



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**CRIMINAL CASE NO. 13 OF 2015**

**REPUBLIC.....PROSECUTOR**

**- VERSUS -**

**PHILEMONA KIDAYWA GAIKA..... ACCUSED**

**JUDGMENT**

1. The village of Puma in Rapogi of Uriri Constituency within Migori County was awakened by a huge fire in the night of 12th March 2015 from the homestead of one **Mama Margret Angerusa Mmameti** also known as **Margret Shamisha Kaika**. Efforts to put off the fire by the family members and the villagers only succeeded after two people were seriously burnt. The victims were rushed to hospital and who unfortunately succumbed to the injuries the following day.

2. Following the incident, **PHILOMENA KIDAYWA GAIKA**, the accused person herein, was charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya.

3. The particulars of the counts as contained in the **Information** were as follows :

***"On the 13<sup>th</sup> March 2015 at Rapogi village in Uriri Sub-County within Migori County in the Republic of Kenya murdered Margret Agerusa Mmameti.***

***"On the 13<sup>th</sup> March 2015 at Rapogi village in Uriri Sub-County within Migori County in the Republic of Kenya murdered Wellington Kaika."***

4. The accused person denied both counts and the trial followed. For the purposes of this judgment I will refer to **Margret Angerusa Mmameti** also known as **Margret Shamisha Kaika** to as **'the first deceased'** and **Wellington Kaika** to as **'the second deceased'**.

5. The prosecution called a total of 8 witnesses in proving the information against the accused person. They were **PW1, M S K**, a fifteen year old girl who was then in Form One at St. [particulars withheld] Secondary School. She was also the daughter of the first deceased and an Aunt to the second deceased. **PW2** was **THOMAS NASIALI KHAMONI** who was a brother to the first deceased. **B K K** testified as **PW3**. He was aged 17 years old and was in Form 3 at [particulars withheld] High School in Kitale. He was a son to the first deceased. **PW4** was **Dr. VICTOR AWINDA OMOLO** who produced a P3 Form on the accused person's mental assessment. **Dr. EDDIE OMONDI MBOYA** who performed the post-mortem examination on the deceased persons testified as **PW5**. Another daughter to the first deceased

testified as **PW6**. She was **PHANICE SAVAYI KAIGA** and was also the mother to the second deceased.

6. It also came out that the accused person and PW6 were blood siblings whose biological mother was the first deceased whereas PW1 and PW3 had their biological mother but shared the same father with the accused person and PW6.

7. Crime Scene Support Services Officer No. 80072 **CORPORAL BENSON INGOSI** testified as **PW7** and the Investigating Officer No. 577030 **PC KENNEDY MWACHI** testified as the last prosecution witness, **PW8**. Going forward, I will be referring to the witnesses by their respective numbers as they appeared and testified in Court.

8. **PW1** and **PW6** were eye witnesses. I will therefore revisit their testimonies closely.

9. **PW1** used to sleep in the same house with PW6 while the deceased persons slept in one other house within the homestead. The two houses were about 30 metres apart. In the night of 12th March 2015, as PW1 was sleeping in their said house with PW6, she was awoken by PW6 who had heard the sound of some footsteps outside their house. PW1 also heard the footsteps which were heading towards the house the deceased persons were sleeping in. PW1 was frightened. After about 10 minutes later PW1 heard a large sound of something blowing up and suddenly heard the first deceased screaming for help. PW1 immediately put on the lights in their house and opened the door leading outside.

10. On opening the door, PW1 saw the house in which the deceased persons were sleeping in on a huge fire. It was iron-roofed with mud walls. Although it was night the intense fire produced sufficient light to enable PW1 clearly see around the homestead. As PW1 stepped out of their house she saw the accused person armed with a panga near the burning house who then ran away. PW1 was then following PW6. PW1 did not talk to the accused person but instead rushed to save those who were in the house. With the assistance of PW6, they broke the rear door of the house and entered inside despite the blazing fire. They found the deceased persons on fire. PW1 ran out to the kitchen house which was next to the house on fire and took some water which they poured unto the first deceased. They eventually managed to get the deceased persons out of the house. With the help of a neighbor's car the victims were taken to Migori District Hospital. That was around 11.00pm. Upon reaching the hospital the victims were referred to Kisumu New Nyanza Provincial General Hospital for further treatment. The victims however succumbed to the burns the following day.

11. According to PW1, the accused person's house was about 100 metres away and confirmed that there had been longstanding family disagreements to such an extent she personally did not talk with the accused person at all.

12. **PW6** more or less restated the evidence of PW1. Whereas PW1 was awoken by the footsteps of someone walking outside the house she was sleeping with PW1, she clearly stated that when she eventually went out of the house with PW1, she did not see the accused person. To her, the accused person was only mentioned by the first deceased person in the vehicle as they were taking the victims to hospital.

13. PW6 testified that when the neighbours responded to their call for help, they turned out in a large number. The neighbours wondered where the accused person was and one of them went to call him from his house. When the accused person arrived at the scene, he also accompanied PW1 and PW6 to the hospital with the victims. PW6 stated that as they were on the way to hospital the first deceased person was bitterly saying that it was the accused person who had decided to kill her. She so said in Kiswahili as follows"

***"Nimekulea na umenigeuka. Kila mara ulikuwa unasema utaniuwa lakini wakati huu umefaulu. Hata kama nishamba nimekuachia. Sioni kama nitapona tena. Na yote umenifanyia Mungu anajua."***

14. While still on the way to hospital, PW6 also informed the Court that her son, the second deceased, told her that as he was on his way home from school he had met his uncle on the way and as he passed him the uncle stepped hard on the ground and pointed the second deceased while laughing. To PW6 that uncle to the second deceased was the accused person as he was the only uncle to the second deceased living with them in the family in Rapogi as the rest of the second deceased's uncles were living in Kitale.

15. PW6 was not aware how the accused person was arrested and she had never differed with him.

16. **PW2** lived in Kitale. He was called on 13/03/2015 at around 09.00am and informed that the deceased persons had been burnt in their house in Rapogi and that they had been taken to the Nyanza Provincial General Hospital in Kisumu for further treatment. As he prepared to go to the said hospital, PW2 was again called and was informed that both the first and second deceased persons had succumbed to the injuries. He then informed the other family member in Kitale and then proceeded to Kisumu. Since the deceased persons were already dead PW2 proceeded to the hospital's Mortuary where he was assisted by the Mortuary Attendant to indentify the bodies of the deceased persons which were badly burnt.

17. **PW3** received a call from PW1 who was his sister. That was on 12/03/2015. He was informed that deceased persons had been burnt in their house and had been taken for further treatment in Kisumu. He then proceeded to the hospital in Kisumu on 13/03/2015 where he learnt that the deceased persons had died. He managed to go into the Mortuary where he saw the bodies with names tags.

18. **PW4** produced a P3 Form which had been filed by his colleague Dr. Kamau whom he was familiar with his handwriting and signature. The P3 Form was on the mental examination of the accused person and the examination had been conducted on 19/03/2015 at the Migori District Hospital. The accused person was found to be fit to stand trial.

19. **PW5** conducted the post-mortem examinations for both deceased persons. That was on 19/02/2015. PW5 stated that the body of the second deceased was naked and it was of an African child approximately 7-10 years old in fair nutritional state and good physique. The body had been embalmed and preserved in formalin. It was stiff and approximately one week old after death. Externally, the body had extensive body burns classified as both mixed first and second degree burns. The first degree burns were superficial whereas the second degree burns were deeper. There was evidence of medical intervention in both limbs with no fractures. The body had 84 per cent body surface burns. Internally, all the systems were normal. PW5 formed the opinion that the possible cause of death of the second deceased was lack of oxygen due to the burns. He filed in the Post Mortem Form and signed it.

20. PW5 also conducted the post-mortem examination for the first deceased. The body was of an African female of about 50 years and was also naked and in good nutritional state. The body had also been embalmed and preserved in formalin and was approximately one week old from the time of death. Externally the body had 90 percent surface burns which were mixed first and second degree burns. The lips and nose were darkened due to lack of oxygen and there was evidence of medical intervention. No fractures were seen. All internal systems were normal. PW5 formed the opinion that the cause of death of the first deceased was lack of oxygen due to burns. He filed and signed the Post- Mortem Report.

21. **PW7** informed the Court that he was called by Deputy OCPD Migori to accompany him to a scene in the night of 12/03/2015. They then proceeded to Rapogi area and to a scene of arson where they found a semi-permanent house on fire. They were several police officers at the scene and they learnt that they victims had been taken to Migori District Hospital. He took four photographs of how the scene was which he produced together with his report as exhibits.

22. **PW8** informed the Court he was a Co-Investigating Officer with the OCPD Migori. He recalled how he accompanied the Deputy OCPD to the scene of arson in Rapogi in the night of 12/03/2015. He also confirmed that on reaching the scene he found a house on fire and some police officers but without any members of the public. He observed that the house was totally burnt and the roof was collapsing. The house which was on fire was in a homestead with other houses nearby. As the victims had been taken to the Migori District Hospital, the police then left the scene and headed to the hospital. On reaching the

hospital, PW8 was informed by the nurses on duty that the victims had been rushed to the Nyanza Provincial General Hospital in Kisumu for further treatment. He then returned to the Migori Police Station.

23. In the morning of the following day, PW8 was informed by the OCPD that there was a suspect on the arson incident who was being held in the police cells. He also learnt that the suspect had been taken to the police station by the security guards at the Migori District Hospital who had been informed by one of the victims that the suspect was the one who had set their house on fire. PW8 proceeded to the police cells and collected the suspect for further interrogation. As he was yet to record any statement from the witnesses, PW8 proceeded to the lower court and sought for more time to hold the suspect in police custody. The suspect was the accused person. That prayer was granted. PW8 then learnt the victims had passed on.

24. PW8 recorded statements from various witnesses and gathered how the incident had occurred. To him, PW1 and PW6 saw the accused person running away from the scene after torching the house. PW8 also accompanied the family members to the hospital in Kisumu where he witnessed the post-mortem examinations on the deceased persons. He then took the accused person for mental examination and preferred the charges before Court.

25. At the close of prosecution's case this Court found that the accused person had a case to answer and placed him on his defence. The accused person opted to give unsworn statement. It was his testimony that in the night of 12/03/2015 he was sleeping in his house in Rapogi village where he was awoken by some screams calling for help. He readily recognized the screams to be by the first deceased. As his house was about 50 metres away from where the first deceased house was he armed himself with a panga and set out. On the way he met other people who had also responded to the call of help and on reaching at the scene he found that the two deceased persons had already been removed from the burning house and they were lying outside. He joined the others in looking for transport from their neighbours and managed to get a Nissan Matatu which took the victims to hospital. He also accompanied the victims together with PW1 and PW6. On reaching the hospital the victims were referred to Kisumu for further treatment.

26. While at Migori District Hospital the accused person was advised by the hospital security guards to report the matter to Migori Police station. He proceeded to the station together with security guards. On reaching the police station the security guards instead told the police that the first deceased had told them that he suspected that the accused person was the one who had burnt her house. The accused person was shocked as he had never heard the first deceased say so since according to him there was no grudge between him and the deceased persons. The accused person was then arrested and put in police cells. He denied the charges which according to him were false. The accused person did not call any witnesses and closed his case accordingly.

27. The Defence Counsel, Mr. Gembe, tendered very brief submissions thereafter. It was his submission that the evidence was marred with contradictions especially the testimonies of PW1 and PW6 on whether the accused person had ran away from the scene. He also took issue with the failure by very crucial witnesses to testify especially the nurses and the security guards on whose allegations the accused person was arrested. Counsel prayed that the accused person be acquitted of the charges.

28. Miss Owenga, Learned Counsel who appeared for the State relied on the evidence as tendered on record in praying for convictions.

29. I have carefully considered the evidence on record as well as the exhibits and the Counsels' submissions. As the accused person is charged with the offences of murder, the prosecution must prove the following three ingredients: -

***(a) Proof of the fact and the cause of death of the deceased;***

***(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;***

**(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.**

I will deal with each of them separately.

**(a) Proof of the fact and causes of deaths of the deceased persons:**

30. It is not in dispute that the deceased persons in this matter died. That position was confirmed by PW1, PW2, PW3, PW5, PW6 and PW8. The first limb is hence answered in the affirmative.

31. As to the causes of the deaths of the deceased persons, PW5 produced two Post Mortem Reports which he personally prepared upon conducting the twin post mortem examinations on the first and the second deceased persons.

32. The said reports gave the possible causes of death of both the first deceased and the second deceased to have been *asphyxia* (lack of oxygen) due to severe and extensive body burns. Since there is no any other evidence contradicting that of PW5 on the causes of death of the deceased persons, this Court so concurs with the medical finding that the deceased died as a result of a *asphyxia* due to severe and extensive body burns.

**(b) Proof that the deaths of the deceased persons were the direct consequence of an unlawful act or omission on the part of the accused person:**

33. This issue is aimed at establishing whether the accused person actually caused the deaths of the deceased persons and if so, whether it was by an unlawful act or omission.

34. The accused person denied both charges. Some factual issues were clearly undisputed. They included the fact that the house in which the deceased persons were sleeping in was set on fire; that the incident happened at night when people had retired to their beds; the victims were taken to the Migori District Hospital while accompanied by *inter alia* PW1, PW6, the accused person; that the accused person was arrested on the very night the house was torched and that as a result of the fire the deceased persons lost their lives. What remains in dispute is whether it was the accused person who torched the house that burnt the deceased persons who later on succumbed to the injuries.

35. PW6 was awoken by the footsteps of someone walking outside the house they were sleeping in. She immediately woke up PW1 and told her about the footsteps. PW1 readily said it must have been the accused person who had the habit of walking around the homestead at night. PW1 was however fearful. About ten minutes later, there was the sound of a large explosion which was followed by the screams of the first deceased calling PW6 to help her. It was PW1 who put on the lights in the house they were in and proceeded to open the door leading outside.

36. PW6 then led the way out of their house and was followed by PW1 closely. Both of them headed towards the first deceased's house which was then on a huge fire to rescue the two persons therein. Whereas PW6 categorically stated that she never saw the accused person at that point in time PW1 instead stated that she saw the accused person armed with a panga standing next to the burning house and who later on ran away from the scene. It cannot be doubted that the fire in the burning house produced light capable of enabling one to see at least the surroundings. PW1 stated that although she saw the accused person with PW6 they did not even talk to him partly because they rushed to save the victims and further given that PW1 was not in talking terms with the accused person due to earlier family disagreements.

37. Since PW1 was behind PW6, she did not clearly state how far she was from the accused person or how near PW6 was from the accused person. Whereas it is never in doubt that PW1 knew the accused person quite well as his brother, it was imperative in the circumstances of this case for PW1 to have given an elaborate description of how the accused person was at the scene. Such a need was compounded by the fact that PW6 who was in the company of PW1 and indeed leading the way did not set her eyes on the

accused person. Further there was no mention by PW1 that she had seen the accused person run away from the scene especially when the neighbours had positively responded to their call for help.

38. Identification of an assailant always remains a very cardinal issue as if not properly handled can easily lead to instances of mistaken identity and thereby cause miscarriage of justice to the affected persons. Such a grave issue has therefore to be treated with the weight it deserves especially in serious cases like the one before Court.

39. This Court is therefore under a legal duty to weigh the evidence of PW1 who is the only identifying witness with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such recognition.

40. In discharging that duty, I will revisit settled principles on recognition and identification as developed by case law. The Court of Appeal in the case of Wamunga Vs Republic (1989) KLR 426 stated as under;-

***“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”***

It was also held in Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

41. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

***“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

42. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR in upholding the evidence of recognition at night held as follows:-

***“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***

***“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”***

***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”***

43. Again the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night:-

***“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”***

44. Upon subjecting the evidence of PW1 to the foregone legal requirements it appears that the same has fallen short of attaining the required legal bar so as to regard the recognition of the accused person by PW1 to be free from error. In reaching that finding this Court takes further cognizance of the fact that there was such a deep disagreement between PW1 and the accused person to the extent of PW1 concluding that the person who was walking outside their house in the fateful night was the accused person as he always did even before seeing him. That disagreement was further confirmed by PW6 when she stated that the first deceased person had expressed her bitterness over the conduct of the accused person. This Court is also alive to PW1's own admission before Court that the footsteps outside their house made her fearful and that may explain why she instead followed PW6 from behind although she was the first one who opened the door of the house they were sleeping as they rushed out.

45. There was however the evidence of PW6 which purported to be suggesting that the first deceased made a dying declaration that it was the accused person who had finally decided to kill her. The exact words uttered by the first deceased person are captured elsewhere hereinabove. A closer look at the words allegedly spoken by the first deceased person did not clearly say that the first deceased referred to the accused person as the author of the misfortune that befell them. It was PW6 who expounded on the words to the effect that the first deceased was referring to the accused person as they were travelling to hospital with PW1, the accused person as well as the driver. PW1 however did not say anything to do with the first deceased complaining that it was the accused person who had instead attacked the deceased persons especially when they were in the vehicle on their way to the hospital. Equally the accused person did not hear the first deceased say anything concerning him either on the way to the hospital or elsewhere.

46. Another angle of the alleged dying declaration comes in from the events that took place at the hospital that led to the arrest of the accused person. It was alleged that one of the victims had told the nurses then on duty and the security guards that the accused person was the one who had torched the house they were sleeping in. That made the security guards to arrest the accused person and led him to the police station where he was re-arrested and put in custody. However none of the nurses or the two security guards either recorded their statements with the police or testified before Court. The explanation given by PW8 for that lacuna was that the nurses and the hospital security guards had all refused to either record their statements with the police or to testify before Court and the matter ended there.

47. I will now turn to the law on dying declarations. **Section 33(a)** of the **Evidence Act**, Chapter 80 of the Laws of Kenya provides as follows:-

***“33. Statements, written or oral or of electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:***

***(a) Relating to cause of death:***

***When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and***

*whatever may be the nature of the proceeding in which the cause of his death comes into question.”*

48. Further, Courts have had several occasions and interrogated the above provisions. In *Pius Jasunga s/o Akumu vs= R (1954) 21 EACA 333* the predecessor of the present Court of Appeal had the following to say:-

*“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval.....It is a rule of law that in order to support a conviction there must be corroboration of a dying declaration (*R –v- Eligu s/o Odel & Another (1943) 10 EACA 9*) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused ,,,,,,, But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”*

49. The Court of Appeal in a later case of *Stephen Muturia Kinganga v. Republic (2013) eKLR* reiterated the foregone.

50. From the foregone evidence, it is clear that the only person who talked about the dying declaration was PW6. Her evidence was not corroborated at all despite the fact that PW1 was present when the words were allegedly spoken by the first deceased. The matter was compounded further by the said nurses and security guards who flatly refused to participate in the case.

51. This Court finds that the alleged statement by the first deceased did not amount to a dying declaration under **Section 33(a)** of the Evidence Act, Chapter 80 of the Laws of Kenya. That is because this Court is not satisfied that the words were infact uttered by the first deceased in the first place. I say so because of the several evidential gaps as analysed above including but not limited to the fact that the rest of the people in the vehicle did not hear the first deceased person utter the said words. It will therefore be contrary to law to even think of acting on the alleged statement which does not meet the parameters of a dying declaration.

52. Another issue worth looking at concerns the grudge that existed between the first deceased and the accused person. PW1 vehemently talked of the said grudge to the effect that the accused person always did bad things to the first deceased's family. On her part, PW6 did not expressly expound on the relationship between the first deceased and the accused person from her personal perspective but only reiterated that the first deceased had on several occasions expressed concerns that the accused person was out to kill her.

53. There was no evidence that the seemingly grave and longstanding issue of threats to the first deceased's life was either addressed at the family level or reported to the local administration or to the police. Likewise the police did not investigate the issue so as to ascertain if it had any bearing in the matter. Further even the allegations that the accused person had pointed at the second deceased and stepped hard on the ground while laughing were never acted upon. I am therefore unable to find that the allegations of the drudge between the first deceased and the accused person had any bearing in this case.

54. This Court is therefore not persuaded that the prosecution has managed to demonstrate the second ingredient of the offence of murder against the accused person in the affirmative. What readily comes to the fore are instances of incomplete police investigations, failure to record statements from and to avail crucial witnesses without any reasonable justification and a case shrouded in very strong suspicion. It may however be true that the accused person committed the heinous act but that cannot be left to speculation and to strong suspicion or upon the Court to fill in the gaps for the prosecution. The legal burden squarely rests upon the prosecution throughout.

55. As I come to the end of this discussion, I wish to once again fully associate myself with the finding by

the Court of Appeal in the case of James Tinaga Omenga vs. Republic (2014)eKLR where it held that:

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*“20. Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”*

*It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic - Criminal Appeal No. 17 of 1998, the court held,*

*'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'*

*See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”*

56. Having found that the prosecution has failed to connect the accused person with the commission of the alleged unlawful act that led to the deaths of the deceased persons, it shall serve no purpose for this Court to deal with the third and last ingredient of the offence of murder.

57. Consequently the information of murder as contained in the two counts facing the accused person has not been proved. The accused person, **PHILEMON KIDAYWA GAIKA** is hereby found not guilty of any of the murders of **MARGRET ANGERUSA MMAMETI** also known as **MARGRET SHAMISHA KAIKA** and **WELLINGTON KAIKA**. He is hereby set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MIGORI this 21<sup>st</sup> day of December 2016.**

**A. C. MRIMA**

**JUDGE**