REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO.52 OF 2010

REPUBLIC...PROSECUTOR

VERSUS

SAMUEL MBUGUA MWAURA.........................ACCUSED

JUDGMENT

1. Charles Maina Mwangi (the deceased) and Samuel Mbugua Mwaura (the accused) shared accommodation at Pipeline Estate, Embakasi within Nairobi County. On the morning of 1st July 2010, the lifeless bloody body of Charles Maina Mwangi was found lying on his bed. This was after the accused alerted the caretaker of the premises. Upon investigation, the State preferred murder charges against the accused. He was arraigned in court on 2nd August 2010. The particulars of the offence were that on the night of 30th June and 1st July 2010 at Pipeline Estate in Embakasi within Nairobi Province he murdered Charles Maina Mwangi.

2. For a charge of murder to be sustained, the prosecution must prove the death of the deceased and the cause of such death; that the accused committed the unlawful act which caused the death of the deceased; and, that in causing such an unlawful act the accused had malice aforethought.

3. The death of the deceased was easily proved in the trial. The accused in his statement to the police and in his defence testimony in court said that he found the deceased lying on the bed and there was a lot of blood on the bed. He reported to the caretaker (PW1). Upon receiving the report, PW1 went to the room and saw the body. He immediately informed his employer and also called the police who collected the body. The accused also called the deceased's uncle (PW2) to inform him of the death. PW2 rushed to the deceased's house, where he saw the body before it was collected by the police. PW2 later identified the body at the city mortuary for purposes of autopsy.

4. Dr. Johansen Oduor conducted an autopsy on the body of the deceased. He observed that it had two stab wounds on the external and one on the right lower rib cage. He further observed lacerations above the left eye. Internally he noted that both lungs were lacerated and had collapsed. There was blood in both chest cavities and fatty liver changes. He formed the opinion that the cause of death was chest injuries due to penetrating trauma. Dr. Oduor's report signed on 7th July 2010 was produced on his behalf by Dr. Peter Muriuki Ndegwa who testified as PW7. From his testimony it is clear that the deceased died in the hands of an assailant who brutally stabbed him. He suffered an unlawful death.

5. Who then caused the unlawful death of the deceased? In bringing the case against the accused, the State has largely relied on circumstantial evidence and the doctrine of recent possession.

6. The principles for relying on circumstantial evidence in founding a conviction have been set out in various decisions. In the case of ***Sawe v Republic* [2003] KLR 364,** which was cited by the defence, the Court of Appeal held that,

> *"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of any explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused."*

7. Similarly, in order to rely on the doctrine of recent possession, the prosecution must comply with the principles that have been established by the Court of Appeal. In ***Arum v Republic* [2006] 1 KLR 233, 2 EA 10** the court stated as follows:

'In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analyzing it and after it accepts that which it considers is the correct and honest version."

8. Samuel Kariuki Nganga was the caretaker of the block of premises or flats in a plot named Kwa Davton Embakasi Pipeline. He testified as PW1. He described the premises as having 6 floors. He knew that Maina (the deceased) and Sammy (the accused) lived together. They occupied a room on 6th floor. On the morning of 1st July, 2012, he was on ground floor cleaning when Sammy approached him while crying and told him that Maina was dead. He went to the room and found Maina dead. He noticed that he was lying uncovered on the bed with only a boxer shorts on. He noticed that he had injuries on the stomach and that the curtain was blood stained. He said that he was too shocked to notice anything else.

9. PW1 further testified that he called his manager one Kamau Sulu to report the incident to him. His manager advised him to report to the police. He heeded the employer's advice and together with the accused and one other person went to report at Embakasi Police Station. In cross-examination, PW1 stated that he had not seen both the deceased and the accused that day and that he did not know who murdered the deceased.

10. PW2 was one Gidraf Mwangi Wambugu. He was the deceased's maternal uncle and was a close associate of the deceased whom he had introduced to the "mitumba" (second hand clothes) business in Ngara. PW2 testified that he had been with his nephew the day before the incident at Gikomba. On the morning of 1st July 2010, at around 1.00a.m, he received a call from the accused. He initially ignored the calls but picked on the 3rd call. The accused told him to rush to the deceased's house as Maina was dead. He said that he rushed there and found the accused, the caretaker and other people. He found the deceased on his bed with injuries on the forehead, neck and abdomen. There was blood on the mattress and on the floor. The accused told him that he was not there when Maina was killed but that Maina had come home with a girlfriend the night before.

11. PW2 stated that the accused seemed not to be mourning as he was smiling despite the sad occasion. He further said that he asked the accused if he had any documents of the deceased including an identity card and he said he did not have. Later at the police station the suspect was searched and found with two phones and Kshs.12,000/-. One phone belonged to the accused while the other belonged to the deceased. The deceased and the accused had lived together since 2009 for about 8 months. PW2 further testified that the money belonged to the deceased. That he had given the deceased "Chama" (Group money) the previous day and that the accused had no money of his own since he was jobless. In further testimony respecting identification of the deceased, PW2 stated that he identified the body on 7th July 2010 and after the post-mortem they (family) were given the body for burial in Nyeri.

12. The testimony of PW3 Arthur Mbugua Nduati was limited to having known the deceased as he had worked with him before. He met him through PW2. He had been with him (the deceased) the day before on 31st June 2010 at 7p.m. when they arranged to meet at Gikomba Market the following morning. When he called the deceased at 6.00a.m, he found his phone was off. He collected his wares and went back to Ngara. Later at around mid-day, he was informed by PW2 that the deceased was dead. He went to the deceased's house and saw the body. In court, he identified the Nokia phone shown to him as belonging to the deceased.

13. PW4 No.86135 PC Charles Mutua Ndolo testified to having received a suspect (the accused) at the Embakasi Police Station Report office on 1st July 2010 at about 1p.m. The suspect was brought in by the arresting officer Inspector Nyaga. He searched him and found two mobile phones and Kshs.12,000/- which he booked as the property of the accused. PC Charles Ndolo's self-recorded statement dated 18th July 2010 states:

"……I do recall on 1st day of July 2010 I was at the report office…..I did the normal search and the suspect gave me his two mobile phones and Kshs.12,200/-. I kept them as prisoner's property and gave the property (sic!) a paper indicating what he had left at report office."

14. The investigation officer was No. 65448 PC James Muisa. He testified as PW5. He was assigned investigation of the case on 1st July 2010 by the OCS Embakasi. He immediately visited the scene in the company of PW2 where upon arrival, he found the deceased lying on his bed. There was blood on the bed and on the floor. He saw a deep cut on the neck and stomach. He called the scene of crime officers who went and photographed the scene before he moved the body to the city mortuary. Back at the station, PW5 investigated the issue of the mobile phones. Upon inquiring from the accused, the accused stated that the two phones were his. He also stated that the money was his even after saying that he was not working. PW5 testified that he was informed by PW2 that the second phone bearing the initials BNT belonged to the deceased. He had been given by his girlfriend named Bentar Kanini.

15. PW5 testified that he called the said Bentar who confirmed to him that the phone was hers and she had given it to her boyfriend (the deceased) some three months earlier. She also confirmed that she had not visited her boyfriend on the material day. The investigating officer testified that he took a statement to that effect from Bentar Kanini. The said Bentar Kanini however passed on in the course of the trial before she could testify on her statement. In further testimony, PW5 discounted the alibi of the accused that he had been at a funeral gathering that night and only went back to the deceased's house late morning the

following day. He stated that he had been seen within the premises and that he could not name even one person who was at the funeral gathering with him.

16. Dr. Zephania Kamau testified as PW6. He examined the accused and evaluated his mental status on 19th July 2013. He found him mentally fit to stand trial. He signed the P3 which he produced as Exhibit No. 4. PW7 was Dr. Peter Muriuki Ndegwa. He testified on behalf of Dr. Johansen Oduor who conducted the autopsy and signed the post mortem report on 7th July 2010. According to the report, the cause of death was chest injuries due to penetrating trauma.

17. Put on his defence, the accused gave an unsworn statement in which he denied having committed the offence. He told the court that on the night of 30th June 2010 the deceased came home with a girl and he (the accused) went and stayed the night at a funeral gathering in the neighbourhood. That in the morning, he took tea in a hotel and went to the market to buy stock for his kiosk business and returned to the house around 10.00a.m. He found his friend dead and immediately informed the caretaker and the deceased's uncle (PW1). The accused stated that PW 1 picked the deceased's phone from the table and gave it to him. That was the same phone which he (the accused) handed over to the police at the police station.

18. In closing submissions, the defence discounted the prosecution's case as being merely built on suspicion. That there was no evidence linking the accused to the offence. That the accused had given a reasonable explanation of how he came into possession of the deceased's phone. Further, the defence submitted that the phone in question was not positively proved to belong to the deceased.

19. There was no eye witness to the killing of the accused. The prosecution has however pieced together circumstantial evidence in a bid to link the accused to the heinous crime. Circumstantial evidence however, must be analyzed with utmost care and the same should point to no inference other than the guilt of the accused. As already stated the accused discovered the lifeless body of the accused lying on the bed full of blood. He said so himself both in his statement to the police and in his unsworn statement in court. He informed the caretaker (PW1) and the deceased's Uncle (PW2) and also accompanied the two to the police station to make the report. It appears from the testimony of the witnesses, the accused was suspected of the murder because he lived with the deceased in the same house and was found with the deceased phone and Kshs.12,000/- said to belong to the deceased.

20. PW2 testified that he had given the deceased *chama* (merry-go-round) money the previous day and that to his knowledge the accused was not gainfully engaged to be in a position to have such money. PW4 on the other hand testified that he searched the accused at the police station and recovered from him two mobile phones and Kshs.12,200/- which he recorded as the property of the suspect. This accords with the accused's own statement to the police in which he states:

> "*when I was put in custody, I was with two mobile phones Nokia 6310 and Nokia 1202 and cash Kshs.12,200/- all which are mine (sic!) Later the officer who was investigating this case took the two mobile phones and the money."*

21. The prosecution claims that the money belonged to the deceased. Indeed it is possible that it did belong to him given the testimony of PW2 that he had given *chama* money to the deceased the previous day and that the accused had no known source of income; and, that the said money may have provided the motive for the murder. However, I find no conclusive proof that the money which had no peculiar identifying mark must have belonged to the deceased and to no one else. The accused may have come by money through some means only known to him. I agree with the submission of the defence that the suspicion that the accused took the deceased's money after killing him remains a mere suspicion. It cannot be a basis for conviction.

22. The other piece of evidence linking the accused to the offence is the mobile phone of the deceased. The accused was found with two mobile phones Nokia 6310 and Nokia 1202. According to the investigating officer (PW4) he recovered both phones from the accused at the police station. PW4's evidence both in his self-recorded statement and testimony in court is that the accused told him that the phones were his. PW2 however stated in his testimony that one of the phones belonged to the deceased. PW3 identified the phone [Prosecution Exhibit No.1] shown to him in court as belonging to the deceased as he had seen him with it.

23. During the investigation, PW4 summoned the deceased's girlfriend one Bentar Kanini to shed light on the ownership of the phone [Nokia 1202] According to his evidence, Bentar responded to the summons and identified the phone as hers. She said that she had given it to the deceased who was her boyfriend some three months earlier. She identified the same by the initials B.N.T which she had inscribed on it. The said Bentar wrote a statement to that effect. Although she passed on before testifying on the content of her statement, the court had opportunity to see the exhibit and noted in the proceedings that it indeed bore the initials B.N.T scratched onto it. I am convinced after carefully considering the evidence of PW2, PW3 and PW4 that the mobile phone Nokia 1202 was positively proved to belong to the deceased and not to the accused.

24. Whereas the accused is not required in law to prove his innocence, I find that the matter of the ownership of the phone was a matter within his special knowledge for which he had a duty to explain. The accused however had contradictory accounts regarding the phone. In his statement to the police, he stated that when he was put in custody, he had "two mobile phones – Nokia 6310 and Nokia 1202 and cash 12,200/- all which are mine" (emphasis added). In his defence before court, he stated that when the deceased's uncle (PW2) arrived at the deceased's house, and asked about deceased's phone, the accused told him it was on the table and that PW2 picked it and gave it to the accused. That at the police station the accused told the police that he had the deceased's phone and the police said there was no problem. I find that the explanation given by the accused does not displace or shake the prosecution evidence which I find cogent and credible. I am convinced that the evidence of PW2, PW3 and PW4 firmly establishes that the prosecution exhibit No. 1 (Nokia 1202) did indeed belong to the deceased.

25. The question however remains as to whether the recovery of the deceased's mobile phone from the accused, is sufficient to

establish that the accused did indeed murder the deceased.

26. To determine this conclusively, all circumstances must be considered holistically. Being circumstantial evidence, all factors leading to a presumption of guilt on the basis of such evidence, must leave no doubt as to an accused person's culpability. As reiterated by the Court of Appeal in ***Abanga Alias Onyango v. Rep*****ublic Cr. Appeal No. 32 1990 (UR)**, such circumstantial evidence should meet the following criteria:

> **"...(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; <u>(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."</u>** **(**Emphasis added**)**.

27. The death of the deceased is not in dispute. According to the medical doctor's evidence, there was no sign of a struggle and this led to the conclusion that the deceased could have been attacked while he was sleeping. The absence of a struggle could be an indication of the fact that the attacker had lawful entry into the house, there having been no evidence of a break-in.

28. From the evidence of the prosecution, the accused person was the last person to be in the company of the deceased. The accused himself did not deny having been with the deceased on the night he was attacked.

29. From this account, there is reasonable opportunity that the accused was the last person to be with the deceased. He was also the first to encounter the body of the deceased and report his death. The question however remains as to whether the accused and no one else could have had access to the deceased's house that night. Firstly, there is the issue raised by the accused that the deceased came home with a girlfriend that night. Although the allegation sounded outright false, the prosecution did nothing to challenge it. Similarly, the accused raised an alibi that he did not spend the night at home but in funeral gathering in the neighbourhood. This he did early in the case when he gave his statement to the police. The police therefore had every reasonable opportunity to rebut the alleged alibi. Even in the trial, the prosecution had an opportunity to test the same. Unfortunately the prosecution failed to prove the fact that the accused was at all material times present in the room. The only attempt was through the submissions of prosecution counsel when he submitted that the accused did not prove that he was away at a funeral gathering. This unfortunately was an attempt to shift the burden to the accused to prove his innocence.

30. To reiterate the sentiments of the court in the case of ***Sawe, v Republic*** (ibid), where circumstantial evidence is sought to be relied on to infer guilt of the accused, ***the burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused."***

31. While, according to the evidence of PW5, neighbours indicated they had seen the accused on the material night, none of them was called to testify to this fact. The accused himself admitted that he was at the residence for part of the night when he left the deceased in the company of a woman. It has not been confirmed foolproof that the death of the deceased took place when the accused person was present at the residence. Anyone else could have therefore, been present. PW1 himself stated that he would not know all the people who passed through the gate to access the building. He added during cross-examination that he did not see the deceased or the accused on the material night. This is contrary to PW5's assertion that PW5 had stated that the accused had been in the building on the material night. While I highly suspect from my overall appreciation of the prosecution evidence that the accused may have committed the murder, there exist the possibility that any one else could have accessed the deceased's house and committed the offence. It was incumbent upon the prosecution to provide further material evidence to prove the case beyond all reasonable doubt.

32. The fact that the accused resided in the same house with the deceased creates all reasonable opportunity for him to have committed the murder. However, in the same light, the sharing of the residence with the deceased, similarly created the reasonable opportunity of him being present at the scene of crime, in circumstances unrelated to the commission of the offence, and in fact, simply by being a resident at the house where the deceased was murdered. Thus, the taking of the deceased's phone by the accused was in this case, possible in circumstances unrelated to him being the culprit. He may have stolen the deceased's phone either before or after the murder. It is my conclusion that it would be unsafe to convict the accused on the basis of the evidence as analyzed above. I do not find the evidence sufficient to prove all the elements of the offence of murder.

33. In the premises, I find the prosecution evidence insufficient to sustain a conviction. The accused is acquitted and set at liberty forthwith unless otherwise lawfully held.

Judgment delivered and **dated** at **Nairobi** this **23rd** day of **April, 2015**

R. LAGAT - KORIR

JUDGE

In the presence of:

…..: Court clerk

……………………………………..: Accused

……………………………………..: Counsel for Accused

....: Counsel for the State