



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL (MURDER) CASE NO. 63 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK SILA KYULE.....ACCUSED

JUDGEMENT

1. The accused herein, **Patrick Sila Kyule**, was charged with the Offence of Murder contrary to Sections 203 as read with Section and 204 of the **Penal Code**, Cap 63. It is alleged that the accused person, on 11th day of June, 2014 at Kithimani Village, Kithimani Location in Yatta District within Machakos County, the accused murdered **Cosmas Muema Ndunda** (the Deceased). The Accused person denied having committed this Offence and as such, a plea of not guilty was entered.

2. In support of the case the prosecution called a total of 17 witnesses.

3. The genesis of this saga as narrated by PW.12 **Alphonse Kituku Mbulu** was that on 31st December, 2013 at 10.00 am while stationed at Thika CID Office, he received a report from one **Bernard Odhiambo**, BAT security officer, who reported that that the night of 28th December, 2013, a lorry and trailer which was laden with 235 bales of tobacco worth 3 million had been parked in the BAT yard when the said 235 bales of tobacco were stolen. The company requested that the matter investigated. It was reported that the theft occurred from the trailer Registration No. KBV 867 B and ZB 5874 which was still loaded.

4. Upon the receipt of the said report, PW12 proceeded to the scene where his investigations revealed that the goods were stolen by 5 people including a staff member with BAT. The others were staff of the trailer owner and the name of the officer employee of BAT was **Cosmas Muema**, the deceased hereinafter recording the statements from the witnesses, he started looking for the culprits and managed to arrest **Peter Njuguna, James Odongo, Caleb Kipsoma** and **Charles Mbole**. The deceased however never went back to the company. He charged the 4 with theft of goods on transit.

5. As he continued with investigations on 26th June, 2014 at 2.00 p.m. he received the OCS Yatta police station, **CIP David Muli**, PW11, who inquired from him whether he knew the deceased and PW13 informed him that the deceased was a suspect in the said case. PW11 then informed him that the deceased was killed at Yatta and PW11 wanted him to record his statement which he did. According to PW13 the deceased was not known to him as he never met him up to the time he was killed. The case was however still pending in court and the deceased was to be charged in the same case. PW13 was however not involved in the murder case and did not know the accused herein.

6. According to PW15, **Sgt. John Kemboi**, in June, 2014 he was based at Special Crime Prevention Unit at Nairobi Area. On 11th of that month, at 11.00 a.m. he was in the office when one employee of Salama Fikira, a security firm, called **Nelson Mandela** sought their assistance in tracing a suspect who had stolen from BAT. During the same week he had gone to his bosses and talked to in-charge on the same case which was alleged to have been committed in February. According to PW15 they started tracing the deceased suspect and with the help of the call data of the suspect from Safaricom, they were led to Thika Matuu. It was his evidence that the number was active though it was switched off. PW15 identified one lady at Gatura whom he learnt was working at Catholic Church, PW7, whose contacts they got from her Facebook posts.

7. In the company of other officers and an employee of the said company, Peter, the driver and Mwangi. He called the accused and they picked **Mwangi** at Kasarani. In the company of Nelson Mandela, the accused, the driver and **Mwangi**, they left for Gatura. Upon arrival we got the in-charge of the church and asked to see the Father. In the meantime, they had passed through the local AP Post to report their presence and their mission in the area. At the church, the company of the accused and the said **Mwangi**, they were directed to the secretary from whom they inquired about PW7. After introducing themselves and explaining to the Father that they were looking for PW7, they had a word with PW7 and explained that they wanted her to help them trace the deceased. PW7 divulge that she was the deceased's girlfriend and knew where the deceased was staying but her attempts to contact him on phone were unsuccessful. She then called a number belonging to a friend of the deceased, PW1, and informed the latter and she wanted to see the deceased. After that they left towards Kithimani with PW7

and told her to call PW1. According to PW15 this was around 3 pm. At a petrol station in Kithimani, they met PW1 and after introducing themselves to him and explaining their mission and after confirming that PW1 knew the deceased, they proceeded to the Police Station to make a report during which they had a minor accident with the vehicle.

8. At the Police Station, PW15 and the accused entered the Station where they found a police officer, PW13, they asked for the OCS but they were informed that the OCS and duty officers were out of station. They were however given the go-ahead. PW1 informed them that he knew where the deceased could be found and PW15 informed him to go with the accused who was Kamba by so as not to raise any suspicion. The two went away and returned and the accused informed him that the information they got was that the deceased goes to a construction site. PW15 told them to go back to check him and after a few minutes the accused called and informed him that he saw the deceased walking on a footpath from the construction site. He informed the accused to monitor as they approached. As they proceeded along the road, they saw the accused approaching them and the accused informed him that the deceased had fled. They then boarded the vehicle and returned to the station but since it was getting late they decided to return to their place of work at Nairobi without seeing the OCS after dropping PW7 at the Church. According to him, the accused told him that after PW1 pointed the deceased out to him, PW1 went away. They decided to continue with the mission another day.

9. On 12th June, 2014 at about 12 p.m. PW15 was called by OCS Gatumo to the latter's office where he found his superiors who asked him what had transpired and he explained the same after which he was informed that someone was found dead and it was alleged that they were responsible. He however informed them that according to him, they did not kill anyone. They then proceeded to the DCI headquarters and explained what happened. The following day they went back to the CID Headquarters with the accused and recorded their statements. Upon him explaining relaying the information to the accused, the accused disclosed to him that there was a struggle between him and some two men and there was discharge.

10. According to PW15 on the day of the mission, both himself and the accused were armed with Cesca pistols though with different serial numbers. He explained that when going for duty one gets firearm from armoury and he got his on 11th June, 2014 on which day he was the one standing-in for the in charge of the Armoury who was away so he was in possession of the keys. According to him, when taking arms you record as well as when you return it. He however denied that it was him who gave the firearm to the accused as everyone took firearm on his own. He however confirmed that the accused returned his firearm the following day and it was received by PW15. In his evidence, when the accused returned his firearm, it was intact and had no defects and the 15 rounds of ammunition he had taken were there. According to PW15, though the capacity of the magazine for the said firearm is 15 rounds with a maximum of 16 rounds, on that day, the accused took 15 rounds though he stated that it was not him who gave the accused the ammunitions.

11. It was his evidence that when the accused left with PW1, he left them at the station. He, however neither heard any sound of gunshot nor was he aware of what happened. On 24th June, 2014, when he went to record his statement at Kithimani Police Station, he did not see the deceased and he did not know him. It was his evidence that the accused is not called **Mwanga** and that they only introduced themselves to PW7 once. According to him, they were not with PW1 for a long time and that the report he was given by the accused was that he fled. He however admitted that he had worked with the accused who was a friend for 2 years and that before the day of the incident he neither knew the deceased nor PW7.

12. In cross-examination by **Mr Langalanga** learned defence counsel, he stated that he was the operation officer and that they were two police officers with 3 civilians, the driver, **Benson Mwanga** and **Patrick**. At the church, though they identified themselves using their IDs, he could not remember if **Mwanga** also identified himself though initially PW7 was not present. At Yatta, both himself and the accused alighted when PW7 arrived and they then went with him to police station after which the accused left with PW1. According to him, he never saw the deceased and was just informed by the accused that he had seen him. PW1 however never returned after he left with the accused.

13. According to him, they used to file their reports within 2 – 3 days and by the time he was called the following day, he had not filed the same as it was still within the said period. According to him, the accused did not confess to him and though he was present when the accused recorded his statement, he did not know whether the accused confessed. He however admitted that both himself and the accused were arrested. He was however unaware if **Mwanga** was armed. Though he was the one who received the accused's gun, he could not remember its serial number but confirmed the pistol was in good condition and was returned with the number of bullets he was given according to the record.

14. In re-examination by **Miss Mogoi**, learned Prosecution Counsel, he stated that he did not file his report because the operation was incomplete.

15. On her part, PW7, **Margaret Kamande Mutinda**, testified that the deceased was her fiancée from 2013-2014. It was her evidence that she came to know the deceased in 2013 as a customer in a hotel at Matuu and that he was working in Thika at BAT as computer operator. However, by the time the deceased went to Matuu he had left the job in Thika for three days. She stated that the deceased had stopped working at BAT in October 2013 after which he went to Mombasa then Malindi and later returned to Kithimani where she used to visit him.

16. On 11th June, 2014 at about 2.00 pm, she was working at Gatura Catholic Parish, Muranga County as cook when she was informed by the church secretary that some people were looking for her. When she went there she saw men who were not known to her among them the accused and she was told by the Parish Priest to just talk to them. After introducing themselves, they asked her whether she knew the deceased. According to her the accused introduced himself as **Mwanga** while one of them was **Kagoi**. They informed her that they were CID officers from Nairobi and showed their IDs. According to her only two of them introduced themselves. He admitted to them that he knew the deceased and they asked her to show them a person they were looking for but known to the deceased without disclosing that particular person.

17. After he was accompanied to collect her phone in her house, the officers told her to take them where the deceased was and they requested the Priest to allow her accompany them and left their contacts. However, when they reached the vehicle she was not allowed to call as the attitude of the officers suddenly changed and they insisted she puts the mobile on speakerphone before later taking the phone and was placed in the middle. According to her, the deceased was using PW1's phone since he had no phone and she gave the officers the number. She

called PW1 and the officers told her to ask where he was and she told them. At Kithimani they told her to call the PW1 whom they put in the vehicle and we took the route to Machakos. At a police station, the accused left them and returned after 20-30 minutes after which he entered the station with his colleagues leaving PW1 with another person. After a few minutes, they entered the vehicle and PW1 left and went away. When they started moving one of them told her that the deceased took off before they arrested him. They returned back to Gatura where she was working returned my phone.

18. According to her, upon reaching the gate the accused told her the deceased was being looked for and would be found soon but they never told her why they were looking for him. They informed the priest they had returned her and left.

19. PW7 tried calling PW1 but did not get him. It was when she called the deceased's uncle, PW3, that she was informed that the deceased was killed. A few days she later got Mpesa message for 10/= and later she started receiving threatening messages. According to her, when she viewed the body at the mortuary she saw a bullet wound on the head.

20. According to her the deceased informed her that he left the job because he had problems at work and that some keys got lost at his work place. She however, only visited him in Mombasa once and was not aware he was being looked for by the police.

21. She stated that they left Kithimani between 6.00-7.00 pm. She stated that PW1 only left with the accused and that she never talked to the boy later because she was in shock. She however did not know PW1's name.

22. In cross-examination, PW7 stated that the people who went to her place of work were four in number and though they introduced themselves, only two people produced their IDs written Kenya Police which she read and confirmed their photocopies in the ID. She insisted that the accused identified himself as **Mwanga** and produced Kenya Police ID written **Mark Bokosi Mwanga**. The others did not produce theirs. The other was **Kemboi**.

23. In the vehicle they were five people including driver. At Yatta Police Station, the accused left with PW1 though she did not know where they went and that they took 20-30 minutes. Referred to her statement she confirmed that she stated that four police officers went with PW1.

24. She testified that it was the accused who was talking to her in Kikamba and she was with him all that period. She would not know if there was any other person called **Mwanga** since it was the accused who identified himself as **Mwanga**.

25. PW1, **Robert Musembi Mutuku**, testified that in 2014 he was a caretaker in a building owned by **Peter Kioo Mutua**. On 11th June, 2014, he was at his place of work when he got a telephone from a lady called Maggie, PW7, who asked him if he had seen the deceased and requested him to check for her if the deceased was at his home. According to him, he had seen PW7 once. PW7 called him once again and informed him that she wanted to meet him at Kithimani. By then he had left his place of work to go and repair his bicycle. He then went to a car with hazard lights on near the container where PW7 had directed him to where he found five people with PW7 on the back seat with another man. According to him, the man who had opened the car for him showed him a police card and informed him that he was a policeman.

26. From there they proceeded to Kithimani police station. When we were about to enter the police station, the driver of the motor vehicle checked his phone and asked how he knew the deceased and he responded that the deceased used to pass by his building to borrow his phone to make calls. Accompanied by the accused, they proceeded to the building where he showed him where the deceased used to stay next to PW1's building. There, the accused was informed that the deceased was working at Konza petrol station where they proceeded to on foot. However, they were informed that the deceased had left work and they returned to the market using a motorcycle. However, on his way home, he saw the deceased in the next plot standing and he informed the accused who called him and who was about 100 meters away. The accused proceeded towards where the deceased was and after five minutes, he then heard a gunshot. When he went to check, he found the deceased had been shot on the head and he was with someone who was staying with him in the plot called Mburu. On his way, he met the accused who was returning his gun in the pocket together with the police officer who had shown him his ID Card. He however did not witness the shooting. According to him, the police officer who showed him the ID Card was slim, tall and dark while the one who was returning the gun to his pocket was the accused.

27. He was then received a call from the accused's number and was told to go to Yatta police station. This was around 6pm. On his way there he met some police officers on the way and walked with them. At the police station, the accused told him to give him his phone and he deleted his number and the accused asked him if there were many people at the scene and he answered in the affirmative. The accused then told him to go get the bullet cover (cartridge) from the scene, but when he went there he got scared of being beaten by the crowd.

28. He was later arrested by PW11 and was released after recording his statement. According to him, the accused was given his number by PW7.

29. In cross-examination by **Mr Mbindyo**, he stated that he was born in Kithimani and he knew the deceased from February 2014 though he did not know him very well as he used to greet the deceased because the deceased used to go to his building and he knew where the deceased stayed. As for PW7, he only saw her once but could not remember her phone numbers. He also the accused's phone number because he erased it. Apart from PW7, he did not know the men he found in the vehicle, a Noah van. According to him, the police who called him aside at Yatta police station was not in court and he did not know if he was a police officer from the said police station. In his evidence, they went with the accused to Kithimani market to show him where the deceased lived after which they proceeded to where the deceased was working but missed him. In his evidence the police told him that they were not arresting him n asked him to look for the deceased after which they would release him. He however did not want the deceased to know that he was the one who led the police to him as he did not know him well and so he did not go where the deceased was and only the police went. He however denied that he went into hiding and insisted that he was at his place of work. He insisted that he saw the accused returning the gun back into his pocket and that the gunshot came from the direction where the accused and the deceased were though he did not see the person who fired the shot. The accused, according to him was about 100 feet away from when he was returning the gun, in the next plot while the deceased and **Mburu** were about 30 meters from me him (about 90 feet) and the accused was not further away but was standing in front of the plot. When the accused came back is when the other

police officer also came with him and they got in the car and they drove away. He could not tell if the other police officer had a gun. Since front of the building he could not see the place where the deceased was shot at the back of the building and so did not see the person who shot the him.

30. In his evidence, the other police officers were in the car at the Safaricom booster which was about three plots away on the road to Yatta police station. They however proceeded from the booster to the plot where the deceased was on foot. He however admitted that in his statement he neither stated that he saw the accused shoot the deceased nor that he saw the accused returning his gun into his pocket.

31. PW1 stated that **Mburu** who was with the deceased left Kithimani and that he did not know that **Mburu** went and hid himself in the home after the deceased was shot since he did not talk to **Mburu** after the shooting. He however admitted that there was another statement he wrote that he talked to **Mburu**.

32. In re-examination, PW1 reiterated that he met the accused on his way back when he saw him returning the gun and that the other officers came after the shooting. The officer who left him and went to where the deceased was, was with the accused and he did not see the person who fired shot. According to him, he heard the shot and went to the direction it was coming from.

33. PW10, **Mark Bokose Mwanga**, testified that in 2014 he was with a company called Salama Fikiria Security Firm as a private investigator and security. According to him, he joined a Special Unit of CID officers at about 2.00 pm on 11th June, 2014 comprising of the accused and **Cpl Kemboi**, PW15 whom he knew previously. According to him, their duty was arranged by his boss on 9th June, 2014 to assist the police arrest a suspect in theft of BAT by the name of **Cosmas Ndunda**. He was told the officers knew where they were going. On 11th June, 2014 he was picked by company vehicle from his house at Kasarani and they proceeded to the CID offices at Nairobi Area where he got PW15 and they then went to Thika road. The vehicle was with the driver, **Peter Njeri** and **Mandela**.

34. After picking PW15, they went to Roysambu Thika Road and picked the accused. Led by the said officers, they proceeded to Gatura AP's Post to report and they were joined by an AP officer and they proceeded to Gatura Catholic Parish. There in the PW15, the accused and the AP Officer went to see the in charge and after about 20 minutes they returned with a lady. He also entered the church office because the in-charge of the church wanted to know who they were. However, only the police officers identified themselves by their IDs. On his part he did not have his work ID and only had his National ID. They informed the in charge that they wanted to interrogate a lady who was working there and he accepted. When PW7 came in the office he was allowed to leave and left the others and returned to the vehicle. Shortly the lady and the officers went to the vehicle but without the AP Officer. The officers questioned PW7 about the deceased and she said that she used to speak to the deceased though not on a daily basis and when they asked her to call the deceased, she said that she used to talk to him through a third party who was in Kithimani. They then left for Kithimani where we arrived at 2.00 p.m and went to Kithimani police station. They passed through Kithimani Centre where they stopped and the lady talked to the said third party, PW1, who came and entered the vehicle. The 7 of them then proceeded to Kithimani/Yatta police station in the office vehicle Noah KBL 492 X. At the police station, himself, PW1, and PW7 were left behind while the accused and PW15 alighted and they went to the officer at the station. Shortly they returned and told PW1 to alight and he saw him accompany them. Upon being questioned PW1 accepted that he knew the deceased and where he was staying. When he alighted he saw the accused leaving with him while PW15 remained behind. They also alighted and stood out. Shortly after about 10 minutes the accused returned alone at about 5 p.m. and PW15 then went to OCS office after which they left for Nairobi PW15 informing him that the suspect was not found.

35. In his evidence when the accused returned and told PW15 that the suspect had been seen PW15 said they slowly drove towards Kithimani but before reaching the Centre the accused boarded the vehicle and they returned to police station. At the Centre PW15 alighted and left after some minutes they returned to the vehicle with the accused and told the driver to reverse and they returned to the station. It was at this point that PW15 informed him that the suspect was not seen. However, when he asked them whether they found the suspect he did not respond and the accused told him that the suspect disappeared after which they returned to Yatta police station. After that, they took back PW7 to the church and returned to Nairobi since he was told by PW15 that they only had that day to look for the suspect and he would be informed of further action later. According to PW10, after the accused left with PW1, he did not see him again.

36. On 12th the following day at 7.00 a.m. he was called by PW15 who informed him that they would not return back. PW15 then told him that when the accused went to look for the suspect there was a struggle between the accused and the suspect and that they were planning further action and he would be informed. Referred to his statement he confirmed stating that PW15 said there was struggle between the accused and the suspect and a bullet was discharged accidentally and he was not sure of what happened. He was told that they would deal with the matter as per police procedures. He then briefed his boss **David**. After talking to PW15 he also briefed **Mandela**, his colleague and the driver. On 22nd June, 2014 when at work he received a message that 2 officers from Yatta Police station wanted to record their statements. He went to the office and got the OCS Yatta and another officer who requested for their statements with **Mandela** and he recorded his statement. According to him, their firm is a Security Company contracted by BAT for security purposes and this was a case of theft at the BAT though he was not involved directly in that case and his instructions were only to accompany the officers. He did not know the deceased. He said that he knew **Patrick Kyule**, the accused as he had known him for 3 years. However, he was **Mwanga**. Since he did not accompany the accused, he did not know what happened.

37. In cross-examination, he confirmed that he was working with Salama Fikiria and was contracted for the operation. On that day they were 2 security officers with the driver, **Peter**. The officers knew him and they were only inquiring when he left police service. At the church he alighted with the officers leaving the driver and while he had his ID Card, the officers had their badges bearing their names. They did introduction twice before and after PW7 came and she knew she was with **Patrick Kyule**, **Kemboi** and **Mwanga**. At Yatta where they found PW1, they did not alight and it was PW1 who boarded and they proceeded to Yatta Police station where PW15 and the accused went to introduce themselves and returned. However, it was the accused who left with PW1 while PW15 remained. They took less than 10 minutes before the accused returned. In his opinion, they could have gone for about 300 metres. In his evidence, he never saw the suspect and never saw the accused with the suspect. In his evidence, he also confirmed from the accused that there was a scuffle. He denied that he was the one involved in the incident.

38. In re-examination he reiterated that he introduced himself as **Mwanga** but could not tell if PW7 forgot the names. However, his ID had

the name **Mwanga**. He however did not hear any gunshot. We were inside the station in front of the office in a vehicle.

39. On 11th June, 2014, PW.14 **SGT. Betty Kigen** was at the Armoury/Report Office at Yatta Police station at 5.00 p.m. when motor vehicle reg. no. KBL 492 X Toyota Noah arrived at the station and one person alighted and told her he was Corporal from CID Headquarters Nairobi called **Cpl. Kemboi** (PW15) and that he wanted to see the OCS. She told PW15 that the OCS was not in and told him to wait since he was on the way. He went outside and they waited outside she then left them and proceeded for other duties at the road block. Apart from PW15 she never interacted with the others whom he saw outside. On 12th June, 2014 when she returned to station she got information from the report office that on 11th June, 2014 someone had been shot at Kithimani Shopping Centre and she suspected the person who had gone to the station. Among the people she saw outside was a lady and they were about 6 people though he was not aware if the accused was among them.

40. PW.11 **David Muli** was in June, 2014, the OCS Yatta Police Station. On 11th June, 2014 at 6.00 P.m. when at Kabaa on out of station duties, I went on duty outside the station at Kabaa, he was called by members of community policing from Kithimani market who told him that there was shooting incident and that a person was shot. He then called duty officer Yatta police station to go to the scene. According to his information, the deceased was, he was told he was walking with another person and the culprit took off. He called PW13 who later informed him that she went to the scene and confirmed there was someone who was shot. Less than 40 minutes later, he joined her PW13 and he found someone lying facing down on the road between houses on a footpath. The person was a young man who was shot from behind and had bled a lot. They found driving licence from his trouser pocket bearing the name **Cosmas Muema Ndunda**. At the scene was PW13 and very many people.

41. Upon his investigations, he was told by a young man in the crowd who said he was with the deceased that there was someone who arrested the deceased and that the deceased tried to escape and he was shot. He then took the said young man whose names he could not remember to the station and the body was photographed and was taken to Matuu Hospital Mortuary. From his further investigations, he was informed by PW14 that some officers from CID headquarters went looking for the suspect and the OCS and they were told to wait as he was out. By the time he went to the Station the said officers were not there and no one knew their whereabouts. It was his evidence that he was not aware of their presence.

42. He was however informed that the team was in Old Nairobi Area. He proceeded there and met their boss **Mr. Katumo**, PW9 and explained his mission. PW9 told him that he got a signal from Yatta involving the shooting and the team were from his office. He then started recording statements from PW15, the accused and other officers totalling four after which he returned to the station. Later he went to Gatura parish and recorded statement from PW7 after which he opened inquest file and relatives went to record their statements. They went to Matuu Mortuary to identify the deceased and Post mortem was done and they went to bury the deceased. The said investigations continued up to Thika CID office it was said the deceased was working there and was involved in theft of goods worth 3 million and the matter was still ongoing. However, the deceased had not been arrested and was still being looked for. After his investigations, he forwarded the file to the ODPP and by the time he left Matuu police station no one had been arrested.

43. According to him, he did not know the deceased and never met the officers from the CID previously. He recalled that informant was PW.1 who was the one he found at the scene and who said the accused went to him. He later learnt PW1 was arrested and he learnt that the recommended that the accused be charged with murder. It was his evidence that the body was behind 2 buildings.

44. In cross-examination he stated that the initial information mentioned two armed gangsters and that the person fled away. According to him the scene was outside the market in between the buildings and there were many people including PW1 who described the officers who were more than 5 with a woman. According to PW1, the officers had ample time with the deceased person. It was his evidence that PW9 informed him that he had not sent the officers to Yatta though they extended their duties to Yatta. He confirmed that the deceased was shot from the back of his head and that from records he was armed though he could not remember the serial number of the firearm and did not forward the same for ballistic examination though it was done later.

45. In re-examination he reiterated that his information was that the deceased was shot by people who behaved like gangsters. However, no other witnesses told him they witnessed the shootings. The incident occurred during the day before 6.00 p.m. but after 5.00 p.m. According to him, PW.1 identified the accused by name and they were with him up to the house of the deceased and he said the deceased was shot by an officer. He was with the officer from 2.00 p.m. and they were communicating using PW7's phone and that of the PW.1 to trace the deceased. According to him, there was pressure to open the inquest with recommendation of not to charge him but his recommendation was for murder and he took the file to state counsel. Whereas he saw the firearm at CID Headquarters at the Armoury, it was never handed over to him and they never found the spent cartridges at the scene.

46. On 11th June, 2014 at about 6.10pm upon getting a call from PW11 informing her that there was shooting incident within market area and she should rush there and assist the victim, PW13, **Sgt Diana Musumba**, the duty officer at Kithimani police station in Yatta who was in her residence within the station, called **PC. Kibor** the crime standby on that day and we boarded the station land cruiser and proceeded towards the market where they saw members of public running towards a certain direction and they proceeded there. On reaching there were very many people and they found an adult male lying on the ground facing down within Kithimani market between residential houses behind a certain building with a wound on his head from which blood was oozing. They tried to interrogate members of public but nobody volunteered information. They retrieved a driving licence from his pocket bearing names **Cosmas Muema Ndinda** which they handed over to PW11 when he arrived. After the body was photographed PW11 told them to take it to Matuu Mortuary awaiting post mortem which they did and left PW11 at the scene.

47. According to her, the body had wound from the left side to the head and they were told by members of the public he had been shot though they did not find any used cartridges. It was her evidence that though someone told her that's he knew what had happened, before she could interrogate him, PW11 arrived.

48. Before the said officers left for the operation, they were cleared by PW6 **IP Mcdonald Okoth** who was by then attached to special crime prevention unit at DCI Headquarters Old Nairobi Area. On the morning of 10th June, 2014, being the most senior NCO Officer tasked with

conducting a briefing for all officers and forwarding them to the senior most officer of the unit, various officer asked for various duties to perform. PW15 who was following up a case together with the accused sought permission to proceed to Matuu. He relayed the information to the authorities of the intended going out and they were released. According to him, they were performing duties all over the county, some of which could take them 2 – 3 days or a week. He was however unaware of the duties the two were going to perform as the briefing was given to his senior. After that the duo left on 11th June, 2014 and he never saw them back that day. He however saw them on 12th June, 2014 when he was conducting morning briefing but he did not ask them how far they had gone with their investigations believing that the information had been passed to his seniors. He later received some officers from Yatta on 19th June, 2014 in their office who requested him to record a statement on the departure of the two officers from our office who had gone to Matuu. According to him, he had worked with the accused for about three years.

49. He explained that their duties for the unit included dealing with serious crimes such as Robbery, Trafficking of drugs and Human organised crimes within the county and any other emerging assignment from the DCI headquarters. Accordingly, any of the officers could be sent to any part of the county for investigations or operations and the two had gone out on an assignment.

50. PW8 **CPL Amos Kioko** was the custodian of Unit's Armoury based at Nairobi Area Special Crime Prevention Unit. On 9th May, 2014 he issued the accused with Ceska pistol body S/No. F5450 and on 8th June, 2014 he also issued PW15 with Ceska pistol S/No. F6119. He explained that when he was off duty or in other assignment he usually handed over the armoury keys to PW15 and on 13th June, 2014 PW15 was the one he left with the armoury keys and he returned Ceska pistol body number F5450 that had been issued to the accused on 9th May, 2014. According to him, the said pistol was returned on 13th June, 2014. During that period, it was in custody of the accused.

51. He explained that the officer usually signs for firearm and indicates force number. On this date the accused signed on Arms movement book- MFP-2 and he was the one who records and then the officer signs. Referred to entry No. 778 dated 9th May, 2014 he confirmed Force No. 74438 **PC Patrick Kyule** for Ceska Body No. F5450, ammunition 9mm. He issued him with 15 rounds of ammunition and the accused signed confirming receipt and wrote his force numbers. When returned they kept records and it was PW15 who received and recorded in the same book. The said entry for 13th June, 2014 indicated that the pistol was returned and the officer receiving it signed with remarks that it was returned in good order. He explained that they would record the rounds returned, in this case the rounds were not indicated but when indicated good order it means it was in same condition it was issued. Though in normal circumstances one is supposed to renew firearm on daily basis, due to their special duties you can go out even for two months hence impossible to renew daily. His work was just to give and receive.

52. In cross-examination he stated that when indicated that the firearm is returned in good order, it means that it had no defects and the ammunitions are the same number as those issue. In the event that ammunition is missing it is indicated in red ink plus the missing ammunition.

53. PW9, **SSP Noah Katum** was by then the head of Special Crimes Prevention Unit based at Old Nairobi Area. According to him, on 11th June, 2014, PW15 and the accused requested to proceed to Matuu though the request was not made to him and he was not part of the same. On 12th June, 2014 at about 12.00 noon he was in office when one **Mr Nyale** formerly head of Flying Squad called him and asked if he was aware of general shooting incident within Kithimani/Matuu and he told him that he would find out. This is because officers were from Nairobi. He summoned PW15 and the accused since he was informed that the officers involved were from Nairobi.

54. The said officers informed him that there was a case pending within Thika and the suspect was heard to be in Matuu. Upon reaching Gatura they picked PW7 who knew the suspect they went to arrest. The lady further happened to know a contact called **Musembi**, PW1. according to PW15 when they arrived at Kithimani, they picked PW1 who left with the accused to identify the suspect. The accused informed him that immediately they were shown the suspect, PW1 teamed up with the suspect and they tried to snatch his pistol and a commotion ensued and they all disappeared to different directions. The accused heard a loud bang so he joined his colleague and they left for Nairobi. He then took them to DCIO headquarters where his superiors directed that investigations be done.

55. According to him, he did not know when the said officer arrived back ordinarily officers arrived at 7.30 am. They did not inform him that they reported the incident though ordinarily, they are supposed to reach police station or senior. He came to know of the of the case after incident. According to what they told him, there was a bang and fearing attack from members of the public they ran away.

56. PW.16, **SSP Wycliff Sifuna** was, in 2014, the DCIO Kangundo, Matungulu, Yatta and Masinga Sub-counties and was aware that on 1st June, 2014 at Kithimani Trading Centre, an incident occurred where some officers from Special Crime Prevention Unit were pursuing a suspect who was alleged to have stolen some items from BAT Thika who they alleged was on the run at the time. He received information from Kithimani in Yatta while he was in my office in Kangundo. According to that information, on 11th June, 2014 at Kithimani Trading Centre Yatta Sub-county, Machakos County PW15 and the accused were in pursuits of one suspect namely **Cosmas Muema Ndunda** who was being sought for offence of stealing by servant in that on 28th December, 2014 at Thika BAT Co. Limited jointly with others before Thika Law courts stole 235 Bales of Tobacco valued at Kshs. 3,000,000/=. In course of investigations officers from Special Crime Prevention Unit SCPU on directions of Criminal investigations were called to assist track the said **Cosmas Ndunda**.

57. According to him, on 19th August, 2014 he prepared the exhibit memo for the assistance of the Ballistic Experts because the said suspect was fatality injured. He pursued and recovered Ceska pistol body number F 5450 marked Q1, magazine marked Q2 and 15 rounds of ammunition marked Q3 (i) to (xv) and sought assistance to establish whether the firearm Ceska marked Q.1 issued to the accused was issued on the day of the incident to fire any ammunition; to establish whether the firearm Q1 is a firearm under **Firearm Act**; whether Q2 magazine is a component of the firearm in accordance with **Firearms Act**; whether the 15 rounds of ammunition Q3 (i) – (xv) were ammunitions in accordance with **Firearms Act**. Since there was no spent cartridge it was designed to establish whether this firearms Q1 was used before or after the incident. He visited the SCPU Nairobi and requested for Arms Movement Register and found out that the pistol was in possession of accused. After that they took the said exhibits to Nairobi for ballistic examination and they were on 21st August, 2014. He later got the Ballistics Report though the original report was displaced/got lost. He however had the duplicate of what he received. He produced the pistol, magazine, round of ammunition and exhibit memo as exhibits.

58. In cross-examination he confirmed that the Arms Movement Register indicated that the ammunitions were in good condition. He however confirmed that when he received the ammunitions, they were all intact and all the 15 rounds of ammunition were in the magazine. It was however possible for the officer to fire the ammunition and replace them.

59. PW17, **Johnstone Musyoki Mwangela** the Firearms Examiner was the in charge of Criminal Investigation Ballistic Section and appeared on behalf of **Alex Mwadawilo**, who was an officer working under him and who was the author of the Ballistic Report dated 22nd August, 2014. According to him, the original was misplaced and the investigating officer requested for certified copy which was signed by the maker.

60. According to the report, on 21st August, 2014 **Alex** received exhibits from No.65776- **Cpl. Fredrick Maina** – one pistol S/No. F5450 marked Q1, One magazine Q2, 15 rounds of ammunition Q3 (i) – (xv). They were accompanied by exhibits Memo P. Exhibits 5). He was requested to ascertain whether Q1 (pistol) was used to fire any ammunition, whether Q2 is **Firearm under the Act**, whether Q2 is component of firearm, and whether Q3 are ammunitions and to ascertain whether the pistol was used to fire in the incident. He examined the exhibits. He found that exhibit Q1 was a C285B Pistol manufactured in Czech Republic commonly called Ceska pistol. It was in calibre 9mm and fired ammunition in 9x19 mm. Such as the Exhibit Q (i) – (xv). The pistol was in good general condition and was complete in all its parts. This means it was not prone to accidental discharge. He testified the pistol Q1 by 3 rounds of ammunition for Q3 (i) – (xv). From the test he obtained 3 cartridges (i) to (iii). Q3 (i) – (xv). He found to be 15 rounds of ammunition in calibre of 9x15mm used in pistol; such as Q1. From examination of Q1 and Q3 (i) – (xv) he formed opinion that Q1 is a firearm and Q3 3(i) –(xv) are firearms under the Act. He examined Q2 and found it was Ceska pistol magazine suitable with and forms part of components of Q1. The magazine had capacity of 16 rounds when fully loaded. He stated it was not possible to determine the time lapse since a firearm was fired. There are no known methods to determine that. As to whether firearm had gunshots residues, he said he did not pursue that time because even if a firearm is cleaned it would still test positive for gunshot residues. PW17 the produced the said report dated 22nd August, 2014 as an exhibit.

61. In cross-examination he stated that there was no indication whether the gun had even been used. There was no need to determine that since these are police guns and are used in training and operations. He could not say if the firearm had even discharged a bullet. He received 15 rounds of ammunition to carry the magazine even with less ammunition.

62. In re-examination, he stated that a gun like that would always test positive hence it was not possible to determine if a firearm has even been used. The possibility that this was used before was high and it was tested by being fired.

63. **Dr Muni Simon Kioko**, PW2, on 27th June, 2014, carried out post-mortem examination on the body of the deceased, **Cosmas Muema Ndunda**, whose body was at Matuu Nursing Home Mortuary. The body was identified by **Boniface Muema Ndunda** (PW4) and **Peter Mukumu Ndunda** (PW5), in the presence of a police officers from Yatta, **Constable Peter Yegon**. From his examination, the deceased was a male African 27 years of age. He was of medium body frame, 5 feet 6 inches, wearing black jacket, orange T-shirt, blue jeans trousers all of which were bloodstained. The body was properly preserved at Matuu mortuary. The body had peripheral synosis on the right temporal region of the head there was a bullet entry wound dimensions 1 by 1 centimetres. On the left temporal region of the head was exit wound dimensions 1 ½ by 1 ½ centimetres. The findings on dissection was that he had cerebral haemorrhage. Other findings were normal physical findings. He formed the opinion that the deceased passed on as a result of cardio pulmonary arrest due to intra cranial haemorrhage resulting from a small calibre gunshot wound from a close range between 6-20 metres. On 27th June 2014, he filled post-mortem form, signed it and stamped it produced the same as an exhibit.

64. At the close of the case, the accused was placed on his defence. In his sworn evidence, the accused testified that on 11th June, 2014, he was called by PW15 who was his senior and who informed him that there was a duty at Matuu Kithimani which PW15 wanted them to go for together. He was informed that the suspect was one **Cosmas Muema**, the deceased who was a fugitive suspected of having stolen Kshs 3 million from BAT and was nowhere to be seen since 2013. He was informed that the operation was a dangerous one since the suspect was believed to be armed and he was told to be very cautious. They were joined by three other people from Salama Fikira Security Firm for BAT and therefore they were 5 in number.

65. Using the telephone contacts, they proceeded to Gatura in Murang'a where they got PW7 who disclosed to them that the deceased was her boyfriend and that he used to call her using another person's number which she also disclosed. Using the said number they traced PW1 whom they met at Kithimani and they proceeded to Kithimani Police Station to report their presence in the area. While waiting for the in charge of the station, PW15 instructed him to go with PW1 to trace the suspect and they proceeded up to Konza Petrol Station where they were informed that the suspect had left through the bush since he was in hiding and they returned to the station and relayed the information to the other colleagues and sent PW1 to go back and look for the suspect and alert them through PW7.

66. After some time, PW1 called and informed them that he had seen the suspect with another person and in the company of the other officers, they proceeded to where PW1 was. According to the accused he tried to talk to the two people while waiting for his colleagues but they became aggressive and when he produced his ID Card, they pinned him down by both hands and he tripped and fell down. Immediately, he heard a loud bang and he dashed back to the car where he could see his colleagues running and they met at another place since the scene was not an open place.

67. They decided to contact the OCS for reinforcements since it became clear that they were dealing with an armed suspect. They then went back to the Police Station and after 30 minutes when it was approaching 6pm PW15 told him that they should return PW7 back and they left for Murang'a with PW7 arriving there at 8pm. PW15 then told him that they should return the next day.

68. The follow day, 12th June, 2014, they met for the morning briefing for the return of their arms which he did with 15 rounds of ammunition he had been given and signed for the same. In the afternoon he was called by PW15 who informed him that the suspect had been shot down at Kithimani and he was instructed to go to the CID Headquarters to record his statement. Two months later he was called and informed that he had been redeployed to Migori on official duties but was later informed that there were warrants of arrest from Machakos in respect of the murder case and was later charged.

69. He reiterated that the suspect pinned him down and it was during the struggle that he heard a gunshot. He said he was with PW1 who was giving him the information but after the confrontation he did not see PW1 since where PW1 was he could not see him. According to him, he put his hand in his pocket to confirm if his firearm was still there but he never used the same. According to him the report should have been made by the in charge of the operation.

70. In cross-examination by **Ms Njeru**, for the prosecution, he stated that the second time they all moved together and PW15 was near him though he was the one who was in front. However, when he was attacked, PW15 was behind the building and was coming to the scene when he heard the gunshot. He stated that he pulled out his wallet to identify himself and when PW1 saw him, he was putting it back into his pocket. They however left without knowing whether someone was shot and he did not know what happened to the deceased at that time. When they met with PW15 10 metres away, he informed PW15 that he had been attacked and the suspect disappeared. He stated that he was issued with 15 rounds of ammunition though the gun could carry 16 rounds when forced. According to him, he introduced himself to PW7 as **Patrick Sila Kyule**.

71. In re-examination, he denied that he sent PW1 to go and pick the cartridges. He said that he could not tell whether the gun shot came from his colleagues since they were all armed.

72. On behalf of the accused, it was submitted that there are two major issues which this court is called upon to deal with as follows:-

73. Regarding the burden and standard of proof the defence relied on the cases of **Republic -vs- Stanley Muthike Tiire (2018) eKLR**. They also relied on the case of **Ndungu Kimanyi -vs- Republic (1979) eKLR** and **Shantilal M. Rawala -vs- Republic EA 570** and submitted that though Pw1 testified on oath and he stated that he saw the accused return his gun in the pocket the same was not captured in his statement. His evidence was also inconsistent with the evidence of Pw16 who stated that he was the one who prepared the Exhibit Memo and that he did not find any spent cartridge at the scene and that all the 15 rounds of ammunition were load in the accused fire arm. Likewise, the evidence of Pw17 who was the ballistic examiner stated that the firm was in order and could not be fired accidentally. It was therefore submitted that the inconsistencies and contradictions in the evidence presented by the prosecution witnesses raise serious doubts on the alleged guilt of the accused.

74. According to the defence, the entire prosecution's case seems to be based on pure circumstantial evidence without any direct evidence linking the accused to the death of the deceased and reliance was placed on **Abanga alias Onyango vs. Rep CR A No 32 of 1990** and **Republic vs. Danson Mgunya [2016] eKLR** and submitted that there is no eye witness who saw the accused shooting the deceased from the entire evidence tendered by 17 prosecution witnesses. The only circumstantial evidence available is that the accused was the last seen person with the deceased.

75. It was submitted that it was important to prove both *actus-reus* and *mens rea* based on the case of **Republic-vs- Stanley Muthike Tiire (2018) eKLR** and **Joseph Kimani Njau -vs- Republic (2014) eKLR**. In this case, it has not been proved beyond reasonable doubt that it is the accused that fired the fatal shot. The circumstances of the shooting are such that it raises the credible and distinct possibility that the fatal shot could have been fired by the men who attacked the accused as it was testified by PW15. There could be also a possibility that because they were 4 police officers and all were armed at the scene but their guns were not examined.

76. It was submitted that P10 testified that the accused was grabbed by the deceased and his friend and that a gun shot was heard which would mean that he did not testify that it was the accused person's gun that went off. The same corroborated the testimony of the accused that he was attacked by the deceased and his friend. He also stated that in a shot while he had a gun shot prompting him to take cover. Further to that PW11, testified that he had been informed by members of the public that there was a shooting at the market by two armed gangsters who fled away after the incident. From his statement it is clear that the accused did not shoot the deceased and also corroborating the evidence tendered by the accused during the defence hearing. It was therefore submitted that in this case the prosecution failed to adduce cogent and reliable evidence to prove that it is the accused and no other person who caused the injury which led to the death of the **Cosmas Muema** (deceased) since PW 16 who produced the ballistic report confirmed that the gun which was alleged used by the accused person did not fire any bullet and that all the ammunition was all intact. It is our submission that the accused gave a detailed explanation which was truthful and the corroborated by the prosecution's witnesses.

77. It was noted that the state never called the deceased's friend by the name of **Antony Mburu** to shed light on what transpired being actual witness. The Court was therefore called upon to find in favour of the accused based on the case of **Bukenya and Others vs. Uganda [1972] EA 349** and the case of **Pius Arap Maina vs. Republic [2013] eKLR**.

78. It was therefore submitted that the prosecution has failed to prove the charge of murder beyond reasonable doubt to sustain a conviction and that the defence tendered by the accused person is plausible and tenable. The Court was urged to acquit the accused under Section 215 of the **Criminal Procedure Code** Cap75.

79. On behalf of the prosecution, it was submitted that the prosecution did not have any eye witness and relied wholly on circumstantial evidence. However, based on the evidence adduced, it was the prosecution's case that the evidence met the threshold for convicting based on such evidence.

80. It was submitted that the evidence of PW1 which was consistent and clear places the accused at the scene of the offence. He pinpointed the deceased to the accused. The deceased was a few meters away from where he was. The accused proceeded to where the deceased was and in a few minutes he heard a gunshot from where the deceased was. He then rushed back to see what was happening and found the accused returning his gun. The accused contradicted himself as to what he was returning to his pocket – first his wallet then his handkerchief. According to the prosecution, the fact is he was returning his gun but merely trying to deny it. He confirmed to his counsel and in cross examination he was returning something to his pocket.

81. It was submitted that the accused does not deny he was at the scene where the body of the deceased was found on the fateful day. He does not deny he was indeed armed with a ceska F5450 at the scene. He admits he heard the sound of a gunshot when at the scene. He alleges

the deceased and his friend attacked him by assaulting him but does not state any of them was armed. The allegation that the deceased and his friend fled contradicts his evidence that the body of the deceased was found where the two had allegedly attacked him. The fact that the body was found at that very scene, places the accused at the scene of crime and any other allegations are mere denials.

82. According to the prosecution, the evidence of PW17 adds to the merit of the prosecution's case in that he confirms the capacity of ammunition that can be contained in the gun issued to the accused is sixteen (16). The analysis of this evidence is that when being issued with the 15 rounds of ammunition they were loaded into a gun with a maximum of sixteen rounds. The inference drawn from here is that on 9th May, 2014 the accused was issued with 15 rounds of ammunition which filled the ceska which had a maximum of 16 rounds to its maximum capacity of sixteen rounds. Hence after the accused fired and killed the deceased, the firearm was returned in good order with its 15 rounds of ammunition.

83. It was submitted that this evidence coupled with the accused's admission that he was at the scene with the accused and his friend who were unarmed, he heard a gunshot at the scene and the deceased's body was found at that very spot, proves beyond any reasonable doubt that the accused caused the death of the deceased. These inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

84. The Court was therefore called upon to be of the same finding since the accused's defence has not displaced the prosecution's case, but rather added weight to the same.

Determination

“The “blue code of silence” is a common phenomenon, spanning across different countries and police cultures in America, Europe, Asia and even Africa. It is the unwritten rule according to which police officers never provide incriminating information about their colleagues; to close ranks in silence and to cover up knowledge of a fellow officer's wrongdoing with a collective blanket of self-preservation, a feeling of *esprit de corps* among officers who by and large depend on each other for their very risky lives as they confront the violent and hostile world of policing and crime.”

85. That was the Court of Appeal's opening statement in Criminal Appeal No. 124 of 2018 between **Titus Ngamau Musila Katitu vs. Republic.**

86. That statement reflects the increasing loss of lives connected with the police. A recent incident in the United States where one **George Floyd** was trammelled down by a police officer despite his pleas that he could not breathe is a worldwide case in point. While one may be mistaken in believing that **George Floyd's** case was a distant case of racial discrimination, locally our media is replete with reports of people who have lost either lives or limbs in circumstances connected with police brutality. This manifests how those who are tasked with law and order often misuse their powers and do the opposite. Clearly while a majority of police officers diligently carry out their duties in accordance with the law and ought to be applauded for doing so, there are still rotten eggs in the police service who still believe that the service is a force it used to be. Such individuals who still have misplaced and past attitudes ought to be weeded from the service in a proper sanitisation process.

87. As happens often, when the law enforcers find themselves on the wrong side of the law, members of the same force are tasked with investigating their own. It is therefore not surprising that most of the cases connected with police brutality never find their way to Courts of Justice and even those that do, the investigations are so shoddily undertaken that convictions even where warranted are often impossible as it becomes difficult to unravel the circumstances under which the deceased met his or her death.

88. These are the circumstances that we have to deal with when a matter such as this where deceased's death is somehow connected with police officers arises and is placed on our laps.

89. Back to this case, the known facts are substantially not in dispute. According to the prosecution's case the deceased was an employee of BAT in Thika. He was however suspected jointly with other people to have been involved in the theft of 235 Bales of Tobacco valued at Kshs. 3,000,000/=. As a result, some of his fellow suspects were arraigned before a court at Thika Law Court. He was however on the run and was not arraigned with them. As a result, the assistance of the officers from Special Crime Prevention Unit (SCPU) on directions of Criminal investigations were called to assist track the deceased. Through Facebook posts, they linked PW7, his girlfriend to him and proceeded to track her at Gitura Catholic Church in Murang'a. Upon finding her, she admitted that the deceased was indeed her boyfriend and offered to assist the police though the deceased only used to get in touch with her through a telephone number of PW1.

90. Through the phone of PW7, they managed to trace PW1 at Kithimani Area where they proceeded and after getting him, they went to report their mission at the local police station but were unable to get the OCS. At this point it was decided that in order to minimise on the suspicions, the accused being a *Mkamba* would accompany PW1 who was to assist in tracing the deceased. Their first attempt however failed to yield any fruits as the deceased was not to be found where he was thought to be and the duo returned to the Station. Some kind of agreement seemed to have been arrived at with PW7 in which they agreed that upon sighting the deceased, PW1 would alert the accused. Shortly thereafter, PW1 called the accused and informed him that he had sighted the deceased.

91. Here the versions of the prosecution vary. According to PW15, the accused left again and followed PW1 leaving them behind. However, according to the accused, they all left together though it was the accused who was in front. At Kithimani Centre, according to PW1, PW15 alighted and left and after some minutes returned to the vehicle with the accused and told the driver to reverse and they returned to the station. On 12th June, 2014 he was called by PW15 who informed him that they would not return back. It was then that PW15 told him that when the accused went to look for the deceased there was a struggle between the accused and the deceased and that they were planning further action and he would be informed. Referred to his statement he confirmed stating that PW15 said there was struggle between the accused and the deceased and a bullet was discharged accidentally and he was not sure of what happened.

92. As appreciated by the learned Prosecution Counsel, there was no eye witness as to how the incident took place. PW1 who was the one accompanying the accused and who was to identify the deceased to the accused was apparently, at the time of the incident behind a building and did not witness how the deceased met his death. According to him however, he met the accused returning a gun into his pocket after he heard the bang. Referred to his statement, he admitted that he did not indicate therein that he saw the accused returning his gun into his pocket.

93. According to PW1, when he saw the deceased, the deceased was with another person called **Mburu**. That the deceased was in company of another person was also confirmed by the accused himself. The accused's version of the events, however was that when he confronted the deceased and the said person, they pinned him down when he removed his wallet to identify himself and in the said commotion he heard a loud bang after which he ran away. He denied that he removed his gun and that when PW1 saw him, he was returning his wallet into his pocket.

94. The question that one asks is whether the circumstances as narrated by the prosecution witnesses are sufficient to find that the accused is culpable beyond reasonable doubt.

95. 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.

96. 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.”

97. 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.**

98. 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.”**

99. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence on record that the deceased passed away and the defence has not challenged that fact. His body was duly identified and post mortem examination carried thereon.

100. As regards the cause of death, it is clear from the post mortem examination conducted by PW2 that the deceased's death resulted from cardio pulmonary arrest due to intra cranial haemorrhage resulting from a small calibre gunshot wound from a close range between 6-20 metres.

101. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no direct evidence that the accused caused the death of the deceased. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not

made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

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

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

103. 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.”

104. 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.”

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

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

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

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

107. In this case, as stated above, in the absence of any direct evidence linking the accused with the death of the deceased, this court must rely on the circumstantial evidence if the case against the accused is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe -vs- Rep [2003] KLR 364** the Court of Appeal held.

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

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

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

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

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

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

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

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

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

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

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

113. In this case, the prosecution’s case is that the accused had been tasked with apprehending the deceased. The accused was armed for the purposes of the said operation. However, it is not only him who was armed as PW15 was similarly armed and both of them had similar guns. While the prosecution evidence is that PW15 was left in the car and was not nearby when the incident occurred, the accused’s evidence is that PW15 was not very far off. There is no evidence that the deceased or the said **Mburu** were unarmed. In fact, according to the accused person, he had been informed that the operation was a dangerous one since the suspect was believed to be armed and he was told to be very cautious.

114. At the scene, the only evidence that links the accused with the shooting is the allegation by PW1 that he saw the accused returning his gun back into his pocket. However, when PW1 had the opportunity to record his statement, this very crucial fact was not disclosed by him at all. According to the accused, PW1 might have mistaken the fact of his returning his wallet into his pocket as that he was returning his gun. The importance of the first report cannot be overemphasised. As was appreciated in the case of Rex vs. Shabani Bin Donaldi (1940) 7 EACA 60:

“We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such reports (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all.”

115. The importance of such statements, according to the case of Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259:

“...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.”

116. As regards this piece of evidence, by not disclosing that crucial fact until at the time of the hearing of the case, PW1 created an impression that his evidence as regards that fact might have been embellished or deliberately made up. Such conduct was deprecated in the case of Ndung’u Kimanyi vs. Republic [1979] KLR 282 that:

“A witness in 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”.

117. See also Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004 and David Kariuki Wachira vs. Republic [2006] eKLR.

118. The prosecution has submitted that the court ought to consider the fact that it was the accused who was last seen with the deceased. There is evidence however, that the accused was not alone with the deceased at the time of the incident. There was a third person by the name of **Mburu** in the picture whose role in the saga remains unexplained to date. I will however come to him shortly. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the 'last seen alive with' doctrine held:

"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

119. In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:

"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

120. It was however held in the case of Ramreddy Rajeshkhanna Reddy & Anr. vs. State of Andhra Pradesh, JT 2006 (4) SC 16 that:

"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."

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

"The prosecution has adduced evidence which establishes that the deceased was last seen alive in the company of the deceased [sic]. That was in the evidence of PW5. Time was 9.30 a.m. Her evidence was not corroborated by any other witness. The accused has denied that and has countered the evidence of PW5 by stating that in fact, it was PW5 he saw with the deceased last. Given that the evidence is the word of the accused against that of PW5, the court has to look for corroboration or other evidence implicating the accused. I am persuaded by the Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is advisable to exercise caution and look for some other corroboration. I will get back to this later."

122. As appreciated above, even if the accused was the last person to be seen with the deceased, which was not the case, that would only be circumstantial evidence. Can be said that in the circumstances of this case, the inculpatory facts against the accused person are incompatible with his innocence and is incapable of explanation upon any other reasonable hypotheses than that of his guilt? Has the prosecution proved that there are no other existing circumstances which weaken the chain of circumstances relied on? The law is that the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution.

123. As already indicated there is evidence that there was a third person in the picture, **Mburu**. No one knows the role if at all he played in the whole saga. No one knows whether or not he was similarly armed. He was however not called to testify in the matter yet from the evidence adduced he was the person who was present during the incident and his evidence would have explained the circumstances under which the deceased met his death. In my view, in the absence of definite evidence from PW1 as to the circumstances under which the deceased met his death, this was one witness whose evidence would have determined whether or not the accused herein would be a free man, the shoddiness of the investigations notwithstanding. It is to that extent that I agree with the views expressed by the Court of Appeal in Titus Ngamau Musila Katitu vs. Republic Nairobi Court of Appeal Criminal Appeal No. 124 of 2018 that:

"The decisions in R V. Police Constable Samson Muriuki Mbui (2006) eKLR and I.P. Veronica Gitahi & another V. R. (2017) eKLR are some of the examples of cases where the courts have expressed concern over police cover-up of crime involving police officers. A similar diversion will be seen in the present case...We have said that all the doctor found was that the immediate cause of death was injury from three gunshot wounds. Even by eliminating Exhibit "A" and basing our conclusion on PW2's evidence, there is irresistible inference that the first shot fired by the appellant killed the deceased. The bullet fired by the appellant needed not be Exhibit "A". Our analysis and conclusion on this question disapproves the appellant's contention that he fired three times in the air. With respect, we cannot help but fully agree with the learned Judge's observation that there was an active attempt to sweep the cause of the deceased's death under the carpet and, in death, deny him and his family justice. In our own assessment, the evidence was deliberately manipulated and improperly handled, while the scene of crime was not secured. As we have already observed, of all the five bullets fired at the scene, not a single spent cartridge was recovered from the scene, except Exhibit "A" that was lodged in the deceased's body and whose origin the prosecution treated as a mystery. PW18, an officer from IPOA alluded to manipulation of the firearms movement register. Out of the 15 prosecution witnesses, 8 were police officers, who were determined to maintain the "blue code of silence" and ensure they saved one of their own. Indeed, it was only after the intervention by IPOA and other pressure groups that the appellant's nearly two years of freedom after the incident was brought to an end. We are satisfied, in the end that there was proof beyond any reasonable doubt of the appellant's hand in the deceased's death. The circumstances prevailing at the time of the shooting were conducive; the time, the surrounding, recognition of the appellant, and the distance of PW2 from the scene. He accurately and unmistakably identified, indeed recognized the appellant as the person who fired the fatal shot. That evidence was supported, as we have demonstrated, by other independent evidence. Considering

that the deceased was not armed, that he was in fact subdued and on the ground and bearing in mind that he had even raised his hands in defenceless submission, we have no doubt that by shooting the deceased on the head at point blank position, the appellant acted with malice aforethought. His actions violated guidelines contained in the Sixth Schedule of the National Police Service Act, which enjoin police officers in effecting arrest to always attempt to use non-violent means first and only resort to force when non-violent means are ineffective. It directs that if force is used, it must be proportional to the objective to be achieved, to the seriousness of the offence committed, and to the resistance by the person against whom force is used. A firearm may only be used for exceptional purposes, such as to save or protect the life of the officer or any other person; in self-defence or in defence of other person against imminent threat of life or serious injury; and to prevent a person charged with a felony from escaping lawful custody. With that we reject the appeal on conviction. Both in his memorandum of appeal and submissions, the appellant has not challenged the sentence imposed, and since it is not illegal, though unusual, we say no more, with the conclusion that this appeal fails and is accordingly dismissed.”

124. I agree that the holding in the case of Paul Kanja Gitari vs. Republic [2016] eKLR restates the general legal position when the court of appeal expressed states that:

“the state of the evidence tendered with all of its inconsistencies means that the appellant’s complaint that some vital witnesses were not called is also not idle. It is of course trite that there is not number of witnesses required for the proof of a fact. See Section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See BUKENYA & OTHERS VS> UGANDA [1972]EA 549. Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.”

125. Similarly, in the case of Said Awadhi Mubarak vs. Republic [2014] eKLR the Court stated as follows;

“
Secondly, very crucial witnesses were not called by the prosecution to testify in this case. These were the people who arrested the appellant. These crucial witnesses would have explained the circumstances and reasons for the arrest of the appellant. Since they were not called to testify, we do not know the circumstances and reasons for the arrest of the appellant. In the case of Bukenya -vs- Uganda [1972] EA 549, the Court of Appeal held that a failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution case, and acquit the accused person. In our view, the failure by the prosecution to call crucial witnesses herein weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure of the prosecution to call important witnesses is a doubt whose benefit we must give to the appellant, which we hereby do.”

126. The question however is whether notwithstanding the said person’s evidence, the evidence adduced was adequate to warrant a conviction. As already stated hereinabove, PW1 never witnessed the incident. His evidence that he saw the accused returning the gun is clearly unreliable. The other evidence which would have supported the prosecution’s case was that of PW15 and PW8, the officer in charge of the armoury. However, their evidence was to the effect that the accused returned his firearm in good working condition together with the rounds of ammunition which he had been given. Theirs was clearly exonerating evidence. As for PW17, the Ballistics Expert, his evidence was inconclusive as regards the use of the firearm. While he gave an opinion that the subject firearm could hold 16 rounds of ammunition, there was no evidence that the accused was issued with that number of ammunition.

127. It is therefore clear that the evidence adduced by the prosecution was barely adequate to justify a conviction. As was held in Njoroge Ndungu vs. Republic Nairobi Court of Appeal Criminal Appeal No. 31 of 2000 [2001] eKLR:

“
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.”

128. Before I conclude the judgement, I must say that the manner in which the investigations were conducted in this matter leaves a lot to be desired. PW15 who recorded the return of the firearm to the armoury by the accused was the head of the said operation. For purposes of transparency and accountability, it is my view that to avoid any suspicion of conspiracy between him and the accused, the receipt of the firearm ought to have been handled by an officer totally unconnected with the incident. Apart from that PW15 was armed with a similar firearm to that which was issued to the accused. He was present somewhere within the vicinity of the incident. There is no evidence at all that his firearm was similarly examined in order to rule out the possibility that the bullet was discharged from his firearm.

129. It is therefore my view that based on the evidence as presented it is not possible for the court to make a definitive finding as to how the deceased met his death. Shoddy investigations, in my view, are detrimental to both the victim and the accused. The leaves the victim dissatisfied as to whether justice has been done. Similarly, the accused is left in a situation where his innocence is still mired in doubt. However, where shoddy investigations are undertaken whether inadvertently or by design, the court is left with no option but to make a finding based on the material placed on its lap however distressing and unpalatable that might be since the courts as impartial arbiters have no business descending into the arena of investigations even where they feel that something better could have been done. As was appreciated by Mativo, J in Elizabeth Waithigeni Gatimu vs. Republic [2015] eKLR:

“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.”

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

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

131. It may well be that the accused’s explanation that after the incident he ran away without ascertaining what happened manifests lack of candour on his part. However, that alone is not sufficient to return a verdict of guilty against him. The totality of the evidence must be considered. In this case, the totality of the evidence point to the involvement of a third party in the commission of the crime other than the accused. In **Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004** the Court of Appeal stated that:

“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.”

132. Having considered the evidence presented in this case, I am unable to find that the the inculpatory facts against the accused person are incompatible with her innocence and are incapable of explanation upon any other reasonable hypotheses than that of her guilt. In my view, the possibility of the involvement of a third party in the commission of the crime introduces other existing circumstances which weaken the chain of circumstances relied on by the prosecution. Accordingly, the facts adduced by the prosecution do not justify the drawing of the inference of guilt to the exclusion of any other reasonable hypothesis of innocence. There may well have been suspicion that it was the accused who caused the death of the deceased but as was held by the Court of Appeal in **Joan Chebichii Sawe vs. Republic [2003] eKLR**:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt...Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

133. In that case the court relied on **Mary Wanjiku Gichira vs. Republic**, Criminal Appeal No 17 of 1998, where it was held that:

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life.”

134. The rationale for this position was explained in **John Mutua Munyoki vs. Republic [2017] eKLR** where the Court of Appeal opined that:

“...in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged.”

135. As was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR**:

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

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a

remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

136. The Court of Appeal noted in the case of Mwangi & Another vs. Republic [2004] 2 KLR 32 as follows:-

“In a case depending on circumstantial evidence, each link in the action must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that he accuse is guilty of the charge.”

137. The same Court in Omar Mzungu Chimera vs. Republic Mombasa Criminal Appeal No. 56 of 1998 reiterated that:

“It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The complete chain is as strong as its weakest link and the weak link here is that the alleged murder weapon had not been produced in the superior court in the manner in which it ought to have been done...In a case based on circumstantial evidence such missing links can create sufficient doubt to entitle a court to say that the evidence adduced is not sufficient to sustain a conviction of murder. It has been said time and again that circumstantial evidence in order to sustain a conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused. Circumstantial evidence which falls short of the required standard on all material particulars cannot in law form a basis for a conviction.”

138. On my evaluation of the evidence I have come to the conclusion that the circumstantial evidence relied on by the prosecution was not strong enough. In other words, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant the conviction on the basis of the evidence on record. 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 is factually innocent of the offence with which he is charged. It simply makes a finding that the prosecution has failed to legally discharge its obligation by proving his guilt beyond reasonable and he is therefore constitutionally deemed to be innocent. That is what our law provides. In that event the benefit of doubt must tilt in favour of the accused.

139. In Philip Muiruri Ndaruga vs. Republic [2016] eKLR at page 3 it was held that:

“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 favorite child of the law and every benefit of doubt goes to him. 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.”

140. Accordingly, I find that the prosecution has failed to prove that the accused person herein on 11th day of June, 2014 at Kithimani Village, Kithimani Location in Yatta District within Machakos County, murdered **Cosmas Muema Ndunda** (the Deceased). He is accordingly acquitted under section 215 of the *Criminal Procedure Code*.

141. Judgement accordingly.

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 the accused

Mr Ngetich for the State

CA Geoffrey