 after being referred from a private clinic. He reported to have been assaulted by someone known to him due to unknown reason and was stabbed with a knife on the left side of the neck. Upon examination, the patient was in pain and he was smelling of alcohol and was in a white sweatshirt which had bloodstains around the collar. The approximate age of the injury was 8 hours and the weapon used was a sharp object. He had already been stitched in the private clinic and in the hospital they just examined him and gave him antibiotics. She filled the P.3 on 13th September 2013 but the patient returned to hospital on 18th July 2012. She produced the treatment notes and P3. Form as exhibits.

28. PW11, **Pc. Dan Onyango Njura**, was on 18th July 2012, at the station and he was informed by his D.C.I.O. **C.I Njuguna** to accompany him to a scene of murder. The D.C.I.O. then asked me to take over the case. He then accompanied the D.C.I.O. and O.C.S. to the Kilembwa area where the murder occurred. On arriving at the area they found the deceased lying on his back on a foot path. The body was covered with a blanket and the villagers had gathered. When they removed the blanket they found the deceased had a wound on the chest and back. Next to the body was a knife, bow, arrow and torch. Members of the public were interrogated and some recoded statements and they established that the deceased was **David Musau Kivuitu**. They were also told that the deceased was killed by someone known who was with the deceased that night and the person was called **Elijah Mutisya Munyao**. Further that the deceased had differed with the deceased in a bar and the owner of the bar **PW4** chased the accused out with his brother that night as they were interfering with his business. **PW5** and **PW9**, the deceased's uncles, informed them that when he was outside the bar the accused shouted that he would find the deceased in another way. The knife, bow and arrow were taken as exhibits and the body was taken to Machakos Level 5 Hospital awaiting post mortem.

29. On 18th July 2012 at around 10.a.m. the in-charge received a call from the in- charge of AP Mwala that the accused had been arrested on his way to Mwala. They went there and found the accused at the AP Camp at Mwala where he was arrested. When they interviewed him and he said that he was going to Mwala AP camp as he feared for his life as he had killed someone. On 26th July 2012, he attended the post mortem at Machakos Level 5 Hospital done by **PW6** and the doctor formed the opinion that the

death was caused by a sharp object to the head. He then decided to charge the accused. From the interview of those who were at the bar, he found out that the accused had differed with the deceased at the bar because the accused had poured the deceased drink on the floor and that is why the accused was chased from the bar as he wanted to fight in the bar with the deceased. He produced the exhibits in court.

30. In cross-examination, he stated that he was the investigating Officer in this case. When they got to the scene the deceased body was lying sideways and there was a lot of blood on the ground. The wound on the body was visible when they removed the blanket. They found the bow, arrow and knife next to the body and they presented them to the Government Analyst. There was no blood on the weapon. He interrogated the people who gathered at the scene and recorded statements from the key witnesses and he relied on key witness who were with the deceased and in the bar. He was however unaware of when the murder occurred or whether the accused was injured during the fracas in the bar. According to him, it is not true that the accused person did not complain and that he complained to him and to the AP. Officers who arrested him. He however denied that the accused was going to report an assault.

31. According to him the report from the Government Analyst revealed that they could not ascertain any blood on the knife.

32. Upon being placed on his defence, the accused testified that was employed as a watchman by **Titus Muasya** at a CDF dam Kilembwa between Wamunyu and Mwala. on 17th July, 2012 he went to work at 6 pm as usual. At 9.00 pm he went to Kilembwa market and ate at a hotel called Kwa Pauls then went to a bar called **Ndonge Muthiani** where he drank one bottle of Vienna beer. According to him there were many people there. At around 11pm he was told by the owner the beer was finished and he left and went to a second bar belonging to **PW4**. He greeted **PW4** and asked for one glass of alcohol called Vienna. At the bar he found three people with the owner, **PW5**, the deceased and **PW9**. He was on his second glass when Geoffrey said he looked like an old man who was there and had poured his beer but he never responded. The owner Timothy then asked him to leave on the ground that he was protecting him as the others were many. When he got out, **Peter** and **Geoffrey** followed him and **Timothy** told him to go away and he left and went to his place of work. When he reached a building called Kithutu about 50 metres from the bar, **Geoffrey** and **Peter** followed him and started beating him.

33. According to the accused, though there was no light, he knew it was **PW9** and **PW5** as he had a torch and shone it on them. He fell down and heard some people whom he did not know saying that they should stop beating him. At that time the deceased was not there as he had left him in the bar. He then left the place after being beaten and went to work and **PW9** and **PW5** went back to the bar. When he reached the place he was working, he got onto a tractor that was in the dam. He had bow and arrows which he used for his work about 200 meters away. He sat there for about two hours. Between 1 am and 2 am in the night he heard people talking nearby and he recognise their voices that of **PW5** who was asking if **David**, the deceased, had a share in a *shamba* and the deceased responded that he would not ask them again. Then **PW9** asked why he had taken them to take the oath by force and the deceased repeated that he would not ask them again. Geoffrey then told the deceased that the person they should ask is the deceased's father. According to the accused, the three were from the same family.

34. **PW5** was leading them as they were walking to where he was. He got down from the tractor and went to the back of the tractor and they followed him. At the top of the dam there was a farm which he ran and entered with **Geoffrey** and **Peter** chasing him. He reached a thorny fence and **Geoffrey** then tripped him and he fell on the road. They then started beating him. The deceased then came and told them to stop beating him and he fell on the accused as he was drunk when he tried to separate them. By then, **PW9** had removed a knife he was holding though the accused did not know where he got it from. Though he wanted to stab the accused, he instead stabbed the deceased. The accused then got up and ran away and started screaming leaving the deceased lying on the ground with **Peter** and **Geoffrey** standing next to him. When he screamed, one person called **Muema Munyao** responded and **Peter** then told **Geoffrey** they had been seen by the accused. The accused then walked away to cross the road and when I got to the dam he told them to take the deceased to hospital but instead, **Peter** and **Geoffrey** and stated beating him. **Muema** then intervened and separated them after which they all left leaving the deceased on the ground. **Peter** and **Geoffrey** went as if they were going to the market and the accused left towards Mwala to

report. By then it was around 9.00 am in the morning the next day. Since he was hurt, he was walking slowly on his way to the AP camp in Mwala. On the way he met the sub chief **PW3** and two Aps near the market and they handcuffed him. Being a market day, those who saw him in handcuffs started chasing me. He ran and went to the Mwala AP camp and it was there that the sub chief and Aps informed him that he had killed someone in Kilembwa. After a short while the police from Masii station appeared and he found **PW5** and **PW9** being taken out of the cells where he was in. He stayed there for a week before he was arraigned in court.

35. According to the accused, he differences before with **Geoffrey** and **Peter** as he used to work for their mother in collecting for them water and they would not pay him. He, however, had not differed with the deceased and that day they had even eaten meat with him since they were friends. The accused stated that while he used to use a bow and arrows in his work, he never at any time went to work with a knife and he had no knife that day. It was his evidence that the person who stabbed the deceased was **Geoffrey Ngumbe** who had a knife. At the time he was lying down below the deceased. He insisted that that night he was not drunk to the extent of not knowing what happened and I knew them. Other than the three **Peter, Geoffrey** and **David**, there was no one else at the scene other than **Muema** who arrived after the deceased had fallen down and when **Peter** and **Geoffrey** started beating me again.

36. In cross-examination he stated that at the bar he was sitting at the counter and he did not talk to **Peter, Geoffrey** and **David** and he left after he was urged to do so by the owner though he could not remember how long he stayed in the bar. It was his evidence that that was not his first time in the bar and it is not every day he used to tell he to get out of his bar. On that day he was trying to protect the accused and the time was around 11 pm at night. The accused stated that he was a watchman to guard a tractor at the dam and was planning to return to work after drinking. According to him he belongs to the same clan as **David, Geoffrey** and **Peter** and there are many times they had land disputes among themselves and his uncles.

37. The accused stated that he had left someone to stand in for him guarding the tractor when he was at the bar. According to him, he did not know which land **David, Geoffrey** and **Peter** were talking about but it was like they were arguing and he could see that they were holding David by the shirt. It was his evidence that where he was was not their road going home as they had left the road to their home and were on the road to the dam. He stated that **Felix Muema Munyao** is my brother and he is the one who went to his rescue when he screamed. He however admitted that **David, Peter** and **Geoffrey** were drunk that night. After separating them **Felix Muema Munyao** returned home. He also left and **Peter** and **Geoffrey** and went home. He stated that he went to hospital after having been beaten and he had the hospital card.

38. According to the accused, when he saw Geoffrey stab the deceased there was no light and when we were struggling, at some point he held the knife and **Geoffrey** then took it away and in the process stabbed himself. He stated that the deceased was stabbed in the chest though he did not see how many times. He however denied making any statement accepting that he killed the deceased.

39. The accused called **Philip Muteti Nyaramba**, a clinical officer base in Masii Health Centre as DW2. According to him, the accused reported at the clinic complaining of assault and pain on left lower limb and on the hip joint, neck pain, chest pain for one week having been assaulted on night of 17th/18th July 2012. On further inquiry he reported he had blood trauma strangulation. He patient reported he was in police custody and had not received any medication. He was not anaemic and there were no injuries picked apart from those he complained about. A diagnosis of multiple soft tissue injuries secondary to assault was made and he was put on analgesics and bandaging of the knee. According to him, the patient was attended to by a colleague called Nyabuto with whom he was in college. According to him, the accused could have been hit by a blunt object. He produced the treatment card as exhibit.

40. In cross-examination he stated that though the document was indicted to be for Masii, it had no stamp of the hospital. Though it had a signature on the lower right side, it had no name but the witness insisted that he knew the person who signed it as **Mary Nyabuto**. He however could not say whether it was the accused who was seen and what was documented is what the patient said and not what was found.

Determination

41. The prosecution's case in summary is that on 17th July, 2012, the deceased, PW5 and PW9 were drinking in PW4's bar. In the course of that a customer who seems to have been drunk knocked their beers. Unhappy with that event, the deceased demanded that he pays for the same and it took the intervention of PW4 for the situation to be brought under control. After the said customer left, the accused who according to PW4 was already drunk entered the bar and sat alone at the counter. However, the deceased or PW9 started insulting him and once again PW4 intervened and got the accused out of the bar. The accused, according to PW4, returned with PW1 and another person and once again they were restrained by PW4 after which PW4 closed the bar and the other group also left.

42. It would seem that after the deceased's group left a fight ensued between the deceased and the accused at which the deceased was stabbed. According to PW1, when he was awakened by the accused's screams he left and found the accused being beaten by PW5 and PW9. He separated them and left them. It would seem that after he left them another fight ensued between them and the deceased was stabbed to death.

43. I have considered the evidence on record. Section 203 of the *Penal Code* under which the accused is charged provides that:-

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

44. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

45. In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by M. Odero, J as follows:-

- 1) The fact of the death of the deceased.**
- 2) The cause of such death.**
- 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
- 4) Proof that said unlawful act or omission was committed with malice aforethought.**

46. In this case, there was no doubt as to the fact of death of the deceased. The evidence of PW1 and PW7 who identified the body as well as that of PW6 who carried out the post mortem clearly proved beyond reasonable doubt that the deceased passed away.

47. As regards the cause of death, the post mortem report showed that the deceased met his death as a result of cardiac temponent caused by stab wound in the right ventricle, multiple injuries to the head and body caused by blunt trauma. It is therefore clear that the deceased was killed.

48. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, apart from PW5 and PW9, the only other evidence as to how the deceased passed away came from the accused.

49. According to PW5, he never saw the accused stabbing the deceased. PW9 however insisted that he

saw the accused stabbing the deceased. In his evidence however, PW9 clearly was not truthful. While PW3, PW4 and PW9 testified that the person who knocked the drinks on the deceased's table was a person other than the accused, who was not even present at that time, PW9 insisted that it was the accused who knocked the drinks. It would seem that PW9 was prepared to twist the evidence so that the accused could be found culpable by all means. As was held in Ndung'u Kimanyi vs. R [1979] KLR 283.

“The witness in a criminal case upon whose evidence the court is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

50. In my view the twisted evidence of PW9 cannot be the basis of finding a conviction against the accused. If discounted the only other evidence connecting the accused with the death of the deceased is that of PW5 who admitted in cross-examination that he never saw the accused stab the deceased.

51. In this case the accused said that after he fell down the deceased who was drunk fell on him and PW9 who was attempting to stab the accused, stabbed the deceased instead. That PW5 and PW9 were beating the accused was confirmed by PW2. The knife that was allegedly found at the scene had no blood stains and when taken for analysis was found that that it was not helpful. Accordingly, there was no evidence that the knife produced in court was the murder weapon.

52. From the evidence of PW3, it was clear that in the bar it was the deceased's group that was the aggressor. After the accused left the bar, the deceased and his companions seemed to have taken the route towards where the accused was working. This is despite the fact that PW5 and PW9 acknowledged that there are many other routes to their home other than the one they used. There is no explanation as to why they decided to use that route particularly when, going by their own evidence, the accused had warned the deceased to find a place where to pass.

53. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481 in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

54. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

55. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme

Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

56. In 1997, the Supreme Court of Canada in R vs. Lifchus {1997}3 SCR 320 suggested the following explanation:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

57. In JOO vs. Republic [2015] eKLR, Mrima, J held that:

“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

58. Matavo, J in Elizabeth Waithieni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a

plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

59. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions**, [1947] 2 ALL ER 372 where he stated:-

“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.”

60. As already noted above, the only evidence linking the accused with the murder of the deceased emanated from PW5 and PW9. However, whereas PW5 stated that he did not witness the actual stabbing of the deceased by the accused, as already found hereinabove, PW9’s evidence was less than candid.

61. In my view the evidence linking the accused with the murder of the deceased in light of his own explanation as to how the deceased met his death and the evidence of PW1, leaves me in doubt as to whether the death of the deceased was caused by the accused.

62. That leads me to the last issue: whether it was proved that the said unlawful act was committed with malice aforethought.

63. Section 206 of the **Penal Code** on malice aforethought states:-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

64. The law is however clear that the burden is on the prosecution to prove that unlawful act was committed with malice aforethought. In this case none of the witnesses testified as to the existence of any bad blood between the deceased and the accused. According to the accused, they had even taken meals with the deceased that very day. It would seem that the disagreement between the deceased and the accused was as a result of taking one too many. The deceased seemed to have been in a belligerent mood even before the accused entered the bar. In those circumstances, I am unable to find that malice aforethought has been proved.

65. It may well be that the accused’s defence may not be very convincing but as was held in **Boniface Okeyo vs. Republic** [2001] eKLR:

“Before we conclude this judgment however, there are two other matters which, though not raised by the appellant’s counsel, have caused us considerable concern in this appeal. These arise from the judgment of the High Court on first appeal where it said as follows:

"the appellant himself narrated how he was arrested. He did not raise any serious defence to the charge except to state that he was not guilty."

In another part of the judgment the High Court further said as follows:

"the appellant had full opportunity and did cross-examine the witnesses but no crucial evidence arose out of his cross-examination"

We are satisfied that in the two passages, the High Court on first appeal seriously fell into error by appearing to shift the burden of proof to the appellant. It is trite law that in criminal cases the burden of proof rests throughout on the prosecution to establish the guilt of an accused person beyond reasonable doubt save in few exceptions of which this was not one. The appellant had no duty in law to raise a serious defence, nor did he have a duty to elicit crucial evidence by cross-examination of prosecution witnesses. We are satisfied that the burden of proof was, clearly, placed on the appellant and this is another reason to fortify the conclusion we have reached that the conviction was unsafe and cannot stand.”

66. Having considered the totality of the evidence adduced in this case, I find that the prosecution has failed to prove the case against the accused beyond reasonable doubt that the accused murdered the deceased. Accordingly, the benefit of doubt must go to the accused. In the premises, he is acquitted of the charge of murder and is set at liberty forthwith unless otherwise lawfully held.

67. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of January, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kimeu for Mr Mutuku for the accused

Miss Mogoi for the State

CA Geoffrey