REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 2 OF 2016

REPUBLIC.....RESPONDENT

VERSUS

CHARLES KIMANI MBUGUA.....ACCUSED

JUDGEMENT

Charles Kimani Mbugua, the accused herein, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. It is alleged that on the night of 25th November 2014 at Kambi Moto Centre within Kajiado County murdered John Kihara Njau hereinafter referred as the deceased. During plea, accused denied the offence. At the trial he was represented by Learned Counsel Ms Kwena while the state case was prosecuted by Mr. Alex Akula the Senior Prosecution Counsel.

Background of the Case

The state called seven witnesses together with a sketch plan of the scene and a post mortem report. The summary of the evidence by the prosecution witnesses can be appraised as follows: The evidence of the **Francis Kipsang (PW1)** was that on 17th December 2014 while at Kandisi Police he received information from Sgt. Tumo that a suspect of murder whom he identified as the accused has been spotted at Kambi Moto shopping Centre. In response to the call he travelled to the Centre and effected arrest.

PW2 Simon Njau Kihara testified as the son of the deceased that he learnt of his father's death from the sister's mobile telephone call. He rushed to the scene at Kambi Moto shopping centre where he confirmed that the deceased had sustained multiple injuries. With the help of a friend he managed to take the deceased to Jamii Hospital where on physical examination the clinical officer referred them to Mbagathi Hospital. On arrival at Mbagathi he was however referred to Kenyatta National Hospital for further management. PW2 also testified that it was at Kenyatta Hospital where he underwent treatment as an admitted patient but on 12/12/2014 he succumbed to death.

PW3 Isaac Ruo evidence was to the effect that on 25th November 2014 he passed through one of his bar and restaurant at around 10pm. Upon arrival he noticed that one of his customers whom he came to identify later as the deceased person was very drunk. He decided to call for help from a boda boda operator to assist in ferrying him home. However, the motor cycle operator in assessing the situation and level of his intoxication he declined to carry the deceased. PW3 further stated that it came to his knowledge that the accused had to secure a place for the deceased to spend a night. In his evidence PW3 realized that next to the bar and restaurant one of his friend and mason – Charles Kimani, the accused could be requested to host the deceased for the night. In company of the motor cycle riders they walked the deceased to the Charles Kimani's house who accepted the request of having the deceased spend a night at his house. It was PW3 testimony that the following day he became aware that he deceased had been discovered injured and his children including PW1 had taken him to the hospital.

The evidence of PW3 further testified that the police came in knocking wanting to know and trace the movements of the deceased on 25th November 2014. While in the presence of the police PW3 testified that he showed them the house of Charles Kimani (accused person) where they left the deceased on the night of 25th November 2014. But no sooner had they entered the house PW3 told the court that they noticed evidence of blood stains spread within the house.

On being cross-examined by Ms. Kwena the defence counsel, PW3 gave a history and sequence of events which culminated in him escorting the deceased to Charles Kimani's house. In answer to the events of the said night, PW3 narrated that Charles Kimani Mbugua was also a customer in the same bar and well known to him prior to this incident.

According to PW3, the accused was also drunk but making a lot of noise and causing disturbance to other persons. He was concerned about the situation getting out of control he ordered him out of the bar. As the deceased left later and unable to ride the motor cycle PW3 decided that he takes him to Charles Kimani's house which he confirmed he did. In the evidence of PW3 the deceased entered the house upon permission from Charles Kimani. In the meantime, he left for his home.

The evidence from **PW4 Stephen Kimani** was to the effect that Charles Kimani Mbugua was his tenant in a house located at Kandisi area. PW4 confirmed that Charles Kimani – rented the house for three and half months including the fateful day on the 25th November, 2014.

PW5 Geofrey Ng'ang'a's evidence is that on 25th November 2014 he was one of the motor cycle riders called to PW3's bar to carry the deceased home. PW5 however could not assist the deceased because he was very drunk to take a ride on his motor cycle. That same night according to PW5 because of the deceased drunken state in company of PW3 they took him to Charles Kimani's house next to the bar and restaurant. PW5 stated in court that when they arrived in the house of Charles Kimani he willingly opened accepted the deceased to spend a night. The following day on 26th November 2014 he was to hear that the deceased had been found physical injuries on side of the road - next to the house he was taken to spend the night.

As this matter escalated to be a police case PW5 was asked to record a statement on the role he played on the fateful night.

On cross-examination by the Defence Counsel PW5 testified that the reason he did not escort the deceased home was because of his inability to walk nor use the motor cycle. He also stated that the suggestion to have the deceased sleep over at Charles Kimani's house came from PW3. As he did not have any reason to object. PW5 stated that he agreed to accompany PW3 to walk the deceased up to Charles Kimani's house. It is in the evidence of PW5 that upon knocking the door, Charles Kimani, let in the deceased freely.

PW6 PC Henry Kepagetich formerly attached to Kandisi Police Post testified on the role he played in booking the assault report made by one Simon Kihara (PW2). In the testimony of PW6 the victim had already been taken to the hospital for medical treatment. In the subsequent happenings PW2 filed a further report that the victim who was his father had passed on while undergoing treatment. This made PW6 to go to the scene where he a sketch plan. The sketch plan was admitted in evidence as exhibits 2(a) (b).

PW7 Dr. Oduor Johanson, the Pathologist testified that he examined and conducted a post mortem on 18th December 2014 involving the deceased body. John Kihara Njau at Kenyatta Hospital Mortuary. From PW7 positive findings the deceased had suffered injuries to the right parietal scalp, right subrogated haematoma, right parietal cortical subarachnoid haematoma and brain contusion.

PW7 attributed the cause of death to severe head injury due to assault and brain atrophy suggestive of Alzheimer's disease.

At the close of the prosecution case Charles Kimani Mbugua, the accused denied the offence and the allegations made by the prosecution witnesses that the deceased spent a night on 25th November 2014 at his house. His version was that on 25th November 2014 he spent part of the period between 7-9pm hours at PW3's bar. In the course of that said evening he saw PW3 enter the bar. In the testimony of the accused PW3 was a person known to him because of prior engagement of working for him but never complied paying for work done. The following day he continued with his usual work schedules but heard that someone had been found injured at Kambi Moto Shopping Centre. He never bothered on the issue until the 12th December 2014 when he was arrested by police officers that he had murdered the deceased. He denied any knowledge or doing anything to implicate him with the death of the deceased.

Submissions by counsel for the accused

Ms. Kwena, the defence counsel filed final submissions of the case. The main contention of Ms. Kwena's submissions was to the effect that the accused was arraigned before court on mere suspicion. Learned Counsel asserted that the investigations conducted was inadequate and failed to place the accused at the scene of crime.

Ms. Kwena submitted that the prosecution witnesses PW3 and PW5 evidence consisted of contradictions and inconsistencies which was fatal in establishing the ingredients of the offence. The Learned Counsel argued and submitted that the circumstantial evidences did not lead to irresistible inference that the accused killed the deceased. Learned Counsel placed reliance on the following cases. **Judith Achieng Ochieng VS Criminal Appeal No. 28 of 2006 Joseph Ndung'u Kimanyi VS Republic Criminal Appeal No. 22 of 1979.**

Learned Counsel submitted and ended with a hypothesis question whether any other person who had the opportunity to commit this crime other than the accused? In reiterating the evidence adduced the so far touching on the allegations against the accused, Learned Counsel urged this court to evaluate the following scenarios:

It is possible that the deceased in his intoxicated mind could have wandered off out of the room and met his attackers outside. Secondly, it is possible that the deceased having slept and regained sobriety decided to leave to get to his house early and unfortunately he met his attackers by the road. Thirdly, is it possible that the door had not been secured well and this place being crowded with bars and at junction road, some criminals might have pulled the deceased out of the open room, ransacked his pockets and caused him the deadly blow? Fourth, it is also possible that PW3 and PW5 in their bid to get the deceased out of the bar because it was closing time, removed him and threw him on the tarmac, hitting his head on the road, causing the injury. Fifth, or was the deceased hit or attacked by those who revealed the news to the sister of PW2.

According to the Learned Counsel all these facts coupled with lack of motive cannot constitute circumstances for this court to draw an irresistible inference of guilt against the accused. The option available therefore is to resolve the doubt in favour of the accused and order for an acquittal.

Submissions on behalf of the state

The Learned Prosecution counsel Mr. Akula submitted that PW1-PW7 evidence supports proven facts beyond reasonable doubts that the accused committed the offence.

Learned Prosecution Counsel contended that in the night of 25th November 2014 the deceased was drinking at PW3's bar. The owner of the bar PW3 came in checking on or about 10pm and found him intoxicated. In addition, the accused was also present quite drunk and creating disturbance to other customers. In order to bring calm to the bar Learned Counsel pointed out that PW3 ordered the accused out of the bar.

The Learned Prosecution Counsel argued and submitted that PW3 and PW5 testimony is abundantly clear that they escorted the deceased to accused house to spend a night.

According to Learned Prosecution counsel evidence was adduced that the deceased was found in location very near to the house where PW3 and PW5 had allegedly left him to spend the night. The deceased this time been found with multiple injuries to the head. From the perspective of Learned Counsel and his arguments he urged the court to find by holding that the accused person was responsible for the death of the deceased.

Analysis and determination

I have considered the evidence by the Prosecution and Defence. The highlights of the submissions and arguments put forth by Learned Counsels for the state and the accused have also been taken into account.

The burden of proof in cases of this nature as an illustrated in the cases of **Miller Versus Minister of Pensions 1947 ALLER and Woolmington Versus DPP 1955 AC** Lies with the prosecution and that they must prove the case beyond reasonable doubts.

In the same principle if there is any doubt as to how or who committed the offence the benefit of doubt should be resolved in favour of an accused person.

On the evidence before me I propose to deal with the issues based on the following structure. To begin it is to discuss the nature of the evidence and the threshold that must be discharged by the prosecution for Liability to attach against the accused person.

Under section 203 of the Penal Code, the offence of murder is defined as: ***"Any person who of malice aforethought causes death of another person by unlawful act or mission is guilty of murder"***

There are therefore three ingredients of the offence to be proven beyond reasonable doubt in order to secure a conviction. They are: (a) **The death of the deceased, (b)That the death of the deceased was unlawfully caused, (c) That in causing the death the perpetrator had malice aforethought.**

Whether the death was unlawfully caused.

As stated in the case of **Rex v Guzambizi S/O Wesonga 1948 EACA 65:** all homicides are presumed unlawful unless excused by law like those committed in execution or advancement of justice, in reasonable defence of self or other person, property or as a result of natural causes or an accident. (***See also Criminal Law 2nd Edition by William Musyoka on page 299 paragraph 122)*** some of the circumstances the cause of death may be manifested are defined under section 213 of the Penal code. The section defines casing death to include acts which are not immediate or sole causes of the death under the following situations:

> **a) The accused inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.**
>
> **b) He inflicts injury on another which would not have caused death of the injured persons had submitted to proper medical or surgical treatment**
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> **c) He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death.**
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> **d) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other person.**

From the foregoing provisions the unlawful act to cause death may be transferred where an offender through a deliberate act like assault inflicts another human being which subsequently causes death. That through unlawful and dangerous acts causes physical harm which inevitably causes the deceased death.

In applying the provisions of section 213 of the Penal Code the provision has to satisfy the threshold that the accused did an act that was substantial or significant cause of death or which substantially contributed to it. Secondly, if at the time the deceased was already suffering from a disorder or disease for which the accused was not himself responsible, it is enough that the accused did an act which hastened the death.

In this specific case, the deceased was alive on 25th November 2014 up to around 10.00pm. as stated by PW3 and PW5 being some of the last people to be with the deceased he had no visible physical injuries. In the morning of 26th November 2014, the deceased was found lying on the road side but with multiple injuries on the head. He was rescued by family members notably PW5 who took him to Kenyatta National Hospital. That is the medical facility the deceased was admitted and later died on 11th December 2014.

Dr. Oduor Johanson's post mortem revealed that the deceased suffered severe injuries to the scalp and the head. PW7 Dr. Oduor made a finding that the deceased died as a result of the head injury due to blunt force due to assault.

Secondly, brain autopsy, the relevant chain of evidences in brief are that the deceased who was having alcoholic drinks was taken out of the bar with the help of PW3 and PW5 at about 10pm on 25th November 2014. Thereafter he was found unfit to ride a motorcycle operated by PW5 due to his level of toxification.

Further, it is the evidence of PW3 that when he entered the house of the accused he could see the presence of blood stains spread within the house thus there is a prima facie evidence in terms of proximity opportunity, cause and time. That there is a correlation between the period the deceased was entered into the house of the accused and the obvious injuries on his head.

As far this second ingredient is concerned the deceased did not die from an accident, natural causes or any of the actions permitted by the constitution or the law. The Prosecution evidence has proved that the death of the deceased was unlawful due to sustain assault inflicted to the scalp.

The third ingredient refer to what is commonly defined as malice aforethought. Malice aforethought is the mensrea or the intention required to secure a conviction under section 203 of the Penal Code. The scope of the doctrine of malice aforethought is well captured under the provisions of section 206 of the Penal Code as follows.

> ***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 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. An intent to commit a felony.***

The superior courts have given interpretation to the circumstances envisaged on malice aforethought under section 206 of the Penal Code.

In the case of **Virsasingh Versus State of Punjab AIR 1958 SC 465** the Supreme Court referring to the provisions of section 300 with similar provisions with our section 206 of the Penal Code stated as follows on the intention to cause death as follows:

> ***"Once these four elements are established by the prosecution and of course the burden is on the prosecution throughout, the offence is murder under section 300. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two) it does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be proved, the rest of the inquiry is purely objective and the only question is whether as a matter of purely objective in reference to the injury is sufficient in the ordinary course of nature to cause death. No one has a license to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of the kind, they must face the consequences and they can only escape if it can be shown or reasonably decided that the injury was accidental or otherwise unintentional."***

In our own Court of Appeal in the cases of **Republic Versus Godfrey Ngotho Mutiso 2008 eKLR and Morris Alioch Versus Republic Criminal Appeal No. 47 of 1996 relying** upon the celebrated case of **the Eastern Court of Appeal in Republic Versus Tubere S/O Ochen 1945 12 EACA 63** the court made the following observations.

The duty of the court in defining whether malice aforethought has been established has to consider "***the nature of the weapon used, the manner in which it was used, the part of the body and nature of injuries inflicted, the conduct of the accused before, during and after the offence***."

It was further stated in the same court in Godfrey Ngotho case as follows:

> ***"The injury on the head was grievous. The deceased head was hit against the wall and as a result the deceased bled through the mouth. Can it be said that malice aforethought can be inferred from the injuries"***

In addition, in the case of **Karani and three others Versus Republic 1991 KLR 622** the same court laid down as follows:

> ***a) Malice aforethought is deemed to be manifested from the nature of the injuries caused on the deceased and the weapon used. In the recent case of James Masomo Mbatha Versus Republic 2015 EKLR*** the court held this:
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> > ***"In the present case the sheer force of the wounds on the deceased are indicative of malice aforethought. As discussed in the case of Republic Versus Ndalamia and two others 2003 KLR 638 the court held that there was sufficient proof of malice aforethought as defined in section 206(b) of the Penal Code where the accused persons beat the deceased violently and persistently inflicting injuries on him which caused his death".***

It is abundantly clear from the above elements that evidence under section 203 of the Penal Code the prosecution has first to prove that there was an intention of causing grievous bodily harm. Secondly the injury slated to be inflicted on the victim is sufficient to cause death.

It is imperative to note that the accused denied killing the deceased. From the record there is no eye witness to the murder. The case for the prosecution is purely circumstantial. In the case of **Musli Tulo Versus Republic 2014 eK**LR the court of appeal held as follows: "**~The evidence linking the appellant to that offence is circumstantial we must therefore closely execute the evidence on record not only as**

our normal duty as the first appellate court to arrive at our own conclusions, besides to ascertain whether the record evidence satisfies the following requirements:

i) The circumstances from which the inference of guilt is sought to be dream, must be cogently and firmly established

ii) Those circumstances should be of adequate tendency pointing on 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 no else. In **Musoke v Republic 1958 EA 715** the court citing with approval the classic case of **Temper v Republic 1952 ALLER 480** held as follows:

> ***"It is also necessary before drawing the reference of accused's guilt. From circumstantial evidence to be sure that there are no other co-existences which would weaken or destroy the inference."***

It follows from above decisions that the case for the prosecution on circumstantial evidence must be examined as a whole in order to draw an inference against the accused person.

It is that chain of events which primarily this court analyse in reference to the facts of this case. I have closely examined the evidence of PW3 and PW5. These two witnesses are ones who picked the deceased from the bar where he had been drinking alcohol.

Apparently the deceased was already in a state of intoxication incapable of walking to his house. That their objective was to have the deceased driven home by the motor cycle rider PW5 but this was not to be due to his inability to ride and control himself on top of the motor cycle. PW3 and PW5 refer to the dialogue they had of finding an alternative accommodation with the accused. The accused was no stranger to PW3 because he had previously worked for PW3 on various construction assignments. PW3 and PW5 categorically refer to the request made to the accused to accommodate the deceased temporarily for the night which apparently was voluntarily accepted. That is the last location PW3 and PW5 left the deceased in the house of the accused.

The next appearance involving the deceased was at the road side with evidence of physical injuries on his head. The last person in this case who agreed to host the deceased when still alive without any physical harm was the accused. How the deceased found himself on the roadside the following day on 26th November 2014 cannot be accounted for by the accused in his answer to the prosecution case.

In **Ndinguri Versus Republic 2001 EA 179 the court of Appeal** considering the facts of the case observed interalia that the appellant was the last person to be seen with the deceased and the deceased body was later retrieved from the appellant's latrine. He was unable to give a plausible explanation of how he and the deceased ***parted (See also scholarly text on Criminal Law Reprint 2016 Law Africa by William Musyoka J) at Page 309 at paragraph 2.***

From the testimonies of PW2 who first arrived at the scene the deceased was bleeding from the ears, nostrils and breathing with difficulty. The clothes on the body of the deceased were blood stained. PW3 further confirmed that on visiting the house of the accused with police officers there was evidence of blood stains spread within the house.

This last seen evidence, the injuries on the deceased the following day circumstantially links the accused with the murder of the deceased. Under section 111 (1) and 119 of the Evidence Act a stability rebuttable presumption exists. In this case it exists against the accused person when the prosecution has discharged the burden of proof beyond reasonable doubt. The two sections stipulate as follows:

> ***"Section 111(1) when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from. Or qualifications to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.***
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> ***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution whether in cross-examination or otherwise, that such circumstances or facts exist. Provided further that the person accused shall be entered to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence. Section 119: the court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events. I honour counsels and public and private business in their reaction to the facts of the particular case".***

In the present case the accused had a rebuttable burden to explain earlier how the deceased died, what time he checked out of his house or how he came to find himself on the roadside at Kambi Moto Centre. The accused did not delve into this aspect of the deceased leaving his house by the force of evidence by Pw3 and Pw5 with regard to their interaction with the accused on the fateful night is a chain of events from the time the deceased was walked out of the bar. In the sequence of events the deceased was hosted for the night by the accused. It is appropriate to state that Pw3 and pw5 positively identified the accused as the one who admitted the deceased into his house at their request. There is credible evidence from PW3 and PW5 interacting with the accused in the presence of the deceased. The accused denial concentrated on the other relationship between PW3 when he worked for him but failed to complete payments. That evidence did not fall within the scope of section 111(1) and 119 of the Evidence Act to controvert the prosecution case.

The two witnesses PW3 and PW5 inspired confidence their testimony was truthful, reliable and cogent. During the hearing, PW3 and PW5 were subjected to rigorous cross-examination by the defence counsel. The last seen piece of evidence coupled with the presence of blood stains streams in the accused's house creates a correlation with the injuries on the deceased's body. There are no discrepancies on the statements of PW3 and PW5 to warrant this court case a doubt as to its reality and reliability.

On careful examination of the responses and on examination and cross-examination the two witnesses were candid in explaining the circumstances of this offence. As articulated in the persuasive authority from the **Supreme Court in Bhadra J. Versus State of J. & K 2002 & SCC 45** it was held.

> ***"The last seen mainly comes into play where the gap between the rules of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small. The possibility of any person other than the accused being the author of the crime becomes impossible."***

In the present case going by the above principles the sequence of events from the moment the deceased was taken out of the bar into the house of the accused nothing has come up to break the chain to occasion an intervening factor to weaken the Prosecution case. This charge and evidence is purely anchored on circumstantial evidence which is well settled in our Criminal Jurisprudence.

Secondly, on brain trauma applying the principles in **Tubere S/O Ochen Versus Republic, Godfrey Ngotho, James Masomo (Supra)** the perpetrator targeted the vulnerable part of the body. The injury was severe. The use of force as deduced from the post mortem was excessive. The deceased was moved from the actual scene to the road to make it appear the attack happened elsewhere other than the house of the accused. Through the blunt murder weapon was not recovered. The presence of streams of blood in the house of the accused renders credibility to the prosecution evidence that the house of the accused was the actual scene of inflicting harm.

Malice aforethought as defined under section 206 (a) and (b) of the Penal Code has been manifested through the evidence by the prosecution. The fatal injuries form part of the cumulative effect to satisfy this court that his death was caused by unlawful acts of assault accompanied with malice aforethought. It is for this reason I am satisfied that the prosecution has discharged the burden of proof beyond reasonable doubt for the offence of murder contrary to section 203 of the Penal Code which I hereby find him guilty and convict him accordingly.

SENTENCE

In this case the court found you guilty of the offence of murder contrary to Section 203 as punishable under Section 204 of the penal code. The summary on this violent assault occurred are well illustrated in the body of my judgement. The pathologist Dr. Oduor opined that the cause of death was head injury due to blunt trauma due to assault. The passage of time between the date and time the deceased was seen alive and when his body was discovered rendered cogent circumstantial evidence which positively place you at the scene of the crime. In my valuation the nature of the murder was heinous, and cruel which must have occurred to an innocent victim who was said to be in a state of intoxication incapable of any defence mechanism against his assailants. There is no evidence that while committing the offence you were under any influence of drugs or mental disorder.

Mitigation

On your behalf Ms Kwena urged this court to consider the following factors:

a) You are currently at your prime age of 47 years

b) You have been in remand custody for three years

c) This case is alcoholic related and must have contributed to the commission of the offence.

d) You are remorseful and regret the incident

e) You are a family man with children looking up to you for support and maintenance.

Based on this factors learned counsel invited this court to consider a non-custodial sentence in your favour.

Victim Impact statement

The victim impact statement was given by one Simon Njau Kihara a son to the deceased. In his testimony he described briefly the psychological trauma and loss of the head of the family unit by virtue of this unlawful act committed by you. For the victim justice can only be seen to be done if appropriate sentence is passed against you.

On the part of the state Senior Prosecution Counsel Mr. Akula informed this court that you have no previous criminal record but dwelt more on the aggravating factors present as deduced from the facts of this case. Learned prosecution counsel urged this court that in the event the court doesn't exercise discretion to impose a death penalty long custodial sentence will be appropriate to enable you be rehabilitated to be a good citizen of the republic.

Having reviewed the evidence and submissions made by both counsels on mitigation and aggravating factors of this offence, and further taking into account the victim impact statement I proceed to render verdict on sentence as follows: The position in law as to applicability of death sentence as of now is settled following the supreme court decision in the case of ***Francis Muruatetu and another v Republic Petition No. 15 of 2015 (2017) eKLR.*** The court declared that the mandatory nature of the death penalty to be unconstitutional. This case is binding on this court in so far as Section 204 of the penal code is concerned.

According to the facts of this case I find the following to be aggravating factors:

1. The deceased came to be accommodated in your house by virtue of the trust Pw3 and Pw5 had in you that you will be able to take care of him pending his travel to his house the following day.

2. As evidence would show you breached this trust by assaulting the deceased which injuries led to his death.

3. By targeting one of the most venerable part of the deceased body there is clear manifestation that your intention was to cause death or serious grievous harm, unfortunately for the deceased death was the end result.

4. There was direct evidence from the prosecution witnesses Pw3 and 5 that the deceased was intoxicated to a level where his body faculties were impaired and could not even be in a position to defend himself in the event of an attack. It therefore follows that the sustained assault against him was an easier prey for you in absence of any defence on his side.

When passing sentence against you I have taken into account the mitigating factors, the pre-sentence report which gives the detailed report on your personal circumstances but in my view for this offence aggravating factors outweigh any mitigation or positive indicators contained in the presentence report. One key factor which the court should not lose sight of is the period you have been in remand custody awaiting trial and conclusion of your case. In the decision I am about to make that period is a credit to the order on sentence against you.

The upshot in punishing you for this offence and your specific involvement I sentence you to 20 years imprisonment.

14 days right of appeal explained.

Dated, delivered and signed in open court at Kajiado on 23rd day of March, 2018.

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R. NYAKUNDI

JUDGE

Representation:

Ms. Kwena – present

Mr. Akula for Director of Public Prosecutions present

Accused – present