



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 18 OF 2012

REPUBLIC.....PROSECUTION

=VERSUS=

ZAKARIA MUSYOKA MUA.....ACCUSED

JUDGEMENT

1. The accused, **Zakaria Musyoka Mua**, was charged with the offence of murder contrary to section 203 as read section 204 of the **Penal Code**. It is alleged that on 1st May, 2012 at Katoleni Market in Machakos District within Machakos County, the accused murdered one **Paul Munyao Musau**. The accused pleaded not guilty and in support of its case the prosecution called a total of 10 witnesses.

2. PW1, **Isaac Malonzi Mutu**, then a student, had accompanied his father, **James Mutia**, PW5, on 1st May, 2012 to see PW3 at Kaloleni, a nearby market. On their way back they found the deceased's vehicle stuck in a ditch as it had rained. Together with his said father, PW3 and other people who included the accused, they helped remove the car which was being steered by PW3. Though PW1 did not know the accused then, he heard him being called **Zakaria**. After the car had been removed from the ditch, PW3 drove it leaving the deceased walking with the rest. Some of the people who assisted in removing the vehicle asked for money and two of them, including the accused remained behind. According to PW1, the said two people were arguing with the deceased, demanding that the deceased should give them money to buy soap to clean their clothes. PW1 who had gone ahead of his father tried to alert his father about the argument but he did not hear. PW1 then saw the deceased pushed and he slid into a trench full of rain water, about 4 feet deep. PW1 then called his father and alerted him that the deceased had fallen into a ditch and that the people who were with him had run away.

3. Unable to assist the deceased, the father proceeded to call the deceased's son, **Philip Mulwa** from the shop and they proceeded to remove the deceased from the trench, placed him on the ground where he stayed for 8-10 minutes before he was transported to Machakos Level 5 Hospital on a motor bike. According to the witness, he was able to see the accused push the deceased since he was nearby and there were shops nearby with security lights.

4. According to PW1, the deceased was unable to remove the vehicle because he was drunk and they asked him to hand over the car to PW3 who was less drunk. In his evidence the people who went to help were not more than 20 and they thereafter asked for money, but when told by the deceased that he had none, some of them left and went back to the market leaving some behind. Since the deceased was in front of him, PW1 could not tell what the people with him were discussing since he did not hear them well. He however did not know the people who were with the deceased but saw him being elbowed. Though the deceased tried to hold on to the accused, he slid and fell into the water. The accused then turned back and ran passed him and his father. PW1 however insisted it was the accused who pushed the deceased into the water.

5. PW2, **Stephen Kimulu Kilonzo**, was on 1st May, 2012 at around 8.00pm drinking alcohol with his uncle, PW7, at a bar called Kintu when the accused, his first cousin, joined them and they continued drinking with him till between 10-11pm when they were asked by the owner of the bar to leave as it was closing time. The three, then paid their bills and left. As they came out there was vehicle which was stuck on the road due to the rain about 50 metres away and they were asked to help push it. According to him, he did not know the owner but recalled that he was an old man, who appeared drunk PW3 got into the vehicle and after getting the vehicle out, PW3 continued driving it. After that PW2 and PW7 proceeded on their way home but upon realising that the accused was not with them they turned back to look for him.

6. While they were looking for the accused, a young man, whom he later came to learn was PW1, informed them that the accused had pushed a man who had fallen into a ditch. Upon looking at the ditch he saw a coat resembling that of the owner of the car they had assisted. It was his evidence that there were lights from the neighbouring shops and PW1 had a torch. They then got into the ditch and together with the son of the deceased removed him and put him on a motorbike with the deceased's son for Hospital. In the meantime, the accused was brought

back by some people while being beaten allegedly that he was the one who had thrown the deceased into the ditch. The accused however managed to escape. As they proceeded home, they came across the deceased's vehicle and the occupants, **Katua** and another person alighted and started beating them asking where the accused was and then put them into the car and took them to the Chief's office at the Chief's Camp where they stayed till the following day when they were informed that the deceased had died.

7. On 1st May, 2012, PW3, **Cpl Jackson Kimani**, went to Kitwa Bar where he found his uncle **Paul Munyao Musau**, the deceased and his cousin one **Kaleli**. At 11.00 pm the deceased left the bar, got into his car with the said cousin and left for home. After 10 minutes the car got stuck and the deceased requested him to help him. He entered the car, removed it with the assistance of many other people who were pushing it and drove it up to the deceased's home where he gave the keys to the deceased's wife as the deceased was drunk. On his way back, he met the deceased's son, **Philip** who told him to go get the car as the deceased had been thrown into a ditch by a young man he knew. Upon driving back, they found that the deceased had been removed from the ditch and had been taken to Hospital. On their way, **Philip** informed them that he had seen some people who had been with the person who pushed the deceased into the ditch. They then took the said people to the AP's Camp after they denied that they were the ones who pushed the deceased. Upon arriving at the Hospital they found the deceased already dead. According to him, prior to that day he did not know the accused but knew his father, **Mua**. According to the witness, he never saw the accused that evening. It was his evidence that at the Camp, the people they took there stated that they had seen the accused push the deceased.

8. PW4, **Wilson Mutua Munyao**, was on 1st May, 2012 at 11.00pm from the market going home when he came across his friend, the deceased's car stuck in the mud. He therefore helped remove the same in the company of other young men after which the deceased gave them Kshs 1,5000/- to share in appreciation. After he went to change, he was called by his cousin, **Katua**, who informed him that his father had been thrown into a ditch and that the young men had gone towards the market. They however did not find them and upon their return, they found when respiration was being done on the deceased after which they took him to Hospital where he was pronounced dead. According to his information the deceased had been pushed into the ditch by the accused. In his evidence the accused was not amongst those who assisted in removing the stuck vehicle and was not amongst those who were to share the money.

9. PW5, **James Mutua Vulu**, was on 1st May, 2012 called by his cousin, PW3 at Kaloleni market and he went with his son, PW1. On their way from the market they found the deceased's vehicle stuck on the road as it was raining. PW3 then got into the vehicle and drove it away leaving him, PW1, his uncle and others who had been with them in the bar and who assisted them in pushing the car. Amongst them were the accused, his cousin PW7 and one other cousin. The accused then asked the deceased to help him with money to buy soap and they continued talking as PW5 followed them. PW1 then informed him that it seemed that the deceased and the accused had disagreed. When he went there he did not find the deceased or the accused. After looking for the accused they found him in a bar and upon returning to the scene they found that the deceased had been found in the ditch which was deep and had water. Upon the accused seeing the deceased he ran away. After that the deceased was taken to the Hospital where he died. According to him, he never saw the accused assisting in removing the vehicle though he did not know him before. He disclosed that his uncle had been operated in the stomach.

10. PW7, **Timothy Malinda** was on 1st May, 2012 drinking with **Stephen** (PW2), and the accused, his nephew, after which on their way home they found a car stuck on the road. The car belonged to an old man whom he did not know. After helping in removing the car, the driver left with it, but they did not see the accused. However, upon going ahead 100 metres they found the accused being beaten and upon inquiring the reason they were told that the accused had accosted the owner of the car after which the accused ran away. They were later showed where the deceased had been pushed into the ditch and the deceased was then removed and taken to the Hospital by his son and they left for home with PW2. On their way they were stopped by **PW3, Kamuli** and **Katua** who were in a vehicle and asked where the accused was after which they were beaten and taken to the Chief's Camp where they spent the night.

11. PW7, PC **Charles Musau Munyao**, in the company of other people identified the body of the deceased at Machakos Funeral Home on 7th May, 2012. PW8, **Dr Fredrick Okinyi**, conducted post mortem on the body of the deceased and formed an opinion that the cause of death of the deceased was asphyxia from drowning. PW9, **APC Joseph Angote**, testified that on 1st May, 2012, two suspects, **Timothy Mativo** and **Stephen Kimuyu**, were taken to their office at Ngelani Police Station. Upon interrogating the two they said that it was the accused who had pushed the deceased into a stagnant pool of water and that the accused had escaped. On visiting the scene, he found a deep ditch, 6 feet filled with water, in which he himself could have drowned had he entered it. In his evidence the place was muddy and slippery. PW10, **IP Lorna Kamuma**, was the investigating officer and testified as to the steps she took after the incident was reported.

12. Upon being placed on his defence, the accused in his sworn evidence testified that he never knew the deceased prior to the date of the incident. According to him, on 1st May, 20102, he left home with his cousin, PW2 and his uncle, PW7 and proceeded to Kaloleni Market where they entered the pub called Vitumbao and stated drinking till sometime between 10.30 and 11.00pm when the owner wanted to close the bar. Outside, they were informed that there was a vehicle that had stalled and they were asked to assist. Upon reaching there, they found the owner who was very drunk and was unable to remove the vehicle. PW3 who was with him entered the vehicle, removed it and drove it away. However, the people who had assisted in pushing the vehicle demanded for money from the deceased. At this point PW2 and PW7 turned to go home. He, however, met his friend, **Gerald Malembe** (DW2) who told him that they should proceed to a pub where he was drinking and they proceeded there.

13. After a while, one **Katua** and another person entered and approached where they were with **Katua** saying that it was the accused who threw the deceased into the water. He then pulled him outside where he met many people who insisted that it was him who killed the deceased. Fearing for his life, he escaped and went home together with DW2.

14. The following day he went to Machakos Police Station to record his statement after which he was told to go home and was arrested a month later.

15. It was his evidence that he was not present when the deceased's body was recovered but later came to learn that the body was recovered in a ditch off the road, some 500 metres away from where they were pushing the vehicle. According to him, the deceased was drunk and could not drive and the incident occurred during the rainy season.

16. In cross-examination he admitted that they requested for payment after that helped push the deceased's vehicle. Referred to the testimony of PW1, he stated that he was not related to him and did not know his family though he said that there was a possibility he could have had a reason to falsely accuse him but could not tell why. According to him, the deceased was assisted to come out of the vehicle but was staggering. According to him, they entered the bar at 7.00pm though he was not drunk and he denied that he pushed the deceased.

17. The accused called **Gerald Malembe Mutuku** who testified as DW2. He admitted that he knew the accused who was his neighbour. According to him, on 1st May, 2012, he saw the accused when he was pushing the vehicle. It was his evidence that he did not know the deceased previously whose vehicle had gotten stuck on his way home and he was called from a nearby pub where he was drinking. He however found the accused at the place where they were pushing the vehicle after which many people demanded for money from the deceased who said he had no money. In his evidence there was no scuffle between the deceased and the accused and he returned with the accused to the pub. At the time they were pushing the vehicle, the deceased was drunk and he was not present when his body was recovered though it was said that he was pushed into a pool of water.

18. He stated that 5 minutes after they entered the pub, **Katua** went and pulled the accused outside accusing him of killing the deceased. The accused then escaped fearing for his life. In his evidence he did not know how the deceased entered the pool because they left with the accused together.

19. In cross-examination, he admitted that they were 5 people pushing the deceased's vehicle from behind. After pushing the vehicle, they left the deceased there and he did not hear the accused demanding for money from the deceased after the deceased said he had no money. He insisted that he left with the accused. He however stated that the deceased did not fall far and the pub they went to was on the way towards the deceased's home and the pool is after the pub. He therefore denied that it was the accused who pushed the deceased as the vehicle left him standing with the accused.

20. On behalf of the prosecution, reliance was placed on the submissions filed in support of the finding on prima facie case. In them it was submitted that from the evidence of PW1 and PW2, the accused was placed at the scene and after helping in pushing the vehicle, the other people who were pushing the vehicle left leaving the accused behind demanding for payment from the deceased and later pushed him with his elbow into the ditch. It was submitted that the fact of death was proved by the post mortem conducted on 7th May, 2012 as resulting from asphyxia from drowning.

21. It was therefore submitted that the prosecution discharged its burden in proving the case against the accused.

22. On behalf of the accused, it was submitted that no single prosecution witness saw the accused push the deceased into the ditch. It was said by all the witness that it had rained on 1st May, 2012 and the ground was muddy and slippery and that the scene was filled with a number of people who had come to assist the deceased as it was a market day. It was submitted further that according to PW8, the death resulted from drowning and there was no sign of struggle.

23. It was submitted that there were too many gaps left in the prosecution case and it is not known who the mysterious boy who informed PW10 that it was the accused who pushed the deceased as the said mysterious boy was never called as a witness. According to the defence, mere suspicion no matter how strong cannot form the basis of any conviction.

24. To the defence there was no evidence that the deceased was pushed by the accused into the ditch. The Court was also urged not to overlook the fact that the deceased was drunk and could only stand while shaking and could not even drive a state which could have caused him to fall in the ditch.

25. The Court was therefore urged to find the accused not guilty.

Determination

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

27. 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.

28. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

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

29. In this case, the prosecution's case was that on the 1st May, 2010, the deceased was driving his vehicle towards his home when his vehicle got stuck in the mud as it had heavily rained that day and the road was muddy and slippery. Apart from the rain the deceased was very drunk and was unable to remove the vehicle from the mud. As result people were called to assist on pushing the vehicle and one of the people who answered the call was the accused.

30. As the deceased's status could not enable him drive the vehicle, the deceased alighted therefrom and PW3 took over from him the wheels. After the vehicle was successfully pushed, PW3 however continued driving the vehicle till the deceased's home where he parked the vehicle and handed over the keys to the deceased's wife. On his way back, he met the deceased's son, **Philip** who told him to go get the car as the deceased had been thrown into a ditch by a young man he knew. Upon driving back, they found that the deceased had been removed from the ditch and had been taken to Hospital. On their way, **Philip** informed them that he had seen some people who had been with the person who pushed the deceased into the ditch. They then took the said people to the AP's Camp after they denied that they were the ones who pushed the deceased. Upon arriving at the Hospital they found the deceased already dead. According to him, prior to that day he did not know the accused but knew his father, **Mua**. According to the witness, he never saw the accused that evening.

31. According to PW1 who was amongst the crowd together with his father, PW5, after the car had been removed from the ditch, PW3 drove it leaving the deceased walking with the rest. Some of the people who assisted in removing the vehicle asked for money and two of them, including the accused remained behind. According to PW1, the said two people were arguing with the deceased, demanding that the deceased should give them money to buy soap to clean their clothes.

32. According to PW1, he was ahead of his father, PW5 and tried to alert his father about the argument but PW5 did not hear. PW1 then saw the deceased pushed and he slid into a trench full of rain water, about 4 feet deep. PW1 then called his father and alerted him that the deceased had fallen into a ditch and that the people who were with him had run away.

33. On his part, PW5 testified that on their way from the market they found the deceased's vehicle stuck on the road as it was raining. According to him, after the vehicle was successfully pushed PW3 drove away leaving him, PW1, his uncle and others who had been with them in the bar and who assisted them in pushing the car including the accused, his cousin PW6 and one other cousin. The accused then asked the deceased to help him with money to buy soap and they continued talking as PW5 followed them. PW1 then informed him that it seemed that the deceased and the accused had disagreed. When he went there he did not find the deceased or the accused. After looking for the accused they found him in a bar and upon returning to the scene they found that the deceased had been found in the ditch which was deep and had water. Upon the accused seeing the deceased he ran away. According to him, he never saw the accused assisting in removing the vehicle though he did not know him before. He disclosed that the deceased had been operated in the stomach.

34. It would seem that there were a number of people left behind including the deceased and the accused. According to PW1, apart from the accused there were two other people who were with the deceased. These two people were however not called to testify. In my view, their testimony would have thrown better light as to who actually pushed the deceased assuming that he was actually pushed and that he did not fall in the ditch on his own considering that he was unstable due to his drunkenness state was unable to even stand properly and was staggering. It is noteworthy that PW1 himself testified that he alerted PW5 that the deceased had fallen into a ditch and that the people who were with him had run away. From his own evidence the information he relayed was that the deceased fell into the ditch and that those who were with him, meaning that there were more people with him apart from the accused, ran away.

35. According to PW9, **APC Joseph Angote**, on 1st May, 2012, two suspects, **Timothy Mativo** and **Stephen Kimuyu**, were taken to their office at Ngelani Police Station. Upon interrogating the two they said that it was the accused who had pushed the deceased into a stagnant pool of water and that the accused had escaped. It may be assumed that the said two were PW7, **Timothy Malinda** and PW2, **Stephen Kimulu Kilonzo**. In his evidence in court PW2 testified that after the vehicle left, he and PW7 proceeded on their way home and only then did they realise that the accused was not with them and they turned back to look for him. On his part, PW7 testified that after helping in removing the car, the driver left with it, but they did not see the accused. However, upon going ahead 100 metres they found the accused being beaten and upon inquiring the reason they were told that the accused had accosted the owner of the car after which the accused ran away. If the evidence of PW2 and PW7 is to be believed, they also heard about the accused pushing the deceased from other people and did not witness the same.

36. As already stated, the only eye witness in this case was PW1. From his own evidence, he did not know the accused prior to that night. On that night, according to him, it had rained while according to PW3, his father, it was still raining. At the time the deceased fell into the ditch as he informed PW3, the deceased was with the accused and two other people. The only source of light was security light. We are not told how bright the lights were.

37. On his part the accused stated that after helping in pushing the vehicle he came across DW2 who invited him for a drink and they went into a pub to drink. Shortly thereafter he was picked from the pub and was accused of having caused the death of the deceased.

38. In his evidence, PW8 while stating that the deceased's death was due to asphyxia, there was no evidence of struggle and the deceased had no injuries.

39. In the case of **Charles O. Maitanyi vs. Republic [1986] KLR 198** the court held that:

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification...The court must warn itself of the danger

of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.”

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

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

41. In my view, considering the prevailing circumstances, the fact that PW1 did not know the accused prior to that date, the number of people who were involved in pushing the vehicle, the fact that at the time the deceased fell into the ditch he was not alone with the accused, lack of evidence as to how bright the security lights were and how far they were, it would have been safer if there was further evidence incriminating the accused person.

42. Whereas the accused’s evidence may not have been fully truthful, the burden was not upon him to prove his innocence. As was held by the Court of Appeal in Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004 expressed itself as hereunder:

“We have perused the entire record of appeal and particularly the proceedings...He [the appellant] may not have been truthful when he said that PW4 summoned him and asked him if he knew about the robbery at the complainant’s home but the burden was on the prosecution to displace his alibi.”

43. 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.”

44. 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.”

45. 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.”

46. In 1997, the Supreme Court of Canada in R vs. Lifchus [1997] 3SCR 320 suggested the following explanation:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is

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

47. 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.”

48. Matavo, J in Elizabeth Waithiengi Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

49. It may well be that the conduct of the accused in demanding for money from the deceased raised a suspicion that it must be him who pushed the deceased into the ditch. However, in Sawe vs. Rep [2003] KLR 364 the Court of Appeal held:

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

50. In this case, the possibility that the deceased could have staggered and fell into the ditch can also not be ruled out considering PW1’s first statement to PW5 that the deceased had fallen into a ditch.

51. 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, this 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 roving 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.

52. Accordingly, I find that the prosecution has failed to prove that the accused person herein, on 1st May, 2012 at Katoleni Market in Machakos District within Machakos County, murdered one **Paul Munyao Musau**. He is accordingly acquitted and I direct that they be set at liberty forthwith unless otherwise lawfully held.

53. Judgement accordingly.

Judgement read, signed and delivered at Machakos this 18th day of June, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muli for the accused

Mr Ngetich for the State

