



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL (MURDER) CASE NO. 47 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN KYALO MUTHIANI.....ACCUSED

JUDGEMENT

1. The accused herein, **Martin Kyalo Muthiani**, was charged with the Offence of Murder contrary to Sections 203 as read with Section and 204 of the **Penal Code Act**, Cap 63. It is alleged that the Accused, on the 26th July, 2014 at Kasuito Area in Athi River District within Machakos County murdered **Joseph Kimuti Ituma** (the Deceased). The Accused person denied having committed this Offence and as such, a plea of not guilty was entered.

2. In support of its case the prosecution called 11 witnesses.

3. According to PW3, **Patrick Mulinge Muinde**, on 20th July, 2014 at 9pm after closing his water vending business, in the company of some young men known as **Vincent, Ndunda** and the deceased herein, they were seated outside the home of PW2 chewing *miraa* (*khat*) and taking spirits which were being sold by PW1. It was his evidence that the deceased was a motor bike operator. The accused then accused then alleged that his *miraa* had disappeared and he started looking for it. When the deceased attempted to leave upon receiving a call saying that he had been called by a customer, the accused insisted that they look for the *miraa* first who restrained the deceased from driving away on his motor bike. The deceased then slapped the accused and the two started fighting after which the accused left. Upon the accused's return, the deceased asked him what he was had and went and held the accused. It was then that the deceased stated that he had been stabbed by the accused and asked that the accused be apprehended. Upon checking PW3 confirmed that the deceased had been stabbed in the stomach.

4. The deceased was then ferried to the Hospital by PW5. While at the Hospital, PW3 received information that the deceased had died. Upon returning to the scene they found the accused being beaten by a mob. After which the accused was taken to the Athi River police station.

5. According to PW3, PW1's home had an outside shed from where she used to sell vegetables and by help of the light from the shed he was able to see as the night was not dark. According to PW3, he knew the accused and his family very well as he used to collect sand from the river. It was his evidence that the three were friends and he never saw the accused and the deceased differ. It was his evidence that at the time of the incident, PW1 was in the house and that the light at the shed was a hurricane lamp. It was his testimony that outside the home they were 7 youths and there were two men inside Grace's home. After the deceased and the accused were restrained, the accused left them taking *miraa* and drinking. However, upon his return the accused stood on the side and the two did not exchange any words until the deceased asked the deceased what he was carrying and grabbed him. When PW3 grabbed the deceased the accused was still standing there though PW3 never saw the accused holding anything. The deceased then fell down and when PW3 was attending to the deceased he heard the others ask the accused where he was going. It was his evidence that the deceased was stabbed on the stomach and his intestines wanted come out and he saw that he was bleeding. He however did not see any hole through his clothes when he removed his clothes to see the wound.

6. In his testimony the lamp in question was a paraffin lamp. According to him, he was not very drunk though both the deceased and the accused were drunk as they had been drinking the whole day. Since he was concerned about the deceased he did not check to see what the accused was carrying and by the time they left with the deceased, the accused was no longer next to the home as he was already being beaten by members of the public.

7. PW1, **Grace Mueni**, a business woman operating a shop (kiosk) testified that on 26th July, 2014 at about 8.30 pm she was at work at her business/kiosk where she was selling vegetables, groceries and spirits and paraffin, when the accused and the deceased, whom she knew, entered and sat down at the sitting place but they did not talk to anyone. She however noticed that the two had soda in plastic bottles in a paper bag, and she continued serving other customers.

8. A woman, PW7, then entered the kiosk and asked the deceased to take her to Kitengela on his motorbike and after a while the deceased

left with PW7 and were followed by the accused. After the deceased and PW7 got onto the motorbike, PW1 heard the accused demanding his *miraa* from the deceased who denied having the accused's *miraa* saying that he was the one who bought it for the accused. An argument then ensued and PW7 left them and took another motorbike. The two then started fighting before the accused was taken away by another young man called Chief but returned after a while and continued arguing.

9. The accused then left and PW1 then entered her house which was next to the kiosk and locked the doors. As she was eating she had someone screaming that he had been stabbed and when she got out, she was asked by PW3 to give him some cloth (*lesso*) as the deceased had been stabbed by the accused. She obliged and gave him the shawl which PW3 used to wrap the deceased and rushed him to hospital on a motorbike. According to PW1, though she saw the deceased on the ground, she did not notice that she was bleeding where he was stabbed. It was her evidence that though it was dark and there was no electricity, she was able to see using her shop light. The accused was at the time being beaten by the people who were there after which he was also put on motorbike and taken to hospital. She then saw an old man called **Mutungu**, PW4, with a knife, the type for cutting vegetables with a plastic blue and red handle which it was said had been used to stab the deceased. It did not have blood but had something that looked like stool from intestines.

10. That night she heard people saying the deceased had died and the next morning the person who took him to hospital on a motorbike confirmed he was dead.

11. According to PW1, she did not know the accused and the deceased very well, but she knew them as her customers and were friends who had never differed before.

12. She explained that that day the deceased and the accused went to her kiosk at 2 pm and they just arrived the two of them chewing *miraa* and that the only person who joined them was the woman who wanted to be taken to Kitengela, PW7. However, at the time they started fighting the woman had left but there were other young men outside, including PW3 who were trying to separate the accused and the deceased and it was then that the accused left leaving behind the deceased, PW3 and one Chief. It was however PW1's evidence that she never witnessed the stabbing since she was inside her house when she had the screams. Upon her coming out, she found the accused being beaten and only saw the knife after the deceased had been taken to Hospital in possession of an old man but did not know where he was coming from.

13. According to PW1, it was the accused who started the fight by asking for his *miraa* and insulting the deceased. The deceased then got angry and got out of his bike and they started fighting. It was her evidence that she did not know the contents of the soda bottles which the accused and the deceased had but insisted that she did not sell to them any spirits or soda. She could not tell if they were drunk and remained at her kiosk after they were taken to hospital.

14. According to her, the knife she saw had not blood but had something that looked like pieces of liver.

15. It was her evidence that by the time she entered her house, neither PW3 nor the said Chief was not there and only met PW3 after she heard the screams and came out.

16. On 26th July, 2014 at about 9pm, PW7, **Janet Mwendu** went to the Club Kwa Kameli to call the deceased whom she wanted to take her to Shell Petrol Station where she wanted to take a *matatu*. At the said Club she found the deceased drunk and he drinking and taking *miraa* with the accused. As they left, the accused demanded that the deceased give him his *miraa* and barred the deceased from leaving when the deceased was about to start the motorbike but the deceased denied having taken his *miraa*. Upon realizing that the two were quarrelling, PW7 decided to take another motorbike and left.

17. The next day PW7 received information from her neighbour that the accused had stabbed the deceased to death. According to PW7 he had known both the accused and the deceased for 3 years and that they were close friends.

18. It was PW7's evidence that the club was full with many people. She stated that there was a solar bulb at the Club hence the place was lit and she saw the accused. She stated that both the accused and the deceased did not have anything and she left when the accused was pulling the deceased off the bike and she did not witness the cause of the death of the deceased.

19. On the same day at about 9.30pm, PW4, **Samuel Mutungu Ndetu**, was in his house with his wife which was next to where the incident took place asleep when he heard the deceased say he had been stabbed. Though he was already in bed, he said that he was not fully asleep. Upon his getting out he found the deceased on the floor outside the veranda of the plot and the deceased said that he had been stabbed and gave him his phone. Other neighbours had come and the people tied him with a *shuka*. Using his light from his phone he checked where the deceased had been stabbed in the stomach but saw no blood as the intestine had come out.

20. After the deceased was taken to hospital, they searched the area with their torches and found a knife which he took and called the community policing officer, PW2, also known as the computer, and handed over the knife and deceased's phone to him. According to him, the handle of the knife had three different colours. It was his evidence that the knife was on the ground though it did not have blood or sand.

21. After that PW4 went to sleep. At around 11-12pm PW2 called him and told him the deceased had died and the police were coming for the knife. While he was outside, he heard that the deceased's friend called **Kyalo**, the accused, whom he knew was the one who had stabbed the deceased. PW4 stated that he saw the accused that day during the commotion and said he should be taken to the police station. He stated that upon receiving the news of the death of the deceased he got up again and was present when PW2 gave the police the knife before he went back to sleep. It was his evidence that the knife was found about 4-5 meters from where the deceased was lying. He confirmed that the accused and deceased were both his friends and he identified the knife in Court as the one he saw.

22. It was PW4's evidence that from where he was staying and where the incident occurred was about 10 meters and it took him about 5 minutes to get to the scene. He found the deceased lying on the floor outside the next house, which home belonged to a woman. It was his

evidence that there were many neighbours at the scene about 10 in number one of them being PW3 who tied the deceased with a *shuka* and took him to hospital. When he got there the deceased was speaking but in a very low voice. In cross examination, he stated that the knife had no blood, intestine or sand and stated that he was the one who took the knife and he did not give it to anyone other than PW2. By the time they got the knife the accused had been taken to the police station though when he arrived at the scene the accused was there surrounded by the young men and was 4-5 meters from where the knife was found. He explained that the plot had only two entrances and the deceased was next to the road while those who took the deceased to hospital used the road to the river. However, the knife was found on the other side of the road which was a village path about 6 meters. It was his evidence that there were many people when the knife was found and that the deceased was on one side of the road and the accused was at the side of the road where the knife was found.

23. PW2, **Andrew Mogoi Omao**, a member of the Community policing was on 26th July, 2014 at 10pm at home in Kasutu village in Athi River when he was called by PW4 who informed him that two young men had fought and one had stabbed another. He proceeded to the scene which was the house of PW1 where he met PW3 outside the home and was handed over a domestic knife by someone who had picked it, whose handle was wooden with a metal blade, brownish in colour. He then called the OCS and told him he had been given the knife. The OCS informed him that he was sending police officers to whom he should give the knife. It was his evidence that the knife had no blood, and looked clean like it had not been used. After 30 minutes the police officers arrived at the scene and he handed over the knife to them. He stated that upon being handed the knife he left the scene and moved about 20 meters away. Though he did not witness the fight, he knew both the accused and the deceased very well having been in the village since 2008. The deceased and the accused were residents of the village and together with them, they used to do odd jobs together. It was his evidence that the relationship between the accused and the deceased was cordial and that they were even staying in the same house. He was however informed by PW4 whom he found at the scene outside PW1's house with the knife, that it was the accused and the deceased who were fighting. He however did not find PW1 and PW3 at the scene.

24. PW2 denied that the knife was blue and stated that the handle was like the wooden top, and looked clean like it had been washed. He insisted that he handed over the knife to the police officers about 20metres away from where he received it and not at his house since he did not go with the knife to his house. He identified the police officers as **Keter** and **Wairimu**. It was his evidence that he did not know what caused the death of the deceased and only relied on what he had been told.

25. According to PW2 by the time he arrived at the scene 20 metres later some people had already left since some took the deceased to hospital. Though he said he could recognise the knife upon seeing it, he could not say that the colour of the knife was red or blue but insisted that it was wooden and painted like the table. He explained that there was light where he was handed the knife by PW4 who informed him that it was the knife that had stabbed the deceased.

26. Upon being recalled he clarified that the handle of the knife had many colours and he identified the same in Court.

27. PW5, **Josephat Kaval Makoma**, was the motorcyclist who took the deceased to the Hospital. According to him, on 26th July, 2014 at about 11.00 pm he was on his way home when he came across a group of people who called him and directed him to take the deceased who was known to him as a fellow motorcyclist to the Hospital. It was his evidence that it was at night and though there was moonlight, there was no other light but you could identify somebody. He did not notice where the deceased was injured and took him to Shalom Hospital in the company of PW3 who supported him. It was his testimony that the deceased was not talking and upon arriving at the hospital, he was told by PW3 the deceased had a knife in the stomach. After dropping the deceased at the Hospital he went to sleep but the following day he was informed by his brother that the deceased had passed away.

28. PW5 however confirmed that he knew both the accused and the deceased who were close friends. He however did not find the accused at the scene that day but only saw the motorcycle carrying him going away and was informed that he had been taken to the police.

29. PW6, **Margaret Achieng**, only witnessed the accused being carried a cyclist and they left.

30. PW10, **Elizabeth Waithera Oyiengo**, a government analyst on 13th August, 2014 received from PC Daniel Nyatiki of Athi River police station items vide exhibit memo dated 13th August, 2018. The said items were blood sample in a bottle indicated as deceased's and a knife in khaki envelope and it was desired she examines the items and determine the presence of any blood stains. On examination the knife was stained with blood of human origin but did not generate DNA profile. While the DNA profile was generated from the blood they were unable to match it with deceased's. It was her evidence that the knife was slightly stained and with naked eye you may not know that it was blood. She explained that at times the blood may be very little to meet the threshold of DNA or if the object is subjected to strong heat or detergent it may affect the DNA. After her examination, she prepared and signed a report which she exhibited.

31. In cross-examination she reiterated that since the blood could not produce a profile she could not state whether it was the deceased's and that only DNA could determine the person from whom the blood originated.

32. PW11, **Dr. Peter Muriuki Ndegwa**, on 4th August, 2014 at Athi River Shalom Community Mortuary, performed post-mortem examination on the body of the deceased. According to him, body was of male adult African in bloodied clothes of fair nutritional status, slim and tall. Externally, abdomen was bandaged and there were two penetrating wounds below the rib cage left averaging 2 cm long from where abdominal contents were protruding. His opinion was the cause of death was haemorrhage due to abdominal penetrating trauma. He prepared and signed a report which he exhibited.

33. PW8, **Sgt Gladys Wairimu**, a police officer attached to Athi River police station was, on 26th July, 2014 on patrol duty with a colleague, **PC Keter**, when at 9.00 pm they were called by PW9 who told them there was a person at Shalom hospital who had been stabbed. They proceeded to the said Hospital where we found the deceased still breathing. They also found the accused who had been beaten by a mob. From the Hospital, led by a neighbour, PW2, they proceeded to the house where the incident took place where PW2 then gave them a bloodstained kitchen knife with plastic handle. The house where they were led by PW2 was within the compound where the incident took place. After the treatment of the accused, they took him into custody since he was not seriously injured after which they started

investigations. She however clarified that she was not the investigating officer. She identified the said knife in court.

34. In cross-examination she stated that when they visited the accused's house which was shown to them by PW2, they did not find anything inside. While she insisted that the knife they were given was bloodstained, she denied that it her who wiped it. She confirmed that she was the arresting officer having arrested the accused at the hospital based on what the witnesses said.

35. PW9, **Ip Boniface Mwangi Wachira**, one of the Investigating Officers, testified that he was the Ag. Deputy OCS Athi River police station and on 26th July, 2014 they were on patrol along Mombasa Nairobi road when they received information from the OCS that there was an incident at Kasoutu and that the victim was taken to Shalom hospital. Accompanied by PW8, **Muli** and **Keter**, they proceeded to Shalom where they were informed that someone had been taken with stabbed injuries and died shortly. He found the body on a stretcher about to be removed to the mortuary. He observed stomach injuries. He was informed that the person was called **Jose**, the deceased. The accused who was also injured was taken with the deceased to the Hospital having been injured and was in the process of being treated. They effected a re-arrest and took him into custody.

36. According to their investigations, the knife used in stabbing was found at the scene and they sent some of the officers to collect the knife and returned with the knife which was a home plastic kitchen knife, which was later handed over to him as the investigating officer. It was his evidence that the knife was sharp but had no blood. It was clean and not bloodstained and he produced the same in Court.

37. While in the course of recording statements and collecting evidence he was transferred and handed over the case. It was his evidence that he visited the scene the same night and also the following day and prepared a sketch plan which he produced.

38. It was his evidence that the nearest structure to the scene was semi-permanent which had not electric light and had no security bulb. He was however unable to recall if the permanent structure had electric light.

39. When placed on his defence, the accused testified that the deceased was his friend and on 26th July, 2014 between 8-9pm he was at a Club called Kwa Kabesh at Kasuito in Athi River. It was his evidence that they were 10 in number including the deceased and they were chewing *miraa* and drinking alcohol. While there a lady customer went and told the deceased who was a bodaboda rider (motorcyclist) to take him to Makadara. The deceased then got up with the *miraa* and went outside where his motorbike was. The accused followed him and asked him why he was going away with the *miraa* and the deceased told him to go back and drink. By that time the deceased had already boarded the motor bike with the said customer. The deceased then alighted and hit the accused at which point they started fighting. The people inside the club then came out and separate them. It was during the time when they were being separated that the accused heard the deceased saying that he had been stabbed. At that time they were both lying separately on the ground. The deceased was then taken to Shallom Hospital where the accused was similarly taken having been injured by the people who were separating them. It was the accused's case that the people inside the club were the deceased's *boda boda* colleagues.

40. The accused denied involvement in the deceased's death and stated that he saw the knife in court for the first time. According to him, during his fight with the deceased, no one had any weapon and he did not know how the deceased sustained his injuries. It was the accused's evidence that though they were drunk they were not too drunk. He insisted that the deceased had been a close friend of his for 5 years. He denied that he returned to the scene after being separated since none of them left the scene.

Determination

41. The prosecution's case in summary is that on 26th July, 2014, the deceased and the accused who were close friends were drinking and chewing *miraa* together at a Club when PW7, a customer asked the deceased to take her to catch a vehicle. As the deceased left with PW7, the accused followed them and demanded that the deceased returns his *miraa*. Annoyed, the deceased hit the accused and a fight ensued. After being separated the accused left briefly and returned to the scene. He was however accosted by the deceased who demanded to know what he was having. Once against the two got themselves in a fight and it was during the same that the deceased was head saying that he had been stabbed.

42. I have considered the evidence on record. 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.

43. 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.”

44. 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.

45. In this case, there was no doubt as to the fact of death of the deceased. Even the accused did not raise any doubt as regards the death of the deceased. PW11 who conducted the post mortem examination on the body of the deceased clearly testified as to the cause of the deceased's death. I therefore find that the fact of the death of the deceased was proved beyond reasonable doubt.

46. As regards the cause of death, the post mortem report showed that the deceased met his death as a result of haemorrhage due to abdominal penetrating trauma. It is therefore clear that the deceased was killed.

47. 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 clear evidence as regards whose action caused the death of the deceased. The evidence before the Court was that the deceased and the accused who were close friends and even stayed in one house had been drinking for long hours together. However, were several hours later, a disagreement arose apart between them after the accused alleged that the deceased was going away with the *miraa* which they were chewing. A fight then broke out between the two but they were separated after which the accused left the vicinity briefly. When he returned, the deceased once again picked a quarrel with him demanding to know what he was having. No one however saw the accused carrying anything. The deceased then accosted the accused and once again a fight ensued. It was during the said fight that the deceased was heard screaming that he had been stabbed. According to the accused, that scream was made when the two were being separated by the deceased's colleagues. That there were many people at the scene is not in doubt as the evidence on record is clear that there were at least 10 people present.

48. The prosecution's case seems to be that the deceased's fatal injuries were caused by a knife, Exhibit 1. According to PW4, **Samuel Mutunga Ndeto**, he was the one who recovered the said weapon which he eventually handed over to PW2. It was however his evidence that the knife had no bloodstains.

49. The question for determination is whether Exhibit 1 was the murder weapon. According to PW10, the Government Analyst, the knife which was taken for examination was slightly stained with human blood but did not generate DNA profile. She was however unable to pin point the exact reason for this. What is however intriguing was that the blood sample which was allegedly obtained from the deceased did not match the deceased's DNA profile.

50. It is therefore clear that Exhibit 1 could not be conclusively be proved to have been the murder weapon since there was no link between the said knife and the deceased. Without that proof, it is difficult to connect the accused with the said weapon leave alone connecting the knife with the fatal injuries sustained by the deceased. From the post mortem report, the only possible conclusion one can arrive at is that the fatal wounds could possibly have been caused by a sharp object. That however is not the same thing as saying that they were cause by the knife which was exhibited.

51. 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.”

52. 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.”

53. 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.”

54. 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.”

55. 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.”

56. Mativo, J in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

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

57. 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.”

58. As already noted above, the only evidence linking the accused with the murder of the deceased emanated from PW3. PW3 could not however positively testify as to whether the accused was in possession of the weapon that caused the deceased’s death. It would seem that the suspicion on the accused was due to the fact that he allegedly left the scene after the first fight and returned later. Even then no one saw him with any weapon.

59. I agree with the submissions of defence that there was no direct evidence linking the accused with the death of the deceased. It therefore follows that the court must rely on the circumstantial evidence if the case against the accused is to be proved. 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. 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.”

60. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In Sawe –vs- Rep [2003] KLR 364 the Court of Appeal held.

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the

exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

61. 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.”

62. 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.”

63. 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.”

64. 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 and Teper vs. Republic [1952] AC 480 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.”

65. In this case the only inculpatory fact is that the accused left the scene briefly and returned thereat. In my view considering the fact that the accused and the deceased were close friends staying in one house and they had been drinking together for the better part of the day does not necessarily mean that by returning to the place where his friends were he was scheming to inflict injury on the deceased. In my view these facts cannot be said to be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

66. In my view the evidence linking the accused with the murder of the deceased in light of his own explanation as to how the deceased sustained the injuries in question leaves me in doubt as to whether the death of the deceased was caused by the accused. In my opinion there exist other co-existing circumstances which do weaken or destroy that inference such as the role played by the other people and whether the injuries could have been caused by objects other than a knife.

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

68. Section 206 of the *Penal Code* on malice aforethought states:-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

69. The law is however clear that the burden is on the prosecution to prove that unlawful act was committed with malice aforethought. In this case none of the witnesses testified as to the existence of any bad blood between the deceased and the accused. According to the witnesses the accused and the deceased were close friends and housemates and that day they were drinking and chewing *miraa* together. It would seem that the disagreement between the deceased and the accused was as a result of taking one too many. The deceased seemed to have been in a

belligerent mood. In those circumstances, I am unable to find that malice aforethought has been proved.

70. While some people may find accused's defence unconvincing as was held in **Boniface Okeyo vs. Republic [2001] eKLR**:

“Before we conclude this judgment however, there are two other matters which, though not raised by the appellant's counsel, have caused us considerable concern in this appeal. These arise from the judgment of the High Court on first appeal where it said as follows:

"the appellant himself narrated how he was arrested. He did not raise any serious defence to the charge except to state that he was not guilty."

In another part of the judgment the High Court further said as follows:

"the appellant had full opportunity and did cross-examine the witnesses but no crucial evidence arose out of his cross-examination"

We are satisfied that in the two passages, the High Court on first appeal seriously fell into error by appearing to shift the burden of proof to the appellant. It is trite law that in criminal cases the burden of proof rests throughout on the prosecution to establish the guilt of an accused person beyond reasonable doubt save in few exceptions of which this was not one. The appellant had no duty in law to raise a serious defence, nor did he have a duty to elicit crucial evidence by cross-examination of prosecution witnesses. We are satisfied that the burden of proof was, clearly, placed on the appellant and this is another reason to fortify the conclusion we have reached that the conviction was unsafe and cannot stand.”

71. Having considered the totality of the evidence adduced in this case, I find that the prosecution has failed to prove the case against the accused beyond reasonable doubt that the accused murdered the deceased. Accordingly, the benefit of doubt must go to the accused. In the premises, he is acquitted of the charge of murder and is set at liberty forthwith unless otherwise lawfully held.

72. It is so ordered.

73. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Judgement read, signed and delivered in open Court at Machakos this 29th day of September, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Nyaata for the accused.

Mr Ngetich for the State

CA Geoffrey