



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

1. ALEX MUSEMBI MUTUKU.....1ST ACCUSED

2. MICHAEL MBAI MUTUKU.....2ND ACCUSED

JUDGEMENT

1. The accused, **Alex Musembi Mutuku** and **Michael Mbai Mutuku** were charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged on 30th September, 2013 at Katine Village of Matungulu District, the accused jointly with another murdered **Daniel Mwanzia Mutiso** (Deceased).

2. The prosecution's case was based on the evidence of 8 witnesses.

3. According to PW1, **Agnes Kalekye Mutiso**, on 30th September, 2013 at 3 pm she was at home when PW2, **NMM**, went and requested her to go and rescue the deceased, her son, who was being killed by the two accused persons and one **Mose** who were the children of **Mutuku** and who were PW1's neighbours but their homes are separated by a river, her being on the side of Kangundo and they on Matungulu side. After storing away, the utensils she was washing she left towards the place she had been directed to by PW2 where she found the deceased with his shirt having been removed and there was blood on his head and the rest of the body. He also had cuts on the head and his hands and legs had been broken. At the scene were the 1st and 2nd accused holding stick which the 2nd accused threw away. When she inquired was he was that badly injured, the 2nd accused insulted her and threatened that he would kill her with her son. She then ran back home and got a motorcycle ride to Kangundo Police Station where she reported the incident. The police however told her to return back to the scene and confirm if the deceased was still there and they would come later. On her way back home, PW1 received a call from one **Mbithe** who told her that the deceased had been removed.

4. PW1 then proceeded to Tala Police Post where she found her sons, **Munyao** and **Ndunda** at around 7 pm. Upon inquiring about the whereabouts of the deceased at the said Police Post, they were informed that no one had been taken and they went back home. The same day at 8.00 pm PW1 went to Kangundo Hospital to check if the deceased had been taken there but they did not find him there and together with her said sons they returned home and slept. The next morning at 5.00 am they returned to Tala Police Post and after she had introduced herself to the in charge of the post as the deceased was her son and nephew to **Joshua Muasya** all of whom she was with, the said in charge told them that there was somebody they had taken from a home next to the police post who had been badly injured and they were directed to go to the Kangundo Hospital where they had taken the person. When they proceeded to the said Hospital, they found the deceased but he could not talk. He had a swollen face and could not see. They were then directed on the things and medicines that were needed to assist the deceased and were advised to take him to a bone specialist. Since she had no money she took them to Kangundo Police Station and reported them that she had found the deceased after which she was given a letter to take to the matron at the hospital. Though she could not remember the contents of the letter, it was her evidence that the letter was to ask the matron to assist them with the things needed to treat the deceased and half of the requirements were supplied while the other half she bought.

5. It was her evidence that the deceased was in hospital for three months after which following the doctors' strike, he was taken home where he stayed for 2-3 weeks. However, since his hands and legs were broken and he had cuts on the head and back, they took him to Machakos Hospital where he was taken to the theatre and iron plates in his legs and hand. While there, the deceased who could speak informed them that he had been beaten the accused persons who found him in PW1's shamba cutting trees. Since the deceased's condition worsened they transferred him to Kenyatta Hospital on 7th February, 2014 where he was operated on but eventually died on 11th February, 2014.

6. It was PW1's evidence that the accused's father, **Mutuku**, who had bought land on her side, started giving her problems by taking the trees from her *shamba* following her husband's death. The said problems, it was her evidence went on for years and the said **Mutuku** would send elders to go and insult her. She recalled 24th September, 2013 when she was at the Tala market when the said **Mutuku** called her and insulted her that she was a stupid woman and that she was playing with him and that he was giving her five days and she would see something that she had not seen. PW1 reported this incident to the police. It was after this on 30th September, 2013 that the incident with the deceased took place.

7. In cross-examination she stated that the accused persons who had a panga carried the trees and took them. According to her the accused continued beating and kicking the deceased while he was on the ground. It was her testimony that despite her reporting Mutuku's threats to the Chief he refused to obey the summons. Two days before deceased's assault, the deceased who was working in Nairobi for a company called Twafik, as a casual labourer had come home and was cutting trees cutting trees to burn bricks.

8. On her part, PW2, **NMM**, a minor aged, 17 years old who testified after voir dire examination, and who in 2013 was 13 years, denied witnessing the assault on the deceased. Instead, it was her testimony that it was PW1 who told her to go to Kangundo Police Station and state that the deceased had been beaten. According to her, it was PW1 who told her what to record. As result, PW2 was declared a hostile witness. Cross-examined by **Miss Mogoi** for the prosecution, she denied that she was promised anything in return or that she was threatened or forced to do so. She denied having seen the deceased on 30th September, 2013 and further denied knowing the accused who according to her were shown to her by PW1 at the police station after recording the statement which was done in the presence of PW1. She was however unable to identify them in court. As a result, her statement was produced as an exhibit.

9. In cross-examination by **Mr Tamata** for the accused, she stated that the contents of her statement was what she was told by PW1. She stated that PW1 told her that she would pay her school fees because she had no parent and was staying with her grandmother after her mother died. Though she stated that she had no problem with school fees and joined a dress making course after she finished standard 8. PW1 however did not pay. Examined by the Court, PW2 stated that on the day of her testimony she went to court with PW1 who was aware of what she was going to say.

10. PW4, **Dorcias Mutinda Mutiso**, the deceased's sister received the information of the deceased's assault from her mother, PW1. Upon doing so she set off the following day for home and found that PW1 had been looking for the deceased. PW1 informed her that she had gone to the scene she saw the deceased and the second accused after which she went away crying. After looking for the deceased, they eventually found him at Kangundo Hospital where he had been taken by police officers from Tala Police Post, unconscious with two cuts on the head and hip and fractures on the arm and the leg but had not been treated. After reporting the matter at Kangundo Police Station, she accompanied police officers to the scene where they only found standing trees. 2½ weeks thereafter, the deceased was discharged home after regaining consciousness and the deceased informed her that he was beaten by Musembi, Mbai and Muse who were neighbours having bought part of their ancestral land. However, the deceased's condition worsened was returned to Kangundo Hospital from where he was transferred to Kenyatta Hospital on 7th February, 2014 where he passed away on 10th February, 2014. After the deceased's death, PW4 together with her brother, Raphael and a police officer went and identified the body on 27th February, 2014 for the purposes of conducting post mortem examination.

11. According to her, the deceased had two cuts on the back of the back and middle of the head and died due to injuries sustained from the attack. However, the doctor informed her that he died from kidney failure due to the attack. In her evidence, the deceased had no kidney problems before the attack.

12. PW5, **Sammy Mbuui Itumo**, a taxi driver was on 30th September, 2013 called by **Peter Kyalo**, the accused's cousin, a fellow taxi driver, who directed him to the two accused persons who were known to him as neighbours and who by the roadside and who informed him that there was a person who was cutting their trees and they wanted him to take him to police station. The accused persons brought the person who was injured and could not walk and was carried by the accused persons and placed in the back seat after which PW5 took him to Tala Police Post. According to him, the injured person told him he was in pain and told him to place him in a shade which he did and left him there. According to him, he used to see the injured person as Daniel. It was his evidence that apart from the injuries on the leg he had head injuries.

13. On 5th October, 2013, PW3, **Erastus Gichuhi**, who was the DCIO Kangundo, received a report from the sister to the deceased that her brother had been assaulted by three persons known to her namely **Leonard Mutuku, Alex Musembi and Michael Mbai**. According to him the reportee had gotten the report from her younger sister who had seen the three persons assaulting the deceased. He took over the matter visited the person who had been assaulted and was hospitalised for a long time at Kangundo hospital but he was not in a position to furnish him with the information he needed. He however arrested the three persons who had been seen assaulting the deceased after receiving information from the eye witnesses, the person who made the report, and the mother of the deceased. According to him, the eye witness was a girl aged about 14 years, who informed him that the deceased was assaulted because he was found cutting trees along the common boundary shared by the deceased and accused persons' families. Referred to the statement, he confirmed that the said eye witness was PW2 who said she knew the person who was being assaulted and the persons who were assaulting him. According to the witness she reported the assault to the mother and when the mother went to the scene the accused waved. According to the eyewitness, the accused persons put the deceased in a car and took him to Tala police station and left him under a tree. They also called their father who came to where the deceased was left.

14. The witness requested the doctor at Kangundo hospital to assess the injuries the deceased had suffered and he was told they were severe. He then arrested **Leonard Mutuku, Alex Musembi and Michael Mbai** and initially charged them with attempted murder. He reiterated that though he talked to the deceased only once, he was not able to talk coherently but recorded a statement after the arrest when he was still alive. After that he was moved from the station and later on learnt that the deceased had died. According to him, when he visited the deceased in hospital he had many wounds on the arms, legs and head but since he was dressed up, he could only see the dressing he had a plaster on one of the legs and both hands. He identified the accused persons as two of the three persons he arrested.

15. In his evidence, the young girl was very honest and innocent and not under duress when she gave her statement which he found reliable.

16. In cross-examination, PW3 stated that he was informed by PW1 that there was only one witness who was taken to him by PW1.

17. PW6, **Dr Katua Daniel**, a physician, was called to produce a P.3 form filled by his colleague **Dr. Kemunto** with whom he had worked for one year and was familiar with her handwriting and signature. The said doctor had resigned and joined private sector and whose whereabouts were unknown to the witness. From the report the deceased had bruises and cuts on the legs. He was in fair general condition and vital signs he had slightly increased breathing rate at 24 per minute. He had deep cut wound on the scalp, bruised back and upper limbs he had fracture of left radius. On lower limb the right leg had external rotation with gross angular deformity. Painful to touch around the thigh and leg fracture on tibia and fibula left leg was painful to touch. The doctor examined the victim a few hours after the incident and probable weapon were sharp and blunt objects. The conclusion was that the victim was that the level of injury was harm. Patient was sent to hospital on 30th September, 2013 at 3.00 p.m. a few hours after the incident. The witness could not tell why it took a month to fill in the P.3 form. It was indicated he was attacked by a mob and it was alleged that he was attacked by persons known to him and both sharp and blunt objects were used.

18. PW.6, **Dr. Okemwa Minda Panenus**, the Pathologist did autopsy on the body of the deceased on 21st February, 2014. In attendance were a police officer from Kangundo **Cpl. Opondo** and relatives of the deceased, **Dr. Mutinda** and **Dr. Raphael Mbatha**. The findings on examination were that he was African man, aged approximately 32 years. He had surgical wound on the right inner side of the leg measuring approximately 15 cm. He had an implant to fix a fracture he sustained on the leg. On the left forearm he had stitched surgical wound approximately 10 cm. Also there was implant from fixing other fracture on the outside of the forearm. He also had healed scars on the left eye from the injuries he had sustained and on the skull. On examination of implant there was evidence of infection that had arisen in the course of the treatment. The doctor also found that the deceased had kidney failure as a result of the underlying hypertension which he corroborated with the medical notes provided to him. Rest of his organs had no injuries. He formed the opinion that the cause of death was disseminated infection arising post operation from these fractures in a person with a chronic kidney failure. In his opinion there were injuries from sepsis and the kidney failure. The injuries are what brought the deceased to the hospital but due to his weak immunity he got infection. The kidney failure worsened his state of management for the implant for the fractures and it was the infection that eventually killed him. Though many people have managed kidney failure, for him it was worsened by post surgical management.

19. Cross-examined by **Mr Tamata**, the doctor reiterated that the cause of death was septicaemia and Renal disease and that the immediate cause of death was septicaemia. He however admitted that diabetes can cause kidney failure. From the treatment summary he relied on the deceased was being injected with insulin solution due to diabetes and he therefore admitted that the deceased was suffering from diabetes but confirmed that the deceased suffered injuries on the leg, forearm and the head.

20. In re-examination, he confirmed that the immediate cause of death was infection from injuries from the fractures but he was being managed outside for his diabetes. The major injuries were the fracture on the right leg and the forearm but he had healed injuries on the face and the head.

21. **Sgt Willis Otieno**, testified as PW.8. According to him, on 2nd December 2013 he was called by PW3 who informed him that someone was admitted at Kangundo Level 4 hospital with injuries. In company of **Cpl. Opondo** they proceeded to male ward at the hospital where with help of duty nurse they were shown the said injured person. This was after they had visited him on 30th November, 2013 and found him asleep. On 2nd December, 2013 they found him awake but he could not stand and was lying on the bed. Upon inquiring from him what happened, the deceased informed them that he went to cut trees and after cutting the 1st tree some young men known to him appeared and demanded to know why he was cutting the tree. He insisted the tree was his. He told them he was aware of a dispute which he had reported to the police. The said young men were **Musembi** and **Mbai** attacked him by **Musembi** hitting him with a stick on the hand till he fell down. Others beat him till he lost consciousness. The attackers had a taxi. They tried to remove his wallet with Kshs. 1,900/= with his ID and documents with OB Number which they took. He lost consciousness and regained consciousness along the way in the said taxi. He heard one of them asking where to dump him and they dumped him at Tala police post. The police then took him to Kangundo level 4 hospital. When being removed from the taxi at Tala police post he heard the father saying at Tala police post they had not finished their work. According to the witness, on 2nd December, 2013, the deceased was in right senses and he had injuries on the head, legs, right hand. The deceased introduced himself as **Daniel Mwanzo Mutiso** and even disclosed his ID Number. The deceased disclosed that he knew **Musembi's** father with whom he had a dispute over the same land. Later he was transferred to Kenyatta hospital where he later died.

22. In cross-examination, the witness stated that the Investigating officer was PW3 who handed over to **Wachira** and that his role was only to record statement which he handed over to the main investigating officer. He was therefore unaware whether further investigations were undertaken regarding the deceased's allegations.

23. Upon being placed on their defence the 1st accused, **Alex Musembi Mutuku**, as DW1, testified that he was operating an electrical shop at Tala Market where he used to engage from Monday to Sunday. Though he would open the shop on Mondays after service, during weekdays, he would open from 9.00 am to 9.00pm. It was his evidence that on 30th September, 2013 he was throughout that day in the said shop from 7.00 am till 9.00 pm.

24. While admitting that the 2nd accused was his step brother, he stated that the 2nd accused's home was at Katine while their home was in Tala and he had no land in Katine. He stated that on 30th September, 2013, he was not at Katine. He therefore denied any knowledge of either the deceased or PW1, his mother whose evidence was that they were staying at Katine.

25. Referred to the deceased's statement. He stated that the statement was recorded on 2nd December, 2013, 62 days after the alleged incident by which time the deceased was conscious since he asked for water and sugar and could recall telling the taxi driver to place him under a tree. The noted from the P3 form which was filled the same day of the alleged incident that the deceased disclosed that he was beaten by a mob and the names of those who assaulted him were not mentioned anywhere. Similarly, PW4, the deceased's sister who stated that the deceased was discharged after 2½ weeks did not mention the accused's names. The 1st accused also noted that PW5, the taxi driver was never mentioned by the deceased in his statement who stated that he was picked by a maroon Volkswagen which the accused had before he was attacked. On the other hand, PW5 stated that his vehicle was green in colour and that he found the accused on the road and not at the

scene.

26. The 1st accused denied that he called PW5 to carry the deceased and noted that PW5 stated that he was called by **Peter Kyalo** who was never called as a witness.

27. According to the 1st accused, whereas PW1 testified that he was called by PW2, pw2 denied having called her and stated that he was in school. The 1st accused also noted that one of the persons from whom a statement was recorded was one **Raphael Kilonzo Matheka** who alleged that he saw the deceased being assaulted. He was however not called to testify and his statement was exhibited by the 1st accused. He also produced PW1's statement to show that its contents were different from her evidence.

28. In cross-examination he produced his ID Card which showed his place of birth as Tala Location, Ktine Sub location. He admitted that his father stays in Katine with his first wife where he has land. He admitted that mob means more than one person but insisted that PW5, Sammy Mbuvi, was unknown to him. He however admitted that he was doing business in Tala and was known there though Tala was a big town. He denied that he had a cousin known as **Peter Kyalo**.

29. The 2nd accused, **Michael Mbai Mutuku**, DW2, testified that he was staying in Katine, Tala, where he was engaging in casual construction work. On 30th September, 2013, he woke up as usual and went to his work at Komarock Area where he was throughout. According to him, he did not know the deceased and Katine is a big area. Similarly, he did not know the deceased's mother, PW1 since they were not his neighbours. He denied any knowledge of the disputed land since his father had many parcels of land. He denied assaulting the deceased since he was not in the area.

30. While admitting that the 1st accused was his step brother, he stated that they do not stay together since the 1st accused stays in Tala while they stay in Katine and on the day of the alleged incident, they did not see each other.

31. In cross-examination by **Mr Ngetich**, he stated that Katine is a village and his father has about 15 parcels of land at Katine though he did not know all of them. From Katine to Tala, he stated was between 15-20 kilometres.

Determination

32. I have considered the evidence on record as well as the submissions filed.

33. The prosecution's case in summary is that on 30th September, 2013, at 3.00 pm, PW1 was cleaning utensils at her home when PW2, a young girl then aged 14 years went to her and informed her that her son, **Daniel Mwanzia**, the deceased herein, was being killed by **Musembi** (1st accused), **Mbai** (2nd accused) and one **Mose**. Acting on that information, PW1 rushed to the place where she found the deceased's severely injured. He found the two accused persons at the scene holding sticks and pangas and assaulting the deceased. When she sought to know why the deceased was being assaulted, the 2nd accused insulted her and she was threatened with being assaulted. As a result, she went to report the incident at Kangundo Police Post but was never assisted. On her way she was called by one **Mbithe** who informed her that they had carried the deceased using a car which had been availed by the accused's father, **Mutuku**. However, her attempts to trace the deceased at Tala Police Post were fruitless as she was informed that the deceased had not been taken there. By then it was around 7pm. Later at 8pm they also went to look for the deceased at Kangundo Hospital but did not find him there and they returned home and slept. It was not until the following morning that they got information that the deceased had been picked up from a home next to the police post badly injured and they were directed to Kangundo Hospital where they found the deceased. By then the deceased's hands and legs were broken and he had cuts on his head and back. The deceased disclosed to her that he had been beaten by the two accused persons who found him cutting trees in a parcel of land which was under dispute between PW1 and the accused's father.

34. On her part, PW2 denied having reported that the deceased was being assaulted by the accused. She denied knowing the accused and testified that it was in fact PW1 who persuaded her to go and record a statement at the police station that she had witnessed the deceased being assaulted on the promise that PW1 would pay her school fees. She in effect recanted her statement to the police and was declared a hostile witness. PW3 who recorded her statement described her as an honest and innocent witness and suspected that she must have been enticed to recant her statement. According to him, the first statement was made by the deceased's sister, **Dorcus Mutinda**, PW4, based on the information she received from PW1, her mother. According to the information given to him by PW2, the deceased was assaulted by four people including the accused though she did not know the other two people. However, PW3 initially charged the accused and their father **Leonard Mutuku** with attempted murder because the father joined the accused persons team that was dropping the deceased at Tala Police Post. He was however unable to get a statement from the deceased due to his state of health but according to PW8, on the instructions of PW3, he recorded the deceased's statement in which he named the people who assaulted him those who were known to him including the accused persons. According to that statement, he was assaulted when he went to cut trees for the purposes of construction. According to the deceased, the accused had a taxi. As a result of the attack, he lost consciousness and only regained it along the way in the said taxi when he heard a person asking where to dump him but they later dumped him at Tala Police Post from where he was taken to Kangundo Level 4 Hospital by an officer who was on patrol. According to PW8, on 2nd December, 2013, the day the deceased recorded his statement he was in his right senses though he had injuries on his head, legs and right hand.

35. According to PW5, **Sammy Mbuvi Itumo**, a taxi driver on 30th September, 2013 while in the course of his business, he was called by one **Peter Kyalo**, the deceased's cousin who informed him that the accused were looking for a taxi to transport an injured person. He met the accused with the deceased all of whom were known to him on the road and he was directed to drop the deceased at Tala Police Post.

36. PW4's evidence was however based on information that she was given by PW1 and the deceased as regards the circumstances under which the deceased sustained his injuries.

37. The accused's evidence was to the effect that at the time it was alleged that they were assaulting the deceased, they were engaged

elsewhere in their businesses and that they neither knew the deceased nor PW1. According to the 1st accused, on the said day, he was nowhere near the place where the deceased was allegedly assaulted since he does not hail from the said village while the 2nd accused's case was that he was away in Komarock engaged in his casual construction work. In his evidence the 1st accused produced the statements by the deceased and one **Raphael Kilonzo Matheka** who was never called but who alleged that he witnessed the said assault.

38. 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.

39. 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.”

40. 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.**

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

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

- a) **Proof of the fact as well as the cause of the death of the deceased persons.**
- b) **Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.**
- c) **Proof that such unlawful act or omission was committed with malice aforethought.”**

42. The general principle of law on homicide cases is that it is important that the prosecution proves death and also the cause of death. As held in the case of **Republic vs. Kimbugwe S/O Nyagoli & Others (1936) 3 EACA 129** it is cause of the death which often links the accused to the death. As regards proof of death it is usually through medical evidence as stated in the case of **Republic vs. Cheya & Another (1973) EA 500**. However, the Court of Appeal in **Harun Mambili Lubembe & Another vs. Republic Kisumu Criminal Appeal No. 103 of 2000, it** has long been recognised that the fact of death and the cause of it could be established otherwise by medical evidence. (see **Republic vs. Cheya & Another [1973] EA 500**). In that case the court found that there was ample evidence from the witnesses that the deceased was viciously attacked with a panga and died instantly from injuries inflicted on her hence there was no doubt about the death and the cause of death.

43. The decision in **Cheya** has however been discredited in **Benson Ngunyi Ndungu vs. Republic Nairobi Criminal Appeal No. 171 of 1984** where the Court expressed its displeasure with it in the following terms:

“On this first appeal our task is to give our own consideration and views of the evidence as a whole and our decision thereon. It is our duty to rehear the case and as regards credibility of witnesses to be guided by the Judge's impressions, if any, of the witnesses he saw and heard. We have to be satisfied that there was evidence upon which the Judge could properly and reasonably find as he did: SHANTILAL M. RAWALA VS. R [1957] EA 570 and ANSWAR KIMNGETICH V. R, Criminal Appeal No. 14 of 1985 (unreported)...Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the post-mortem examination is cross-examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some Hospital or Police file. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the Judge. The prosecution, relying on the decisions in Republic vs. Cheya and Another [1973] EA 500, argued that death and cause of it could be established otherwise than by medical evidence and that the evidence of PW1 about the sickness of the deceased proved that the deceased's death was as a result of the accused's attack on him on 18th January, 1983. It was also submitted before the Judge that a doctor gives only opinion evidence which the Court can accept or reject. The judgement in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a

group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion evidence and as supporting evidence of the cause of death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report prepared, signed and kept in safe custody, but the Doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the Doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to *Cheya*. It is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgement, that the judgement is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision.”

44. However, in an article on causation in *English Law by Hart, HLA & Another* the author had this to say:

“For causation to amount to murder by a defendant at the time of death, the defendant’s acts or omissions must be the operating and most substantial cause of death with no novus actus interveniens (latin for new act breaking in) to break the chain of causation.”

45. In this case, according to the evidence of PW6, **Dr Okemwa Minda Penenus**, on 21st February, 2014, he conducted an autopsy on the deceased who was admitted at K.N.H with history of assault and subsequently died while undergoing treatment at the Hospital on 10th February, 2014. After setting out his findings on examination he formed the opinion that the cause of death was disseminated infection arising from post operation from these fractures in a person with a chronic kidney failure. Though, it was the injuries that took the deceased to the hospital, due to his weak immunity he got an infection. The kidney failure therefore worsened his state of management for the implant for the fractures and it was the infection that eventually killed him. However, the immediate cause of death was infection from injuries for the fractures.

46. In **John Muia Muli vs. R. Mombasa Court of Appeal Criminal Appeal No. 96 of 1999** it was held that:

“In other words, a person inflicting injury on a deceased person is not deemed to have caused the death of that person if the surgical or medical treatment which is the immediate cause of death of the deceased person was negligent...The deceased had been hospitalized for eleven days during which period, according to PW10, he was given proper medical attention. Unfortunately, the nature and extent of that medical attention was not disclosed to the superior court since the notes relating to his medical treatment were never tendered in evidence at the trial of the appellant. Whether or not the deceased’s medical treatment at Taveta District Hospital was the cause of his immediate death and that such treatment was employed in good faith or with common knowledge and skill was anyone’s guess. It was the bounden duty of the prosecution to establish this aspect of the case against the appellant. This was not done. Consequently, the deceased’s cause of death as was found by PW10 became unreliable. Nonetheless, the learned trial judge on the evidence available before her proceeded to convict the appellant of the murder of the deceased as is mentioned above. Whether therefore the deceased’s cause of death was as a result of medical negligence or sheer medical incompetence is conjectural. In these circumstances, the appellant’s conviction for the charge of murder contrary to section 204 of the Penal Code is unsustainable. Nevertheless, the arrow injury that resulted in the deceased’s being admitted in Taveta District Hospital for eleven days was grievous. Consequently, and as the appellant’s appeal turns on whether or not there was proof that the deceased’s cause of death was as a result of the injury inflicted on him by the appellant, we allow the appellant’s appeal to the extent that his conviction for the offence of murder contrary to section 204 of the Penal Code is quashed and the death sentence set aside but substitute thereof a conviction of doing grievous harm contrary to section 234 of the Penal Code. However, as the appellant has been in custody since his arrest on 7th January, 1992, we, in the circumstances, sentence him for the latter offence to a term that would lead to his immediate release from prison subject to his undergoing corporal sentence of two strokes of the cane.”

47. In this case, PW4, the deceased’s sister testified that the deceased was in hospital for 2 ½ weeks and he was discharged home after regaining consciousness. However, after 2 ½ weeks the condition worsened and he was returned to the hospital as a result of the injuries. He was transferred to Machakos from Kangundo due to doctor’s strike. After surgery his condition worsened and he was transferred to Kenyatta hospital where he passed away. It is therefore clear that the strike by the doctors intervened in the deceased’s treatment. Considering the evidence by P6 that the cause of death was disseminated infection arising from post operation from the fractures in a person with a chronic kidney failure which contributed to his weak immunity worsened his state of management for the implant for the fractures and that it was the infection that eventually killed him, one cannot tell the contribution, if at all, of the improper management, to his death.

48. From the evidence adduced, it is clear that only three people could possibly testify as to how the deceased sustained his injuries. Starting with PW2, her evidence was rendered worthless after she recanted her statement and was declared hostile. Section 161 of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

The court may, in its discretion, permit the person who calls

a witness to put any questions to him which might be put in cross-examination by the adverse party.

49. It is such a witness who is being sought to be cross-examined by the party calling him that is termed in legal parlance as a hostile witness. In other words, he is hostile to the position favourable to the person calling him contrary to the position which he had made the party calling him to believe was the position. In other words, a hostile witness is not just a person whose evidence is merely unfavourable to the party calling him, but a witness who appears to be biased or unwilling to tell the truth. In such cases the Court has the discretion to permit the party calling the witness to put any questions to him which might be put in cross-examination by the adverse party. See *Evidence in East Africa*

by **H. F Morris** page 206.

50. As was held by **Sir J.P. Wilde** in Coles vs. Coles, (1866) L.R. 1P. &D. 70, 71:

“A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.”

51. In Alowo vs. Republic [1972] EA at page 324 the East African Court of Appeal said: -

“The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.”

52. Similarly, in Batala vs. Uganda [1974] E.A. 402 the said court at page 405 said:

“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.”

53. I take it that what the Court meant was that such evidence cannot be relied upon by the party calling that witness. This was the position adopted in Abel Monari Nyanamba & 4 Others vs. Republic [1996] eKLR and Maghanda vs. Republic [1986] KLR 255. In the latter the Court of Appeal held that:

“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.”

54. As was appreciated 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.”

55. It follows that the evidence of PW2 carries very little if any weight in support of the prosecution case and therefore, to the extent that she informed PW1 that the accused were assaulting the deceased, that evidence worthless.

56. PW6's evidence was to the effect that he was called by one **Peter Kyalo**, a cousin of the accused persons to take the deceased to the hospital. However, his evidence was contradicted by the statement of the deceased himself who stated that he was carried in a vehicle which the accused persons had. The statement of the deceased to that effect seems to have been similar to the evidence of PW1 that she was informed that the deceased was carried in a vehicle belonging to the father of the accused persons. Further, the deceased never mentioned PW5, in his statement and instead stated that he was picked by a maroon Volkswagen which the accused had before he was attacked. However, according to PW5, his vehicle was green in colour. To make matters worse, the said **Peter Kyalo** was never called as a witness in the case to shed light as to who sent him to get a taxi. Considering the fact that the accused denied any knowledge of the said **Peter Kyalo**, the evidence of PW5 stood alone and was even contradicted by the rest of the prosecution case and is not believable. In Omar Nache Uche vs. Republic [2015] eKLR the Court observed as follows:

“If the complainant contradicted her uncle and mother on the events of 24th January 2013 how sure are we that whatever she testified as having transpired on 19th January 2013 is true" Can we rely on her to tell the truth" The court of Appeal in the case of Ndungu Kimanyi VR [1979] KLR 283 held:

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

57. According to PW1, when she went to the scene, she found the accused and the deceased there and only ran away after she was threatened. However according to the deceased's statement, he lost consciousness after being placed on the vehicle. The deceased in his very comprehensive statement did not mention PW1 at all. The omission to mention the presence of his mother at the scene creates serious doubts as to whether PW1 actually found the deceased at the scene taking into account that her statement was recorded on 30th October, 2013 almost a month after the incident.

58. That leaves only the statement of the deceased as regards the identity of his assailants. It is clear that the deceased passed away before the hearing and taking of his evidence. Section 33(a) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases– (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances

of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding.

59. It is therefore clear that a statement by a deceased as to the cause of his death where the cause of death is in issue is admissible. However, as held in Trikabi vs. Uganda [1975] EA 60, the weight to be attached to such a statement is, of course, a different question, and the law on the point is correctly stated in the case of Akumu vs. R (1954) 21 EACA 331 cited with approval in Okale vs. Republic [1965] EA 555 in the following terms:

‘...it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, not subject to cross-examination, unless there is satisfactory corroboration.’

60. I have gone through the evidence adduced and I am unable to get any corroboration of the deceased's statement. That statement in my view would have been corroborated by the evidence of one **Raphael Kilonzo Matheka**, whose statement to the police was to the effect that he saw the accused beating the deceased. For some reason, this person was never called to testify and he was not even mentioned by the deceased in his said statement. It is now trite that where the prosecution does not intend to call witnesses who recorded their statements, they should offer them to the defence for cross-examination. In Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR the Court of Appeal opined as follows:

“It is, to say the least, surprising that the prosecution chose not to call the watchman or offer him for cross examination. The trial magistrate did not consider the evidence about the watchman. That was a further misdirection. The trial court would have been entitled to presume that the evidence which the watchman would have given, which was not produced, would, if produced, be unfavourable to the prosecution who withheld it: R V Urberle (1938) EACA 58.”

61. Similarly, in Gabriel Kimuhu Kariuki vs. Republic [2003] eKLR the court held as follows:

“... It is my holding therefore that although the prosecutor in this case in hand had a discretion to decide which material witnesses to call or not to call he had an obligation to call the three witnesses hereinabove mentioned. But if he did not do so, he should have made them available to the appellant to call them if he so chose to do. On the other hand, the trial magistrate had a duty to impress upon the prosecution of such a duty and call the witnesses itself if the prosecution failed to do so. And finally, in this case, it cannot be arguable that the prosecution need not have called the mentioned witnesses because it had called adequate witnesses. In fact, without calling the said witnesses, the prosecution barely had any adequate evidence on the record upon which it could prove its case. Failure to call them therefore was motivated by a greater negative reason like the fact that if he called them, their evidence would tend to be adverse to the prosecution case. I accordingly have to hold that the prosecution failed to call the witnesses mentioned above because their evidence would possibly exonerate the appellant.”

62. In Njoroge Ndungu vs. Republic Nairobi Court of Appeal Criminal Appeal No. 31 of 2000 [2001] eKLR the Court of Appeal held that:

“

In Bukenya vs. R [1972] EA 549, it was held that the prosecution has a duty to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Where the prosecution fails to do so the court may, in an appropriate case, infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. However, such inference may only be drawn if the evidence called is barely adequate.”

63. One cannot therefore help but find that the failure to call **Raphael Kilonzo Matheka**, who alleged that he witnessed the deceased being assaulted by the accused was possibly due to the fact that his evidence could, just like that of PW2 been adverse to the prosecution case.

64. The accused person in their defence raised the defence of alibi. In the case of Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR) the Court held that:

“an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.”

65. In Wang'ombe vs. The Republic [1980] KLR 149, Madan, Miller and Potter, JJA held that:

“...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.”

66. In Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR where the Nigerian case of Ozaki & Another –vs- The State was relied, where it was held that:

“Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible...”

67. In **Uganda vs. Sebyala & Others, [1969] EA 204** the learned Judge citing relevant precedents had this to say: -

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

68. The South African case of **Ricky Ganda vs. The State, {2012} ZAFSHC 59**, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held that:-

“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”

69. In this case, the alibi defences of both accused persons was not challenged even in cross-examination.

70. I have considered the evidence by the prosecution herein and I find that the prosecution has failed to prove its case beyond reasonable doubt, in light of the inconsistencies in the testimonies of the witnesses, the recanting of the statement by PW2 and the failure to call people whose evidence would have been critical to the case, that the accused persons committed the offence with which they were charged.

71. I accordingly give the benefit of doubt to the accused persons and acquit them under section 215 of the ***Criminal Procedure Code***. They are set at liberty unless otherwise lawfully held.

72. It is so ordered.

73. This Judgement is delivered, as far as the 2nd accused is concerned by Skype video link due to the prevailing restrictions occasioned by COVID 19 pandemic, the 2nd Accused having consented to that mode of delivery.

Read, signed and delivered in open Court at Machakos this 23rd day of June, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Langalanga for Mr Tamata for the accused persons

Mr Ngetich for the State

CA Geoffrey