



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL CASE NO. 22 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DAVID KASOVU SYENGO.....1<sup>ST</sup> ACCUSED**

**STEPHEN KIMANZI KIMWELE.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. The two accused persons David Kasovu Syengo and Stephen Kimanzi Kimwele stand charged of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that on 13<sup>th</sup> October 2014 at Syunoo village Maai Location of Mwingi east District within Kitui County jointly murdered Naomi Mumbe James.

2. They both denied the charge and the prosecution have called several witnesses in support of their case.

3. PW1 was James Kitivui Syengo the husband of the deceased who worked in a quarry at Mandera with both accused persons. According to him, David who is one of the accused had alleged that the wife of the witness (the deceased) had evil spirits which she had spelt on David's wife. That information caused the necessity of calling an elders' meeting at which the father of David, Francis Syengo left the meeting and said that the deceased (Naomi) and his son David should discuss the issue as they were adults. Though the story about evil spirits was heard from the wife of Francis Syengo who was the mother of David, the said Francis Syengo left the meeting with his wife.

4. It was his evidence that the elders disbanded the meeting because they could not continue without the father of David being present. At the meeting however, David maintained that he did not have a problem with Naomi the deceased.

5. It was his further evidence that on 13<sup>th</sup> October 2014 while at Elwak he talked to his wife on phone before going to sleep but at 10 pm, his son by the name J called him on phone and informed him that something had happened to the deceased who had been attacked and was in serious condition and John a young man who lived with them was also injured. He then called a neighbour on the phone and asked him to take the injured in a Probox vehicle to Mwingi Hospital. That neighbour was called Mupengei. He was however informed that his wife died on arrival at Mwingi Hospital. In the next morning, he left for his home and was told on the phone that the culprits David Syengo and Stephen Kimwele had been found and arrested.

6. He stated that ordinarily he worked with Mwangangi at Elwak who also called him on phone to say that David had said to him earlier that he would do something to an old person which would be regretted. He said that he was with both accused on 11<sup>th</sup> October at Elwak because he used to engage them in his work, but did not know that they had left for their rural home in Ukambani.

7. He attended the postmortem examination at Mwingi Hospital on 16<sup>th</sup> October. He saw visible assault marks on the lower hands and back of the head. He said that the doctor informed him that the deceased was hit with a blunt object on the head which caused the death. He said that ordinarily when David left Elwak he would tell him but there were times that he did not tell him. According to him, on 12<sup>th</sup> October both the accused left Elwak without informing him and he was surprised that they even left their wives behind in Elwak which was unusual. He knew both the accused and identified them in court.

8. In cross examination he stated that he was informed about the attack on the phone and that at home where J, Wanjiru, Tabitha, Mwendu Kithome, and John Jane a neighbour. According to him J and Tabitha Mwendu left the deceased in the house with John Jane when the incident occurred. He stated that Naomi and John did not identify the attackers and that John said that the attackers wore black overroll. He stated that John Jane was also attacked to the extent that he became unconscious. He stated that John Jane had previously worked for the family and maintained that John could identify all the accused on sight. He maintained that the mother of David said that the deceased had 'Jinis' or 'spirits'. He confirmed also that the wife of David was at Elwak and was not sick. He also confirmed that David said that he had no problem with Naomi. He maintained that Mwangangi Munyoki informed him that David had said that he would do something because of a problem between the mother of David and Naomi. He lastly said that he did not know the reason why the two accused left their wives at

Elwak.

9. PW2 was Alice Wanjiru James a daughter of the deceased Naomi James from Nguuni in Mwingi area. She worked at Garissa as a secretary and knew David Syengo Kasovu as cousin and Stephen Kimanzi as an uncle. She stated that both accused persons were neighbours and lived and worked together with PW1 her father at Elwak in Mandera.

10. According to her, on 13<sup>th</sup> October, 2014 slightly before 10 pm, she had gone to Nguuni to visit her sister called M at Mandombe Primary School with his brother Syengo. They came together with M after about 30 minutes and M entered the house only to see her mother lying down with the head under the cupboard and screamed. The witness also entered the house and saw the mother lying on the side and bleeding from the mouth, ears and head. She then took the mother's mobile telephone and called her father who advised that they inform neighbours on the phone and promised to contact a neighbour on the phone to help. They called Nduku on the phone but did not get through and they also called an aunt by the name Kasyoka. The brother went out to call neighbours and shortly thereafter those who had been contacted by the father arrived. One brought a vehicle in which they put the two injured persons but the vehicle could not proceed beyond 5 kilometers because the road was bad. However, they tried their best and managed to pass through Nguuni police station where they reported and then proceeded to Mwingi Hospital where the doctors attended to the mother first but she did not see her again. They then went back to Nguuni police station. According to her, she did not see any of the accused throughout this encounter though she knew that there existed an issue between her parents and the parents of David. The next day she saw both accused persons after they had been arrested and brought home.

11. In cross examination, she stated that at the time of incident she had gone to collect her sister from school. She denied the existence of a grudge between her late mother and John Jane. She said that there were three neighbouring homesteads. She confirmed that she entered the house and that people came and later also entered the house. She said that they had followed their sister at school because she was late doing preps. She said that if there existed such a grudge she would have known. She said she did not know the person who injured her mother. She still maintained that John Jane and her mother did not fight. She did not know the exact distance between their home and the nearest three homesteads.

12. She said that when people arrived, her aunt entered the house. She said that she did not count those who came but some later entered the house. She said the house of the 1<sup>st</sup> accused was not far from their home and the house of the 2<sup>nd</sup> accused was further on. She did not know whether the accused had been in their homes but doubted because she did not see them.

13. She stated that the Probox vehicle did not reach their home and they used a wheelbarrow to transport her to the Probox vehicle. She could not know whether in the process they injured her further.

14. In re-examination she maintained that when they went for their sister they left only her mother and John Jane in the house. According to her at this time the deceased went to her room to sleep while the employee John Jane was eating. She said that when they came back they found both her mother and John Jane in the sitting room.

15. PW3 was J K a student at [particulars withheld] Secondary School and son of the deceased Naomi Mumbi. He was aware that his father James Kitivoi worked at Elwak. He also knew David the 1<sup>st</sup> accused as a cousin who worked at Elwak. He knew also the 2<sup>nd</sup> accused Stephen Kimanzi as an uncle in the family who worked at Elwak.

16. It was his evidence that 13<sup>th</sup> October 2014 at 7.30 pm he was at home with his sister Alice Wanjiru, mother, Mwendu Kithome and John Jane. They ate supper in the sitting room and went to his house to sleep, but his sister Alice told him that they had to follow another sister from Primary School who was doing preps. Therefore at around 9.30 pm his sister woke him up and went for M K. He was together with Alice and Mwendu Kithome and left behind their mother and John Jane in the main house.

17. They picked M from a place near her school and went back home. When they approached the door, and their sister M entered the house, she called loudly because the mother lay on the floor and John Jane lay on top of her both seriously bleeding. According to him their mother's house had solar lighting. He then entered the house and confirmed that the mother was lying on the floor and John Jane lay on top of her. Alice Wanjiru then tried to wake up the mother but she could not talk. They tried to lift John Jane but he could not talk. According to him the mother had an injury on the eye, the head and the hands, while John Jane was injured on the chest and the head. He observed pieces of wood in the house as well as sticks, which ordinarily were not in that house. In addition to these strange items, he noted blood splatted all over the floor and the cupboard was also blood stained. This was all in the sitting room.

18. His sister Alice Wanjiru asked him to go to the mother's bedroom to check for her mobile phone and he saw it in the bedroom and called their father. The father told him to go and inform a neighbour Kituku Mbaluka and ask him to assist. He also told him to go to his aunt Kasyoka and inform her. He went to his aunt and came with her after passing through Mbaluka's home. When they arrived at the house, the father called on the phone and said he had phoned Ben Mutiso who was coming with a Probox vehicle. In the meantime, Mbaluka asked other neighbours to come and help and people came.

19. They waited for the vehicle and later saw the lights but the vehicle could not reach their home and they carried their mother and John Jane on the wheelbarrow to the vehicle and put them in there. Then the vehicle driver, his aunt Kasyoka Ali, Alice Wanjiru, Ben Mutiso Syenge and Mutiye Kitindi went to hospital. The witness also boarded the same vehicle.

20. They passed by Nguuni police station and made a report before proceeding to Mwingi Hospital. At Mwingi Hospital the mother was hospitalized but the doctors said she had died while John was alive. Then Mutiso said that they should go and report the death to Mwingi police station and they then took the body to Matuu hospital mortuary with Ben Syengo, Pastor John Okuko, Mutie Kitiki and the driver called Muthengei Muthui. He stated that they left John Jane at Mwingi Hospital.

21. He stated that after the incident he saw David the 1<sup>st</sup> accused on the following day after he was arrested. He did not know where any of the accused was arrested. He also saw Stephen the 2<sup>nd</sup> accused on the following day. He said that ordinarily both accused lived at Elwak.

David was his cousin. He was aware that there were family issues but he did not know the details. He stated that he did not know how the relationship between David and his mother was. He also did not know why both the accused were brought to their home after arrest.

22. In cross examination, he stated that he recorded and signed the witness statement. He maintained that when he left the house that night with his sisters he left behind his mother and John Jane. He stated that they took about 30 minutes before coming back.

23. With regard to sticks in the house of his mother, he said he did not record that in the police statement. He denied having been told outside court to mention sticks. He said he could not remember that sticks the next day when he recorded the statement because he was stressed and nobody reminded him. He could not comprehend John Jane and the mother fighting and falling on the floor and falling on one another though he could not confirm what happened. He stated that when they came back that night Alice entered the house and later him and his sister M entered. Aunt Kasyoka also entered the house when she arrived, same with Nduku Mbaluka. According to him no other neighbour entered the house though he could not say how many neighbours came out. He stated that he did not know how the number of people came and where each stood. He maintained that the Probox vehicle did not reach the house as the road was not good. He said they used a mattress to carry his mother and John Jane to the Probox vehicle as well as a wheelbarrow. He did not know whether after he left people entered his mother's house. He stated that he did not attend postmortem examination.

24. Pw4 was M K a student at [particulars withheld] Secondary School in Form 2 and a daughter of the deceased. It was her evidence that David Syengo was a cousin while Stephen Kimanzi was a paternal uncle. She said that in 2014 both David and Syengo lived in Mandera but she did not know what they did there or whether they were married.

25. On 13<sup>th</sup> October, 2014 at around 10.00pm she was followed at school as usual which by then was [particulars withheld] Primary School because she was doing preps. She was followed by her sister Alice Wanjiru, a brother J S and another sister Mwendu Kithome. They walked home arriving at around 11pm. They found the solar light on but the light was not very bright. The door to the mother's house was open and when they entered the house they found her mother on the floor and John Jane lying on the abdomen of the mother. She noted that her mother was injured on the head with blood oozing from the ears. She ran and touched her mother and Alice called the mother's name but she did not respond. They then pulled a mattress, placed the mother's head on it and J S placed John Jane beside the mother. His brother then phoned their father who was at Wajir and J left to look for neighbours. J also came back with an aunt by the name Kasyoka and neighbours also came. The mother was breathing but could not talk. The same applied to John Jane. Their father contacted a person with a vehicle who came and took the mother to hospital. She was left behind and slept in a neighbour's house and did not go to school the next day. Their uncle instructed them not to open the house again as police were coming. When the police arrived, they were with Stephen and David. She said that in the morning before that incident she left her mother at home and she was not sick. She said that she had not seen David or Syengo at the house before and was not aware of the reason why they were brought there by the police. She did not know the person who killed her mother but she knew both David and Stephen and identified them in court.

26. In cross examination, she stated that neighbours were not very close to their home. She said however that after their brother went to call neighbours, many of them came. She said that their aunt also came. She said however that when she recorded a statement she was mixed up. She did not know whether the neighbours entered the house or their compound. She said that she slept at a neighbour's house and did not come back to the house. She agreed that she had not seen any of the accused for a long time.

27. In re-examination she stated that what she had said in court was the truth.

28. PW5 was John Mutembei Nzuki an Assistant Chief Kiavuka Sub-location. He said that Naomi Mumbe James the deceased was from his area as she was married there. He did not know David Syengo. He also did not know Stephen Kimanzi Kimeu. He said that early 2012 Kitivoi Syengo reported to his office that members of extended family had a problem with his wife. He did not establish the nature of the problem but was informed that a member of the family has said that the wife of Kitivoi had made them ill and he advised him to approach the clan. He said that the complainant did not come back until he heard about the death of the deceased. According to him the deceased Naomi was alleged to possess demonic powers. He heard that Naomi was killed by extended family members.

29. PW6 was John Mwanza Wanzau from Kamutio sub-location in Nguni division. He knew Naomi Mumbe the deceased as a daughter in law in the extended family. On the 16<sup>th</sup> October, 2014 at midday he was at Matuu with Kitivoi and police officers, where he witnessed post mortem examination of Naomi after identifying the body. But feared to be present during post mortem examination and he left the room.

30. In cross examination he said he was called back to the room by the doctor after post mortem was conducted.

31. Pw7 was Mwendwa Syengo of Sino village Kiaviurea sub-location. He said he knew Naomi James as a wife of his elder brother, while David Syengo was a son of a brother while Stephen Kimanzi was his cousin.

32. It was his evidence that in 2014, he heard that David worked with James and his father at Elwak. He said he last saw them on 14<sup>th</sup> October, 2014.

33. On 14<sup>th</sup> October 2014 a Tuesday, at night his phone was charging and at about 3 am he picked the phone only to find that his elder brother James had called him. Shortly thereafter he received another call from James who told him his wife was assaulted and in bad condition and had been rushed to hospital. He knew the wife as Naomi. He left and proceeded to neighbours and met the children of the deceased. They all proceeded to the house of his brother, which was still open at 6.30 am and they closed it and asked everybody not to enter the house. They went round the house saw footsteps and footprints of two people who had ran away but had left one shoe mark behind. He placed three basins to preserve the prints and remained there with children and neighbours and at 7.00 am the chief Jeremiah Mwendwa Muthusi arrived and he explained to him what had happened. The chief then left and at 10.30 am he came back with the OCS Ukasi Police station and other police officers. They then removed the basins and he showed them the footprints. The police came with two young men Stephen and David and tried to place the shoe of Stephen on the print for comparison. However he was not involved in what the police were doing. He only noticed that Stephen wore safari boots and David wore shoes whose size was similar to that of Stephen but with bigger prints.

He identified shoes worn by David Syengo and said the prints resembled the safari boots. He said when the police came they told Syengo to step on the shoe print on the ground and it fitted the shoe print marks.

34. He said he was the first person to arrive at his brother's house that morning and met nobody because the children had run to neighbours house. He said the foot prints were about three paces from the door of the house. He said that both accused were relatives. He stated also that there existed a small problem in 2013 wherein Naomi the deceased made a report to the Assistant Chief and they were called because it was alleged Naomi had sent evil spirits to the house of Kasovo Syengo who was the father of David Syengo. He said also that there was no evidence to support the allegation but they were not able to resolve the issue though a family meeting was called where elders attended. He could not remember if David was in that meeting but said that father of David was present. He said that Naomi made the complaints but because the complainant could not confirm the incident the matter ended there.

35. Cross examination he said that he had arrived at his brother's house at 6.30 am. He did not know that Alice had arrived there earlier. He only met two children of the deceased at a neighbours house. He did not know the identity of the first people who went to the scene. He arrived there in the morning and did not know what had happened at night.

36. According to him, the foot shoe of J S K were not measured. He confirmed there was a worker called John Jane and said the shoe prints of John Jane were not measured either. Nor were neighbours shoe marks measured. He said he saw shoe prints and foot prints which to him showed that someone ran to the second gate. He confirmed that shoes soles could resemble. He only covered the shoe prints and foot marks that gave him the impression that someone was escaping. He said he did not say that the shoe print belong to the accused. He admitted that he said in his statement to the police that young men followed the prints to the road "V" junction. He said he did not know the names of those young men.

37. In re-examination he said the "V" junction on the road was a distance away from the house. He maintained that the shoe marks on the ground resembled David's shoes.

38. PW7 was Jeremiah Mwendwa Muthusi. It was his evidence that he was a chief of Maani Location and that the deceased Naomi James lived in his location. He knew her husband. He knew her relatives. He knew James Kitivoi Syengo and also David Syengo and that they worked at Elwak in Mandera.

39. On 13<sup>th</sup> October, 2014, at midnight he was called on the phone while at home by a village elder who told him some people had attacked Naomi and a young man and both were bleeding seriously. He was told that the attackers had not been seen but shoe marks were noted outside the home. When he arrived at the scene at 6.30 am on a motorbike he was led there by Mwendwa syengo and neighbours. He was informed that Naomi had died. He was shown covered shoe marks by Mwendwa Syengo and he informed the police. The police told him that they had received the report and that they were on the way to the scene. He informed neighbouring chiefs like Elijah Kitema that the attackers might have proceeded to their locations on the Garissa Highway and that all chiefs in the area should be vigilant and inspect buses for the suspects. Later the OCS Ukasi police station arrived with police officers who were shown the scene and started investigations. Blood was scattered in the house and the seats were disturbed and blood stained. There was a head cap which was black and red near the seats on the floor which was blood stained. There was also a blood stained piece of cloth (leso). The police collected the items and he left them to conduct investigations. Shortly thereafter, he was called by a neighbouring chief Elijah Kitema who told him that at Ngiluni near the bus stage there were two suspicious young men who appeared to be waiting for a bus and later informed him that the young men had boarded Muhsin bus to Garissa. He informed the OCS who said she had informed the police at the Ukasi barrier to arrest the two suspicious people who had boarded the bus. He went with the police to Ukasi police station and they recognized the two people who were from his location. He was surprised to see them around as they lived and worked at Elwak with their families there. He did not have any report that they were in his location. He went with the police to Nguni police post and later proceeded with the police to the scene. Police tried to take measurements of the foot prints at the scene and found that the shoe marks fitted those of the shoe of David. He stated that before the police arrived they followed shoe and foot marks and found that the person who initially was bare feet later wore safari boots. According to him both David and Stephen wore safari boots. He later recorded a statement. According to him the two accused persons were away from his location for about 8 months. He said that though a chief did not have to know at all times when a person came to a location, ordinarily he has to know as he lived in the community. He said Kastenani was about 7km from the home of the accused persons. He identified both the accused in the dock.

40. In cross examination he stated that he was phoned at midnight by Muema Syengo who told him that he had seen foot marks. They agreed that those who visited the scene could also have left behind foot marks. He said Muema Syengo was a village elder. He stated that the children might not have been concerned with people following foot marks. He said though Muema Syengo reported the incident to him he might not be a witness but stated that was a brother in law of the deceased. He admitted that shoe prints could resemble and said that he was not an expert in shoe or foot marks. He said he did not get involved in investigations. He maintained that he had seen the accused persons 8 months earlier. He stated that the door of the house of the deceased was not broken into. He said that the village elder did not tell him the type of light used to identify the foot or shoe marks on the ground. He denied being a liar. He said those who had visited could say whether or not the clothes of the deceased were blood stained.

41. In re-examination, he said that he told the village elder to preserve the place so that the police could come and investigate.

42. Pw8 was Elijah Mutemi Kitema a chief of Mbuvi location in Kitui County. His location bordered Nguni location and Maai Location and Ukasi location. He said he had been a chief for 12 years. He did not know Naomi Mumbi James. He knew James Syengo though he was not from his location. He did not know David or Stephen Kimanzi.

43. On 14<sup>th</sup> October, 2014 at 8 am while at Kastenani at his office he was phoned by Jeremiah Muthuri another chief who informed him that an incident had occurred in his location that is, a woman had been attacked with an employee and both were seriously injured. He asked him to take note of suspicious people. At around 10 am he saw two suspicious people at a bus stage to Garissa. He suspected them. He approached them and introduced himself and asked them to identify themselves. They responded willingly and said they came from Tseikuru. They said they had arrived from Nairobi where they had followed a job which they did not secure and they were going back to Garissa. They said they had been dropped from a lift near Kastenani and had come to take transport to Garissa. He then rang chief Muthusi and OCS Ukasi police

station and the OCS told him to monitor their movement. Shortly they boarded Muhsin bus. The OCS then called and said he would instruct a check at the police barrier. The two were arrested at Ukasi police station and he was called to go and identify them and later recorded a statement. He said that Mivukoni was about 50km away from Mbuvu location while Tseikuru was 25 km from Maai location. He identified the two in court.

44. In cross examination, he stated that he first saw the accused on 14<sup>th</sup> October 2014 and did not know their home. He said Kasten was his location and there was a trading centre and visitors came there. There was also a bus stage. He denied saying that the two appeared to be worried. He said that he followed them merely because they were strange and were standing alone. He confirmed that there was nothing wrong with them standing there. He said that he did not notice any weapon or blood stains on them and they explained that they came from Nairobi. He said that when he arrived at Ukasi the two had not come out of the bus. He said that his information was merely that the two had injured someone. He knew James Kitivoi Syengo whom he used to see at the market. He did not know him well nor did he know his wife, the deceased. He stated that it is possible that the culprits moved in another direction. He insisted that the two told him that they came from Tseikuru.

45. In re-examination, he said that the suspects were two and pointed at them in the dock. He said that James Syengo was not his friend.

46. Pw9 was Corporal Geoffrey Limo the investigating officer currently at Kiambaa police station Uasin Gishu County. Previously at Ukasi police station for 4 years. At the time of incident he was the deputy incharge Nguni police post. On 14<sup>th</sup> October, 2014 at 8.00 am he met Sgt. Ndirangu who informed him of report of a serious injury of a person which had occurred the previous night. Moments later another report was made that on arrival at the hospital, the doctor said the person had died and another injured person was admitted. At around 10.00am OCS arrived and proceeded to the scene and established that there were blood stains in the room and room which appeared disturbed as everything was scattered. Cushions were scattered all over. At a certain corner there were dried blood stains and broken pieces of sticks. Outside the house the Eastern side there was shoe prints which was preserved by a relative of the deceased. Other shoe prints might have been interfered with as there were many people there. According to him Syengo preserved the shoe print. While at the scene they received information from the chief Mbuvu location Elijah Kiteme that he had seen two suspicious people who did not hail from his area and who had boarded a Muhsin bus. The OCS then called Deputy incharge of Ukasi police station to arrest those two people at the bus stage. They were arrested and escorted to Nguni police post for interrogation. He said they took a piece of cloth (leso) as an exhibit. The pieces of stick were very small. He identified the (leso) which had blood stains. They took it to the Government Chemist together with blood samples of the accused. They got a result from the government chemist and a report. He produced the piece of cloth as an exhibit.

47. According to him when they received the two suspects they revisited the scene with aim of establishing the shoe marks on the ground. He said that the first accused David Syengo shoe resembled the right hand shoe mark on the ground which was visible on loose sand. He corrected himself by stating that the shoe print was just at the entry in back of the compound as one comes in. They thus took possession of the shoes of David which he produced as exhibit 1. He said the accused did not say anything when they took the shoe though he denied that he was at the scene

48. He drew a sketch plan and escorted the accused to Nguni police station.

49. They visited the scene again on the same day at 2.00 pm to comb the area for more evidence. About 800mteres from the homestead they found two sticks hidden in a thorny bush a short distance apart. One of the sticks had blood stains. They were taken to the government chemist for analysis. They also received a report. He produced the two sticks as exhibit 5 (a) and 5(b).

50. Investigations were then conducted and statements under inquiry were recorded. The accused were then recommended for charges. He attended post mortem examination at Matuu hospital conducted by Doctor Kioko. He received the post mortem report of Naomi Mumbi. It was signed by doctor Kioko on 16<sup>th</sup> October, 2014.

51. He also took a blade with grey patches from one of the accused which was taken to government chemist for analysis to find if it was blood stained.

52. In cross examination he said that John Jane Kilewa was assaulted. That both injured were rushed to Mwingi hospital. He said on arrival at the scene there were few people. He said when first accused came to the scene he wore his shoes and that both accused walked on the ground like the police. He said measurements were done by PC Muinyi. No photos were taken of the shoe prints. He admitted no member of the public had his shoes measured.

53. He said he took two sticks at around 2 pm that day. He could not recall when the said sticks were taken to government chemist. He said he took blood samples from the accused persons. He said he used circumstantial evidence to charge the accused persons. He said he could not analyze the report of the government analyst.

54. In re-examination he said that 1<sup>st</sup> accused was told to step on the shoe mark and even though the step matched he denied it was his shoe mark.

55. PW10 was Doctor Muli Simon Kioko. Bachelor of Medicine, Bachelor of Surgery 1988 University of Nairobi. He conducted postmortem examination on 16<sup>th</sup> October 2014 on Naomi Mumbi body identified by James Syengo and John Nzau. It was a female African with blood oozing from the ear and both nostrils and the head had a bone fracture and there were bruises on the left leg. Cause of death was haemorrhage due to trauma.

56. PW11 was Henry Kiptoo Sang, a government analyst Bachelor of Science Moi University 1997 attached to Government Analyst Nairobi. On 5<sup>th</sup> November 2014 he received items for examination and analysis from police Cpl. Geoffrey Limo from Ukasi police station. He did examination. The stick A1 was very slightly stained with human blood which could not generate genetic profile. Leso A2, net A3, brown cap A4 knife A6 were heavily stained with human blood. And red/brown cap was moderately stained with human blood. He found

that all items that were blood stained matched the blood of the deceased. The blood of Kasovo Muthui and Kimanzi were not noticeable on the items. He produced the report as exhibit 7. He also produced the exhibit memo form as exhibit 8.

57. In cross examination he said that it was not indicated how the items were preserved.

58. At this point the prosecution closed its case. Each of the accused person elected to make unsworn defence statements and not to call any witnesses.

59. Dw1 was the 1<sup>st</sup> accused David Kasovo Syengo. In his unsworn statement in Kiswahili said he was a 27 year old casual worker who built houses at Elwak in Mandera County and living there. That on the 12<sup>th</sup> October, 2014 he was called for a job at Thika and left Elwak in the morning, arrived Garissa at midnight and slept. He boarded the same bus to Thika arriving at 11 am and went to the man who called him for the job and they disagreed on pay. He then slept at Subira Lodge and in the morning went to board a bus for Mandera at 5 am but was late and the bus left him. He saw a probox vehicle and talked to the driver who said that he was driving to Ngomeni. He was with the 2<sup>nd</sup> accused and they both asked the driver to take them to Mwingi to see if they could catch the bus. Each paid Ksh.500/- but on reaching Mwingi, the bus had left so they asked the driver to take them to Kasteni to see if they could get a bus or any alternative transport. They did not however get a bus at Kasteni. They then booked to board Muhsin bus and got a receipt but at Ukasi police road block the bus was stopped and the driver asked whether some people had boarded between Mwingi and Ukasi. They were told to alight from the vehicle and they give the receipts and the police later asked where they came from and they explained that they were from Nairobi and gave the police the receipts from Elwak to Thika and the lodging receipts. They were however taken to court in Garissa and charged with offences they neither understood nor were involved in any way.

60. Dw2 was the 2<sup>nd</sup> accused Stephen Kimanzi who in his unsworn statement said he was 31 years old and a casual mason in Nairobi and Elwak in Mandera County. He stated that on 12 October, 2014 he left Elwak proceeded to Thika where they were called for a job with the 1<sup>st</sup> accused. They arrived Garissa at midnight and slept in the morning they travelled in the same bus arriving Thika at 11 am, saw the man who asked them for a job. They did not agree because he offered to pay them little money. They slept at Subira Lodging in Makongeni, woke up at 5 am boarded the bus to Mandera but were late and the bus left them. Shortly thereafter a probox vehicle stopped and they talked to the driver who said he was going to Ngomeni and offered to take them to Kasteni. They paid Kshs.500 each to Mwingi to catch the bus but they found that the bus had left. They told him to take them to Kasteni where they might get the bus because usually it picked luggage from there but still found the bus had left. Shortly thereafter a person named Kasovo issued them with a bus ticket to Garissa for kshs.300 each and Muhsin bus arrived and they boarded. However at Ukasi police barrier police officers entered the bus and asked for the people who boarded between Ukasi and Mwingi. Conductor pointed at them and were ordered to alight. The police ordered the conductor to return the money to them and also ordered them to give back the bus tickets and then took them to Ukasi police station. Though they explained to the police about their travel and gave them bus tickets from Elwak to Thika and receipts for Subira lodge they were detained at police station and later brought to Garissa court where charges were read against him which he denied. He said that he did not know anything about the charges and that he was not involved.

61. This is a murder case. The prosecution is required to prove all the elements of the charge beyond any reasonable doubt. The defence is not required to prove the innocence of the accused but may raise doubts in the prosecution case. The prosecution is required to prove the offence beyond reasonable doubt even if the accused person raises a defence of alibi. See the case of **Leonard Asenath –vs- Republic (1963) EA 206**.

62. The prosecution is required to prove that the deceased died. Secondly, that the death was unlawful. Thirdly, the prosecution is required to prove that the death of the deceased was caused by the accused person. Fourthly, the prosecution is required to prove that the death was caused with malice aforethought. Each of these four elements is to be proved beyond any reasonable doubt.

63. Did the deceased die? The evidence of the prosecution witnesses is clear on this. Naomi Mumba was attacked at night. It was in her house and she was found by her children injured and unconscious around 11 pm. She was taken to Mwingi hospital for treatment. Getting transport that night was difficult and the road condition was not easy. Ultimately she was carried on a wheelbarrow to a Probox motor vehicle outside her homestead and taken to Mwingi hospital where the medical personnel pronounced her dead. Later post mortem examination was conducted and the cause of death recorded by the post mortem doctor Muli Simon Kioko (Pw10). The death was due to cardiopulmonary arrest due to haemorrhage or bleeding inside the head, which was caused by blunt head injury. In my view therefore, the prosecution proved beyond any reasonable doubt that the deceased died.

64. Was the death unlawful? In my view, the way this death occurred clearly demonstrates that it was unlawful. The attacking of somebody at night in the manner the deceased was attacked, resulting in death cannot be anything but unlawful death. No lawful reason or suggestion has been given by the prosecution or defence and I find that the death of the deceased was thus unlawful.

65. Did the accused cause the death of the deceased? This is a very crucial issue in this matter in which the deceased was seriously injured in her house at night and died shortly thereafter and another person called John Jane was also seriously injured. Both of them were found unconscious in the house of the deceased that night. The accused persons were charged with the death of the deceased but am not aware of anybody who has been charged for assaulting John Jane who was seriously injured in the incident but from the evidence managed to recover after treatment in hospital. The allegation of the prosecution is that the two accused persons left Elwak without informing the husband of the deceased whom they worked for. They left their wives behind at Elwak. The mother of the 1<sup>st</sup> accused David Kasovo Syengo is said to have alleged that the deceased was in possession of evil spirits which was said to be the cause or the motive for the two accused persons killing the deceased. The prosecution evidence is that the shoe mark in the compound of the deceased was similar to the safari boot shoe mark of one of the accused persons (David Syengo). The accused persons were also both found at Kasteni trying to board a bus to Garissa in the morning after the deceased was attacked at night. They were said to be suspicious because they boarded the bus in a place which was not their ancestral location. They were arrested at the police barrier at Ukasi and later charged in court.

66. On the other hand, the accused persons in their unsworn defences said that they left Elwak on 12<sup>th</sup> October 2014 and proceeded to Thika where they had been called for a job. They arrived Garissa at midnight and slept and left very early the next morning to Thika and on arrival

they talked with their would be employer and disagreed on payment. They slept at Thika and then tried to get a bus to Garissa but were late because the bus leaves at exactly 5 am. They however got a probox vehicle to Mwingi and still found the bus had left and proceeded again to Kasten where they found the bus had also left. They then managed to get a ticket to board Muhsin bus to Garissa and when they boarded they were told to alight at Ukasi police station by police and later charged. In effect therefore, the accused persons gave a defence of alibi.

67. It is instructive that thoughts the assault on the deceased and that on John Jane was in the same house and at around the same time, the two accused persons were charged only with murder of the deceased but there was no indication of any charge against the invasion and assault on John Jane. John Jane also who might have known the accused or one of them, did not testify in court and no reason was given for that failure. Indeed a shoe print on the loose sand outside the house might have been similar to the shoe print of any of the accused persons, but in my view, that is not proof that any of them was involved in the murder as many shoes or prints can be similar. The suspicious behavior of the accused also in my view does not connect them to the offence. The first suspicion is that they left Elwak without informing the husband of the deceased(Pw1) James Syengo. However, the evidence on record is that sometimes they left Elwak without telling him. The other suspicion in the allegation of the deceased possessing spirits which were used against the mother of David Syengo. There is no indication that the matter was so serious that both the deceased and John Jane could have been attacked viciously that night. The other suspicion was the fact of boarding a bus at Kasten which was far from their own homes and also in a different location. Though that itself might be a strong suspicion as it occurred just some hours after the vicious attack, suspicion alone however strong cannot be the basis for a conviction or proof of commission of a criminal offence. See the case of **Sawe –vs- Republic (2003) KLR 364**. From all the evidence on record I find that prosecution did not prove beyond reasonable doubt that accused killed the deceased person. This is a case of circumstantial evidence and the prosecution is required to prove that there is no other explanation than that it must have been the accused who killed the deceased and no one else. They failed to do so.

68. Was the death caused with malice aforethought? Malice aforethought has a statutory definition under Section 206 of the Penal Code. It is an intention to cause death or do grievous bodily harm. Since I have found that the accused persons were not proved to have killed the deceased, I do not have to determine whether the death was caused by malice aforethought because the accused persons did not cause the death in the first place.

69. Consequently and for the above reasons, I find that the prosecution did not prove the case of murder against any of the two accused person beyond any reasonable doubt. I thus find then not guilty of the offence and acquit them under Section 215 of the Criminal Procedure Code.

**Dated, Signed and Delivered at Garissa this 27<sup>th</sup> day of November, 2018.**

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**George Dulu**

**JUDGE**