REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 89 OF 2010

REPUBLIC.....PROSECUTOR

-VERSUS-

ROBERT KIILU WAMBUA.....ACCUSED

JUDGEMENT

1. The accused herein is charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that on 22nd December, 2010 at Kiliku Village, Kayatta sublocation, Kyanzavi Location in Matungulu District within Machakos County, the accused murdered **Isaac Musyimi Kimote**.

2. In support of its case the prosecution called 11 witnesses while the defence relied on the evidence of the accused.

3. According to PW1, **Rodah Kaluki Mutuku**, on 22nd December, 2010 at 6 pm she was at the back of her butchery known as, White Buffalo, situated at *Kwa Mwaura* Centre selling soup when the accused, who was her neighbour, entered and asked for soup. In the course of taking the soup, the accused banged the table and said that someone would sleep in the mortuary that night and then left.

4. The following day PW1 learnt that the Assistant Chief, Isaac Musyimi Kimote, who was also her neighbour, the deceased herein, had been killed in a coffee farm.

5. PW2, **Philip Muasya Kaloki**, testified that on 22nd December, 2010 at 5pm he was with the deceased in a bar at *Kwa Mwaura* called Stage Bar belonging to **Morris Muthike**, when he saw the deceased staring at the entrance to the bar. When he checked he saw the accused, whom he had not known before, entering the bar. The deceased then told the accused "to return his drunkenness from where he had come from". The accused then went and stood at the counter next to them and the deceased stood and repeated the same words to the accused and slapped the accused on the face with his left hand. The accused then made as if he was going to the toilet but returned and loudly told the deceased in *Kikamba*: *"Isaac, today I must kill you"*. He then started going out and upon reaching the entrance repeated the same words, returned back to the middle of the bar and repeated the same words. After that he left and never came back.

6. According to PW2, he was informed by the deceased that the accused was not a good person though he never knew the accused and had never seen him before. It was his evidence that he was not drunk as he had only taken one keg and he left the bar at 6.45 pm, leaving the deceased behind with the bar tender called **Grace** as he went home to sleep. The next morning at 6 am when he was at work, he received a call from one **Nzumba** who informed him that the deceased had been found dead at a coffee farm called Mikaka. He then called the assistant chief of Kenyatta sub location, **Mr. Daniel Munya**, and relayed the information to him though he, himself, did not proceed there as he was working.

7. It was his evidence that since he did not know the accused, he was not able to identify him at the identification parade and only recognised the accused in court.

8. It was his evidence that the accused was slapped only once by the deceased. According to him, it is normal to say "I will kill you" in Kamba culture when one is wronged. He however stated that when he left the bar there were many people outside he could not tell if any other person entered the bar after he left.

9. In his evidence, though he attended the deceased's funeral, he did not view the body. It was however his evidence that during the exchange between the accused and the deceased they appeared as people who knew each other. He clarified that it is not normal for an adult person to threaten another with death. He stated that the accused had covered his head in the bar with a sweater and that is why he did not recognize

him in the identification parade. It was his evidence that **Paul Musau** the chief was the one who told him it is the accused who committed the offence in court when he was bonded.

10. PW3, **Martin Musili Mwangangi**, a teacher at Mbiuni Primary School, testified that on 22nd December, 2010 at 6.45 pm he went to visit the accused who was his neighbour but did not find the accused at home. Later the accused arrived and was very annoyed and told his mother to give him a *panga* as there was someone who had hit him at the market and he was going to kill him. He disclosed that the said person was Isaac the assistant chief. He then took a *panga* but the same was taken away by his mother. After that he took a hoe and ran towards the market. Though PW3 was with the accused's brother, because of fear they did not follow the accused. After one hour the accused returned and when his brother **Munyao** saw him he ran away. The accused then informed PW3 in the hearing of his mother that he had finished the work of killing the assistant chief. By then the accused did not have anything with him and told PW1 that he had killed someone and he was going to kill himself though PW3 did not take him seriously. After that the accused escorted PW3 for about 100 metres as PW3 returned home.

11. The next day PW3 heard his father, **Sammy Mwangangi**, telling his mother that the assistant chief had been killed at a coffee farm. After informing his wife about what happened the previous day, he got onto a motorbike and went to the scene where he found Administration Police Officers and the chief called **Musau**. He also saw the body of the assistant chief but had no opportunity to explain to them what he knew. According to PW3, the next day he met the accused at a neighbour's home and upon asking him why he had done that act, the accused told him that he had met the assistant chief and they fought but that he did not kill him. PW3 then went and reported to his father who was in charge of security who in turn called other security members and they went and arrested the accused at the neighbour's home. He identified the hoe and the shirt that the accused was wearing.

12. In cross-examination, PW3 stated that on 22nd December, 2010, he saw the accused at his home between 6.40 pm and 7.00 pm. According to him, there was still light and the accused was wearing a red t-shirt which he had seen the accused wearing before, trousers and pair of shoes but could not remember if he was wearing a jacket. According to him the accused's brother, **Munyao**, was at the home as well as his mother, **Mutinda**. There were also neighbours, **Mutio Kuvia** and **Mutisya Kiangaga**, among other neighbours who all heard what the accused said when he arrived home. However, no one followed the accused as they were all afraid of him.

13. When he saw the body of the deceased the following day in a coffee farm next to the road leading to the deceased's home. The deceased's feet were on the road and rest of the body was in a coffee farm, about 2 km from the accused home. According to him, the deceased's head was swollen and his teeth had fallen on his shirt and there was blood. The road where the deceased was found was used by people. He however admitted that he was unsure that the hoe he had been shown in court was the one carried by the accused but he asserted that the accused carried a hoe. Referred to the hoe he stated that he could not identify any bloodstains but was quick to add that he was not an expert in identifying blood stains. The reason he gave for not calling the police the following morning was because he did not have a phone. Though he admitted that he had a motorbike, he did not report to the police when the accused returned without the *jembe* as he was not sure of what he was saying. It was his evidence that when he reached the scene of crime he found the policemen leaving for the market and though he was able to talk to them, he did not have enough evidence till the accused himself told him he killed the deceased. He stated that when the accused arrived home the first time they did not talk as he only said he was going to kill someone. Though PW3 knew the deceased as his neighbour, he was not aware of any dispute between him and the accused.

14. In re-examination, PW3 stated that the accused insulted his mother when he arrived and he was afraid to follow him. He stated that the hoe in court was similar to the one the accused carried on that day.

15. PW4, **Michael Musyimi Muinde**, the deceased's brother, on 28th December, 2010 identified the deceased body for the purposes of post mortem in the presence of a police present and one **George Kingoo Ithuka**.

16. PW5, **Superintendent Tom Achiya**, was the OCS, Donyo Sabuk Police Station, when on 23rd December, 2010 at 7.50am he received a telephone call from the chief Kyanzavi location that the assistant chief of Kwakumbu sub location had been found dead and that the body was in a coffee plantation in Kyanzavi area. He proceeded to the scene immediately accompanied by officers from the police station and found the D.O of Matungulu, a **Mr. Wanyoike**, the D.O of Kyanzavi and Administration Police Officers as well as the chief who had called him. According to him, the scene was next to Kyanzavi Coffee Plantation and Co-operative Society and the body was lying on its back with open wounds that did not look old on the forehead and around the mouth while the head of the deceased lay on a pool of blood on the ground. He relayed the information to the OCPD and DCIO Kangundo and brought on board the SCIO (now Crime Support Officer) and started the from Thika took photographs while he drew a sketch of the scene (PEXH 1) of crime for future use (shown sketch). He then caused the body to be moved from the scene to Bishop Okoye (pending transfer) mortuary in Thika for storage and post mortem. The DCIO from Kangundo also visited the scene and he handed over the sketch plan to him and he took over the investigation.

17. According to PW5, on 24th December, 2010 he was informed that CID officers from Kangundo with the help of officer from his police station arrested **Robert Kiilu Wambua**, the accused and **Dickson Kioko Kimunye**, as suspects and they were separately held at Donyo Sabuk Police Station before being transferred to Kangundo. He however did not know the accused.

18. On 28th December, 2010 PW5 attended a post mortem on behalf of the DCIO at Bishop Okoye funeral home at which the body of the deceased was identified by members of his family.

19. In cross-examination he stated that he was not the investigating officer of the case though he contributed to the investigation in other ways by taking the sketch and causing the body of the deceased to be preserved in time for the post mortem which he also attended to witness on behalf of the DCIO. He was however unable to tell what happened to the second suspect.

20. PW6, **Moses Muhiu Mwaura,** an Assistant Government Analyst, with the Government Chemist Laboratory in Nairobi, testified that on 31st December, 2010, there were exhibits submitted to their laboratory from CID Kangundo by **PC Henry Githugi**. The said exhibits were item A- a stick, item B1- a grey trouser belonging to the suspect **Robert Kiilu Wambua**, item B2- a red t-shirt belonging to the suspect

Robert Kiilu Wambua, item C1- Blood sample of the suspect **Robert Kiilu Wambua** and item D- Blood sample of the deceased **Isaac Musyimi Kimute.** The said exhibits were accompanied by the exhibit memo and they were received at the laboratory and he was requested to analyse the blood stain on item A, B1 and B2 and find out if they had any relationship with the blood sample of the suspect and deceased. According to his findings, the blood stains on item A were human blood group AB. The grey trouser and t-shirt (item B1 & B2) had no blood stains and a blood sample of the suspect was found to be of group 'O'. On the other hand, the blood sample of the deceased was rotten and of poor quality and therefore could not give any analytical results and he was unable to establish whether the blood on the stick belonged to the deceased. He produced his said report dated 22nd September, 2011 as exhibit in the case.

21. PW7, **Cpl Hassan Kemboi**, was called by PW5, the OCS of Donyo Sabuk Police Station on 4th December, 2010 at 10.00am and was told to go to a place/market called Kwa Maua where there was a murder suspect called **Robert Kiilu**. In the company of **PC Langat** he went to chief of the location, the late **Paul Mwau** who had already been briefed by PW5 and whom they found with an assistant chief, **Daniel Mutitu** and together they proceeded to a village called Kiliku where they found the accused building a neighbour's home with another person. He was identified by the chief identified and they arrested him. They then took him to his home, about 200 meters away, to look for exhibits, and they recovered a red t-shirt and long grey trouser. The t-shirt had stains which looked like blood stains. They took the clothes which he identified in court together with the accused to Ol Donyo Sabuk Station after which the accused was then taken to Kangundo Police Station.

22. PW8, **Cpl Henry Kithinji**, was on 23rd December, 2010 at 9.30 am in the office at Kangundo CID office when the DCIO, one **Shem**, called him and directed him to accompany **Inspector Waihenya** and the OCPD to Kumbu sub location Kanzyavi location where a sub chief had been killed. At Kanzyavi market they found when the body of the deceased had been taken by the OCS Donyo Sabuk and put in a police car. According to him, the neck had injuries and head was swollen. We started taking statements from witnesses with inspector **Waihenya**. He took statements of **Rodah Kaluki** and **Benedetta Mbula**. On 24th December, 2010 he also took the statement of **Philip Kaluki.** The accused was then arrested on 24th December, 2010 with another person whose name he could not recall by police from Donyo Sabuk police station and taken to Kangundo police station on the same day. He was told there were also clothes brought from his house, a t-shirt and trouser and he went to get the clothes from Donyo Sabuk police station on 26th December, 2010 which clothes he identified.

23. According to his evidence, on 26th December, 2010 in the company of **Cpl Opondo**, upon interrogating the accused, he said that he did not want to kill the assistant chief but that he would show them the stick he used to kill the assistant chief. He then took them to his *shamba* which was about 10 meters from his home where they recovered the stick which had been recovered from a *jembe* which *jembe* was recovered in the house of the accused. The stick has some blood stains. They however did not find the *jembe*. He identified both the said stick and the *jembe*. He prepared an exhibit memo and took the clothes and stick to the Government Chemist. He also took the accused to hospital for his blood sample to be taken to compare with the deceased blood sample and blood stains on the clothes and stick.

24. He also took the statement of the mother of accused, **Agnes Mutinda Wambua** on 29th December, 2010 at their home. According to him, the accused's mother stated that in the evening of 22nd December, 2010 the accused went to her home while drunk and asked her for a *panga* and told her that he was going to use the *panga* to kill the assistant chief. The mother refused to give him the *panga* and told him to stay at home. He then went to look for the stick in his home and went and met the assistant chief on the road and killed him. When the accused returned later he told the mother that he had killed the assistant chief. According to PW8, he was writing the statement as she talked in Kiswahili after which he read it to her and she signed the same. It was his testimony that he was one of the investigating officers in this case with Inspector **Waihenya**. He then produced the stick, the trouser and the t-shirt as exhibits and identified the accused as the suspect who was arrested but stated that he did not know him before his arrest.

25. In cross-examination, he stated that they did not take any photographs of the scene. He also did not take any fingerprints from the stick he recovered. He was unaware if the accused indicated he had a dispute with the deceased since he was not the one who recorded his statement. He also did not record the statement of PW10, though he talked with her but did not interview her.

26. PW9, **Agnes Mutinda Wambua**, the accused's mother testified that she knew the deceased, **Isaack Musyimi**, who was her neighbour. On 22nd December, 2010 at about 7.30 pm she was at home with another person called **Peter Emari** who was in charge at her place of work when the accused arrived from *Kwa Mwaura*, a market place, drunk and was crying. Upon being asked what was wrong with him, he said **Isaac** had beaten him up. The accused then went into his house, took a *panga* and came out. However, PW9 took the *panga* and told him to go and sleep and he returned to his house, closed the door and slept. According to PW9, the accused informed her that he wanted to greet Isaack but instead of Isaac responding he beat him up. **Isaack** was the senior chief. After some time, PW3 came and inquired where Robert was and PW9 informed him that the accused had gone to sleep and PW3 said he would come back the following day. It was PW9's evidence that she prepared food and sent the children to take the food to the accused but they told her he did not wake up.

27. PW9 denied that he recorded her statement with the police and instead stated that some people whom she knew went to her with some papers and asked her to append her signature and she told them she thumb prints. She denied that she knew where Kisukioni is and instead stated that she was from Matungulu and her village was Ivani and she did not have a phone.

28. On application made by the learned prosecution counsel, PW9 was declared a hostile witness and the prosecution counsel was granted leave to cross-examine her. In cross-examination by the prosecution counsel, PW9 stated that the accused was her 5th son and apart from reiterating the foregoing, she stated that when she asked the accused what he wanted to do with the *panga*, the accused did not answer her but after she asked him to go and sleep, the accused obeyed. When food was ready he was served. In the morning she woke up at 6.00 a.m. and informed the accused to go and look for the animals. He did not ask for the *panga*. She reiterated that the people went with statement and told her to sign the documents. It was her evidence that while she knew them, they did not know her. She stated that the accused stated that the sub chief, the deceased herein, had beaten him. She admitted that **Michael Kieti** is her father and stated that she did not know where the stranger got the information from. Her statement was produced as an exhibit in the case.

29. In cross-examination by the defence counsel, **Mr Muthama**, PW9 confirmed that **Michael Kieti** was her deceased father who passed away in 2017 and that she did not know his phone number.

30. PW10 **Grace Kanini Musyoki,** in her testimony stated that on 22nd December, 2010, she was working at Stage Bar at *Kwa Mwaura* Market and opened the bar at about 5.00 p. m. and customers started entering among them the deceased sub chief who entered the bar at about 6.00p.m. with a village elder called **Phillip**, PW2. Some minutes later 3 young men whom she did not know entered and went where they sat and when she returned from where she had gone to look for change, she found the 3 young men arguing with the deceased with the deceased telling them that *Stage Bar* is not his office and that if they wanted to discuss anything with him they should go to his office. After that they left. Thereafter, at about 6.30pm, the accused, who was not known to PW10, arrived and started arguing with the deceased and she heard the deceased ordering him to get out. By that time PW2 had not gone away and they had not lit the light as it was not very dark. The accused however declined to get out and the deceased got up and struck the accused, and the accused told the deceased that "today I am with you". The accused left but returned after 20 minutes and asked the deceased why he had struck him. By then PW2 had left and the accused then left. The other young men present in the bar told the deceased to be contained as the accused could harm him. The deceased told them that if the accused came back a third time they should assist him to apprehend him and take him to the police. At about 7.30pm, the deceased called a person called **Dickson** who was not mentally stable and left him his drinks. The following day on 23rd December, 2010, PW10 heard people saying someone had been killed and when she went to the scene she found the police and the body of the deceased, about a kilometre away. It was her evidence that after the accused came the second time the deceased did not stay for long thereafter and left about 10 minutes later. On 27th December, 2010 at Kangundo police station she identified the accused as the accused from his physical features by pointing him. According to her, she did not know the accused before then as she had not worked there for more than a year. She however knew the deceased who was their customer.

31. In cross-examination, she stated that after the deceased struck the accused the accused retorted that "*leo utaniona*".

32. PW11, **PC Felix Kosgey**, had the post-mortem report performed at Bishop Okoye Funeral Home, Thika by **Dr. Karuri**. According to him, he went to the funeral home and found that management had changed and hardly knew the whereabouts of the doctor. Even the family members were not aware of his whereabouts since he only wrote his name but not his home address. According to PW11, the post mortem was conducted on 28th December, 2010 at 1300 hrs in the presence of **Michael Munee** his brother and **George Muthuka** brother-in-law.

33. The witness also produced the results of the identification parade held at Kangundo police station on 27th December, 2010 conducted by **CIP Samuel N. Mate** of Kangundo police in respect of **Robert Kiilu Wambua** from Kiliku village. According to the report, the accused was informed the purpose of the parade by **C.I.P Samuel Matta** and he had no objection to the parade and signed. At that time the suspect had his friend called **Joyce Nduku** from Kiliku village. There were 3 witnesses, **Benedetta Mbula** from Kayata village, **Grace Kanini Musyoki** from *Kwa Mwaura* market and **Philip Muasya Kaloki** from Kayata village. There were members of the parade including the accused **Robert Kiilu**. The accused did not raise any objection regarding the arrangement of the parade. Before the period the witnesses were outside the parade and were being called separately after the parade they were being taken to the crime office. The 1st witness conducted the parade when the accused was between the 5th and 6th witnesses and the witness identified the accused by touching him. The 2nd witness identified him when the accused was between the 5th and 6th witnesses by touching him. The 3rd witnesses did not identify the accused when between 5th and 6th witnesses. After the parade the accused was asked if he was satisfied with the parade and he confirmed he had no complaint and he signed.

34. Upon being placed on his defence, the accused testified that he knew the deceased who was the Sub Chief of Kumbu Sub Location. On 22nd December, 2010 he received information that he had died at night. Before that day on 22nd December, 2010 he was with him at Stage Bar market where he found him seated with another person PW2. When the accused approached where they were, the deceased asked the accused for his Kshs 300/= which he had given the accused the previous day to use in buying drinks. The accused told the deceased that he was not intending to pass through the market so he did not have the money with him that night. The deceased then told the accused that he was drunk and struck the accused but the accused did not strike back. Instead he left the bar and went home about 2 km away where he found his mother who told him to go and sleep, which he did. According to the accused, he did not go out again that night. In the morning his mother woke him up and at about 8.00 am, he saw people passing. His friend, **Musyimi**, informed him that the deceased had fallen next to coffee plantation and when he went there he found many people there though the body of the deceased had already been taken away by police. In the evening he went to visit his friend **Musembi** who is deceased and he was informed of what happened. The next day at 3.00 pm he was interrogated by the police and was arrested and taken to Ol Donyo Sabuk then transferred to Kangundo where he explained what happened after which he was charged with the offence before the court.

35. In cross-examination by **Miss Mogoi**, he admitted that on 22nd December, 2010 he went to the club and found the deceased and PW2. He admitted that he knew PW1 who operated a butchery. He admitted that he passed there for soup and talked to her before he went to the Bar. He also admitted that PW3 was his friend. Though he met with PW3 the following day, he denied seeing PW3 on 22nd. He also agreed that PW3 was not at the club and he averred that he did not inform PW3 that I disagreed with the deceased. He agreed that PW9 was his mother and he found her at home and informed her what happened. He agreed that when he took a *panga* his mother took it away from him and he went to sleep. He however denied that he gave the police the stick and denied mentioning to anyone that he struck the deceased. According to him, it was the deceased who struck him and he got annoyed and I went home and picked a *panga*.

36. In re-examination, he stated that by the time he went to PW1's butchery he had not met the deceased. In his evidence they were three people, the deceased, PW2 and the bar attendant.

37. On behalf of the accused, reliance was placed the case of **Pius Arap Maina vs. Republic [2013] eKLR (Criminal Appeal No. 247 of 2011),** by his learned counsel, **Mr Muthama,** and it was submitted that there are too many glaring contradictions in the prosecution case and that this casts doubt as to whether the accused person committed the alleged offence. Whereas the prosecution witnesses a total of 11 witnesses, none of the witnesses ever saw the accused murder or attack the deceased. Since there was no eye witness account of the incident, what is available is circumstantial evidence. Reliance was placed on the cases of **Sawe vs. R (2003) eKLR; Teper vs. R (1952) AC 489; R vs. Kipkering arap Koske & Another (1949) 16 EACA 135; Simon Musoke vs. R (1958) EA 715** and **Erick Odhiambo Okumu v R (2015) eKLR.**

38. According to the accused, threats do not amount to actions and in this case none of the witnesses presented by the prosecution ever saw

the accused person attack the deceased or in any way harm the deceased to lead to his death. Further, the items recovered from the accused person never pointed to the accused being responsible for the death of the deceased and there was no direct evidence linking the accused with the murder of the deceased.

39. According to the accused therefore, the case against the accused is purely circumstantial and based on **Sawe vs. Rep [2003] KLR 364**, **Abanga alias Onyango vs. Rep Cr. A No.32 of 1990(UR)** and **Teper v. R [1952] AC at p. 489** the circumstantial evidence to link the accused with the crime does not exist at all. While the prosecution doubles down on the fact that the deceased was in a scuffle with the deceased, they have left out that the deceased was also in a confrontation with 3 other young men on the same night and at the same place. These were never pursued as suspects by the state. If indeed the only link between the deceased and the accused was the deceased slapping the accused who we again stress never retaliated, then the other 3 young men seen confronting the deceased should have been held as viable suspects. While the Investigating officer stated during evidence that he arrested 2 suspects in the case being the accused and another person, no indication was ever given as to why the other person was never charged with the crime. It seems that the state through its police are also unsure of its own circumstantial case against the accused as they have arrested another in connection with the crime.

40. It was therefore submitted that the shaky evidence and the glaring contradictions in the evidence adduced by the prosecution witnesses cannot just be wished away and like in every criminal case, there arises doubt which should be resolved in favour of the accused person.

41. Counsel submitted that the murder weapon that was recovered had no blood stains belonging to the deceased. Counsel cited the provisions of Section 111(1) and 119 of the ***Evidence Act*** and submitted that the evidence of the prosecution could not sustain a conviction against the accused. Counsel urged the court to acquit the accused under Section 215 of the ***Criminal Procedure Code***.

42. The State, though **Miss Mogoi**, the learned prosecution counsel submitted that it was proved that the accused threatened the deceased; that he was identified in the identification parade as the one who argued with the deceased; that he admitted to PW3 that he killed the deceased; that the accused showed PW8 the murder weapon and all this evidence is circumstantial that point to the accused as the killer of the deceased. It was submitted that the accused had intention to kill the deceased for he went and collected the murder weapon that he used to attack the deceased. It was submitted that the evidence of death was proven vide the post mortem report. According to counsel the defence of the accused amounted to a mere denial that did not create any doubt on the prosecution case and she urged the court to make a finding that the deceased was guilty of murder.

Determination

43. I have considered the evidence on record as well as the submissions made on behalf of the parties. 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. The prosecution's case as can be gleaned from the evidence of the witnesses called was that on 22nd December, 2010 in the evening the deceased was drinking with PW2 in a bar known as Stage Bar at a place called ***Kwa Mwaura***, when the accused entered the said bar and an argument ensued between them. As a result, the deceased who was an assistant chief slapped the accused and the accused left the bar after threatening the deceased. That he threatened the deceased was supported by the evidence of PW2. That was at about 5.00 pm. At about 6.00pm, according to PW1, the accused was at her butchery where he took some soup and uttered words to the effect that someone would sleep in the mortuary that night. After 6.45 pm the accused was at his home looking drunk where, according to both PW3 and PW9, his mother, the accused who was visibly annoyed, in anger tried to take a *panga* but the same was snatched from him by PW9. The acused informed both PW3, his friend and PW9, his mother that the source of his anger was that he had been struck by the deceased. While PW9 stated that she convinced the accused to go to sleep and the accused did so. PW3 stated that after the *panga* was snatched from the accused, the accused took a *jembe* (hoe) and having disagreed with PW9, left threatening that he was going to kill the deceased. According to PW3, an hour later, the accused returned and confirmed to him that he had finished the work of killing the deceased. He then escorted PW3. The following day the body of the deceased was found lying in a coffee plantation.

47. According to the post mortem report which was produced by PW8, the cause of the deceased's death was cardiorespiratory arrest due to

severe head injury from multiple blunt trauma to the head. The report noted that there were cut wounds to the eye brow, upper lip, obvious mangled mandible and facial bones. Also noted was occipital haematoma. On the head was an extensive fracture with large haematoma with comminuted fracture of the mandibular. There were also comminuted fractures of the maxillary and fracture of the frontal bone. On the spine there was occipital impact which was likely the initial blow.

48. According to PW8, in the course of their investigations, the accused took them to the *shamba* where a *jembe* stick was recovered. However due to the state of the blood stains, though the analysis of the same showed that it was of blood group AB, it was not possible to match the same with the blood of the deceased which due to lack of proper preservation had rotten.

49. The body was identified as that of the deceased by PW4 and the accused was then charged with the present offence.

50. In this case there was no doubt as to the fact of death of the deceased. Both the evidence of PW4 and PW8 proved beyond reasonable doubt that the deceased was found dead.

51. As regards the cause of death, the post mortem report showed that the cause of the deceased's death was cardiorespiratory arrest due to severe head injury from multiple blunt trauma to the head. In other words, the deceased did not die a natural death but was murdered.

52. 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.''**

53. 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."**

54. 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."**

55. 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."**

56. 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."

57. 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."

58. 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."

59. In this case, 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; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

60. 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."

61. 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."

62. 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."

63. Therefore, for this court to find the accused guilty, the inculpatory facts must be incompatible with his innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** as follows:

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

64. In **Teper v. R [1952] AC at p. 489** the Court had this to say:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

65. In this case the evidence is that on 22nd December, 2010, the accused entered Stage Bar where he found the deceased in the company of PW2. A disagreement seemed to have arisen between the deceased and the accused as a result of which the deceased struck the accused. It is not in dispute that the accused was annoyed by the action on the part of the deceased. According to PW2 he threatened to kill the deceased. Upon leaving the bar, he went to the premises operated by PW1 where he ordered for soup and uttered words to the effect that someone was going to sleep in the mortuary that night. After that he proceeded home and still in a fit of anger attempted to arm himself with a *panga* with the intention of going after the deceased in order to revenge the attack but the same was snatched from him by his mother, PW9. While PW9 insisted that the accused went to sleep, PW2, who was the accused's friend testified that the accused took a *jembe* after expressing his unhappiness with his mother, PW9, and left running towards the market swearing to go and kill the deceased. In PW2's evidence, an hour later, the accused returned and stated that he had finished the act of killing the deceased.

66. Though PW9 denied that the accused went after the deceased, the statement which PW9 gave to PW8 corroborated the evidence of PW2. Since PW9 was declared a hostile witness, her evidence as far as the prosecution's case is concerned is worthless since as was held in **Batala vs. Uganda [1974] E.A. 402** at page 405:

"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."

67. I take it that what the Court meant was that such evidence cannot be relied upon by the party calling that witness since as stated in **Abel Monari Nyanamba & 4 Others vs. Republic [1996] eKLR** and **Maghanda vs. Republic [1986] KLR 255**, it may well be relied upon by the other party though its weight is minimal. Therefore, as appreciated by the Court of Appeal in **Maghanda vs. Republic [1986] KLR 255 at page 257**:

"The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court."

68. As was noted by **Lesiit, J** in **Abel Monari Nyanamba & 4 Others vs. Republic [1996] eKLR**:

"The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt."

69. In this case considering the evidence of PW2, the accused's person's friend who only happened to have been at the accused's home by coincidence of having gone to visit him, I find that the evidence of PW2 was more credible than that of PW9.

70. The injuries which were sustained by the deceased were consistent with the nature of the weapon that the accused was seen by PW2 carrying with him when he left threatening to go and kill the deceased. While not much weight can be placed on the evidence of PW6 as far as the stick and the clothes were concerned in linking the accused to the murder of the deceased, the fact that the accused led PW8 to the place where the *jembe* stick was recovered corroborated the evidence of PW2 that he left the home carrying a *jembe*. That evidence was clearly admissible since as was held by the Court of Appeal in **Peter Ndungu Mwangi vs. Republic Nyeri Criminal Appeal No. 50 of 1999 (Gicheru, Shah & Bosire, JJA) on 29/10/99:**

"…in view of the definition of the term, "confession"" contained in section 25 of the Evidence Act, Cap 80 Laws of Kenya, a confession may be conduct or words…The treatment the law gives to confessions by words is different from those by conduct. Sections 26, 28 and 29 of the Evidence Act provides safeguards to obviate improperly obtained confessions being admitted in evidence against the makers thereof. Section 31 of the Evidence Act, however, is in effect a proviso to the aforementioned three sections, and provides a complete answer…In addition to the foregoing, section 30 of the Evidence Act specifically provides that absence of a caution of itself without more does not render inadmissible a confession which otherwise would be admissible…The independent corroborative evidence include, the fact that the appellant provided information which led to the discovery of the body of Christopher Morris. The body was discovered in a thick part of a forest. The discovery raised a rebuttable presumption either that the appellant who provided the information leading to its discovery, alone or in conjunction with other people was his killer or that he knew the killers…Suffice it to state that the presumption was not displaced by his defence… There is also the fact that the appellant was arrested near where Morris's car was abandoned as he ran away from the general direction of the place it was abandoned and soon after it was abandoned there. His arrest was in a forest and his explanation as to how he came to be found there was clearly unsatisfactory…The place of arrest was not close to the appellant's home."

71. In this case, the accused was seen with the deceased on the day when the deceased was killed. It is admitted by the accused that he and the deceased had a disagreement in Stage Bar at *Kwa Mwaura* Market in the late afternoon. Though the accused stated that he was at PW1's

place before going to Stage Bar, from PW1's evidence, he in fact went there after their disagreement with the deceased. The timing of PW1 seems to tally with that of PW3 who was at the accused's home when the accused arrived. At PW1's premises, the accused was clearly in a foul mood and was agitated. PW1 saw him banging the table while threatening that someone would spend that night in the mortuary and true to his word, the deceased lay dead that night. After leaving PW1's premises he went home to arm himself with a *panga* and though the same was snatched from him, he proceeded to take a *jembe* and hurriedly left with it only to return an hour later bragging that he had finished the job of killing the deceased and would similarly kill himself. From the post mortem report the injuries inflicted on the deceased were consistent with those that could have been caused by the implement that PW3 saw the accused leaving the home with. The accused in fact took PW8 to the place where a *jembe* stick was recovered.

72. While it is true that the blood stains found on the stick was not possible to be matched with the blood samples taken from the deceased, even if the stick had not been recovered that, in itself, would not necessarily have led to the acquittal if there was other evidence on the basis of which the accused could be found culpable. Regarding the failure by the prosecution to produce the murder weapon(s), in the case of **Karani vs. Republic [2010] 1 KLR 73** the Court delivered itself as follows:

> **"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit".**

73. Lesiit, J in **Republic vs. E K K [2018] eKLR** held that:

> **"49. The murder weapons in this case were not recovered. However, the weapons used could be inferred from the injuries inflicted on the deceased as noted by the pathologist in the Post Mortem Form produced as P. Exhibit 11. The child had severed neck blood vessels with through and through stab wound from left to right of the neck. She also had ligature compression around the neck. She also had depressed fracture on left temporal region of the skull and fracture at the base of the skull. According to the doctor the cause of death was neck compression due to ligature strangulation; neck injury due to sharp force trauma; and head injury due to blunt force trauma. The doctor explained that any one of these injuries could have caused the death of the deceased. The pathologist stated that it was not possible to say which of these injuries singly caused the death of the deceased. Neither could he tell the order in which they were inflicted.**
>
> **50. The conclusion one can make from these doctor's findings are that the weapons used were a blunt object heavy enough to cause fractures to the head; a sharp object sharp enough to cut through all the blood vessels and muscle around the neck from left to right; and, a rope or ligature strong enough to cause compression to the neck area enough to cause death. Any person arming themselves with either of these weapons and applying the kind of force that was applied on the deceased cannot have had any other intention but to cause either death or grievous harm to the deceased. Malice aforethought can thus be inferred not only from the weapons used to inflict the injuries but the nature of the injuries that were actually inflicted on the deceased resulting in the deceased death.**
>
> **52. I find that even though the murder weapons were not produced as evidence in this case the weapons used to commit the offence were established in the evidence of the pathologist. I find that failure to produce the weapons did not prejudice the accused defence, neither was it fatal to the prosecution case."**

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

75. 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 arm 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.**

76. 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 there was evidence that the death of the deceased was cardiorespiratory arrest due to severe head injury from multiple blunt trauma to the head. There was evidence that the deceased and the accused had disagreed late that afternoon and the accused had threatened to kill the deceased. He in fact took steps to put that threat into action and this was confirmed by his own mother, PW9. PW3 saw him leaving carrying a *jembe*. I find that malice aforethought was proved beyond reasonable doubt.

77. In this case, the events that took place the day the deceased was killed starting from the altercation between the accused and the deceased, the threats by the accused directed at the deceased, the arming of the accused and the hurried departure from his home while so armed and his

conduct of disclosing where the *jembe* stick, taken together satisfy me that the the inculpatory facts against the accused are incompatible with his innocence and are incapable of explanation upon any other reasonable hypotheses than that of his guilt; I am unable to find any other existing circumstances which can reasonably be said to have weakened the chain of circumstances relied on by the prosecution. As was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR**:

> **"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. 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.'"**

78. The evidence placed before me leaves me with no reasonable doubt that the prosecution has proved that the accused on 22nd December, 2010 at Kiliku Village, Kayatta sublocation, Kyanzavi Location in Matungulu District within Machakos County, the accused murdered **Isaac Musyimi Kimote**. He is therefore convicted of the said offence.

79. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 11th day of March, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Mutua for Mr Muthama for the Accused

Miss Mogoi for the State

CA Geoffrey