



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

#### HIGH COURT CRIMINAL CASE NO. 29 OF 2012

REPUBLIC.....PROSECUTOR

=VERSUS=

ROBERT MWANZIA MUTUA.....1<sup>ST</sup> ACCUSED

JOSEPH MUIA WAMBUA.....2<sup>ND</sup> ACCUSED

#### JUDGEMENT

1. The accused, **Robert Mwanzia Mutua**, and **Joseph Muia Wambua** were charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged on the 23<sup>rd</sup> day of August, 2012 at around 9:00pm, at Kyumbuni market within Matungulu District County, the accused persons jointly murdered **Jane Mbeneka** (Deceased).
2. The prosecution's case was based on the evidence of 11 witnesses.
3. The prosecution's case was that on 23<sup>rd</sup> August, 2012, at **PW4, Willy Mwanzia Muend** left his place of work at Kyumbuni market as a *shamba* worker for one **Stephen Ndambuki** and proceeded to a shop operated by the deceased within the same Market. According to him, the deceased, though an elderly woman was her lover with whom he was living and he was to assist her in carrying the shop goods her home and at about 7.00 p.m. PW4 and the deceased started closing the shop to go home. Just before they left the shop, **Katue** the 1<sup>st</sup> accused went and bought sugar worth Kshs. 20/=. During this time, **Mutinda** the 2<sup>nd</sup> accused was outside the shop standing at the doorway. According to PW4, there was a hurricane lamp in the shop and there was moonlight outside.
4. After they closed the shop they left with PW4 pushing wheelbarrow that contained the shop goods. After about five steps the 2<sup>nd</sup> accused called the deceased and asked if there was bread amongst the goods they had. By then, the 2<sup>nd</sup> accused was next to PW4 and so PW4 knew it was him. The deceased sold a loaf of bread to the 2<sup>nd</sup> accused and gave Kshs.50/= and was given a balance Kshs.5/= which he used buy cigarettes. At this time the two accused persons were together.
5. After the transaction, the deceased and PW4 proceeded with their journey and when they were approaching the deceased's house, PW4 heard footsteps behind and when he looked behind, he saw the accused persons following them. Suddenly the deceased was cut with a *panga* by the 1<sup>st</sup> accused and PW4 dropped the wheelbarrow. The 2<sup>nd</sup> accused then threw a *panga* at him which he dodged and ran away. According to PW4 there was moonlight and they had the hurricane lamp. When he looked behind, he saw the 1<sup>st</sup> accused following him.
6. On the way, PW4 met PW1, deceased's daughter, **Carol** who had responded to the deceased's screams. After passing PW1, he looked behind and saw that the accused persons had left. When he returned to the scene, PW1 started screaming attracting people there. Later the Assistant Chief, **PW.3, Florence Mutindi Mwinzi**, and Police officers went to the scene and he explained what had happened and the body was taken to mortuary. In his evidence the body of the deceased had an injury on the head and in the hand. According to him, he knew the accused persons very well as they lived in the same neighbourhood.
7. It was his evidence in cross-examination that the deceased had two daughters about his age who had finished school but were living with her. He stated that they love affair with the deceased started two years before the material date and that after work he would go to the deceased's shop after which he would accompany her home where he used to sleep. Before then he used to sleep at my employer's quarters. He stated that he came to know the 1<sup>st</sup> accused, when he moved to Kyumbuni market two years before the material date and that they used to meet at the said market, greet each other and depart. According to him, the 1<sup>st</sup> accused wore jeans, a dark leather jacket and a cap while the 2<sup>nd</sup> accused had a white jacket and dark and black trouser just as he had in court but not the same shirt. He confirmed that the same path they used walking at the material time is the same one the accused persons used to go home though it was being used by many people. It was his evidence that the deceased was holding the lamp and her was next to her as they were walking home. After buying the bread and cigarette

the accused persons went their way and they continued with their journey. However, when he heard steps behind him, he looked behind and saw the accused persons had reached where they were. According to him, the deceased was cut with a *panga* from behind then she turned and held the person. Though it was a bit dark, he reiterated that they had the lamp which they were using to serve customers on their way home. Apart from the lamp there was half-moon on the material day. From his calculation from the time the 2<sup>nd</sup> accused was served and the time they were attacked was about five minutes and he admitted that he was shocked by the attack and ran away but he did not scream. He testified that each of accused had a *panga* in their right hands.

8. He stated that he disclosed to both the Chief and the Police that they were attacked by the accused persons whose names he disclosed.

9. On 23<sup>rd</sup> August, 2012 at about 8.30pm **PW1, Caroline Mukonyo**, the deceased's daughter was at home with other family members waiting for the deceased to come home from work. When she went outside to pick some water jerricans, she saw some light about 30 Metres away and then heard screams and she recognised the voice screaming as her mother's. She started running towards the direction of the screams which was the same direction where she had seen the lights. On the way she met PW4, who used to carry goods for the deceased from the shop to the home, running towards their home with a short black man dressed in black clothes chasing him. According to her PW4 was screaming saying that "they have killed her". When the said person saw her screaming he ran away. It was her evidence that there was a bright moonlight and she could see.

10. PW1 then continued towards where the deceased's voice was coming from with PW4 following at the back and found the deceased lying down on the ground on the foot path breathless and bleeding on the head. Her screams alerted the neighbours who rushed to the scene before the police arrived. It was her testimony that she found the lamp the deceased had at the scene on the ground but it was now off.

11. In cross-examination, PW1 explained that their home was about 1½ km from the deceased's shop. While she admitted that PW4 always used to escort the deceased home, she was unaware if PW4 was the deceased's lover and denied that PW4 used to spend any nights at their home. According to her the deceased only screamed once and she also started screaming but she heard PW4 screaming several times. She saw the black man who was two steps from PW4 and because she was frightened she never noticed if he was carrying holding something or not.

12. In her evidence, at the time of the incident she was in Secondary Boarding School though it was during school holidays. She could not therefore tell if PW4 used to visit the deceased during the school term.

13. One of the people who were alerted by the screams was **PW.2 Raphael Stanslaous Musyoka** the secretary of the Village Council which ensures that there is peace and development in the area. At about 9.00 p.m. that night, he screams outside. He then proceeded towards Kyumbuni market where the screams were coming from and he was joined by other people. About 50 Metres outside the market he found a group of people gathered screaming and when he went nearer he saw the deceased on the ground with two of her daughters on top of her screaming. By then the deceased had already passed away and he noticed that she had bled profusely and next to her body was a lantern lamp which was switched off. Apart from the moonlight there was no other source of light. When he went closer he noticed injuries on her hand and her head. Since it was said that PW4 was with the deceased he looked for him and found him crying but though PW4 disclosed that the deceased had been killed and he knew those who had killed the deceased, he refused to divulge the names of the culprits.

14. PW2 then reported the incident to the police who arrived at the same time as the Assistant Chief, PW3. arrived at the scene with administration police officers and they took PW4 with them.

15. According to PW2, about one and a half year prior to the death of the deceased, there was a time the late **David Nzyoka**, the deceased's father in law and a village elder, telephoned her at about 9.00 p.m. saying the 1<sup>st</sup> accused had caused trouble at their homestead wanted to kill them. According to her the deceased's husband passed away a long time ago. On 31<sup>st</sup> July, 2012, a meeting was called by the assistant chief outside Kyumbuni Catholic church at about midday and the deceased went there crying and disclosed that the 1<sup>st</sup> accused, who was a neighbour, wanted to kill her. The first accused whom the deceased reported was following her then arrived at the meeting but ran away saying that the assistant chief would have them arrested. Although the matter was reported to the police the 1<sup>st</sup> accused disappeared before he could be arrested. After about three weeks following that attempt to have the 1<sup>st</sup> accused arrested, the deceased was killed.

16. In cross-examination PW2 states that the deceased did not explain the nature of the problem between her and the 1<sup>st</sup> accused. He however admitted that the Assistant Chief, **Florence**, PW3, is aunt to the 1<sup>st</sup> accused but he was unaware of any dispute between PW3 and the 1<sup>st</sup> accused. I am not aware of any dispute between the 1<sup>st</sup> accused and the said aunt. He admitted that he knew one George who was a brother to the 1<sup>st</sup> accused but was unaware of any burial dispute regarding the burial place of PW3's mother who was also the grandmother to the 1<sup>st</sup> accused. To his knowledge he said mother/granny was buried on her own land which is the same land PW3 lives though the family members. He however did not know the 2<sup>nd</sup> accused but had known the 1<sup>st</sup> accused, his neighbour, for long. That night there was a bright moonlight and one could see somebody who was near since it was not dark at the scene.

17. **PW.3, Florence Mutindi Mwinzi**, the assistant chief of Kyanzavi sub-location was on 23<sup>rd</sup> August, 2012 at about 8.30 p.m, at Katuli Market when she received a telephone call from members of public from Kyumbuni village who informed her of the death of one woman at Kyumbuni Market. She telephoned the nearby A.P camp and relayed the report to an officer by the name of **Erick**, PW5. Accompanied by other Administration Police Officers they proceeded to the scene where they found people crying and found the body of the deceased near Kyumbuni Market. The body was covered with a piece of cloth and next to it was a lamp which was off. Apart from the light from the torches they had and telephone sets of the members of the public, there was also moonlight. PW3 telephoned the D.O. and informed him of the matter so that he could inform the OCS accordingly. The OCS went with a motor vehicle to the scene and upon inquiries they were informed that the last person who had been seen with the deceased was PW4 who was still at the scene and upon interrogation, PW4 disclosed that he knew the perpetrators of the offence and named one as **Kautu** alias **Robert Mulwa Mutua**, the 1<sup>st</sup> accused who was her nephew. She however did not know the 2<sup>nd</sup> person whose name was disclosed. The body was then removed from the scene by the police officers who also took PW4 with them. According to her, though she checked the 1<sup>st</sup> accused house that night at about 2.00 a.m. she found

nobody in the house and the following morning when she heard that the 1<sup>st</sup> accused is in the compound at his house, she telephoned police officers and informed them accordingly. By then she had seen the 1<sup>st</sup> accused leave his compound going towards the scene. She gave police officers the 1<sup>st</sup> accused's description and the police officers arrested him and she confirmed to them the accused was the person being looked for. According to her the other culprit was arrested after being pointed out by members of public.

18. In her evidence, there was no grudge between her and the 1<sup>st</sup> accused or his family but the 1<sup>st</sup> accused and the deceased on 31<sup>st</sup> July, 2012 had an issue arising from a complaint made by the deceased that the 1<sup>st</sup> accused had threatened to kill her. Though the 1<sup>st</sup> accused was following the deceased, upon her asking PW.2 to bring him to the gathering the 1<sup>st</sup> accused ran away. PW4 then left word for the 1<sup>st</sup> accused to be arrested on sight but later the deceased informed her that she had forgiven the 1<sup>st</sup> accused. Previously, the father-in-law to the deceased had reported that the 1<sup>st</sup> accused was causing disturbance at their home wanting to enter the deceased house at night. According to PW4, it seems the deceased used to keep some chang'aa (liquor) for the 1<sup>st</sup> accused but she could not tell if they were lovers.

19. In cross-examination, PW3 stated that though by 7.00 p.m. it was dark there was moonshine. She admitted that there were about 100 people at the scene but she did not see accused persons among them. She admitted that the 1<sup>st</sup> accused is known by the nickname "**Kautu**" and that PW4 named one **Kautu** and one **Mutinda** as the perpetrators of the offence. According to her the deceased's husband had passed away and a report was once made to her by a village elder, the late **Musyoka Komo** that "**Kautu**" the 1<sup>st</sup> accused had tried to get into the house of the deceased at night wanting to be her lover. She however came to learn that the deceased and the 1<sup>st</sup> accused were at one time lovers. Though she did not know PW4, she later came to learn after the material date that PW4 was employed in the area where the offence took place and PW4 informed her that he had a love affair with the deceased.

20. According to PW3 the footpath where the body was found was used by many people who were the family members of the deceased. In her evidence she was with a police officer by the name **Erick**, PW5, when PW4 gave the names of the accused which he repeated when the OCS and other police officers came to the scene.

21. PW3 however denied the existence of any land dispute between her and the 1<sup>st</sup> accused and denied having caused the 1<sup>st</sup> accused to be remanded in custody or jailed. She therefore denied giving false evidence to have the 1<sup>st</sup> accused jailed. According to her, she lived in her own land that she bought while the 1<sup>st</sup> accused lived in their family land that their father bought though in the same neighbourhood.

22. On 23<sup>rd</sup> August, 2012 – 9.00 p.m. **PW.5 APC Erick Muthiani** was at Katulye Police Post when PW3 informed him of a woman who had been attacked at Kyumbuni village and had passed away as a result of the attack. He passed the information to the Sergeant at Donyo Sabuk Police station and accompanied PW3 to the scene where they found the body at a foot path in some bushes. The body had cuts on the head and there were many people gathered at the scene. PW.4 disclosed that he knew the culprits. According to PW5, there was moonlight and at the scene the lights from the motor bike were on while some people at the scene also had torches. The OCS Donyo Sabuk arrived at the scene together with another police officer and they removed the body to the mortuary.

23. On 24<sup>th</sup> August, 2012 at 7.00 a.m. PW3 telephoned and gave the whereabouts about one of the suspects with the details of the clothes that the suspect was wearing. He proceeded to Kyumbuni area with a "*boda boda*" operator and arrested the suspect who is the 1<sup>st</sup> accused whom he never knew previously and escorted him to the police post. Some time at about 9.30 a.m. the 2<sup>nd</sup> accused who was not known to him was taken to the post by PW3 and community policing members. The accused persons were both removed from the cells and they went to the home of the 1<sup>st</sup> accused and upon carrying a search therein they recovered a blood stained *panga* and pair of blood stained jeans trousers from one of the rooms in the house. According to PW5, the 1<sup>st</sup> accused showed them his house and also his father's. The witness identified the *panga* and the pair of jeans trousers which were under the bed. After they returned to the police post, he handed over accused persons and the said items to **Cpl. Muiruri** of Donyo Sabuk Police Station.

24. In cross-examination he admitted that the search was not mentioned in his statement due to an oversight and the statements neither showed that they were with the 1<sup>st</sup> accused nor that the accused's father showed them the accused's house. Referred to the *panga*, he admitted that the bloodstains were no longer visible. According to him even without torches and the motor cycle lights it was not dark as there was moonlight. According to him, PW4 disclosed the names of the accused in the presence of PW3 and other villagers. It was his evidence that he never noticed any blood stains on the clothes of PW4 and was not aware that he was ever arrested.

25. On the same day at about 10.00 pm **PW.6 Cpl. Daniel Muiruri** received a telephone call from the OCS who wanted him to accompany him to a murder scene in Kyumbuni. They proceeded to the scene using a police motor vehicle and at the scene at a footpath they found the dead body of a lady whose name we were given as **Mbeneka** (deceased) who had a deep cut on the head. They recovered a hurricane lamp which was off near the body. According to him, there was moonlight and he could see. They then collected the body and took it to Kangundo Hospital mortuary accompanied by some family members of the deceased together with the village elder together PW4. The following day at about 10.00 a.m. during the day the OCS instructed him to re-visit the scene with **Mr. Kiragu** and **Mr. Langat** and he drew a rough sketch plan of the scene then later made a fair sketch plan and a legend all of which he exhibited. The same day they proceeded to Katulye Police Post at about 12.00 noon where they found both the accused persons under arrest and proceeded to the home of the 1<sup>st</sup> accused where both the accused had spent that night from where they recovered a bloodstained *panga* under the bed and the jeans on the drying lines outside the house. The jeans was wet like it had been submerged in water but did not look clean. The orange T-shirt was also hanging on the lines and had blood stains and was also wet like it had been submerged in water but was not clean. A black jacket was also at the same hanging lines and was also wet similarly to a light green shirt. He took possession of the same which he exhibited. According to his evidence, blood samples of the deceased and of the accused persons were obtained and after preparing the exhibit memo he escorted the afore-stated blood samples and the *pangas*, the pair of jeans, orange T-shirt, black jacket and the right green shirts to the Government chemist for analysis. Later the report of the Government analyst was received and the results were negative. He produced the said memo form as an exhibit.

26. In cross-examination, PW6 stated that it was the 1<sup>st</sup> accused who showed them the house and that the 2<sup>nd</sup> accused had visited the 1<sup>st</sup>

accused that night though he did not know from where accused persons were arrested from. The 2<sup>nd</sup> accused did not show them his house. According to him, PW4 identified the clothes on the lines as the ones accused 1 & 2 wore before he took possession of the same. He was however unable to specifically point out which clothes belong to the 1<sup>st</sup> accused and which ones belong to the 2<sup>nd</sup> accused. He however recovered the *panga* on the bed under the mattress though he did not see any blood stains on the mattress where the *panga* was. It was his evidence that both the mother and father of the 1<sup>st</sup> accused were in the homestead during the recovery. He denied that PW4 was not placed under arrest and stated that they did not go to his home to search the same. Similarly, he did not investigate PW4 but admitted that PW4 and the deceased were close.

27. **PW.7, Dr Fredrick Chege Mbutia** on 31<sup>st</sup> August, 2012, conducted a post mortem on the body of the deceased at Kangundo Hospital at 12 p.m. According to him, the body was of a black female aged 40 years of fair nutrition and was dressed in a panty and bra. At the time of post mortem rigor mortis had set in and the time of death was more than 24 hours. There was a deep cut longitudinally on the right hand with fractures of the bone. The region of the cut was clear suggesting a sharp object. There were also multiple deep cuts on the skull which was fractured into several segments which were well deformed and the brain tissue was exposed. In his opinion, the wounds were probably caused by a sharp instrument with force. He formed the opinion that the cause of death was a head injury as a result of force using a sharp instrument. Though he was unable to take a blood sample he took some brain sample. He signed the post mortem form which he produced as an exhibit.

28. In cross examination, he stated that he could only recall the presence of some morgue attendants and police officers during post mortem examination and not the relatives of the deceased. He however recalled the exact name of the body as **Jane Mbeneka** which he recorded on the post mortem form.

### **Defence Case**

29. Upon being placed on their defence, the 1<sup>st</sup> accused, **Robert Mutua Mwanzia**, in his sworn testimony admitted that he knew the deceased but denied that he was in a relationship with her. According to him, on 23<sup>rd</sup> August, 2012, he was at his home building a kitchen with one **Maingi Mutunga** who was doing the construction. Present were his father, **John Mutua Mwinzi** and his mother **Lydia Mwinzi**. After finishing the work between 6.00 p.m. and 7.00 p.m. they then left and went to his father's home about 20 metres away for meals after which they returned with the fundi to his home to collect his tools. He departed with the fundi about 8.00 p.m. after escorting the fundi he returned back to his house where he was staying alone after his wife left him. As he was preparing to eat he saw safari ants and took a broom to remove them outside. Upon getting outside he heard noise from Koihani market direction about 2 kilometres. In between there is a stream called Kwa Nganga River. Since there was a funeral there he thought people were going there so he slept. When he woke up at 8.00 a.m. I sat down and saw the fundi, **Maingi**, coming for work at about 9.00am. Upon asking him why he was late, the fundi informed him of the deceased's death which his father also confirmed. He told his father to go and check and his father left on a bicycle while he followed him.

30. However before reaching the place, he passed by her aunt's to greet her and after doing so, he proceeded. Upon reaching the river he saw a motorbike behind which stopped and PW5 alighted, handcuffed, put him on the bike and took him back to PW3. It was the 1<sup>st</sup> accused's evidence that he had disagreed with PW3 over land belonging to their grandmother which PW3 sub-divided and took. According to the 1<sup>st</sup> accused their dispute arose from the fact that PW3 killed his brother over the land dispute. He however denied that he been arrested over the *changaa* brewing. When he was arrested, he was never informed about the reason for his arrest and he thought that it was based on the issue of *changaa*.

31. He was then taken to Katulia AP Post when he found a Corporal who informed him that it was PW3 who ordered for his arrest. A vehicle for Donyo Sabuk arrived and it was then that he was informed that he was arrested on allegation of murder. They then took me to his house where they collected some clothes after conducting search together with the cooking spoon alleging that they were blood stained. He was then taken to Donyo Sabuk police post where he was interrogated on the death of the deceased and one month later brought to court.

32. The 1<sup>st</sup> accused's testimony was that he saw the 2<sup>nd</sup> accused when he was picked up at Katulia and brought to the vehicle and that he had never seen him before. He insisted that the charges against him were untrue and were fabricated by PW3.

33. In cross-examination, the 1<sup>st</sup> accused admitted that he knew the deceased and that he used to buy things from her shop. Her home was about 40 minutes away but he did not know that she had been killed though the noise was coming from that direction. He admitted that there was moonlight. In his evidence the fundi left after 8.00 a.m. after he had collected food and returned to his house after which he was alone. According to him, PW3 stated that the deceased had been killed by PW4 and that she also just went there like any other people. The 1<sup>st</sup> accused insisted that PW3 killed his neighbour though he never reported the same and was not aware if any report was made. According to him, the land in dispute belonged to his grandfather, the PW3's father and she had a right over the said land. PW3, the 1<sup>st</sup> accused stated, knew that he was making *changaa* since she was in-charge of security and used to arrest him over the same *changaa* but he would be released on bond.

34. In re-examination, the 1<sup>st</sup> accused reiterated that it was not very dark as there was moonlight.

35. The 1<sup>st</sup> accused called his father, **John Mutua Mwinzi** as DW2. According to him, on 23<sup>rd</sup> August, 2012 between 5.00 p.m. and 7.00 p.m. he was in his home with his wife and saw the 1<sup>st</sup> accused in his house which is 50 metres away. I never saw anyone in his house. I was at home with my wife. He was listening to radio when he heard a knock and his wife opened after which the 1<sup>st</sup> accused entered and asked for food. After staying for 10 minutes, the 1<sup>st</sup> accused returned to his house at 8.30 p.m. The following day, the 1<sup>st</sup> accused went to him in the morning at 8.00 a.m. and informed his that his fundi, Maingi, had told him that there was a woman who had been killed at Kyumbuni village Kaunange market. Since he had received the same message from the said fundi he took his bicycle and went to Kaunange, 1 kilometre away, where he was told a woman called **Jane** whom he knew was killed. The deceased had a food kiosk and was also a prostitute hence her place was called Koinange street. By the time he arrived there, the body had been taken away. He then left market and arrived home at 11.00 a.m.

and found the 1<sup>st</sup> accused had been arrested but he was not aware of the reasons for the said arrest. Around 12.00 p.m. the 1<sup>st</sup> accused returned with the officer who had arrested him and when they tried to follow them the officer told him to return back. According to DW2, the officer came with the wooden spoon but he did not see any *panga*.

36. DW2 however admitted that he could not hear the 1<sup>st</sup> accused leaving his house since his house was 50 metres away though there is no fence between them. In his evidence, he never heard any screams and never saw the 2<sup>nd</sup> accused on that day whom he did not know since the 2<sup>nd</sup> accused was not from his village or location. He however insisted that on that night 23<sup>rd</sup>/24<sup>th</sup> the 1<sup>st</sup> accused was in his house. He stated that the 1<sup>st</sup> accused had a problem with PW3 who had taken land belonging to **George Mutuku** his first son who was deceased and despite their complaint to the DO, he never came so we left the matter. According to him, it was the 1<sup>st</sup> accused who was following keenly on that land.

37. In cross-examination, DW2 stated that PW3 was their last born sibling and he was not related to the deceased and the disputed land had nothing to do with deceased. He was however unaware that the 1<sup>st</sup> accused was making or selling *changaa*. According to DW2, that night the 1<sup>st</sup> accused went to his house alone and left after 10 minutes but he could not tell if the 1<sup>st</sup> accused left after that since he slept at 9.30 p.m. He however did not hear any screams that night but said that the place where she was killed is far and he had to go there on a bicycle. Accordingly, if someone screamed you would not have heard. He was however unaware if it was PW3 who reported the accused.

38. The 2<sup>nd</sup> accused, **Joseph Muia Mwanzia**, who testified as DW3. According to him, before 23<sup>rd</sup> August, 2012, he was working in Kayole, Nairobi from 2009 – 2011 where he had a butchery while staying at Kakuyuni. Since he was unmarried, he was staying with his parents – his father, **Onesmus Wambua Muia** and his brothers and sisters. On 23<sup>rd</sup> August, 2012 he was at home removing manure to take to the farm till evening after which he took a shower and super and then went to sleep at about 9.00 p.m. In the morning he woke up took tea with his family and was then sent to his Aunts - **Tabitha Mulu, PW8**, in in Kyanzavi to call her to come for a family meeting. He left on 24<sup>th</sup> at about 9.00 a.m. but was arrested on the way. According to him he boarded a vehicle till Tala market from Kakuyuni. At Tala he alighted, entered supermarket for shopping and took a vehicle to Kyanzavi and arrived there at 1.00 p.m. At the stage he alighted and started walking towards the house. Shortly, he saw a crowd at nearby home and as he passed he heard someone calling and was told to stop. About 7 people from that group went and greeted him asked his name and where he was from and where he was going. After informing them where he was going they asked him if he knew anyone amongst them but he told them he do not know them. Though he told them to confirm from the home where he was going if he was known there but instead he was tied with a rope and taken to Katunge police post where he was remanded in cell. When he asked the officer why he was arrested the police officer denied knowledge of the reason for his arrest. At 4 p.m. when he was removed and he found police officers from Donyo Sabuki where he was taken and placed in a cell.

39. On 25<sup>th</sup> he was taken to CID officer where he was interrogated after which he was returned to the cells. The next day early in the morning he was taken to Kithimani court and returned to Donyo Sabuk after which he was charged on 29<sup>th</sup> the first day he saw the 1<sup>st</sup> accused as he did not know prior to that day. According to him, he never knew the deceased and never even saw her body and nothing was recovered from him since he only had foodstuffs from the super market.

40. In cross-examination, he insisted that he left home on 24<sup>th</sup> at about 9.00 a.m. to Kyanzavi upon being sent by his mother **Sarah Mwikali Wambua** and his father **Onesmus Wambua** to his Aunt **PW8** who was married to **Muli Mwinzi**, for a family meeting to discuss the forthcoming marriage of his sister. According to him, he knew **PW8's** place since he used to visit the place when he was in school. He also knew **PW8's** husband. According to him, from their home to DW3's place is far because you require two vehicles and 4 hours. He arrived there between 1 p.m. – 2 p.m. The 2<sup>nd</sup> accused stated that he neither knew the deceased nor PW4 though he admitted that he was arrested in area where the deceased was killed. According to him, inside the land cruiser he found police officer and another lady whom he came to know in court was PW3. It was his evidence that he was arrested by members of the public and he neither knew the 1<sup>st</sup> accused nor was at the scene on 23<sup>rd</sup>.

41. The 2<sup>nd</sup> accused called as his witness his father **Onesmus Wambua Muta**, who testified as DW4. According to him, before 23<sup>rd</sup> August, 2012 he was staying with him at home and was unmarried. On 24<sup>th</sup> August 2012 in the morning he was sent by DW4's wife to **PW8** at Kyanzavi, in Matungulu Sub-County. He left at about 6.00 a.m. the same day DW4 returned to Nairobi. Three days later DW4 was called and informed he had not reached there. He returned home went there and was informed he was in prison where the 2<sup>nd</sup> accused narrated to him what happened.

42. In cross examination, he reiterated that on 23<sup>rd</sup> August, 2012 he was at home having left Nairobi where he was working at the Airport at 8.00 p.m. and arrived home in the evening at 9.00pm and found the 2<sup>nd</sup> accused there. He slept at 9.30pm after everyone went to their houses after taking food. According to him each of his four sons has own house and 2<sup>nd</sup> accused's house was 30 feet away from his.

43. According to him PW8 to whom the 2<sup>nd</sup> accused was sent was like the 2<sup>nd</sup> accused's grandmother since PW8 and DW4's mother were sisters. He confirmed that PW8 was married to **Muli Mwinzi**. From his home to PW8's place was in another Sub-county and was far and one had to pay Kshs.600/=. The 2<sup>nd</sup> accused left for the place at about 8.00 a.m. and 9.00 a.m. both of them had left. It was his evidence that he sent the 2<sup>nd</sup> accused 6.00 a.m. so if he left later he would not know. He confirmed that the 2<sup>nd</sup> accused was arrested after 3 days but he could not confirm where the 2<sup>nd</sup> accused was before he arrived home and he did not know his friends.

### **Rebuttal Evidence**

44. At the close of the defence case the Prosecution pursuant to the provisions of section 309 of the Criminal Procedure Code called PW8, **Tabitha Muli**, the 2<sup>nd</sup> accused's Aunt. According to her the deceased was her neighbour. He confirmed having known the 2<sup>nd</sup> accused since his childhood and disclosed that the 2<sup>nd</sup> accused was staying at her place when he was in class 4 – 5 studying in the same school with her own children before returning to their home. He however returned to PW8's place after school and was doing casual work with her sons. By

the time the deceased died, the 2<sup>nd</sup> accused had however returned back to their home. Since the 2<sup>nd</sup> accused was working at a farm in August and left when the work came to an end. During the period of his stay, he was staying with PW8. When the 2<sup>nd</sup> accused left, he went with PW8's son with whom he stayed for many days before the said son returned. According to her they were working in coffee farm spraying the same though the 2<sup>nd</sup> accused was also doing sand harvesting and carrying building stones/ballast. He was just doing any casual work available.

45. It was her evidence the 2<sup>nd</sup> accused returned the day the deceased passed away. Though she did not see him, she was just informed he was around since the 2<sup>nd</sup> accused never used to alert her when he was going to her place and she just used to see him when he went. She however used to inquire from their home when he was there to confirm if he was coming from home. It was her evidence that from his place to her place was not far since they used to send the children there.

46. PW8 confirmed that she knew the 1<sup>st</sup> accused as well since he was from their area and used to walk with her children with others. She was however unaware if the two knew each other as she never saw them at any time when the 2<sup>nd</sup> accused was at her home since the 2<sup>nd</sup> accused never went to her home with any friends. According to her when the 2<sup>nd</sup> accused reached adulthood, he was just staying shortly about 2 months then returning home but confirmed that the 2<sup>nd</sup> accused was not a stranger to their home and her family and that he used to just go to work and the only place he used to go to was the market. They were cultivating in her home and later going to look for work whenever he was called to do so nearby. She however confirmed that the distance from her home to the 1<sup>st</sup> accused's was about 3 kilometres apart.

47. In cross-examination she stated that in order for her to go to the 2<sup>nd</sup> accused's place she normally pays Kshs.100/= to Tala and then 30/= to Kangundo and would spend Kshs.200/- if by *bodaboda* since the 2<sup>nd</sup> accused's home is far from hers. It was her evidence that the 2<sup>nd</sup> accused left her home at the beginning of August. She testified that not very many people knew the 2<sup>nd</sup> accused apart from those who were giving him work and therefore would not be lying if people on the road did not recognize him. She however never heard that he was involved in any criminal activities.

48. In re-examination she stated that the 2<sup>nd</sup> accused's work used to end around 15<sup>th</sup>. While admitting that the 2<sup>nd</sup> accused was known within the area she could not tell the people he was interacting with when at work. She however insisted that there is no way he would have gone to her place and returned back without getting in touch with her children. From the 2<sup>nd</sup> accused's home to her place would take from 8.00 a.m. to 3.00 p.m. due to stopping of vehicles. However, with motor bike he would take about 2 hours. For someone to arrive at her place at 9.30 a.m. it would mean he left their place at 7.00 a.m.

### **Prosecution's Submissions**

49. On behalf of the Prosecution it was submitted by **Miss Mogoi**, learned prosecution counsel, that as demonstrated by the evidence of PW8 and PW4, the accused persons knew each other very well and any evidence to the contrary was only meant to deceive the court with an intention of exonerating them from the offence. Even in their evidence in defence, they gave contradictory evidence that create doubt in their defence. The defence by the two accused persons was a mere denial and a well-crafted defence that intended to deceive the court into believing that the 1<sup>st</sup> and 2<sup>nd</sup> accused did not know each other

50. Firstly, the 1<sup>st</sup> accused testified that he was in his house on 23<sup>rd</sup> August, 12 with a fundi and that the said fundi left late in the evening after they had taken supper that they got from his mother. DW2 on the other hand, testified that on the said 23<sup>rd</sup> August, 2012, the 1<sup>st</sup> accused was alone and that the fundi went there the following day on 24<sup>th</sup> August, 2012. There were further contradictions on the distance between the home of the 1<sup>st</sup> accused and the scene. The 1<sup>st</sup> accused testified that he heard the screams from the scene on the night of the incident while DW2 testified that he did not hear screams on that night and that for someone to have heard the screams, then it means that he was near the scene of crime.

51. The prosecution agreed with the testimony of DW2 that for someone to hear the screams, the person must have been near the scene. It is their submission that the 1<sup>st</sup> accused was able to hear the screams from the scene because he was within the scene of crime. It was the testimony of PW1 that she heard PW4 screaming and saying that they have killed her, she also started screaming meaning that the screams started almost immediately before the perpetrator got too far from the scene hence the reason why the 1<sup>st</sup> accused was able to hear the screams.

52. When PW1 heard her mother's voice, she ran toward the directions and that was when she met a Short black man chasing PW2 and when he saw her, he ran away. According to the learned prosecution counsel, the description given by PW1 fit the 1<sup>st</sup> accused person and this further corroborates the evidence of PW4 that the 1<sup>st</sup> accused chased after him but went away when he met with PW1.

53. It was submitted that this case had nothing to do with the dispute that existed between the 1<sup>st</sup> accused, his family and PW3. The 1<sup>st</sup> accused testified that the case had been fabricated by PW3 who had no relationship with the deceased and who never stated at any given time that it was the 1<sup>st</sup> accused who murdered the deceased since she was not at the scene. The person who testified that it was the accused persons who killed the deceased was PW4 and none of them demonstrated that there existed any grudge between the said PW4 and them to warrant him to give false testimony against them.

54. The fact that the deceased had a cut on the right hand, the same demonstrate that she was attacked from the back hence the right hand injury, if she would have been attacked from the front, the injury would have been on the left hand unless the attacker was left handed. The foregoing, corroborates PW4's evidence that the attack was from behind.

55. Further, there is evidence to the effect that the 1<sup>st</sup> accused had been disturbing the deceased and that he had threatened to kill her

prompting her and her father in-law to make a report of the same to the sub-chief.

56. It was submitted that the cause of the death of the deceased herein as per the testimony of PW7 is not in dispute. The post mortem established that the deceased had a deep cut on the right hand and multiple deep cuts on the skull and the brain matter was exposed and had cuts. Her cause of death was a head injury as a result of force using a sharp instrument.

57. From the foregoing, was submitted that the prosecution's evidence has proved that the accused persons had the intention to kill the deceased and they did actualize the intention by attacking the deceased with a *panga* and causing her instant death.

58. In view of the foregoing, the court was urged to pronounce a guilty verdict against the two accused persons and duly sentence them for the brutal murder of the deceased.

### **Defence Submissions**

59. On their part the defence submitted that the information was defective since the evidence relating to where the deceased's body was found was at variance with the particulars in the information. It was further submitted that there was uncertainty as to who the deceased was as part of the evidence referred to her as **Mbembeka** while part of it referred to her as **Mbeneka** yet despite amending the information the witnesses were not recalled to clarify the uncertainty.

60. It was submitted that the totality of the evidence of the prosecution showed that it was dark and the footpath they were walking along had trees on both sides and according to PW5, it was a bushy area near the deceased's home. It was therefore submitted that the conditions prevailing at that time were not conducive to proper identification when the attack was sudden and from behind hence the description of PW4 cannot be said to have been free from error. It was noted that PW2 did not identify the short man she came across as any of the accused persons and she never saw him holding anything. In support of the submissions the Defence relied on the case of **Roria vs. R (1967) EA 583**.

61. It was submitted that this was a case of a single identifying witness in a case which occurred at night hence the need to test its reliability by making inquiry as regards the nature of the light, its strength, its size and its position relative to the suspects. In this regard reliance was placed on **Kiilu & Another vs. Republic (2005) 1 KLR 174**.

62. It was submitted that apart from the evidence of PW4 there was no other evidence linking the accused persons with the commission of the offence and that the evidence exonerates the accused persons. It was further submitted that there was no evidence of common intention to attribute culpability for the offence to the 2<sup>nd</sup> accused.

63. The defence submitted that the prosecution failed to prove by clear, reliable and cogent evidence the ingredients of murder.

### **Determination**

64. I have considered the evidence on record as well as the submissions made on behalf of the parties.

65. The first issue for determination is whether the Information was defective. It was contended that the Information stated that the offence was committed at Kyumbuni Market while the evidence disclosed that the deceased died on a path towards her home. If I understand the submission correctly, it is contended that the Information ought to have stated that the crime was committed on a pathway rather than a market place. It is true that section 134 of the **Criminal Procedure Code** requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It provides that:

***“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”***

66. Interpreting this provision, it was held in **Isaac Omambia vs. R, [1995] eKLR** that:

***“the particulars of a charge [form] an integral part of the charge.”***

67. However, the test in such cases was set out in **Cherere s/o Gakuli vs. R [1955] EACA 622** in which it was held that:

***“The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity”.***

68. It was therefore held in **Paul Katana Njuguna vs. Republic [2016] eKLR** that:

***“In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the***

vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."

69. Dealing with the framing of a criminal charge in the case of Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391], the Supreme Court of India held that:

"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent... We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands ... but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. ... The essence of the matter is not a technical formula of words, but the reality. Was he told " Was it explained to him" Did he understand" Was it done in a fair way... Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

70. Similarly, in Isaac Nyoro Kimita & Another vs. Republic [2014] eKLR, it was appreciated that:

"In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have "jointly" defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complainant. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants' constitutional right to a fair trial."

71. In Fappyton Mutuku Ngui vs. Republic [2012] eKLR the Court expressed itself as hereunder:

"I have said elsewhere that the answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:

*.... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.*

The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. Next, then, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given pointers. Two cases are pertinent: the case of Yosefa v. Uganda [1969] E.A. 236 – a decision of the Court of Appeals – and Sigilani v. Republic [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. Sigilani held:

'The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.'

As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him" In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice" I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence. At the end of the day, therefore, the test is not at all a formalistic one but a substantive one. On my part, I have adopted a test that looks at the trial process in its totality rather than the retail defects separately. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular

streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal. Applying this approach to the facts of the present case, I can confidently say that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to “cure” it under section 382. If one needed evidence of that, one would begin with the very fact that the Appellant never raised the objection – including on appeal. That must be because he knew the charges he was facing. Second, a perusal of the Court record shows that the Appellant participated vigorously in the trial process and was well aware of the charges he was facing. All in all, I am certain that the trial process was fair and the Appellant had sufficient notice of the charges facing him.”

72. Applying the same test to the present case I am similarly satisfied that there was no defect in the charge sheet. The deceased was coming from Kyumbuni Market where she was operating a shop and the offence was committed on the path leading to her home. The place of the commission of the offence is meant to inform the accused about the particulars of the place where the offence was committed in order to enable him ascertain and understand the nature of case he faces to enable him prepare his defence. In this case the said market from the evidence was not far from where the offence was committed. In fact, the evidence was that it was at the edge of the market. In my view no miscarriage of justice was occasioned to the accused persons and even if there was a defect, which I find there wasn't, the same is curable under section 382 of the *Criminal Procedure Code*. I similarly find that the so called uncertainty in the name of the deceased did not prejudice the accused in any material manner as there is no doubt as to the identity of the deceased.

73. 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.***

74. 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.”**

In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by M. Otero, 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.**

75. In this case, the prosecution's case was that on the on 23<sup>rd</sup> August, 2012 the deceased and PW4 having closed the deceased's shop at Kyumbuni Market were walking towards the deceased's home with PW4 pushing the wheelbarrow containing the goods from the shop while the deceased was holding a lantern lamp when they were attacked. Before the attack, the 1<sup>st</sup> accused had bought from the deceased just before they closed the shop sugar. It was stated that at that time the 2<sup>nd</sup> accused was standing on the doorway. Along the way, the 2<sup>nd</sup> accused called the deceased and asked if there was bread amongst the goods they had and the deceased sold to him a loaf of bread and cigarettes and the deceased and PW4 proceeded with their journey. However, when they were approaching the deceased's house, PW4 heard footsteps behind and when he looked behind, he saw the accused persons following them. Suddenly the deceased was cut with a *panga* by the 1<sup>st</sup> accused and PW4 dropped the wheelbarrow. The 2<sup>nd</sup> accused then threw a *panga* at him which he dodged and ran away. According to PW4 there was moonlight and they had the hurricane lamp. When he looked behind, he saw the 1<sup>st</sup> accused following him. PW4's screams as well as the deceased's attracted PW1's attention and she rushed to the scene and on her way met PW4 being chased by a short black man dressed in black. There is no indication that PW1 recognised the person. By the time PW1 arrived where the deceased was, she was already dead.

76. From the evidence on record there was no other eye witness to the incident apart from PW4. According to PW4, moved to Kyumbuni market two years before the material date and he knew the accused persons very well as they lived in the same neighbourhood and that they used to meet at the said market, greet each other and depart. According to him, when he heard steps behind him, he looked behind and saw the accused persons had reached where they were and the deceased was cut with a *panga* from behind then she turned and held the person. Apart from the lamp there was half-moon on the material day and he was shocked by the attack and ran away but he did not scream. He testified that each of accused had a *panga* in their right hands.

77. In this case, I have no difficulty in finding that the deceased died. There was ample evidence from those who rushed to the scene that they found the deceased dead. The fact of death was proved by the post mortem examination report.

78. As regards the cause of death, PW7 testified that his post mortem examination revealed a deep cut longitudinally on the right hand with fractures of the bone. The region of the cut was clear suggesting a sharp object. There were also multiple deep cuts on the skull which was fractured into several segments which were well deformed and the brain tissue was exposed. In his opinion, the wounds were probably caused by a sharp instrument with force. He formed the opinion that the cause of death was a head injury as a result of force using a sharp instrument. In other words, the deceased did not die a natural death but was murdered.

79. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, as I have stated above the only eye witness to the crime was PW4. In the case of **Charles O. Maitanyi vs. Republic [1986] KLR 198** the court held that:

**“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification...The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.”**

80. In this case however, PW4’s evidence was that he knew the accused persons prior to the date of the commission of the offence. While it was his evidence that he used to see the 1<sup>st</sup> accused at the market and event used to greet him, he never indicated how he knew the 2<sup>nd</sup> accused person apart from merely saying so. In **Peter Musau Mwanzia vs. Republic [2008] eKLR**, the Court of Appeal expressed itself as follows:

**“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”**

81. In this case we do not have any evidence as to how long PW4 knew the 2<sup>nd</sup> accused person. He did not say that the 2<sup>nd</sup> accused was related to him, a friend or someone he used to see within the vicinity or that he had been in contact with the 2<sup>nd</sup> accused before the incident in question. It is therefore not possible to conclude that PW4 was possessed of such knowledge as regards the 2<sup>nd</sup> accused’s features that in seeing the 2<sup>nd</sup> accused that night he could recall having seen him earlier before the incident.

82. As for the 1<sup>st</sup> accused PW4 testified that he used to see the 1<sup>st</sup> accused in the market. Being evidence of recognition, it was held in **Anjononi & Others vs. The Republic [1980] KLR 59:-**

***“recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”***

83. However, in **R vs. Turnbull (1976) 3 ALL E.R 549** the Court held:

**“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

84. It is therefore important that apart from the evidence relating to how well the assailant was known to the witness before the incident, the conditions prevailing at the time of the attack must also be considered in order to determine that there was no possibility of error. Therefore, where the prevailing conditions reveal lack of proper lighting, that the duration of the attack was short in circumstances of shock and fear, the possibility of mistaken recognition cannot be ruled out. The conduct of the witness soon after the incident may also be important in assisting the Court in gauging whether or not the witness was as a result of the prevailing circumstances in a position to identify the assailants. In this case, one of the people who arrived at the scene, among the witnesses who testified soon after the incident was PW2. According to him, though PW4 disclosed that the deceased had been killed and he knew those who had killed the deceased, he refused to divulge the names of the culprits. The importance of the first report where the prevailing conditions are difficult cannot be overemphasised. As was appreciated in **Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259:**

**“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”**

85. As already stated, PW1 did not say that he recognised the accused persons. According to PW4, the person who was chasing after him was the 1<sup>st</sup> accused. According to PW3, the first accused was the deceased’s neighbour. The inability of PW1 to recognise the 1<sup>st</sup> accused can only be explained on the fact that absence the lantern, the presence of the moonlight alone could not have been conducive to proper recognition of the assailants. Back to the lantern, in **Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution by holding that:

**“The appeal of the 2<sup>nd</sup> appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the**

quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant."

86. In **David Mwangi Wanjohi & 2 Others vs. Republic [1989]eKLR** it was held by the Court of Appeal that:

"The quality of the evidence has to be considered. Does starlight afford a means of illumination for observing the shape or features of a person to such a degree that proof can be had beyond reasonable doubt, or is it a state of darkness richer in imagination than fact? There is no doubt that starlight *per se* affords no scientific means of illumination at all. It may purport that there was a clear sky, against which there might be seen the semblance of a human being. But it is not an assured basis, such as moonlight, for observing the details of the features of a person. Indeed Nelson could not tell what clothes the appellant was wearing, however close the latter was to Nelson. It is plain that Nelson could not see details, and the appellant did not speak, nor move in any special way, or indicate any special feature. We are bound to say that the quality of the evidence was precarious at best, and that it was a misdirection for the High Court to conclude that the conditions for "identification were not unsatisfactory." However long Nelson had known the appellant, if there was no light by which to see the appellant, nor other means of recognition, Nelson could only have guessed at the identity of the man near him, and in that event the failure to put the cardinal question, could Nelson have been mistaken, was a grave error. It is also surprising to find that the High Court felt that mistaken identify was not raised by the defence. The appellant had said that he had not been present. Is that not raising the issue of mistaken identity? It is said that he did not cross-examine Nelson on mistaken identity. Was that not suggested by the question to which the answer was "no, I could not recognize the clothes you were wearing when I was attacked." But in any case, upon whom was the burden of proof? Was it not upon the prosecution who were relying on improbable evidence?"

87. In this case the 1<sup>st</sup> accused may have purchased sugar from the deceased just before the deceased closed the shop. It may well be true that the 2<sup>nd</sup> accused also purchased a loaf of bread and cigarettes along the way. However, PW4 stated that after that, the 2<sup>nd</sup> accused went away and they proceeded with their journey. The attacked came from behind. It is not indicated that any of the attackers uttered any word before the attack. It was on a path followed by many people between trees.

88. In my view it would have been safer if there was further evidence incriminating the accused persons. In this case though it was stated that bloodstains clothes were recovered from the 1<sup>st</sup> accused's house, the analysis of the same seemed to have been negative and did not link the accused persons to the offence.

89. In their evidence, the accused persons raised the evidence of alibi. They called witness who supported their defence. However, it is trite that the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial since as was held by the Court of Appeal in **Victor Mwendwa Mulinge vs. Republic [2014] eKLR**:

"It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."

90. The Court of Appeal in the case of **Wangombe vs. Republic [1980] KLR 149** held *inter alia* as follows:

"...in **Ssentale vs. Uganda [1968] EA 365, 368** [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."

91. In the case of **Adedeji vs. The State [1971] 1 All N.L.R 75** it was held that:

"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."

92. In this case in an attempt to rebut the alibi defence raised by the 2<sup>nd</sup> accused, the prosecution called PW8. However, far from rebutting the said defence, PW8 substantially confirmed the said alibi. While it is true that some portions of the accused's defence were difficult to believe, the Court of Appeal in **Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004** expressed itself as hereunder:

"The appellant, as we have stated raised mainly two defences. The first was one of alibi and the second was that there were grudges between the appellant's father and the complainant. Our understanding of the appellant's defence is that he could not be properly identified as he was not at the scene of the robbery and the complainant's evidence together with that of his wife and his grandson were all fabricated stories against him. On the other hand, the complainant and his wife were certain in their evidence that the appellant was one of the attackers. These were conflicting versions and demanded that the trial court had to carefully consider, analyse and evaluate the evidence that was before him both by the prosecution's witnesses and the appellant. He had to consider whether the circumstances for identification were favourable or not. He had to consider whether the defence of alibi was well founded and whether it was properly displaced by the prosecution case. The consideration had to clearly be borne by the record. Equally the first appellate court, as was stated in the case of Gabriel

Kamau Njoroge vs. Republic (supra) had a duty to carefully analyse and weigh conflicting evidence and draw its own conclusion on the same, bearing in mind that it had not seen or heard the witnesses.

.....

We have perused the entire record of appeal and particularly the proceedings. We cannot see any evidence adduced either by the prosecution or by the appellant that would justify the conclusion the learned Magistrate came to, namely that the appellant's alibi was an open lie and an indication of guilt. He may not have been truthful when he said that PW4 summoned him and asked him if he knew about the robbery at the complainant's home but the burden was on the prosecution to displace his alibi."

93. Similarly, the 1<sup>st</sup> accused defence was that of the existence of a grudge between him and PW3 and alibi. While I find no substance on the issue of the grudge, I find that the prosecution failed to displace the alibi defences of both the accused persons.

94. 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."**

95. According to *Halsbury's Laws of England*, 4<sup>th</sup> 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."**

96. 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."**

97. In 1997, the Supreme Court of Canada in **R vs. Lifchus [1997] 3SCR 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."**

98. 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."**

99. **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.”**

100. It may well be that the previous conduct of the 1<sup>st</sup> accused coupled with the fact that immediately prior to the attack on the deceased, the 1<sup>st</sup> accused was seen in the premises of the deceased raised a suspicion that it must be the 1<sup>st</sup> accused who inflicted the fatal injuries on the deceased. However, in **Sawe vs. Rep [2003] KLR 364** the Court of Appeal held:

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

101. The corollary of the evidence against the accused person may well be interpreted that having just been at the shop of the deceased and having known that they had been clearly recognized, it was unusual for them to attack the deceased. In **David Merita Gichuhi vs. Republic Nairobi Criminal Appeal No. 158 of 2003** the Court of Appeal held that:

**“It is incredible that the appellant could have given his correct name to the members of the vigilante group near the home of the deceased when he was proceeding to her home to commit a crime. The fact that the appellant gave his correct name near the home of the deceased is a co-existing circumstance which destroys the inference that he was going to the home of the deceased on the night on 18<sup>th</sup> April, 1999 when Bakari met him...Lastly, Njambi (PW10) testified that she is the one who told the appellant about the death of Elizabeth Naymbura on 21/4/99 and that the appellant decided to remain at the home of the deceased and even slept there. The learned Judge concluded that the appellant went to the home of the deceased as a cover up. There was no evidence to support this finding. If the appellant had indeed committed the crime charged and had in fact seen by Bakari and the members of the vigilante group near the home of the deceased on the night of 18<sup>th</sup> April, 1999, the natural reaction would have been to go into hiding. The fact that he went to the home of the deceased after her death to console the family and even slept there is another co-existing circumstance which destroys any inference that he was the one who committed the offence. On our evaluation of the evidence we have come to the conclusion that the circumstantial evidence relied on by the trial Judge was so weak as to amount to a mere suspicion and could not have been a sound basis for a conviction.”**

102. In this case, the 1<sup>st</sup> accused testified that he was arrested when he was on his way to the scene of the crime. That conduct was clearly incompatible with the conduct of a guilty person. Considering the evidence presented in its totality I find that it does not meet the threshold prescribed for conviction in criminal cases. In so finding, the court does not necessarily make a definite finding that the accused are factually innocent of the offence with which they are charged. It simply makes a finding that the prosecution has failed to legally discharge its obligation by proving their guilt beyond reasonable and he is therefore constitutionally deemed to be innocent. That is what our law provides.

103. Accordingly, I find that the prosecution has failed to prove that the accused persons herein on the 23<sup>rd</sup> day of August, 2012 at around 9:00pm, at Kyumbuni market within Matungulu District County, jointly murdered **Jane Mbeneka** (Deceased). They are accordingly acquitted and I direct that they be set at liberty forthwith unless otherwise lawfully held.

104. Judgement accordingly.

105. This judgement has been delivered pursuant to section 168 of the ***Criminal Procedure Code*** as read with Article 50 of the Constitution in the absence of the accused but with concurrence of the ODPP due to the prevailing restrictions occasioned by COVID 19 pandemic and particularly as the decision is in favour of the Accused Person.

**Judgement read, signed and delivered at Machakos this 27<sup>th</sup> day of April, 2020.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**CA Geoffrey**