



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO.40 OF 2015

REPUBLIC.....PROSECUTOR

Versus

BONIFACE ISAWA MAKODI.....ACCUSED

JUDGEMENT

BONIFACE ISAWA MAKODI hereinafter referred as the accused was indicted before this court with the offence of murder contrary to section 203 of the Penal Code punishable under section 204 of the same code. Briefly the particulars of the charge constituting the accused actions are that on the 3rd day of July 2012 at Ole-rarei area of Namanga in Kajiado Central District within Kajiado County, the accused murdered one Raphael Cheserek Chelang'a hereinafter referred as the deceased.

The accused was arraigned before court for plea on 11/7/2012 where he pleaded not guilty to the charge and any alleged facts of the offence. At the trial accused was represented by Mr. Makundi advocate while the prosecution was conducted by Mr. Akula, the senior prosecution counsel. The prosecution availed a total of five (5) witnesses to prove the case beyond reasonable doubt as provided for under section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya:

“That whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”

The standard of proof required of the prosecution is to prove beyond reasonable doubt that the accused committed the offence of murder against the deceased. This was succinctly stated by none other than Lord Denning in the case of **Miller v Minister of Pensions [1947] 2 ALL ER 372 at 373** where he observed as follows:

“That degree is well settled. It needs not reach certainty; but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

Under Article 50 (1) (a) of the Constitution 2010 the accused person is presumed innocent unless the contrary is proved. What can be deduced from these provisions of the law and the legal principles in the Miller Case (Supra) the duty to prove the guilty of the accused lies on the prosecution and that burden never shifts to the accused save for exceptional circumstances where the accused is required to give

evidence in rebuttal ie. On the doctrine of recent possession of property however even in this circumstance the prosecution bears the greatest responsibility to prove the ingredients of the offence beyond reasonable doubt. The five (5) witnesses therefore ought to prove the following ingredients under section 203 of the Penal Code:

- 1. That the deceased Raphael Cheserek Chelang'a is dead.**
- 2. That the death of Raphael Cheserek Chelang'a the deceased was unlawful through acts of commission or omission by the accused.**
- 3. That the accused person in killing the deceased Raphael Cheserek Chelang'a had malice aforethought.**
- 4. That the accused person was the one who directly or indirectly participated in causing the death of the deceased Raphael Cheserek Chelang'a.**

THE SUMMARY OF THE PROSECUTION EVIDENCE:

PW1 GIDEON PARSANKA an Assistant Chief of the area testified that on 3/7/2012 on or about 6 – 7 pm he met a man not known to him but who appeared drunk. The man made some form of oral complaint regarding a debt he owed to one Boni and which the said Boni was demanding accompanied with threats to kill him if he does not suffice the debt. In the testimony of PW1 in view of the drunkenness state of the man he did not bother but requested him to formally visit his office the following day and lodge the complaint. PW1 further stated that on the same day at about 10.00 pm a village elder by the name Kobia telephoned him that a body of a dead man has been spotted in the area. PW1 further deposed that he acted on the telephone message by conveying it to the Area Chief who in turn informed the police to swing into action to confirm the surroundings of the death. It was further PW1 evidence that the following day he learnt that the deceased person was the man who had a short conversation with him on 3/7/2012 at about 6 – 7 pm. The name of Boni according to PW1 triggered some form of investigations where four people were arrested including the accused person. The other three suspects were later released save for the accused who was charged of the offence of murder involving the deceased. In cross-examination by Mr. Makundi counsel for the accused PW1 further stated that he did not record statements from the ladies who were present when he met the man who later became the deceased. PW1 deposed that he did not take better particulars of the man or the circumstances of the debt he was alleging he owed the said Boni. PW1 further confirmed that when he launched initial investigations within the sub-location he managed to apprehend four suspects but only remembered the names of Josephat Kimutua Rasta Ngongoi and later one Omondi. According to PW1 the discovery of the mobile phone in possession of Omondi allegedly said to belonging to the deceased became a breakthrough as to how the death was occasioned and the accused was implicated by Omondi as the one who sold the mobile phone.

PW2 JOSEPHAT KIMUTUA a resident of Ole-rarei Natatei testified that on 5/7/2012 he was asked by the Assistant Chief Parsanka PW1 to accompany him to go and effect arrest of suspects of murder which had occurred on 4/7/2012. PW2 further told this court that PW1 was in possession of the suspect name as one Boni. The name of Boni was a person known to PW2 prior to this report from PW1. PW2 in his testimony stated that they looked for Boni when they managed to find him in company of another person by the name Omondi. PW2 confirmed that the two were arrested and quick interrogation done involved the whereabouts of a mobile phone of the deceased. That is when Omondi confirmed to that PW1 and PW2 that he had a mobile phone which accused sold to him and at the moment he had it in his house. That mobile phone identified in court at the trial became a subject of this case by virtue of an identification from the son of the deceased that it has his father's phone. In cross-examination by Mr. Makundi learned counsel for the accused PW2 denied that they assaulted the suspects when they had arrested them in connection with the death of deceased. PW2 however confirmed that the suspects were beaten by brothers and sons to the deceased. PW2 further confirmed that the mobile phone was not found at the house of the accused but with Omondi.

PW3 PC EDWIN OMWENGA a police officer attached to Namanga police station as at the time of the

offence told this court that he visited the scene where the deceased body was lying along Naiywon murrum road. PW3 further stated that in company of other police officers on arrival at the scene they noticed the body of the deceased had physical injuries to the head. According to PW3 a quick search conducted revealed existence of a used Airtel scratch card and a broken bottle. The body of the deceased was then carried away from the scene for further investigations as PW3 ruled out that the death was due to a road traffic accident.

PW4 SAMUEL OMONDI took the stand and gave evidence in connection with a mobile phone in his possession said to belong to the deceased person. In a sequence of events commencing on 2/7/2012 PW4 told this court that he is a casual labourer who hawks for work within Namanga area. On this material day they walked around the village looking for charcoal burning work but none was available at the time. At this time PW4 told this court that he was in company of the accused. PW4 further testified that failure to get any casual labour they left for their respective homes. It was only in the morning of 4/7/2012 that accused offered to sell a mobile phone which allegedly he picked on the road. According to PW4 he agreed to buy the mobile phone make Techno from the accused but he did not have money ready at the time. However as per the evidence of PW4 he took the mobile phone for testing by inserting a SIM card but it failed to function for requirement that he inserts a password. PW4 testified that he made a decision to return the mobile phone but it was yet to reach the accused physically. It was therefore according to PW4 that during the interviewing period that the chief PW1 and some youths went to where he was working in a home of a Maasai and demanded that he surrenders the mobile phone to them. The mobile phone taken away by the Assistant Chief PW1 was identified before court. In cross-examination by Mr. Makundi learned counsel for the accused PW4 confirmed that he was in possession of the mobile phone. He also confirmed that he had been arrested as a suspect in connection with the murder of the deceased. It was also his evidence that he had agreed to pay the accused Ksh.1,000 for the mobile phone but did not have ready cash. PW4 further stated that the sale agreement between him and the accused was not reduced into writing.

PW5 CPL JAFFA MSOGO was the investigating officer in this case. His evidence was that the OCS directed him to take over the matter and proceed to collect any material relevant to the murder of the deceased. PW5 stated to have drawn a sketch map to document the scene. He further stated that the investigations revealed that the deceased was murdered elsewhere and placed along the road to distract the traces of where the killing took place. The further evidence by PW5 was that of recording statements from witnesses and recovery of the mobile phone from PW1. According to the investigations the mobile phone belonged to the deceased. The mobile phone he recovered was admitted in evidence as exhibit 1. Postmortem filled and signed by Dr. Gitau was admitted in evidence under section 33 by consent of the Evidence Act as exhibit 4. According to the postmortem the deceased aged about 55 years suffered multiple injuries to the right parietal occipital region, right mandibular, fracture of the cranial, left frontal bone. As a result of the examination the pathologist opined the cause of death to be cardio vascular failure secondary to ultra-cranial haemorrhage tertiary to trauma.

At the close of the prosecution case the accused was placed on his defence. He elected to give a sworn statement where he denied the charge of killing the deceased. The accused stated before court that he was arrested by the chief PW1 and some youths taken to his office and assaulted for an offence he did not commit. The accused further testified that in the chief's office besides the accused had other suspects from other tribes like Kikuyu, Samburu, Luo and Luhya ethnic background. The accused further stated that the other suspects were released from custody in circumstances he did not understand or verify. The accused further gave evidence that before he was taken in as a suspect for murder an OCS whom he could confirm conversed in Luo language removed the other suspects leaving singularly to face the allegations of having killed the deceased. The accused denied selling the mobile phone to PW4 as his evidence was made to portray during the hearing of this case. The accused told this court that the chief and his group of youths arrested him at the construction site where he worked as a mason. He categorically denied being owed any debt not even by the deceased or being at the scene where the deceased was killed. The accused denied any knowledge of knowing the deceased prior to this incident.

SUBMISSIONS BY THE DEFENCE:

Mr. Makundi learned counsel for the accused filed written submissions on a no case to answer. The court in consideration placed the accused on his defence under section 306 (2) of the Criminal Procedure Code. The accused gave a sworn testimony in answer to the charge. Mr. Makundi for the accused in addition to the written submissions earlier filed advanced the arguments that the prosecution has not discharged the burden of proof beyond reasonable doubt against the accused. In his view the key evidence prosecution relied upon was in respect of recovery of a mobile Techno phone. Mr. Makundi contested the argument that the accused was at anytime in possession of the mobile phone which allegedly he sold to PW4 one Omondi. While evaluating the evidence of PW1 – PW5 on record Mr. Makundi submitted that there is neither direct nor circumstantial evidence implicating the accused person with the offence. According to Mr. Makundi, the person found in possession of the mobile phone PW4 and yet the police transferred it to the accused as one originally who possessed it. Mr. Makundi contended that the prosecution availed no evidence on the alleged sale between the accused and Omondi (PW4) which was credible enough capable of exonerating PW4 from blame. It was counsel Mr. Makundi's submission that the deceased person was reported drunk, a bottle presumably to have contained alcohol was found next to the body. The deceased body was found lying next to a road. The question which Mr. Makundi raised where is the evidence to rule out a road traffic accident. Mr. Makundi reiterated that the entire evidence when weighed together with the defence leads to one conclusion that the accused person has not been placed at the scene of the murder. Mr. Makundi urged this court in his submissions to acquit the accused for lack of sufficient evidence from the prosecution.

SUBMISSIONS BY THE PROSECUTION:

Mr. Akula, the senior prosecution counsel for the state vehemently submitted that the prosecution through the evidence of the five (5) witnesses has established the case against the accused beyond reasonable doubt. Mr. Akula further submitted that the prosecution has proved that the deceased died, that his death was unlawful, the person who caused the death had malice aforethought and it is the accused who participated in killing the deceased. In reference to this line of submissions Mr. Akula relied on the testimony of PW1 – PW5 and the postmortem report admitted in evidence by counsel. Mr. Akula in his submissions significantly relied on the recovery of the mobile phone recovered from PW4 – Omonid. That chain evidence according to Mr. Akula has a positive link that it belonged to the deceased. It was further argued by Mr. Akula, that the mobile phone was initially in custody of the accused who offered to sell it to PW4. Mr. Akula submitted that the mobile phone recently found with the accused establishes the participation and placing him at the scene of the crime on 3/7/2012. Mr. Akula further contended that on 3/7/2012 the deceased had met with PW1 where he complained of threats to be killed by one Boni due to a debt. According to Mr. Akula, the deceased told PW1 about his death and a few hours later a report was received that a dead man has been spotted at Ole-rarei area. In his submissions Mr. Akula contended that PW1 confirmed that the deceased was the same person who had a conversation with him on or about 6 – 7 pm on 3/7/2012. That according to Mr. Akula adds to the evidence on the recovery of the mobile phone to the only name Boni associated with the death of the deceased. Mr. Akula relied and referred to the following decisions to buttress his submissions:

- a. **Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Cr. Appeal No. 272 of 2005 (UR)**
- b. **David Mugo Kimunge v Republic [2015] eKLR for the legal proposition on the doctrine of recent possession.**
- c. **Libambula v Republic [2003] KLR 683 for the legal proposition on the relevance of motive as an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence.**
- d. **Charles O. Maitanyi v Republic [1986] KLR 198 on proof of a fact by the testimony of a single identifying witness and the greatness care court has to place on the evidence before relying on it to prove the guilt of an accused person.**
- e. **Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990 UR for the legal proposition on the test to be applied on circumstantial evidence in convicting an accused person.**

Mr. Akula submitted that the four elements of murder have been proved beyond reasonable doubt. Mr. Akula alluded to the defence which did not rebut the credible and consistent evidence by the prosecution witnesses. Mr. Akula invited this court to find the accused guilty of the charge and convict him under section 203 of the Penal Code. On the outset I wish to state that the offence of murder is a serious offence which on conviction attracts the death penalty.

At this stage having considered the charge, the evidence, the submissions by both counsels, the question I ask is whether the evidence supports the ingredients of the offence under section 203 of the Penal Code.

In this regard an analysis of each ingredient with the facts to be proven will suffice.

(a) The death of the deceased:

The prosecution must prove by evidence that a human being identified as Raphael Cheserek is dead. One critical source to prove death is by way of medical evidence. This case incidentally was unique in the sense that the prosecution for reasons not stated did not avail evidence of the deceased known as relatives to positively identify the deceased body. The court had to contend with circumstantial evidence of PW1, PW2, PW3 and PW5 who were all formal witnesses by virtue of their role as public officers and a business man respectively. What is not disputed however is the medical evidence from the postmortem report by Dr. Gitau that the deceased Raphael Cheserek is dead. The postmortem report which revealed that the deceased suffered a multiple injuries to the head, right parietal, occipital region, bruise on the right mandibular region, bruise on the left cranial region and left frontal bone is dead. The postmortem report admitted in evidence by consent as exhibit 4 confirms that it was the body of Raphael Cheserek which sustained the fatal injuries. That reliance of the postmortem has not been challenged by any other cogent evidence. I am therefore satisfied that the prosecution has proved the element of death of the deceased beyond reasonable doubt.

(b) The second ingredient is that of proof that the death of Raphael Cheserek was unlawfully caused:

Under section 203 of the Penal Code the prosecution must prove the element that the death was unlawfully caused to constitute the offence of murder. It is settled law that all homicides are unlawful unless they fall under the exceptions of the law like self defence or defence to property. This was well stated in the classic case of *Gusambizi Wesonga v Republic [1948] 15 EACA 65:*

“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”

In the instant case the deceased was seen alive on 3/7/2012 by PW1 at a shopping centre approximately 6 – 7 pm or there about. According to PW1 the deceased body was found lying along Naiywon murram road at 10.00 pm. There was no eye-witness of the murder. The person who called the Assistant Chief as the first to spot the body was never called as a witness. The prosecution case wholly depended on circumstantial evidence, more specifically on the postmortem report. What this court can deduce from the postmortem is that the multiple injuries targeting the head and force which might have been used can only be attributable to a third party. A perusal of the evidence by PW3 reveals that the scene where the deceased was found remained undisturbed. That again goes not show that the deceased might have been killed elsewhere and his body dumped on the road to disguise it as a road traffic accident. The findings and opinion by Dr. Gitau – the pathologist is more telling as to the cause of death. According to result of the examination Dr. Gitau formed the opinion that the cause of death was cardio respiratory failure secondary to intracranial haemorrhage tertiary to trauma.

I therefore find that the prosecution evidence which attaches the element of grievous harm placed this charge under section 206 (b) of the Penal Code which deals with an intention to cause grievous harm to another establishes that the death of the deceased was unlawful. I am satisfied that proof of this element beyond reasonable doubt has been discharged circumstantially by the prosecution.

(c) The third element to be proved is malice aforethought.

The *mens rea* in homicide cases is referred to as malice aforethought. See *Shampal Shigh v Republic [1960] EA*. Malice aforethought has been defined under section 206 of the Penal Code which provides circumstances to be proven by evidence so as to discharge the burden on the part of the prosecution:

- a. **An intention to cause the death of another.**
- b. **An intention to cause grievous harm, to another.**
- c. **Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, where that person is the person killed or not, accompanied by the offence whether death or grievous injury occurs or not by a wish that it may not be caused.**
- d. **An intention to commit a felony; and**
- e. **An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.**

It is trite that malice aforethought can be inferred from the surrounding circumstances of the murder. The position was stated in the case of *Republic v Tubere S/O Ochen [1945] 12 EACA 63*. The circumstances include:

- a. **The nature of the weapon used.**
- b. **The part of the body targeted by the assailants. This involves the vulnerability of body injury is aimed at to inflict harm.**
- c. **The manner in which the offensive, dangerous weapon is used against the victim. Question like the number of stab wounds, multiple injuries on the body of the deceased.**
- d. **The conduct of the accused before, during and after the attack.**

In *Karani & 3 Others v Republic [1991] KLR 622* the court held, malice aforethought can be deemed from the nature of the injuries caused on the deceased and the weapons used in this case, the postmortem evidence showed deep injuries to the head of the deceased multiple bruises 5x6 cm on the parietal occipital region, bruise on the right mandibular, fracture of the skull and frontal bone. The nature of the weapons used to inflict the injuries was not recovered but they were evidence of a sharp object. What can be concluded from the postmortem report is clear that by the assailants targeting the head there was no other intention but to kill the deceased.

The conclusion I draw from prosecution evidence, the death of the deceased was unlawful and accompanied with malice aforethought. As a direct consequence of the unlawful purpose by the assailants the deceased died of cardio respiratory failure secondary to trauma. From the testimony of PW3, PW5 and the postmortem report, no doubt they demonstrate that the deceased was killed by some person or persons and that he died of multiple injuries inflicted on him more so on the head. The people who killed the deceased dumped his body alongside the road to look like he was involved in a road traffic accident. The deceased suffered multiple multiskeletal injuries more so to the sensitive part of the body being the head as confirmed from the postmortem report. The assailants acted with impunity for not helping the deceased after the attack.

It is against this background I hold that the ingredient of malice aforethought has been proved beyond reasonable doubt.

The most important ingredient of the three is in respect of positively identifying the accused as the one who caused the death of the deceased. The prosecution did not present direct evidence to the murder of

the deceased. It is a case founded wholly on circumstantial evidence. In circumstantial evidence the principle is that the chain of causation must be complete, indeed so complete that there is no escape from the conclusion that the crime was committed by the accused person. (A break in the chain of evidence could be fatal to the prosecution case). See **Mnyele v Republic [2010] EA 315 Chivatsi & Others v Republic [2003] 2 EA 395**. In **Republic v Kipkering Arap Koskei & Another [1949] 16 EACA 135** the court held that where there is no direct evidence linking the accused person to a murder, evidence of the circumstantial can form a basis of a conviction if it points irresistibly to guilt of the accused having excluded any other reasonable hypothesis than that of guilty as well as excluding co-existing circumstances which would find to weaken or destroy such an inference or presumption. In the case of **Mohamed & 3 Others v Republic [2005] 1KLR 722 Osiemo J** as he then was explained what constitutes circumstantial evidence as follows:

“Circumstantial evidence means evidence that leads to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue.

The circumstances should be of a conclusive nature and the tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.”

In the case of **Mwangi & Another v Republic [2004] 2KLR 32** the court of appeal held thus:

“In a case depending on a circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of events as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”

That is the law applicable to the facts of this case. The very witnesses in this case for the prosecution where the assistant chief PW1. He told the court that the deceased who was not known to him reported that a person by the name Boni had threatened to kill him for not settling his debt. PW1 considering the drunk state of the reportee did not bother to extract more information on the complaint. It was after sometime on the same day the 3.7.2012 PW1 received a death report from the village elder. PW1 followed it up in the morning and confirmed that the deceased person was the one who complained of threat to his life the previous day. On cross examination by the defence counsel PW1 confirmed that prior to the 3/7/2012 he did not know who Boni was or where he lived within the sub-location. He further told this court that the initial investigations, four suspects were apprehended for interrogation in connection with the murder of the deceased. PW1 further confirmed that the mobile phone make Techno identified as belonging to the deceased was not found with the accused but one by the name Omondi.

PW2 testified that in company of PW1 they arrested the accused and Omondi (PW4) on the 5/7/2012 as suspects to the murder of the deceased. PW2 further testified that they interrogated Omondi (PW4) who was in possession of a Techno phone belonging to the deceased. According to PW2 testimony Omondi intimated to them that he had purchased the cell phone from Boni. The cell phone was identified by the deceased's son who was not called as a witness. On being cross examined by the defence counsel PW2 stated that they did not go to the accused house. He also confirmed that the cell phone exhibit in this case was not recovered from the accused house.

The accused in his defence denied selling the mobile phone to PW4. He further denied knowing the deceased or being involved in his killing. The accused gave a chronology of events on how he was arrested with other people. The suspects in custody included PW4 but they were all released leaving him behind to shoulder the burden of suspect of a murder charge he did not commit.

What can be deduced from the record is that the case against the accused was purely circumstantial. The prosecution invoked the circumstantial evidence on the doctrine of recent possession to link the accused with the offence. It is trite as to what constitutes the elements necessary to be established by the prosecution on this issue. The Court of Appeal in the case of **Nganga Kahiga alias Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005** stated thus:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof:

- 1. That the property was found with the suspect.**
- 2. That the property is positively the property of the complainant.**
- 3. That the property was stolen from the complainant.**
- 4. That the property was recently stolen from the complainant. The proof as to time as has been stated over and over again will depend on the easiness with which the stolen property can move from one person to the other.”**

The question which begs for an answer is whether the incidences of the doctrine of recent possession were proved beyond reasonable doubt as against the accused. It is clear from PW1 that he did not know the deceased prior to the 3/7/2012. He will therefore not be in a position to adduce evidence positively on ownership of the mobile phone recovered from PW4. The prosecution evidence alluded to the statement by the son of the deceased as the one who positively identified the mobile phone as the property of the deceased. The son of the deceased was never called as a witness nor did the prosecution lay a basis for excluding that crucial evidence on ownership. PW1 and PW2 cannot therefore purport to testify and confirm positively that the Techno phone belonged to the deceased. The son was in a better position to disclose the features of the mobile phone of the deceased including when his name was inscribed on the phone.

There was no direct or circumstantial evidence that the deceased when he met his death possessed the mobile phone. From the record PW3 testified that a used airtel scratch card was recovered in the pocket of the deceased and not a techno phone. The accused and PW4 were known to each other. They were engaged in casual labour within Namanga area. They also used to drink liquor at some places and even at one time or another accused could step in PW4's house. Although PW4 evidence alleges that he bought the mobile phone from the accused, there is no other independent piece of evidence to corroborate the same. The witness PW4 was the one in possession of the phone. It was recovered a few days after the deceased death. There is no evidence that PW4 had possession of the mobile phone with the knowledge and consent of the accused. This court treats the testimony of PW4 with extreme caution in view that initially he was one of the key suspects. The circumstances upon which he was made a witness by the police without cogent evidence on the sale is quite suspicious. In all these set of circumstances placed before me by the prosecution trying to nail the accused with this offence I make the following observations:

1. The evidence fails the test of the doctrine on recent possession as laid down in *Nganga Kahiga Case (Supra)*.
2. The prosecution case failed the test on circumstantial evidence as per the principles in the cited authorities of *Kipkering Arap Kosikei v Republic, Mohammed v Republic, Mwangi v Republic (Supra)*.

The accused defence to me is more plausible in comparison with the attempt made by the prosecution to disapprove his innocent. In the instant case therefore the prosecution case implicating the accused has no legs to stand on in order to implicate the accused with the offence.

I am therefore satisfied in both direct and circumstantial evidence tendered was not capable of establishing the charge of murder contrary to section 203 of the Penal Code against the accused beyond reasonable doubt. The benefit of doubt is hereby resolved in favour of the accused.

Accordingly the accused is hereby acquitted of the offence of murder as charged contrary to section 203 as read with section 204 of the Penal Code. He is at liberty unless otherwise lawful held.

Dated, delivered in open court at Kajiado this 19th day of December, 2016.

.....

R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for the Director of Public Prosecutions present

Mr. Makundi for the accused present

Mr. Mateli Court Assistant

Accused - present