REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 64 OF 2014

REPUBLIC ….....PROSECUTOR

VERSUS

BENSON MUTUA MWANZIA .....ACCUSED

JUDGEMENT

1. The accused herein, **Benson Mutua Mwanzia,** is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the ***Penal Code***, particulars being that on the 21st day of October, 2014 at Nduu Village, Matheini Location in Matungulu Sub-County within Machakos County, the Accused person murdered **Bernard Kioko Kisoi**. (hereinafter referred to as the deceased). He pleaded not guilty to the offence.

2. The hearing of this case commenced before **Ogola, J** but upon his transfer was taken over by **Kemei, J** and after complying with section 200 of the ***Criminal Procedure Code***, the matter proceeded from where it had reached. However, at the end of the prosecution case, **Kemei, J** recused himself from the matter after an issue was taken that since he had presided over an appeal arising from the conviction of the accused herein in a charge in which he was charged with the attempted murder of PW1, it was inappropriate for him to hear this case. Accordingly, this matter was taken over by myself at the defence hearing stage and after complying with the aforesaid provisions, the hearing proceeded from where it had reached.

3. In support of its case the prosecution called 9 witnesses.

4. According to PW1, **Kisoi Musimba Samuel**, on 21st October, 2014 he was called by phone from Chief and sub-chief to go to his farm which about 1 mile from his home. In the company of his son, the deceased, he proceeded there but instead of finding the said chief and sub chief, he found the accused person. They asked the accused if he had seen the sub-chief, but he said they should meet. According to PW1, they were to demarcate the plot. The accused person left them and they waited for 30 minutes while debating whether to go home or not. However, the deceased decided to go to the accused's home for more information. PW1 however refused to go. After a while he heard the deceased crying and when he ran over to him he saw him removing an arrow from behind his neck. As PW1 was trying to stop the deceased's bleeding using his handkerchief, he too was shot in the stomach. Though he did not see the person who was shooting the arrow, the same were coming from the accused's house. He identified he said arrows in court.

5. PW1 then called one of his sons to go to their help. However, as he was running he was shot at again. He took all the arrows and went to the police leaving his injured son who had fallen down at the scene without getting time to establish his condition. According to him, the deceased died that day at about the time he was shot at which was between 8 – 9 a.m.

6. Cross-examined by **Mr Muema** for the accused, PW1 stated that they had a farm boundary dispute with the accused and the chiefs and sub chief were to come and put the boundary, though he did not state this in his statement. According to him the chief, one **Mutua**, and assistant chief of Matheini, one **Ngewa**, had on the previous night, 20th October, 2014, called him for a meeting at the farm on 21st October, 2014 and they arrived at the farm at about 8.30 a.m. When they found the accused at the farm they talked but he denied that the deceased assaulted the accused person. According to him, they did not have any weapon with them. Though the accused asked them to go to Kinui market, they refused and the accused left for his house and the deceased later followed him but did not reach the accused's house. According to him, the deceased was shot when he was about 30 metres from the accused's house. He denied that they attacked anyone and stated that when he arrived at the scene where my son was shot he became afraid.

7. In re-examination he stated that the statement was not self –recorded.

8. PW2, **Joseph Kanyenze Kisoi**, attended Kangundo District Hospital mortuary on 24th October, 2014 at about 2 p.m. in the company of **Joseph Mutunga Kisoi** attended a post mortem of his step brother **Kioko Kisoi** (deceased). Both of them identified the body of the deceased for the purposes of post mortem and he later recorded his statement with the police. According to him, he had known the deceased before and

he identified the body one day after he got to know about the death of the deceased which was on 23rd October, 2014.

9. PW.3**, Joseph Mutunga Kisoi,** was on 21st October, 2014 at about 2.50 a.m. on his way from home going back to work in Nairobi. After about 10 Kilometres he received a call from his father, PW1, who informed him that the deceased had been attacked at the farm which they had gone to inspect. he then took a *bodaboda* and went to Kinui police post to get assistance. At the Police post he found the accused in the police compound. Soon after, his father, PW1, arrived by a *bodaboda* with his blood stained clothes. He had with him two arrows which had blood stains. He identified the said arrows.

10. PW3 then proceeded to the scene of crime in the company of the police officers. According to him, he knew the scene of crime because it was on their land. At the scene of crime, he found his brother lying on his stomach dead and there was blood around his body. Police from Kangundo then arrived in their car and asked for him. They took measurements around the body after which the body was put into the vehicle for Kangundo Mortuary. On 24th October, 2014 at 2p.m. he attended the post mortem of the deceased where he identified the body of the deceased for post mortem operation and later recorded his statement with the police.

11. In cross-examination, PW3 confirmed that PW1 called him at about 9.00 a.m. and told him that where they had gone for a boundary dispute and things had turned bad. He was however aware of the boundary dispute between his family and the accused and the issue was to be sorted out by the assistant chief called **Ngewa**. At the police station he found the accused alone at the compound at about 11 a.m. When his father, PW1, arrived at the station he was injured and had with him the arrows belonging to the accused which were blood stained. It was his evidence that the scene of crime where the body was, was near the boundary and that the accused person's house was about 80 metres from the body which was collected by the police at about 3 p.m.

12. PW.4, **James Wambua Ngewa,** the Assistant Chief of Matheini sub location in Matungulu, was on duty on 21st October, 2014 when the village elder one **Bosco** informed him that there had been a murder at the home of one **Benson Wambua Mwanzia**. Taking a motor bike, he rushed there and on arrival found a large crowd who included the clan elder and the area assistant chief **Isaac Nzioki** as well as Police officers. He found the body of the deceased lying four metres from a building and recognised it as that of **Kioko Kisoi** with blood was oozing from the neck. He proceeded to take photographs which he identified in court. While at the scene he saw that door to accused's house damaged but he never saw any arrows at the scene when he arrived. The body was later picked up by police and taken to the mortuary and the accused was arrested. According to him, the accused was also one of his subjects.

13. In cross-examination, he stated that he found body of deceased lying four metres from the accused's house. According to him, the deceased hailed from Kingoti sub location and had gone to the home of accused. He was however not aware of any boundary dispute between accused and deceased. He learnt accused had presented himself to the police.

14. PW5, **PC. Joseph Mathenge,** was on 21st October, 2014 around 10 a.m. at the report office at Kinyui patrol base when two motorbike riders arrived with their pillion passengers with the accused being a passenger on the front motor bike. The second passenger on the other bike was shouting and claiming that the accused had killed somebody while a third motor bike with other passengers brought some blood stained arrows which he identified. According to him, it was claimed that one **Kisoi** had been killed. One of the passengers also going by the name of Kisoi claimed that the accused had also injured him and he saw an injury on the navel and his shirt had blood stains. More members of public converged at the police post shouting as a result of which he was forced to place accused in the cells for his own safety and kept the arrows. He later proceeded to the scene of crime where he established that it was the home of accused herein and an irate mob had gathered. He found the body of the deceased herein lying in a pool of blood, three metres from one of the three houses. Later CID officers from Kangundo arrived at the scene and photographs of the scene taken at the scene and sketch plans were also drawn after which the body was escorted to Kangundo District mortuary. The person who was injured is one **Samuel Kisoi**. He identified the said photographs.

15. Referred to his statement, he admitted that it was silent on photographs and sketch plans. He admitted that it was the accused herein who was on the first motor bike and appeared nervous and that when he visited the scene he saw accused's timber door smashed. When he entered the accused's house he did not get the bow used to shoot arrows and that the accused did not go with arrows to the police post. He admitted that the arrows had no name of owner but had bloodstains. He however denied that a relative of deceased tried to interfere with police investigations. While disclosing that the Kangundo OCPD then was a **Mr. Joseph Chesire**, he stated that the DCIO did not visit the scene.

16. PW6, **PC. Samuel Kamau,** a gazetted crime scene investigator by DPP, testified that on 25th October, 2014 he received a disc containing images for processing and took the same to the photographic section at CID headquarters where 12 photographs were processed. According to him, all the photos related to the deceased herein. He made a report and certificate to that effect which he signed on 14th September, 2015 and identified the said photographs. In cross-examination he admitted that three of the photographs shows a broken door and that the photographs were taken before the body was picked up though he did not know the person who took them. He however, handed over the disc to process the photographs at the CID headquarters photographic lab.

17. **Dr. Eric Mburu**, PW7, a medical doctor based at Kangundo Level Four Hospital in his testimony stated that he knew **Dr. Hassan** who was his colleague with whom he worked for two years but who had since left for further studies at Nairobi University. He was however familiar with her handwriting and signatures. PW7 had with him the post mortem report prepared by **Dr Hassan** dated 24th October, 2014. According to the report, the body of deceased, **Benard Kioko Kisoi**, was identified by **Joseph Kanyenze Kisoi** and **Joseph Mutunga Kisoi**. The age of death was approximately three days and there was bleeding from the nostrils. It had a penetrating wound about 3x1 centimetre on the left side of the neck and which was deep all the way to the chest cavity with severed muscles. The right lung had a penetrating wound while the cardiovascular system had a haemothorax haemorrhage (blood in chest cavity). The cause of death was severe haemorrhage secondary to sharp penetrating wound. Blood was removed for further analysis and the report was signed by Dr. Hassan was produced by PW7 as an exhibit.

18. In cross-examination he stated that the post mortem was done in his absence and that he began working with **Dr. Hassan** in May, 2015 during his internship and thereafter.

19. PW8, **Lawrence Kinyua Muthuri**, an analyst at the Government chemist testified that on the 3rd November, 2014 he received from **Cpl. Fredrick Maina** of DCIO Kangundo Police station an exhibit memo together with exhibits 'A1' – an arrow wrapped in khaki paper; 'A2' – an arrow wrapped in khaki paper; 'B' – brownish soil sample in khaki envelope; 'B1 & B2' – blood samples in bottles taken from complainant **Samuel Kisoi Musimba**; and 'C' – blood sample in a bottle belonging to deceased **Benard Kioko Kisoi.** The request was for him to examine the items and determine the presence and source of any bloodstains on the evidential materials. It was his evidence that on examination the arrow (A1) was heavily stained with human blood while Arrow (A2) was slightly stained with blood and Item 'B' (soil) was moderately stained with blood. He did DNA profile on the blood samples and bloodstains and concluded that the DNA profile generated from the bloodstains on the arrow marked 'A1" matched with the DNA profile generated from the blood sample item 'C' of deceased **Bernard Kioko Kisoi** while the bloodstains on the arrow 'A2' & on the soil sample 'B' did not generate a DNA profile. According to him, there are several factors such as climate, bacteria etc. which degrade the blood sample though it could also mean the blood samples could be of an animal. He proceeded to produced his report dated 23rd March, 2016 as an exhibit.

20. In cross-examination he stated that it took about 15 months to prepare the report and that during the period the exhibits were kept and did not degrade so as to fail to generate DNA profiles since they have storage facilities. In his evidence the DNA profiles for humans are different from that of animals. He confirmed that they were satisfied by the preservation of the exhibits at the time they were handed over to him and that the blood samples in bottles were still in liquid form. However, no blood samples were collected from the accused.

21. PW9, **CPL. Fredrick Maina**, together with **PC. Wanjohi** were on 21st October, 2014 at around 1 p.m. informed by the Deputy DCIO that there had been a murder incident at Kinyiu police post. On the instructions of the said Deputy DCIO, they proceeded to Tala police post and on arrival, we were briefed by the officer in charge who directed them to proceed to Kinyui police post where they found a report had been made by one **Samuel Kisoi Musimba** (now deceased) that he had been assaulted by the accused together with the deceased son **Bernard Kioko Kisoi**. At the time the accused had been placed in custody plus two arrows. Led by **PC. Murimi**, they left the post and proceed to the scene where they found the deceased **Benard Kioko Kisoi,** which was identified by the deceased's brother Joseph, had a deep cut on the left side of the neck and was in the accused's compound with blood was oozing from the neck. The scene was photographed by a member of public and sketch plans were drawn by **PC. Mathenge** from Kinyui police patrol base. According to him, the door of the accused had been broken by the deceased while accused was inside. They escorted the body to the mortuary at Kangundo district hospital and he also took over the two arrows for further investigations as well as blood stained soil from the scene all of which he produced as exhibits.

22. According to his evidence, on 24th October, 2014, he attended the post mortem of the body of the deceased which was conducted by **Dr. Hassan**. The body was identified by two brothers of the deceased and he requested the doctor to take out blood samples from the body of the deceased to enable him establish the arrow that had been used to stab the deceased. The blood was duly extracted and he prepared the exhibit memo form on 24th October, 2014 containing details of the specimens of the deceased and on 3rd November, 2014 escorted the exhibits to the Government chemist. He produced the said two memos. Later he received a report from the Government chemist. He also recorded statements of witnesses.

23. In cross-examination, he insisted that he thoroughly investigated the matter. According to him, there was a boundary land dispute between the father of deceased and the accused and it was the father of the deceased who informed him of the same. He testified that the deceased and his father plus the accused were to go before the chief to deliberate on the boundary dispute though he did establish if summons had been issued by the chief. He however denied that the motive was a land dispute. In his evidence he arrived at the scene after the incident though the scene had already been secured by **PC Mathenge** and he could not tell if the scene was interfered with though there were no marks cordoning off the scene. He admitted that the father of the deceased ran to the police post and handed over the arrows though there was no distinct evidence that the arrows belonged to the accused. According to him, the arrows were not dusted. He however denied that he was interested in fixing the accused.

24. According to him, the body of deceased was at the compound of the accused and the accused's door had been broken. He did not get witness to establish who had been armed. Though the accused's wife recorded a statement, the mother of the accused who lived in the same compound was not present during the incident. He denied that he was aware that **PC Mathenge** was harassed by deceased's family members to fix the accused.

25. Upon being placed on his defence, the accused, opted to give sworn evidence and called two witnesses. According to the accused, who testified as DW1, on 21st October, 2014, he was at his home in the company of his wife, **Susan Ndunge** and after taking breakfast, he proceeded to his farm at around 8.00 am. Shortly, the father of the deceased went to where he was and demanded to know why he had sold his land and hit the accused with a walking stick had a walking stick with sword inside and the fell down. A struggled ensued between the accused, the deceased's father and the deceased who was armed with bow and arrows. According to the accused, he was attacked with stick and he managed to run to his house where he locked himself. When his wife tried to intervene she was chased away and heard the deceased asking his father to break the door which was violently knocked. According to him, he was hearing screams outside. He then sneaked out of a bedroom window and rushed to the police station to report where he recorded his statement. When the deceased's brother went and alleged he had killed his brother, he was then placed in custody till the following day when he was charged. It was the accused's case that he was not aware of the deceased's death and did not know anything about the weapons exhibited before this court.

26. According to the accused, he was staying with his wife who was at home when he went to the *shamba* but was not around when he returned. Though there is his mother's house and my brothers' his mother was in another *shamba*. He however denied that he had a dispute quarrel with the deceased or his father though the father had a *shamba* next to his. According to the accused, he even used to take care of their cows for them in their absence. It was his case that it was the deceased and his father who attacked him yet their home is far from his and he did not even know exactly where their home was save for the direction. According to him, the deceased's father had bought land in the area. He denied that he attacked the deceased or his father with bow and arrows as alleged and that the alleged weapons produced herein belonged to him. He therefore denied having committed the offence and prayed that he be acquitted.

27. In cross-examination, he admitted that he had been convicted previously for the offence of stealing in Mombasa where he was sentenced to 8 years imprisonment. He insisted that it was the deceased's father who assaulted him and that he reported the incident and went for treatment. According to him, he was alone at the time he was attacked and when he returned home, he was alone and did not see anyone in

the compound. However, according to the evidence adduced, the deceased's body was found in his compound. He stated that PW.1 had no bows or arrows and he did not see the deceased with arrow or bow since he was lying down. Since he was locked inside the house, he could not tell what was happening outside though he heard screams though there were other homes.

28. In re-examination, he stated that he went to report the matter to the police at Kinyui police post himself and that he was only placed in the cell after the deceased's brother arrived. He stated that he was not taken to the scene and only saw the body in the photos. According to him, he was just hearing commotion when he was inside the house.

29. DW2, **Ndunge Mackenzie**, the accused's wife testified that on 21st October, 2014, after she had finished preparing the young child to go to school at about 8.00 a.m. – 9.00 a.m. and the accused had already gone to the *shamba*, she saw the deceased and PW.1 go home. According to her, the deceased carried a *panga* and his sons carried arrows and bows. They asked her the whereabouts of the accused and then hit her. She then told them the accused had gone to the *shamba* and they then left towards the *shamba*. Though she remained behind she was watching them and when they arrived they started beating the accused. She tried to approach them but the deceased started going towards her so she ran into a bush and hid till lunch time when she returned home. She found a crowd at home and found the deceased lying down but his father and the accused were not there though her door had been broken into.

30. In cross-examination, she stated that she was alone in the compound. It was her evidence that though there are close neighbours she was not sure whether they could her someone shouting from their home. She insisted that the deceased's father had a *panga* and that she knew the deceased and his father since their *shamba*s were neighbouring though the deceased and his father were staying far. She however used to hear from the deceased that there was a boundary problem and that the deceased and the father were claiming the accused had interfered with the boundary, a matter which had been reported to the sub-chief who arranged for a meeting between the accused and the deceased's father. Though the accused was aware of the problem, she did not know why they attacked that day.

31. Asked about her statements, she stated that the accused ran and locked himself in the house followed by the deceased and his father and she saw them trying to enter the house. The accused then attacked them with an arrow and she ran away after seeing the injuries on the deceased's stomach. According to her the accused was defending himself from the deceased and his father.

32. In re-examination, she stated that her statement was recorded by police when she was in shock. According to her, she was under attack and she screamed.

33. DW3, **Elizabeth Syombua**, the accused's sister on 21st October, 2014 went visiting her maiden home in Nduu village but did not see either the accused or his wife. She however saw the deceased carrying a bow and arrow walking in her brother's compound. The deceased then chased her away and she ran towards the primary school. Later when she returned she found the body of the deceased lying in the compound. She however did not know what happened. While she saw the deceased with the said weapons, she never saw the deceased's father.

34. In cross-examination, she stated that on that day, she was going to help her mother to plant but did not get her mother. She said that she knew the deceased as their neighbours but they did not stay there and only used to go to their *shamba*. She was however unaware of any boundary dispute. She recalled DW2 telling her that her brother was being attacked.

35. It was submitted on behalf of the prosecution that the evidence adduced in this case is both direct and circumstantial in nature since PW1 was present at the scene and was also shot at and the fact that the deceased was shot and died in the compound of the accused person. It was submitted that though PW1 was unable to see who was shooting at him, the arrows were coming from the house of the accused who testified in his defence that he was the only person in the compound at the time and that he was in his house meaning that if the arrows were coming from his house, it was him and none other who was shooting before he run away and presented himself to the police.

36. The only prosecution witness who was present at the scene was PW1 and the other witness came after the incident had occurred and the deceased was already dead. From the evidence of PW3, PW4, PW5 and PW9 who visited the scene, the body of the deceased was found lying in the compound of the accused few meters from his house.

37. The accused having been the one in his house and the deceased having met his death in his compound and close to his house, and further, PW1 having stated that he had been shot at while in the same position as the deceased while assisting him and the arrows having been coming from the house of the accused, there is established very strong circumstantial evidence that the accused was the one who shot and killed the deceased and injured PW1.

38. The evidence of PW7 in respect a post mortem that was conducted on the body of the deceased by **Dr. Hassan** and the post mortem he had filled, was that the deceased had a penetrating wound about 3x1 centimetre on the left side of the neck which was deep all the way to the chest cavity. The right lung had a penetrating wound and there was blood in the chest cavity.

39. In view of the foregoing, it was submitted that the positioning of the wound that was on the left side of the neck and penetrating through the chest cavity to the right lung clearly demonstrate that the person who shot at the deceased was on the side and on a higher position than the deceased hence the positioning of the wound. The foregoing rules out any possibility that maybe the deceased was shot by the accused in self-defence because, if that would have been the case, the wound would have been on the front and not the side of the deceased. Further, the arrow would have penetrated him straight from the front to the back.

40. In his defence, the Accused testified that the deceased had a *shamba* that was next to his. Although he disputed that they never had a land dispute, his wife DW2 testified in cross – examination that she used to hear from the deceased that there was a boundary problem and that there was a claim that the accused had interfered with the boundary.

41. DW2 corroborated the testimony of PW1 that they had reported to the sub-chief about the boundary issue and the sub-chief had arranged

for a meeting between the accused and PW1 and that the accused was aware of the problem. From the foregoing, it is clear the accused was lying on the fact that there existed a land dispute between him and the family of the deceased and that was the motive of the murder.

42. The evidence of DW2 and DW3 that the deceased was armed with bows and arrows in contradicted by the evidence of the accused himself who testified that PW1 only had a stick with a sword inside, and that PW1 only assaulted him with a stick and not with the said sword.

43. Further, the accused testified on cross-examination that PW1 did not have bows and arrows and that he did not see the deceased with arrows or bows. He testified that PW1 started assaulting him and he was joined by the deceased, as no given time did the accused who alleged to have been assaulted by PW1 and the deceased mention that they were armed with arrows and bows and that there were other people other than him involved who would have shot the deceased.

44. It was the testimony of the prosecution's witnesses that the accused person's door had been damaged. DW2 in cross-examination, testified that the accused had ran and locked himself in the house followed by the deceased and his father and the two had tried to enter the house prompting the accused to attack them with an arrow. The foregoing defence witness clearly demonstrates exactly what transpired on the material day and corroborated the evidence of PW1 that the deceased had gone after the accused who was in his house and that the accused had shot arrows at them causing the death of the deceased and injuring PW1.

45. The evidence by DW3 that she arrived at the home of the accused and found only the deceased person there carrying a bow and arrow cannot be true since it was clear from the evidence of the accused that he ran and locked himself in the house and he heard the deceased asking his father to break the door and that he did not see any of the two with a bow and arrows. Further, it was the testimony of DW2 that the accused attacked the deceased and PW1 with arrows before she ran and hide and according to her, the attack was in self-defence. None of the three individuals (accused, PW1 and DW2) mentioned the presence of DW3. It is not known when exactly she was at the home of the accused because it seems that, that could not have been at the time of the commission of the offence otherwise, someone would have seen her.

46. The defence by the accused was a mere denial that did not create any doubt in the evidence of the prosecution that he is the one who committed the offence. The defence evidence did not give an alternative as to how the deceased met his death, even if it was true that the deceased was armed with a bow and arrows, it is not possible that he would have shot himself, since there was no one else there who would have attacked him other than the accused.

47. Further, even though the accused was acting in self defence, it was the prosecution's submissions that the force and the mode/weapon that he opted to use was excessive and it was only aimed at killing the deceased and PW1 and not to stop them from getting to him. He had an option of running away and reporting to the police as he did after committing the offence but he chose to shot the deceased and kill him.

48. In view of the foregoing, it was our submitted that the evidence against the accused person was clear, consistent, corroborated and without any doubt whatsoever that he is the one who killed the deceased in cold blood and not even the defence of self-defence would apply in his case due to the excessive force used.

49. In view of the foregoing, this court was urged to pronounce a guilty verdict against the accused and duly sentence him for the brutal murder of the deceased.

50. The defence on the other hand testified that considering the law and the facts of this case, the prosecution fell short of establishing the ingredients to sufficiently prove beyond reasonable doubt the offence of murder.

Determination

51. The prosecution's case in summary is that on 21st October, 2014, PW1 and the deceased were called and informed by both the area Chief and Assistant Chief to meet at the *shamba* where there was a dispute between them and the deceased. However, when they arrived there the two were not there and they only found the accused who shortly thereafter left them and went back to his home. The deceased however decided to follow him and shortly therafter, PW1 heard screams. Upon rushing there, he found the deceased having been shot by an arrow and was trying to remove the same. When PW1 tried to assist him, he was also shot at and injured and he left the deceased there and rushed to the police post. According to PW1 the arrows were coming from the accused's house. The body of the deceased was then taken to the mortuary where the post mortem revealed that he died from the injuries sustained therefrom. The report from the Government Chemist confirmed that the blood on one of the arrows belonged to the deceased.

52. The accused's case was that after the initial altercation with the deceased and PW1 where he was attacked and injured, he escaped to his house where he locked himself. However, the deceased and PW1 followed him and when they tried to break his house, he escaped through the window and went to the police post and did not know what transpired outside though he heard people screaming.

53. 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.***

54. 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."

55. 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.

56. In Mombasa High Court Case Number 42 of 2009 between **Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang** the court expressed itself as hereunder:

"The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:

a) Proof of the fact as well as the cause of the death of the deceased persons.

b) Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.

c) Proof that such unlawful act or omission was committed with malice aforethought."

57. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence from PW1, PW2, and PW7 that the deceased died. Those witnesses clearly proved beyond reasonable doubt that the deceased died.

58. As regards the cause of death, according to PW7 who produced the post mortem report made by his colleague, **Dr. Hassan**, the deceased's death was due to severe haemorrhage secondary to sharp penetrating wound.

59. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no direct evidence that the accused caused the death of the deceased. 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.''

60. 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."

61. 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."**

62. 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."

63. 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."

64. **Mativo, J** in **Elizabeth Waithiegeni 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."

65. 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."

66. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

67. In this case, whereas the prosecution contends that there was direct evidence from PW1 proving that the deceased was killed by the accused, PW1's evidence was simply that the arrows that were shot at him came from the accused's house. He never saw who was shooting the said arrows. In the absence of any direct evidence linking the accused with the death of the deceased, this court must rely on the circumstantial evidence if the case against the accused is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held.

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

68. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

69. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

70. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

> **"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."**

71. In this case, it is not in doubt that after the initial altercation between PW1 and the deceased on one hand and the accused on the other, the accused left PW1 and the deceased at the *shamba*. The deceased seems, against the advice of PW1, to have pursued the accused to his house. The door to that house was found to have been damaged. According to the accused, he entered his house and locked himself therein. PW1, while trying to assist the deceased was similarly shot at and the arrows that shot him came from the direction of the accused's house. The accused himself gave evidence that at that time there was nobody else in the homestead, though initially he had stated that his wife was present and tried to intervene but was threatened by the deceased. The wife of the accused, DW2, in cross-examination stated that the accused shot at the deceased though she stated it was in self-defence.

72. From the evidence on record, it is clear that PW1 and the deceased, who had a land dispute confronted the accused in the *shamba* on the material day and when the accused receded back to his house, he was followed by the deceased who being eager to pick a fight broke the accused's door. Only the accused was in his home at that time. From the evidence of DW2, the accused shot at the deceased using an arrow and the deceased sustained fatal injuries.

73. Having considered the evidence presented in this case, I find that as regards the question whether it was the accused who caused the death of the deceased, the inculpatory facts against the accused person are incompatible with his innocence and are incapable of explanation upon any other reasonable hypotheses than that he did so. I am unable to find the existence of other existing circumstances which weaken the chain of circumstances relied on by the prosecution. The chain of the circumstances is clear that there was altercation between the accused and the deceased, the accused managed to extricate himself from being entangled in a violent confrontation with PW1 and the deceased and he was then followed by the deceased up to his home and there was violent confrontation between the two which led to the accused shooting the deceased with an arrow. Accordingly, the facts adduced by the prosecution do justify the drawing of the inference that it was the accused who shot the deceased to the exclusion of any other reasonable hypothesis.

74. From the evidence, it is however clear that though the accused tried not to pick up a fight with the deceased, it was the deceased who pursued him up to his house and even tried to forcefully gain access to the accused's house. This court must therefore explore the possibility of the offence committed being a lesser charge than that of murder.

75. In **Roba Galma Wario vs. Republic [2015] eKLR**, the Court of Appeal cited the case of **Mohammed Omar & 5 Others [2014] eKLR** and the case of **DPP vs. Morgan [1975] 2 All ER 347** where it was held that:-

> **"The essential element of self defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds."**

76. In the case of **Ahmed Mohammed Omar & 5 Others vs. Republic [2014] eKLR** the court held as follows:

> **"What are the common law principles relating to self defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said:**
>
> **"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. .....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or**

punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ..... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

77. The Court of Appeal further held that:

"The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP V MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds."

78. Though the danger the accused apprehends, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means, in **Beckford vs. R [1988] AC 130, Lord Griffiths** stated (at p.144) that:

"a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."

79. In **Peter King'ori Mwangi & 2 Others vs. Republic CR. APP. No. 66 of 2014,** the Court identified two conditions as prerequisites for the application of provocation as a defence, namely:

(a) The "subjective" condition that the accused was actually provoked so as to lose his self control; and

(b) The "objective" condition that a reasonable man would have been so provoked"

80. Turning to the doctrine of self-defence, it is provided for under section 17 of the ***Penal Code*** thus:-

Subject to any express provision of this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.

81. The section has been ably construed in the cases of **Republic vs. Andrew Mueche Omwenga** (supra); **Roba Galma Wario vs. Republic** (supra) and **Ahmed Mohamed Omar & 5 Others vs. Republic [2014] eKLR** from which the following principles have emerged:

(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.

82. **Maraga, J** (as he then was) in **Republic vs. Andrew Mueche Omwenga [2009] eKLR** expressed himself as follows:

"In Mokwa Vs Republic, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force. In Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 243 the English House of Lords held:-

"The defence of self defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict may be one of manslaughter."

What is reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. In the words of Lord Morris of Borth-y-Gest in the said English case of Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in John Njoroge Vs Republic, Cr. App. No. 186 of 1987:-

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that

he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances… It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation….If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction."

I should here point out that like in all other criminal cases, where accused raises the defences of self defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. Where the accused raises defences of self defence or provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was not provoked or that he did not act in self defence. In other words the prosecution must disprove the defences of provocation and self defence and it must discharge this burden beyond reasonable doubt—Joseph Kimanzi Munywoki Vs Republic, Cr. App. No. 31 of 2003 CA Nairobi), [2006] eKLR. In the said case of Beckford Vs R [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-

"It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."

Adequate provocation, especially when coupled with self defence, can reduce a murder charge to manslaughter- Mbugua Kariuki Vs Republic, [1976-80] 1KLR 1085 and Republic Vs Gachanja, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words:-

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

In Mancini Vs Director of Public Prosecutions, [1941] All ER 272 the English House of Lords held that not every kind of provocation, however, will reduce murder to manslaughter. To have that effect the provocation must be such as to temporarily deprive the person provoked of the power of self control, as a result of which he commits the act which causes the death. The test to be applied therefore is that of the effect the provocation would have on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary and reasonable person to act as he did. And before provocation becomes an operative factor in a murder trial, however, the prosecution must have proved beyond reasonable doubt, that murder, provocation apart, had been committed by the accused—Stingel Vs R. [1991] LRC Crim) 639."

83. I associate myself with the view expressed in **Joseph Kimani Njau vs. Republic [2014] eKLR** where the Court of Appeal stated:-

"In all 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 the 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…In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another."

84. Similarly, in **Nzuki vs. Republic (1993) KLR 171**, the Court in substituting Nzuki's charge of murder with manslaughter observed:

"there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."

85. Adequate provocation, especially when coupled with self-defence, can reduce a murder charge to manslaughter – **Mbugua Kariuki vs. Republic, [1976-80] 1KLR 1085** and **Republic vs. Gachanja, [2001] KLR 428**. This is also legislated in Section 207 of the ***Penal Code*** in the following words: -

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

86. Looking at the circumstances under which the crime was committed, it is clear that the accused took steps to remove himself from the

path of confrontation with the deceased who followed him up to his house and even attacked him there. The accused had seen PW1 armed with a stick in which was hidden a sword. He obviously must have genuinely believed that his life was in danger. However, by resorting to the use of the arrow he used excessive force in the circumstances. That was however a reckless action in an attempt to defend himself.

87. Section 179 of the ***Criminal Procedure Code*** provides that:

> ***179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

88. For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the accused of the charge of murder but convict him of the offence of manslaughter contrary to section 202 as read with section 205 of the ***Penal Code***."

89. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 24th day of February, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Muema for the accused person

Miss Mogoi for the State

CA Geoffrey