



**Republic v Nthiwa (Criminal Case 46 of 2013)
[2024] KEHC 8638 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 46 OF 2013**

MW MUIGAI, J

JULY 5, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

CHARLES NDAMBUKI NTHIWA ACCUSED

JUDGMENT

Background

1. The information on the Charge Sheet dated 8th June,2019 that arraigned the accused person before the High Court provides:
2. Manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#) Cap 63, laws of Kenya.
3. Particulars of the offence are that Charles Ndambuki Nthiwa: On the 22nd day of September,2013 at Kinyaata sub location, Kinyaata location in Yatta District within Machakos County, unlawfully killed Mutua Mwanzia.
4. Vide mental assessment dated 27th October,2013 confirmed that the accused was fit to plead. The accused person herein took plea on 30/10/2013 in which charges were read out to the accused in a language that she understood where he pleaded not guilty and a plea of not guilty was entered.
5. By Ruling of 31st January 2014, this Court through Hon. L.Mutende LJ granted the Accused person bond of Ksh 3 million.

Prosecution's Case

6. PW1 was Peter Mwanzia Kibati. He testified that the deceased herein was his eldest son. The accused is a neighbour. That On 22/09/2013 at 7.00 a.m. the accused herein went to PW1's house and demanded



- for the deceased. According to PW1 the accused seemed to suspect the deceased for something and on 17/09/2013 the accused's shop had been broken into and so he had suspected the deceased. PW1 testified that the accused then seized the deceased and took him to his place.
7. PW1 remained behind with another son and wife Monica Mwanza; after thirty minutes PW1 proceeded to accused's shop which is ten minutes' walk from PW1's house. On arrival PW1 met the deceased in company of the accused and his wife plus another woman. He then found the deceased lying down and seriously injured. Stating that the deceased could not even stand up. He lied outside the accused's shop. It was PW1's testimony that a police officer arrived at the scene and that the deceased was bleeding profusely as he had been viciously attacked. His head was injured. The hands were alright.
 8. PW1 confronted the accused who slapped him on the left side of his neck and ordered PW1 to list down the shop goods that his son had allegedly stolen. At the time the accused's wife was stating out the items. The accused then demanded that PW1 avail the stolen goods yet he was sure his son had not stolen them.
 9. Testifying that villagers went to the scene and PW1 declined to read out the items as ordered by the accused who thereafter called police officers. The police officer ordered accused to accompany him to Matuu while the deceased was placed onto a vehicle and rushed to hospital. The deceased later died while at Muaani hospital Matuu. They later recorded statements at Matuu police station.
 10. On the 26/09/2013 PW1 witnessed the post mortem examination in the company of Joshua Kivati. PW1 is the one who identified the body of the deceased. PW1 produced the post mortem form in court, MFI-1 Post mortem form. PW1 proceeded to tell court that he had not disagreed with the accused prior to the incident and that he had no debt with him. PW1 was not aware if the accused had any differences with the deceased.
 11. In Cross – examination, it was his testimony that, On 22/09/2013 accused went to his place and the deceased was then with him and at the time the deceased had no injuries when he accompanied accused to PW1's home. he claimed that they later had a meeting within PW1's compound which took about ten minutes and it was peaceful. That It is not true that the accused had left his motor cycle in PW1's compound but at a nearby thicket about thirty metres from PW1's house but within his land. Testifying that as soon as the accused left the deceased PW1 followed them after about thirty minutes. That the accused later went to PW1's house and requested PW1 to accompany him to his house. PW1 found the deceased tied with a rope and had been hit with a stone which Laid nearby as well as a eucalyptus stick. Further PW1 found deceased already injured and thus did not witness the incident. PW1 suspected the accused to be the assailant and he cannot tell how the deceased sustained the injuries. That the weapons were near the deceased but PW1 had not been shown the same in court. according to PW1, the weapons had blood stains. PW1 told court that the accused slapped him and entered his house. PW1 did not lodge complain over the assault occasioned to him. PW1 had never seen deceased taking alcohol or even looking drunk. He never heard from anybody that the deceased drunk alcohol. Testifying that the deceased had earlier in the past been suspected to have stolen goods. PW1 was not aware that the deceased had previously stolen from the accused's shop.
 12. In re-examination, PW1 told the court that It was the accused who took the deceased from his home to accused's kiosk. PW1 found deceased lying outside accused's shop and was critically injured. Testifying that the deceased was in good health when accused went for him at PW1's home. stating that they had a meeting early in the morning over accused's shop and that the accused informed them that his shop had been broken into and goods stolen. Accused requested PW1 to allow him go with the deceased and to interrogate him over the alleged theft.



13. PW2 was Anthony Kyalo Mwanzia. In his testimony to court, he claimed that the accused herein is a neighbour. The deceased was his elder brother and that on 22/09/2013, PW1 was at home when the accused arrived and met his parents. Accused claimed that his shop had been broken into and goods stolen and he had suspected the deceased. Testifying that the accused ordered the deceased to accompany him to the shop. Later after thirty minutes the accused went and informed PW2's father to go to the shop and record the stolen items. They visited the shop and record the stolen items. They visited the shop and found the deceased lying on the ground badly injured and tied with ropes. PW2 tried to untie the rope but accused threatened him. PW2's father was slapped by the accused and the accused later called a police officer. The police arrived and picked up the accused and they escorted the deceased to hospital. The deceased later died. They recorded statements. PW2 had not disagreed with the accused before. The deceased did not have problems with Accused either. The deceased had not been involved in thefts in the area. The accused had been PW2's friend while they lived in Machakos. He told court that the deceased was in good health when he left home in company of the accused.
14. In Cross – examination, PW2 testified that he could not estimate the time taken while accused was at PW2's home. that PW2 woke up only to find his parents in company of the accused plus the deceased. That accused had left his motor cycle near a thicket. PW2 proceeded to state that he saw the sisal rope, stone and stick. He did not witness the accused assaulting the deceased and that the deceased used to drink alcohol. PW2 could not tell if deceased took alcohol prior to the incident. PW2 did not know if the deceased had been suspected of being behind a spate of robberies in the area.
15. PW3 was Simon Kioko Ngunzi. In his testimony, he told court that the deceased was a neighbour and that Accused's mother bought land in the area and PW3 knew him as a neighbour. PW3 did recall on 22/09/2013 he was at home around 7.30 a.m. when some Sunday school children who included Mutinda Kioko and Ndunda Kioko alerted him that the deceased had fallen down and died outside a shop nearby. Testifying that the accused owned one of the shops. PW3 rushed to the place in company of his brother Mutuku Ngunzi, Patricia and others totaling about thirty in number. On arrival at the scene they found the deceased lying down outside accused's shop the deceased was bleeding profusely. The left eye had been gouged out. The deceased could not speak. Deceased's father and brother as well as the accused were also present. PW3 enquired from the accused as to what had happened and he claimed that the deceased had stolen from his shop. The police were alerted and they arrived in company of the accused. The officers advised that they rush the deceased to hospital. Father of deceased took him to hospital. PW3 learnt the deceased died and recorded his statement. According to PW2, Accused is a neighbour and there had been no differences between him and deceased's family. PW3 had not heard of any criminal activities regarding the deceased.
16. In Cross – examination, he testified in court that the Sunday school children were in fact his own children and that his home is about three Kilometres from the scene. PW3 found a crowd of over thirty people at the scene and he did not witness the incident. PW3 knew the deceased quite well and he was not a drunkard. Testifying further that the deceased had in the past been suspected to have broken into accused's shop and stolen goods.
17. PW4 was Dr. Gloria Sisenda. She testified that she is a medical officer and a graduate from Moi University in 2011 and that she is conversant with conducting a post mortem. In the year 2013 PW4 was based at Matuu District Hospital and currently based at Moi University as a post graduate student. PW4 had seen the post mortem report (MFI-1). Two relatives were present and who identified the body before she did the autopsy on the 26/09/2013. According to PW4, there were bloodstains on the trouser and shirt. There was a laceration on the scalp measuring 6 cm long. There was a fracture of temporal skull bone. There was haematoma in the intracranial cavity (dot). There was bleeding within the skull. PW4 formed the opinion that the cause of death was intracranial haemorrhage due



- to head injury. PW4 showed the report that was produced as exhibit. Exhibit 1- post mortem report dated 26/09/2013. Weapon was inflicted on the temporal area of the head. The weapon was probably a sharp object.
18. In Cross – examination, she told court that the deceased sustained head injury caused by a sharp object and it could be possible that deceased hit himself on a sharp object as It was not likely that the object was blunt.
 19. Re-examination, she stated that weapon might have had sharp edges
 20. PW5 was No.215622 CPL. Stephen Chepkwony. He testified that he is attached at Yatta Ap. Post. On 23/09/2013 he was on duty when a Good Samaritan called him and alerted him that a certain person had been assaulted at Makutano. PW5 boarded a motor cycle and went to the scene and found the caller Charles Ndambuki who led him there while on the way the said Ndambuki requested PW5 to keep his documents. They arrived at the place near a certain shop where PW5 met a large crowd of people. He also saw the victim herein lying on the floor and bleeding profusely. He was unconscious. He was soaked in blood. They organized for transport to rush him to Matuu hospital. PW5 also escorted the said Charles Ndambuki to Matuu police station. PW5 told Court that he had not known him before. He is now before court (pointing to accused in the dock).
 21. In cross-examination, he testified that he could not recall the exact names of the Good Samaritan and that he found accused at Makutano and did not resist being arrested. Accused was booked at Matuu police station and that the initial charge was assault.
 22. PW6 was Joshua Masyula Kivati. He told court that he knew the deceased herein who was a cousin. On 26/09/2013 PW6 was at Matuu Nursing Home in company of his father and one Kyalo for the purpose of post mortem. They identified the body. The post mortem was conducted by the doctor. Later PW6 recorded his statement. On 22/09/2013, PW6 was looking after his cows within Kimundi village within Yatta location when he received a call that he should rush to a certain kiosk owned by the accused herein who was then alleged to have injured the deceased. PW6 rushed there and found the deceased lying on the ground unconscious and bleeding profusely from the head. The accused herein was also there plus a large crowd. According to PW6, he then called the chairman of the community policing. The accused rushed to the police post and came back with police officers. The accused was taken to Matuu Police Station. The deceased was rushed to Matuu District hospital where it was decided that he be transferred to Kenyatta hospital but he passed on before the ambulance arrived. PW6 testified that his mother had sold land to the accused and they had no grudge prior to the incident.
 23. In cross examination, he testified that he acknowledged receiving the call from unknown caller over the incident. And that he rushed to the scene and arrived at 9.30 a.m. The only premise then in the area belonged to the accused and that the crowd number was about 18. PW6 found deceased already injured and thus did not witness the incident. Testifying further that the deceased was lying on the ground with his clothes blood stained and was taken to hospital in that state.
 24. PW7 was No.80950 Pc. Peter Yegon. He testified that On 22/09/2013 around 2.30 p.m. he was the crime aide personnel that day when he was alerted by the O.C.S that a phone call had been relayed by members of public at Kinyati location that somebody had been severely beaten by an assailant. The victim was said to be unconscious. PW7 was then accompanied by Sergeant Baraza to the scene which was 15 km away. An AP officer from Kigesia AP Post directed them to the scene. It was within Kituluni village. The AP. Officer was Corporal Stephen Chepkwony who had made arrangements to escort the victim to Matuu Hospital. He had also apprehended the suspect who was escorted to Matuu police station.



25. According to PW7, he found a large crowd at the scene. The victim and suspect had already been taken away. The premises at the scene belonged to the accused herein. The premises had two shop doors. PW7 collected a stone and piece of stick. The stick had broken into pieces and was lying outside the shop. MFI- 2 – One piece of stick and small broken pieces. PW7 showed the stone recovered outside the shop as M.F.I-3 One piece of stone. Testifying that there were no other sticks at the scene apart from the ones he collected. PW7 took custody of the exhibits to be produced; M.F.I – 2 & 3- produced as exhibits 2 and 3 respectively. It was his testimony that the OCS instructed him to proceed to Matuu hospital to check on the victim. PW7 found him undergoing treatment and that he was led there by family members of the victim who was called Mutua Mwanzia. He was still unconscious. The doctors noted that he had sustained a cut on the head which was still bleeding.
26. The family was then making arrangements to transfer him to Kenyatta National Hospital. Later in the day around 8 p.m. PW7 picked up the suspect from Matuu and took him to Yatta police station. However, the victim died while undergoing treatment at Matuu hospital. PW7 linked up with the family members who agreed to come to Yatta police station to record statements. Testifying that a post mortem was conducted on 26/09/2013 by Dr. Sisenda at Matuu level four hospital. This is the post mortem report (exhibit 1). After compiling the file PW7 forwarded it to the DPP Machakos who recommended that he charge the suspect with murder. The suspect is Charles Ndambuki Nthiwa. PW7 had not seen him before the said date. He is now before court (pointing to the accused).
27. In cross-examination, he told court that he is the investigating officer and that it is true he did not arrest the accused as he had already been arrested by Corporal Stephen Chepkwony of Kigesa AP Post. PW7 did not find the accused at the scene as he had already been arrested he also did not find Corporal Chepkwony at the scene. Testifying that it was Corporal Chepkwony who was directing him to the scene. Further that there was a large crowd at the scene approximately twenty in number. That there were no police officers at the scene when PW7 arrived. He told court that there was one shop with two doors and two windows. The colour of the windows and doors was sky blue and that deceased was injured at the scene.as per PW7 there was a pool of blood mixed with sand outside the shop. The bloodstains were outside the door on an open space. it was possible for the victim's clothes to be bloodstained as he confirmed when he visited him in hospital. PW7 did not see any bloodstains on accused's clothes. he saw a wound on the head during postmortem and which was the source of the bleeding. PW7 stated that he introduced the exhibits for the first time in court and they had been under his custody while still serving at Yatta police station but he handed over to PC Tanui upon his transfer.PW7 had not produced an inventory of the exhibits, and he had not produced an exhibit memo nor supplied any to the defence. That exhibits were collected in 2013. PW7 relocated to Matuu in 2016. He had not produced the handing over notes. The exhibits had been stored at Yatta police station since 2013 and that he had not produced the exhibits register. PW7 maintained the exhibits are the same ones that he recovered at the scene. PW7 did not have anything to connect the accused with the exhibits. The exhibits had no bloodstains. He did not take any DNA samples for testing on the exhibits and neither fingerprint dusting. Testifying that the eyewitnesses confirmed that the accused had used the weapons to attack the deceased. That the eyewitnesses were five children who were then heading to church but they did not record statements. PW7 interviewed the children aged between 6 – 9 years old and who were school going. The children were shy but PW7 did not talk to their parents and that some of the parents of those children were available when he reached the scene. Testifying that the children lived within the vicinity of the crime. The time was around 7.00 a.m. to 8.00 a.m. and that the shop doors and windows were closed and intact. He told court that no photographs were taken of the scene because initially the matter was one of assault. It was his testimony that the accused was initially booked for an offence of assault and there were allegations raised against the deceased for being a criminal as he had broken into buildings and stole property. PW7 did not get anything to the



effect that the deceased had been a drunkard. He maintained the children going to church witnessed the incident.

28. In re-examination, it was his testimony that, he collected the exhibits outside a kiosk belonging to the accused and they had an exhibits store at the police station; they had an exhibit register. The OCS appoints new officers to take over cases or exhibits when investigating officers are transferred. PW7 handed over to PC. Tanui on his transfer.

Ruling On A Case To Answer

29. The Court by the Ruling dated 22nd July, 2020 found that a prima facie case had been made against the accused to require him to be called upon to make a defence. Further the found that the accused had a case to answer and was called upon to make his defence in accordance with the provisions Section 306 (2) of the CPC.

The Defence Case

30. DW1 was Charles Ndambuki Nthiwa. He testified that he comes from Kitulune village and that he is a farmer and also a businessman. That the charge in court are that he is accused of murdering the deceased Person. Testifying that he was in court when the witnesses testified against him. He told court that on 16/9/2013 he was accused on 22/9/2013 his wife's kiosk was broken into and that she is DW1's neighbour.
31. That it was broken into at night. That in the morning of 17/9/2013 when she (DWI's wife) went to open the kiosk, she found the kiosk was broken into and found maize flour and baking flour had been poured on the floor. Testifying that the bags that covered the floor had holes and flour on the ground led them to the place where the goods were stolen. Testifying that the deceased when realized in his uncle's home.
32. DW1's wife went to call the mother of the deceased namely Monica Mwanzia as the deceased laid with the uncle Kiio Kibati who was not there. it was his testimony that that his wife and mother of the deceased went where the deceased stayed and called her son Mutua Mwanzia. That DWI knew him before the incident. Testifying that the deceased mother woke him up and asked him if he knew of goods stolen from the Kiosk. DW1 told court that the deceased admitted that he had goods and handed them to his mother and after the mother took the stolen goods and handing them over to DW1's wife. That his wife called him over and informed him that she had been given the stolen and recovered goods. DW1 immediately called his wife back and informed her to tell the mother of the deceased to give the information of the recovery stolen goods to the father of the deceased. That after DW1 goes back he shall be meeting them at their home on the morning of 22/9/2013.
33. According to DW1, he went home on 21/9/2013 on a Saturday and on 22/9/2013 he proceeded to the home of Mwanzia Kibati, the father of the deceased and found him with his family as DW1 had requested a meeting. Testifying that his wife reported the matter to the village elder and since the goods were recorded the matter rested there. DWI found the deceased's father Mwanzia Kibati, Monica Mwanzia wife/ mother to the deceased, Antony Kyalo Mwanzia and that the deceased was not there. he told court that immediately they sat down he asked the father where the deceased was as they could not proceed without him present. That the deceased's brother Antony Kyalo said his brother was at his uncle's home and he was sent to call him. That the deceased and they had the meeting. They discussed the recovery of the stolen goods and the construction of the shop door. According to DW1 the deceased smelt alcohol and he had a hangover. They had to go and assess the damaged door. Testifying that the stolen goods were taken down by DW1's wife and the father of the deceased acknowledged in his hand writing CNM-1 in Kikamba that this is what was indicated and the deceased's father inserted his ID



number and mobile phone number this is dated 22/9/2013 the day of the meeting, the value of the stolen goods was Kshs. 2,125/= DW1 told court that they have a translated version of the agreement the document is in Kikamba D- Exhibit 1 (a) D Exhibit (b). that they were to proceed to the scene of the broken shop.

34. DW1 went on his motorbike and they walked on foot as it was very near to assess the damage and they were to go back to assess the damage calculate the payment. testifying that him and the two brothers went to walk to the shop as father to the deceased was to cycle behind them. DW1, deceased and Kyalo walked to the shop and that after ten minutes Kyalo went back as DW1 proceeded with the deceased to the scene. That the deceased was very remorseful to DW1 and on reaching the scene, he informed DW1 that he was to go for his father or brother and he was to show DW1 what had happened to the door.
35. That the deceased at the scene showed DW1 the chisel he used to brake the door and the door was a wooden door as shown in the photographs annexed to his statement. Testifying that the deceased showed DW1 how he broke the door and opened the door and how he got inside. That deceased person became very chaotic and held up DW1's neck and started fighting DW1 and in DW1's defence he also exchanged blows with him but unfortunately, he stepped on a sufuria which was in the room and he fell down and he was hit by angle line of the door and he fell and was hit.
36. DW1 was scared as this is not what he was expecting. He produced the photographs of the 2 shops, broken door, the sufuria and angle which is metallic and sharp. Testifying that the deceased fell down and he was bleeding profusely. DW1 got scared and got back to the father and brother and when they went to the scene together and explained to them what had happened. They went to the scene with the father, brother Antony and found the deceased at the scene and he was still there on the ground and he could not stand/ walk. That the father asked him what had happened.
37. According to DW1 after the father had asked the deceased what happened the deceased confirmed that they had a fight and he fell on a sufuria and he was hit by angle. That there was no means nearby and the father of the deceased called motorcycle from Kibati and immediately he came to the scene. They discussed the issue of taking the deceased to hospital. That they called several motorbike transporters who were not available at the moment. Testifying that it was on a Sunday and the deceased remained on the ground for long hours before he was attended to. That the police officers were informed and he was arrested at 9am and that the deceased was helped at 5pm in the evening. He told court that the police officer who came to the ground was an AP Officer who found DW1 at the scene and members of the public were gathered at the scene and asked what was happening and the public informed the AP. DW1 was at the scene. DW1 talked to one lorry driver and the deceased was taken to Matuu Hospital and he was taken to Matuu police station at 3am; he left the scene. That before leaving the scene the AP called DW1 as to accompany him to the station. that at 11pm in the evening DW1 was called by one of the police officers who was on duty and informed him that he was to be transferred to Yatta police station. DW1 was not informed of the death of the deceased as he came to know of the deceased's death on 23/9/2013 at 1pm when they arrived at Yatta Police Station. DW1 told court that he had no intention of harming the deceased and to have him dead. That they had a confrontation and what led to his death is the angle of the door which was metallic. DW1 testified that he did not have any weapon and if so the police officer should have taken it and brought it. DW1 asked the court to look at the circumstances of the case and to its finality.
38. In cross-examination, it was DW1's testimony that on 22/9/2013 he visited the home of Mwanzia as he suspected the son/deceased had broken into DW1's wife shop and that he had evidence that the deceased was found with stolen goods. DW1, deceased and his brother Kyalo left the father to go to the shop and on the way the brother went back as he had left something as they proceeded to the shop and the deceased was much more nicely to shop/kiosk. DW1 denied that they arrived at the shop the



two of them. DW1 went back for the father and son of the deceased to go to the shop. DW1 told court that he had no bad intention as they had a sober discussion and that the deceased challenged him first and that he does not have P3 form showing that he was injured on that day. He claimed that he was the last person to be with the deceased and he is not the one caused the injury. That the circumstances that led to the event, he did not cause the accident.

39. In re-examination, it was his testimony that he was taken to Matuu Police Station and he was not told his problem and why he was arrested and whether he was a culprit.
40. DW2 was Mary Nduku Muungu. She testified that she has a kiosk at home and that Charles Ndambuki Nthiwa is her husband. Testifying that she is aware of the charges in court. That on 16/9/2013 she recalls locked her kiosk and she went home and that the next day on 17/9/2013 she found the kiosk was broken into and the door was broken. DW2 got in and found many items and flour poured on the ground. That the flour that poured on the ground had a straight and it led her to the home of her neighbours, the family of Kibati. She went there and found mzee Kiio. DW2 called the mother as there was a young man who lived there (deceased). She spoke to his mother Monica Mwanzia and told her that DW2's shop was broken into and the flour poured and it led her their home. according to DW2 they reached his home and Mutua Mwanzia responded and he opened the door and the mother asked him to bring back and return the stolen items and DW2 was given the items.
41. DW2 the claimed that there were other items and he said he did not have them. She produced exhibit – 1 DW2 wrote the list and the phone number and other things by Mwanzia Kibati the deceased's father and that they agreed they go and repair the door and the items were recovered. Testifying that on 17/9/2013 DW2 called her husband who was in Machakos who told her to collect the items and she told him that the door was broken and items recovered. That her husband went and on 21/9/2013 her husband went to the deceased's home.
42. DW2 went to Sunday School and her husband went to the deceased family and while at church DW2 heard communication at the Kiosk as it was 22/9/2013 when she was informed that Mutua Mwanzia was lying and he had head injuries. She produced exhibit 2, the photograph of the shop and doors of the kiosk. DW2 told court that she had been married to her husband for 30 years and that he is a peaceful man and that the deceased death was accidental. Testifying that the deceased was drunk.
43. In cross-examination, she testified that her husband is the accused in this case and that the deceased stole from her kiosk. She told court that on 22/9/2023 the accused person went to the deceased's home alone and that when her husband went there she did not know what happened.
44. The matter was canvassed by way of written submissions.

Submissions

Submissions by the State

45. The state vide its submissions dated 25th April, 2024, wherein counsel for the state raised the following issues for determination:
 - a. Was the accused involved in the murder of the deceased?
 - b. Did the accused have malice?
 - c. Was the accused identified appropriately?
 - d. Was the cause of death as a result of the injuries inflicted?



46. On was the accused involved in the murder of the deceased, it was contended by state counsel that that the accused person came to the deceased father's house, in order to confront the deceased on the items stolen in his shop. He took the deceased by force and they headed to the accused's shop. Opining that this is evident from the testimony of PW1 & PW2 who witnessed the accused's actions.
47. It was submitted that when PW1 & PW2 arrived at the kiosk they found the deceased lying down while tied on both hands with rope, with injuries to the head. It was only the accused person who was present at the shop. Contending that it is evident that indeed the accused person is responsible for the injuries inflicted on the deceased.
48. As regards malice, counsel relied on Section 206 of the Penal Code and submitted that the accused person had the malice aforethought to attack the deceased and inflicted injury to him. Contending that the desire to harm is brought out by the fact that the accused suspected the deceased to be the thief who stole from his kiosk.
49. On accused identification, state counsel averred that the accused was properly identified by PW1 & PW2 who witnessed the accused leaving with the deceased at home. secondly it was posited by counsel that they went to the accused shop whereby they found the deceased lying with severe injuries inflicted by the accused person.
50. With regards to cause of death, it was the case of the prosecution that PW4 Dr. Sisenda who filled the postmortem report stated clearly that the deceased cause of death was as result of intracranial hemorrhage as a result of head injury. To bolster this position counsel relied on the cases of *Ronald Nyaga Kiura v Republic* [2018] eKLR, *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 334 and 335 and *R v Jagjiwan M. Patel and Others* (1) T. L. R. (R) 85.
51. On the accused defense state counsel lamented that the said defence is a mere afterthought which cannot shake the prosecution's cogent case. Contending that the evidence of PW1 & PW2 clearly placed the accused at the scene of crime. opining that the motive was clear that the accused inflicted injury to the deceased on the suspicion of theft.
52. It was submitted that the prosecution availed testimonies of the seven witnesses in addition to the documentary evidence produced as exhibits in this matter. Submitting that it has proved beyond reasonable doubt and the accused ought to be convicted of murder under Section 203 as read with Section 204 of the *Penal Code*.

Accused Person's Submissions

53. The accused person in his submissions dated 22nd April, 2024 counsel for the accused raised the following issues which he submitted on sequentially:
54. On the proof of the fact and the cause of death of the deceased, counsel submitted that the postmortem report was produced as PEHX by PW4 confirming that the cause of death was hemorrhage as a result of head injury which had a fracture and that on cross-examination, PW4 confirmed that the injury might have been caused by a sharp weapon like panga or metallic rod and that the possibility of falling down cannot be ruled out. Submitting that the fact and the cause of death is not disputed since a postmortem report was produced of which PW1, PW2, PW6 and PW7 witnessed.
55. On the proof that the death of the deceased was the direct consequence of unlawful act or omission on the part of the accused which constitute the "actus reus" of the offence, it was the accused case that it is alleged that the accused assaulted Mutua Mwanzia outside his shop causing him injuries which



resulted to the death. PW1, PW2 PW3 & PW6 found other people at the scene while Mutua Mwanzia had already been assaulted.

56. It was contended that from the evidence PW6 and PW7, the deceased was found with blood stained clothes lying on the ground and the soil was soaked with blood. Positing that that the I.O equally produced stone and stick purportedly collected outside the shop as PEX 2 &3.
57. That upon cross-examination the I.O could not verify whether these items were collected at the scene since there was no an inventory of items collected at the scene nor were there an exhibit memo produced as exhibits again no photographs were taken at the scene to verify that these exhibits were indeed taken from the scene.
58. The storage of the said exhibits for a period of 6 years since 2013 was also cast to doubt since the I.O alleged that the items were at all times at his custody yet he confirmed to have moved from Yatta Police Station to Matuu Police station and he did not produce any document to confirm that he handed over the alleged exhibits which were allegedly at Yatta Police Station. Submitting that the alleged exhibits to wit stick and stone were not connected to the scene and the accused stated neither were they proved to have been used in assault to/of the deceased and/or to have been collected at the scene and Counsel prayed that this court pronounce that they have no evidential value to this case.
59. Counsel opined that the prosecution did not prove that the death of the deceased was the direct consequence of unlawful act or omission on the part of the accused.
60. Regarding proof that the said unlawful act or omission was committed with malice after-thought which constitute the men rea of the offence, Counsel asserted that the actions of the accused from the very morning of 22/9/2013, when the alleged incident occurred confirm that he had no intention to cause the death of the deceased.
61. It was submitted that he visited the home of the accused, woke up everyone including his father and he did not harm anyone. That he went to the deceased home with his motor bike and even left it there implying that he knew he would peacefully go back there. opining that the accused went to the kiosk together with the deceased and his intention was only that they assess the damage done. It was contended that he even wanted to go there with the deceased father, but the deceased father said he was okay with the deceased going with the accused only.
62. It was contended that at the scene, the accused did not run away when the deceased got injured, the accused was found by neighbours at the scene and he did not escape and the time of his arrest he co-operated with the police.
63. Counsel submitted that due to the forgoing the prosecution did not prove that the accused committed an unlawful act or omission and with malice after-thought.
64. On the investigations done by the police, it was submitted that the I.O in this matter allegedly visited the scene of crime on the fateful day. Contending that his investigations and preparation for this case is wanting in many aspects. It was averred that first it was alleged that there was a pool of blood at the scene and that there was a broken door among others. The deceased was lying at the scene while still alive.
65. Counsel propounded that the I.O did not deem it necessary to take photographs at the scene and again the items allegedly collected at the scene were not minuted, no exhibit memo and they were not taken for finger dusting and/or for DNA analysis.
66. It was the accused case that the I.O while being cross-examined was categorical that there were children who witnessed when the deceased was being assaulted alleging that he even met these children at the



scene who were between 5-7 years and that they were from the vicinity and their parents were also at the scene.

67. It was asserted that it is interesting to note that these young children and/or their parents were not prosecution witnesses. To buttress this position counsel relied on the case of *Republic v Morris Karani Alando* (Kakamega Criminal (murder) case No.32 of 2012), and submitted that the prosecution evidence is insufficient to warrant the accused person's conviction since people at the scene including the alleged children who were eye witnesses were not called as witnesses to corroborate the evidence adduced.
68. Regarding plausible defence, counsel opined that the accused person gave an account to what happened on the fateful date and the previous events leading to the occurrence and that through his witness, one Mary Nduku Muia who is also his spouse it was established that in the nights of 16/9/2013 their shop had been broken into and some goods stolen as tabulated in defence exhibits 2 that luckily some baking flour had poured on the ground and it led DW2 to the deceased home. contending that the deceased acknowledged having broken into the accused shop and stolen the goods.
69. It was averred that the accused went to deceased home 22/9/2013 and met with the deceased parents, the accused and parties agreed on compensation for the stolen goods and that DW1 confirmed that after the meetings, he even left his motorcycle at the deceased home and together with the deceased, they went to the kiosk to assess the damage done.
70. Counsel submitted on behalf of the accused that while at the kiosk that the deceased who was still drunk wrestled the accused and in defence, the deceased stepped over a sufuria causing him to fall down and the deceased was hit by the edge of the angle line of the broken door.
71. Counsel argued that it is unfortunate that the deceased died out of the injuries inflicted by the edge of the angle line of the broken door. Contending that the accused person has not denied these happenings and he was co-operative with the police on all the investigation. It was posited further by counsel that the accused did not have any intentions to harm or even inflict injuries on the deceased and that what happened was purely an accident as he was acting in self defence.
72. To buttress the forgoing counsel placed reliance on the case of *Republic v Ann Karimi* [2020] eklr.
73. Submitting that conviction on the circumstantial evidence can only be made when it excludes all hypothesis of innocence of the accused and that the prosecution has the legal obligation to prove the critical ingredients of the offence of murder. Contending that from evidence on record and matters raised herein, the prosecution has failed miserably in that respect hence circumstantial evidence in the present case does not irresistibly point to the accused to the exclusion of all others so as to justify a conviction. Asserting that there are other existing circumstances weakening the chain of circumstances relied on. To rely on circumstantial evidence counsel quoted the case of *Republic v Pius Kikungu John* (2019) eklr (Makueni HCCR NO. 197 OF 2017). Which counsel urged this honorable court to consider in arriving at a just conclusion.

Determination/Analysis

74. This Court considered the charge /Information, the Record of evidence adduced by Prosecution witnesses, Defense Witnesses and various exhibits and written submissions filed on behalf of the Accused person and Prosecution.

The issue(s) for determination are;



- a. Whether the deceased Mutua Mwanzia's death was caused by the Accused person Charles Ndambu Nthiwa?
- b. Was the Accused person involved in the murder of the deceased?
- c. Was he positively identified/recognized as one who committed the crime?
- d. What was the cause of death of deceased?

Evidence Taken By Different Trial Courts

73. In the case of *Joseph Kamau Gichuki v Republic* Criminal Appeal 523 of 2010 cited in Nyabutu & Another, the Court stressed that;

“By dint of Section 200(1) (b) of the *CPC*, a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely, but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete trial..... See *Ndegwa v R* (1985) supra. In this case the Trial Judge passed on after having fully recorded evidence of 7 witnesses....in fact [he] had summed up to the Assessors. The trial, moreover, was not a short one but a protracted one which had taken 5 years to conclude. The passage of time militated against the Trial being started de novo.....”

Section 200 (1)*CPC* that provides;

- (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
 - (a)
 - (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.
- (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.

Section 201 *CPC* provides;

- (2) The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.

75. The hearing commenced before Hon. D.K.Kemei J on 30/4/2019 and thereafter PW2; PW3; PW4 & PW5; PW6 & PW7. The Court delivered Ruling on 22nd July 2020 on a case to answer.
76. This Court took over the matter and on 1/12/2021 availed copies of typed proceedings and applied Section 200 *CPC*. The Accused person through Counsel agreed to proceed with the Defense. The Court proceedings were conducted in accordance with Section 200 (1) (b) *CPC*.



77. The Accused person was/is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence entails;

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

In *Republic v. Mohammed Dadi Kokane & 7 Others* [2014] eKLR the elements of the offence of murder were listed by Hon.M. Odera, LJ. as follows: -

- 1) The fact of the death of the deceased. [mens rea]
- 2) The cause of such death.
- 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
- 4) Proof that said unlawful act or omission was committed with malice aforethought. [actus reus]

Section 206 of the *Penal Code* sets out the circumstances which constitute malice aforethought as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- (a) An intention to caused death or to do grievous harm to any person whether such person is the person actually killed or not.
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
- (c) An intention to commit a felony.
- (d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

78. In the case of *Nzuki v. Republic* [1973] KLR 171 the Court of Appeal stated that in the commission of the offence of murder it must be committed with the following intentions: -

- “(i) The intention to cause death;
- (ii) The intention to cause grievous bodily harm;
- (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely



to ensue form his conduct is not by itself enough to convert a homicide into a crime of murder.”

79. This Court gleaned the Trial Court record that disclosed the following;

The evidence on record is that PW1 father of the deceased was visited by the Accused person at his house on 22.9/2013 at 7 am and he suspected his late son the victim herein as one who broke into his shop on 17/9/2013. The Accused person seized and left with the deceased to his place as PW1 remained home with his wife and other son. After 10 minutes he went to the Accused person’s shop and found the deceased on the ground and he was seriously injured and he could not stand up and he lay outside the Accused person’s shop. He confronted the Accused person who slapped him on the left cheek and he ordered him to write down the shop items that his son the deceased had allegedly stolen and his wife was stating the items and the Accused person demanded that he avail the stolen items that he was not sure his late son had stolen. He refused, the Accused person called Police and the deceased was taken to hospital and he went with the Police.

80. PW2 younger brother of the deceased stated on 22/9/2013 the Accused person came home and found him and his father PW1. He ordered the deceased to accompany him as his shop was broken into and items stolen and they left. After 30 minutes they went to the shop and found his late brother lying on the ground badly injured and tied with ropes when tried to untie his brother the Accused person threatened him. He saw the Accused person slap his father and he called the Police.

81. PW3 a neighbor stated that on 22/9/2023 his children were coming from Sunday School told him that they saw the deceased had fallen down and died outside a shop nearby. He rushed to the scene and on arrival found the deceased lying down outside the Accused person’s shop and he was bleeding profusely and the left eye was gouged out and he could not speak. PW1 & PW2 were at the scene. He knew the deceased very well he was not a drunkard and he had been suspected in the past to have broken into the Accused person’s shop and stolen goods and he had not heard of any criminal activities by the deceased.

82. The 3 witnesses gave direct evidence on the situation and/or circumstances regarding the deceased on the fateful day. In short, the deceased was at his home, the Accused person went for him on allegation that he broke into his shop and stole items and he took him to the shop. Minutes later, the deceased was lying profusely bleeding lying on the ground near the Accused person’s shop, tied up with ropes and left eye gouged out. The 3 witnesses place the Accused person at the scene and there is evidence of contact and interaction between the Accused person and the deceased.

Circumstantial Evidence

In the case of *Mubdhar Said Jumaan v Republic* Criminal Appeal 119 of 2022 (Gatembu, Nyamweya & Odunga JJA) stated;

Proof in criminal cases can either be by direct or circumstantial evidence. When a witness such as an eye witness asserts actual knowledge of a fact that witness is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences maybe drawn is circumstantial evidence.

In the case of *Republic v Abolfathi Mohammed & Anor* Petition 39 of 2018, the Supreme Court considered circumstantial evidence as follows;

“... the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ...”



In the case of *Musili v. Republic* CRA No.30 of 2013 (UR)

“ to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.”

The fact of the death of the deceased.

84. PW1 PW2 PW3 PW5 PW6 all confirmed on 22/9/2013 seeing the deceased lying on the ground near the Accused person’s shop bleeding profusely and PW5 Scene Visiting Officer organized for the victim to be taken to hospital Matuu Hospital. He was referred to Kenyatta Hospital but he died before the ambulance arrived.

The cause of death.

85. PW1 & PW6 identified the deceased’s body for post mortem. The Post Mortem Report by Dr Gloria Sisenda indicated that the deceased sustained head injury in form of fracture of temporal- parietal skull bone and hematoma intracranial cavity. The Report indicated cause of death as intracranial hemorrhage as a result of head injury.

Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons

In the case of *Stephen Taruma v Attorney General of the Federation* 2010 1 i LAW/CA/A/86/C/2009 referred to in [State v F.O.O.](#) [2021] eKLR indicates;

The doctrine of ‘Last Seen’ means the law presumes that the person last seen with the deceased bears full responsibility for his death. Thus, where an Accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the Appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a Trial Court and an Appellate Court will be justified in drawing the inference that the Accused person killed the deceased.

In the case of *Anjan Kumar Sarma v State of Assam* Criminal Appeal No 560 of 2014 (India) referred to in [Republic v Joseph Kioko Muthoka](#) [2022] eKLR stated;

The circumstances of last seen cannot by itself form the basis of holding Accused guilty of the offence.....There must be something more establishing connectivity between the Accused and the crime.... It is clear from the above that in a case where the other links have been satisfactorily made out in the circumstances point to the guilt of the Accused, the circumstances of last seen together with absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and the absence of satisfactory explanation cannot be made the basis of conviction.

86. From the facts out lined above, the deceased left his home on 22/9/2013 healthy and alive and was in the company of the Accused person. The Accused person took the deceased to the shop from his home, where he alleged that it is the deceased who broke into the shop and stole items. The next time his family saw him he was lying on the ground outside the Accused person’s shop and was bleeding profusely and he could not talk or stand. The deceased was tied with a rope and had left eye gouged out. The Accused person was at the scene/shop and he called Police. The Accused person who went



- to deceased home and brought him to the shop was 'last seen' with the deceased who was injured and bleeding profusely.
87. The Accused person had ample time and opportunity to cause harm or grievous harm to the deceased, more so he had gone to his home on suspicion the deceased broke into his shop and stole assorted items; the Accused person was livid. On the other hand, the injuries sustained by the deceased could not have been self-inflicted.
88. The Accused person testified in Defense on 14/7/2022 and relied on his written Statement filed on 4/3/2021. He stated that on 16/9/2013 his kiosk was broken into and was by deceased Mutua Mwanzia and stole assorted kiosk goods. On 17/9/2013, his wife went to open the shop and found baking flour poured at the doorstep of the kiosk and flour on the ground headed to the doorstep to the house where the stolen items were hidden, his Uncle's house outside the deceased's father's compound.
89. DW2 called him and explained what happened and he went home on 21/9/2013 and DW2 explained what happened and that she reported the matter to the Village Elder.
90. On 22/9/2013, he visited the Deceased's father and he informed him there was no need to call elders and claimed PW1 had asked his son on the theft and alleged that the deceased admitted to stealing the items. PW1 sent for the deceased, he came with his brother PW2 and they had a meeting and discussed recovery of stolen goods and the repair and restitution of the shop door. The deceased smelt alcohol and he had a hangover. The stolen items were written down by his wife and deceased's father acknowledged in his hand writing and produced Note written in Kikamba dated 22/9/2013 and translated into English. The goods were valued at Ksh 2125/- 91. Both Notes were produced as Defence Exhibit 1 & 2. They proceeded to the shop to assess the damage and additional damage for payment. He left with 2 brothers the deceased and PW2, on the way PW2 went back.
92. When they got to the shop the deceased said he would show him how he broke into the shop and showed him the chisel he used to crack the door and got in. He produced photographs of the said door. The deceased turned chaotic and held his neck and started fighting him and in his defence he exchanged blows with him. Unfortunately, he hit a sufuria and fell down and was hit by the angle line of the door. He was scared that is not what he expected and the deceased was bleeding profusely.
93. The Accused person called deceased's father and brother and explained what happened and they rushed to the scene and PW1 asked him what happened. The father called Masyula Kibati and they discussed how to take the deceased to hospital. They called several motor vehicle transporters. The deceased remained at the scene for a long time, he was arrested at 9am and the deceased was taken to hospital at 5 pm. He talked to a lorry transporter who helped to take the deceased to Matuu Police Station and then to Matuu Hospital.
94. DW2 stated that their kiosk on 16/9/2013 was locked on 17/9/2013 she found the kiosk was broken into and the door was broken. DW2 found assorted items missing and flour poured on the ground had a straight line on the ground and it led her to the home of her neighbours, the family of Kibati. She went there and found Mzee Kiiio. DW2 called deceased's mother, and told her that DW2's shop was broken into and the flour poured and it led her their home. According to DW2 they reached his home and Mutua Mwanzia responded and he opened the door and the mother asked him to bring back and return the stolen items and DW2 was given the items. DW2 said there were other items and he said he did not have them She wrote down the List His mother wrote phone number and agreed to repair the door of the shop.



95. On 17/9/2013 she called DW1 her husband and explained the break-in and theft and stated he would come home. He came on 21/9/2013 and went to deceased's home on 22/9/2013. She went to Church when she came and found the deceased and the Accused person.
96. The above outline discloses various strands of circumstantial evidence. PW1 & PW2 testimonies confirm that on 22/9/2013 the Accused person was in the company of the deceased until his demise. There was no one else from when the Accused person took the deceased from home in their presence on allegation of breaking into his shop to the shop and while at the shop it was just the both of them. When the Accused person took the deceased to the scene of crime as he alleged he had admitted to theft of assorted goods from the shop and was going to show/confirm the damage on the door to repair of compensate the Accused person, PW1 & PW2 confirmed when they came to the shop, the deceased was on the ground profusely bleeding and unable to stand or talk, when PW1 enquired the Accused person slapped him and threatened PW2 from untying the deceased who was tied with a rope. PW5 found the Accused and the deceased at the shop. PW7 collected exhibits at the scene I stick broken into pieces produced as Exhibit 2 & 1 Stone Exhibit 3.

These facts depict the Accused person's anger and hence had opportunity and did occasion assault on the deceased. From the injuries sustained by the deceased were consistent with PW4's evidence and production of Exhibit 1- post mortem report dated 26/09/2013 which showed the weapon was inflicted on the temporal area of the head and was probably a sharp object.

The Accused person's presence at the scene at the material time and contact by speaking to the deceased and being together with deceased was/is admitted. There is ample evidence which cumulatively point to the Accused person's assault of the deceased.

The Accused person put forward in sworn statement the defense of self-defense that while at the kiosk that the deceased who was still drunk wrestled the accused and in defense, the deceased stepped over a sufuria causing him to fall down and the deceased was hit by the edge of the angle line of the broken door.

The Accused person alleged that the exhibits produced of stone and stick were not presented in Court with an Inventory of items collected at the scene and countersigned by him, there was no Exhibit Memo to take the items for finger dusting and DNA analysis or photographs taken at /of the scene. He also questioned the fact of chain custody of the exhibits for 6 years, whether these exhibits were actually in relation to this case or not.

The Court finds the issue of being drunk not confirmed by evidence but again if there was a tussle because the deceased wrestled the Accused person, there would have been a report made to the Police on arrival at the scene or later and visible injuries confirmed by visiting a medical facility for treatment and P3 Form filled in.

This Court finds that the Accused person was on a mission to have the assorted items stolen from breaking in his shop to be paid or returned and repair and/or compensation for the door made by deceased and/or family.

The burglary of the shop ought to have been reported to Law enforcement Agencies Police Station and report booked and let the Police investigate and arrest suspect(s) after booking the report in the O.B. If on the other hand the parties resulted to traditional negotiation processes the Local Leader / Elder should have been involved.

As it is we shall never know truly that the deceased broke into the Accused person's shop and stole or not, yet he lost his life. On the other hand, exhibits produced in Court were produced by PW7 as he picked them from the scene of the incident. The exhibits are to answer the question what was used to



injure the deceased? It could be bare knuckles by the deceased and/or gadget or item but the pertinent question is did the deceased meet his death as a result of an unlawful act or omission by the Accused?

The evidence confirms the Accused person was last person with the deceased, he took him from home to the shop a scuffle ensued but the self-defense is not probable or even possible when, PW2 found his late brother tied with a rope. The Accused person was angry that he got the Accused person from home and took him to the shop, he slapped deceased's father when he came to the shop and asked what happened and threatened PW2 when he tried to untie his brother who was roped on the ground. The Accused took the law in his hands and assaulted the deceased causing him injury.

Proof that said unlawful act or omission was committed with malice aforethought.

The prosecution presented evidence of the Accused person visiting the deceased's home on burglary of his shop and spoke with his family then went with him to his shop and thereafter matters took a dramatic turn and when PW1 & PW2 came to scene and found the deceased lying on the ground profusely bleeding. A vicious assault was occasioned on the deceased by Accused person, the deceased was seriously injured and bleeding profusely and they frantically tried to take the deceased to hospital.

The Prosecution submitted that the accused person had the malice aforethought to attack the deceased and inflicted injury to him. The Prosecution submitted the Accused person's desire to harm was by the fact that the accused suspected the deceased to be the thief who stole from his kiosk.

The Defense, submitted it was unfortunate that the deceased died out of the injuries inflicted by the edge of the angle line of the broken door. The accused person called the Police after these happenings and he was co-operative with the police in the investigation. The accused did not have any intentions to harm or even inflict injuries on the deceased and that what happened was purely an accident as he was acting in self-defense.

The Court finds that the Accused person had no intention to kill the deceased because, he sought him out from home as one who broke into his shop, and wanted the return or payment of assorted items stolen from the shop and repair or compensation for damaged door of the shop.

It is while at the shop that he took the law in his hands and beat up the deceased and tied him up and called the Police. It is not disputed that the deceased profusely bled and it took time and effort to get him to hospital for treatment, when the deceased was taken to Matuu Hospital he was referred to Kenyatta National Hospital and this took precious time, whilst waiting to be taken to KNH he succumbed. The cumulative effect is that possibly/probably with immediate treatment the deceased may have survived.

This Court therefore reduces the offence of murder to manslaughter. It is unfortunate that the deceased died out of assault by the Accused person and was tied up in a rope. The defense of injuries inflicted by the edge of the angle line of the broken door and a scuffle that ensued and the Accused person acted in self-defense is not borne out by the evidence on record.

The Deceased died of inflicted injuries and resultant bleeding from the head arising out of assault by Accused person and delay in obtaining medical treatment. A life was lost but based on the evidence in totality, the Court finds that all the ingredients of murder have not been proved. The evidence does not confirm malice aforethought by the Accused person to murder the deceased. In line with Section 179 of *CPC* & 206 of *Penal Code* the Accused Person is found guilty of the lesser offence of manslaughter.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT ON 5/7/2024.

M.W.MUIGAI

JUDGE

