



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 25 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

REBECCA KAMENE MUTISYA.....1<sup>ST</sup> ACCUSED

DENNIS MUSYOKI KIOKO.....2<sup>ND</sup> ACCUSED

JUDGMENT

1. **Rebecca Kamene Mutisya** and **Dennis Musyoki Kioko** hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> accused are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars being that the 1<sup>st</sup> and 2<sup>nd</sup> accused on 25<sup>th</sup> August 2019 at Masalani village in Kibwezi sub-county within Makueni county jointly with others not before court murdered Patricia Katumbi Matini.
2. Both accused persons denied the charge and the case proceeded to full hearing with the prosecution calling a total of eleven (11) witnesses. The accused persons gave sworn evidence and called two witnesses.
3. **PW2 Josephine Siku Kithiki** is a sister to the late Martin Kithiki who was the husband to Patricia Katumbi Matini the deceased herein. She testified that on 25<sup>th</sup> August 2019 around 7.00pm she was from the market with the deceased. The two of them used to sell at the said market. They walked about five (5) meters apart with the deceased walking behind her.
4. At around 7.30 pm as they approached the house she heard the deceased making noises behind her. On turning she saw her held by two people. She ran away at first but on further checking she saw the deceased staggering before falling down. Those who had held her ran away when she fell. By the time PW2 reached her, she was bleeding from stab wounds and had already died. She screamed and people came. She did not identify the attackers. A marvin cap (EXB2) had dropped at the scene.
5. **PW3 Elizabeth Mbinye Martin** is a daughter of the deceased. She was home on 25<sup>th</sup> August 2019 at 7.30pm when she saw the deceased and PW2 on the road coming home. She was 5m from the house. The two women had a torch and were talking as they came, as they neared she heard the deceased screaming. She went to their 2<sup>nd</sup> compound and at the deceased's door and there was a man in a black overall carrying a rungu and a torch. She turned backwards on seeing him. She went to where the deceased had been screaming from and found her dead.
6. The deceased had a stab in her tummy plus other stabs all over her body. Several people arrived and the police were called. She explained the bad relationship between the deceased's and accused's family following allegations that the deceased was having a love affair with the husband of the 1<sup>st</sup> accused who is also the 2<sup>nd</sup> accused's father. Based on this she believed it was the accused persons who killed the deceased.
7. It was her evidence that while at the scene on 25<sup>th</sup> August 2019 at 8 – 8.30pm the 1<sup>st</sup> accused's husband (Kioko) called the deceased on her phone which PW3 picked. He told her to advise the deceased to hide where she was and not come home. She called her uncle (*Joseph Mutinda PW6*) soon thereafter. It was her evidence that the cap (EXB2) used to be worn by the 2<sup>nd</sup> accused in their village.
8. **PW4 Simon Maundu Mwangangi** did not witness the incident but only heard of it. He told the court that the 1<sup>st</sup> accused had grudges with the deceased whom she believed was having a love affair with her husband. That they had fought and the 1<sup>st</sup> accused had promised that the deceased would be dead by end of August 2019 and it came to pass. He witnessed the said fight at Masalaani market and heard the words spoken by the 1<sup>st</sup> accused. He confirmed being at the scene when the 1<sup>st</sup> accused's husband called on the deceased's phone warning her against going to her house.
9. He identified the woolen marvin cap (EXB2) and rungu (EXB3) which were found at the scene. He identified EXB2 as belonging to the

2<sup>nd</sup> accused. It was his evidence that the 1<sup>st</sup> accused used to openly state that the 2<sup>nd</sup> accused would be among those to kill the deceased, and the young man disappeared after this incident. The war between the accused and deceased had been reported to the chief and assistant chief and the same was discussed which made the matter worse.

10. He testified that when this incident occurred the 1<sup>st</sup> accused had not been home for a week.

11. **PW5 Mate Mutumwa Kamba alias Tina** is a village elder. She testified that on 25<sup>th</sup> August 2019 at 7.30 pm while carrying out the census she received a call and later heard noises and calls which they followed leading them to the deceased's home. They found her body lying on the ground and she was heavily bleeding from the stomach, ribs, mouth and breasts. She reported to the assistant chief and later the police came. They finished their work and went to the 1<sup>st</sup> accused's home and found her husband (Kioko). He told the police that EXB2 belonged to his son. Kioko was taken away by the police.

12. She told the court that the 1<sup>st</sup> accused had told her, she would kill the deceased for moving with her husband. That the 1<sup>st</sup> accused had come to the deceased's home with her in-law, sons and daughter whom she referred to as Al-shabaab. On that day the deceased told them she was no longer relating with Kioko. She advised Daniel who is a son to the 1<sup>st</sup> accused to bring his parents and the deceased to her place for reconciliation but this never came to be. She however confirmed that the 1<sup>st</sup> accused was not present when the deceased met her death.

13. **PW6 Joseph Mutinda Kiviki** is a brother in-law of the deceased. He was informed of the deceased's death by PW2 while in Mombasa. He informed the deceased's son and they travelled home together, and he witnessed the postmortem. He explained how the 1<sup>st</sup> accused had sent him to warn the deceased against moving with her husband. He notified Mr. Kioko who asked him not to believe the 1<sup>st</sup> accused's stories.

14. He was present when the 2<sup>nd</sup> accused was arrested in Athi River by members of the public. He was on 3<sup>rd</sup> and 4<sup>th</sup> August 2019 sent by the 1<sup>st</sup> accused to the deceased to warn her since she was going to finish her. He denied mentioning the threats to the deceased. **PW7 Michael Mutia Kitavi** a relative of the deceased identified her body for post mortem. He said the 1<sup>st</sup> accused had in August 2019 complained to her about the deceased interfering with her husband with whom she was no longer relating.

15. **PW8 Nicholas Kyalo Mutie** is the assistant chief Kathyaka sub-location. He received the murder report on 25<sup>th</sup> August 2019 and notified the administration. He proceeded to the scene with others. Later together with the police they had Justus Kioko (*husband of the 1<sup>st</sup> accused*) arrested from his home. The 1<sup>st</sup> accused was not there. He said he never received any complaint over the illicit relationship between the deceased and Jairus Kioko (*husband to the 1<sup>st</sup> accused*). He was however aware that the chief was handling the issue.

16. **PW9 Josephat Musyoka** is the senior chief Kikumbulio. He stated that in May 2019 the deceased had gone his office and complained that the 1<sup>st</sup> accused was scandalizing her saying she had a relationship with her husband. He did a letter calling the 1<sup>st</sup> accused and her husband for a meeting. The accused and the deceased came but Justus Kioko never came. The deceased denied the allegations and he advised them accordingly.

17. In August 2019 the 1<sup>st</sup> accused called him and told him that her husband had beaten her because of his love relationship with the deceased. He sent her to Kibwezi police station. He received a report of the murder on 26<sup>th</sup> August 2019 at 9.00am. In cross examination he said the 1<sup>st</sup> accused had come to his office after the beating by her husband, and her face was swollen. The man (Kioko) did not pick his call, and he never went to their home. He was informed by the village elder of the threats to the deceased by the 1<sup>st</sup> accused but he never followed it up.

18. **PW10 no. 46623 Sgt Paul Kiilu** of scenes of crime is gazetted under No. 10284 of 6<sup>th</sup> December 2006. He took photos at the scene of murder on 25<sup>th</sup> August 2019. He produced them together with his certificate as EXB4a-4e.

19. **PW11 no. 58525 Sgt. Bernard Wakoli Wekesa** from Kibwezi police station is the investigating officer in this matter. He was at the scene of murder at Masaalani village with the O.C.S., PC Wafula and P. C. Kirui on 25<sup>th</sup> August 2019 at 9pm. They found the deceased's body with stab wounds lying on the road 20m from her home. He found the marvin and rungu (EXB2&3) there. He called the scenes of crime officer (PW10) who came. The body was taken to Kiundwani Funeral home and a post mortem was done on 29<sup>th</sup> August 2019.

20. He interrogated those at the scene including PW2. He was told of the dispute between the deceased and the 1<sup>st</sup> accused because of a love affair between the deceased and the husband to the 1<sup>st</sup> accused and the threats by the 1<sup>st</sup> accused. The marvin (EXB2) was identified as belonging to the 2<sup>nd</sup> accused and it was found at the scene. He testified that at the time of incident the 1<sup>st</sup> accused was not at her home as she had gone to her sister's place in Kiuwawani, and thereafter to Machakos. She was later traced and brought to the station by her sister Joyce who was also a suspect. EXB3 (*rungu*) had no blood on it.

21. In cross examination he said he only relied on what PW3 and PW8 told him about the marvin (EXB2). He agreed that the said marvin is a common hat and that the 2<sup>nd</sup> accused denied owning it. He recorded a statement from Justus Kioko but he was not called as a witness because he is the 1<sup>st</sup> accused's husband.

22. He also confirmed that the 1<sup>st</sup> accused has been badly beaten by her husband and that's why she had left home. He did not know what the 1<sup>st</sup> accused had gone to do in Machakos. He alleged that PW4 had told him of having seen the 2<sup>nd</sup> accused at the market that day during the incident.

23. In her sworn defence the 1<sup>st</sup> accused testified that on 25<sup>th</sup> August 2019 she was at her sister's home in Kiundwani (Kibwezi). Her sister is Joyce Zinza Kioko (DW1). It was her evidence that on 14<sup>th</sup> August 2019 her husband Justus Kioko beat her badly following a domestic misunderstanding. She was injured on her forehead (*scar seen*). She reported to her brother in-law (Josiah) at whose home she slept that night. She reported to the chief who called her and Josiah to his office. The chief wrote her a letter and sent her to Kibwezi police station and thereafter to Makindu hospital for treatment.
24. After treatment she went to DW1's home. She remained there upto 19<sup>th</sup> August 2019. She later went to her brother Peter Muthoka's place in Machakos. Upon her sister's advice, she remained there for a week. On 5<sup>th</sup> September 2019 she received a call from Kibwezi police station summoning her there. DW1 was called there to record a statement which she did.
25. She was detained while DW1 was released from Kibwezi police station. The DCIO told her she was a witness in a certain murder case. She stated that the deceased was her friend and they never had any problem. There was land the deceased's uncle had sold to her and they had also bought a plot through her. She denied there having been a love affair between the deceased and her husband. She said the village elder who had alluded to this had wanted the motorbike and land she had acquired through the deceased.
26. In cross examination she said the 2<sup>nd</sup> accused was in Nairobi on 25<sup>th</sup> August 2019. She admitted that her husband had been beating her since 1991, as he envied her level of education. She also admitted that she had quarreled with the deceased very badly in May 2019 at the market but denied having threatened her. A meeting by home people had been held for them to deny being enemies.
27. The 2<sup>nd</sup> accused gave a sworn defence denying the charge. He said he was a day scholar student at Masalani Secondary School now in Form 4. It was his evidence that on 25<sup>th</sup> August 2019 he was with this brother Dickson Mutiso Kioko (DW2) in Nairobi having gone there on 11<sup>th</sup> August 2019, while on holiday. He returned home on 7<sup>th</sup> September 2019 6.00pm as schools were opening. The next day he went to graze cattle and while there he was approached by a young man who said he was looking for his lost cow.
28. After a while he saw PW4 and Mutinda and he went to them. They told him they were looking for him and they later said he was involved in the deceased's death. He was taken to Kyanginywe police post from where he was driven to Kibwezi police station where he was interrogated.
29. He denied owning the marvin (EXB2) and produced the one he owned as DEXB1 and said he had bought it in 2017. When his brother came home in 2019 he had told him never to wear DEXB1 again. He produced a photo (DEXB2) taken on 18<sup>th</sup> January 2019 saying since April 2019 he has never worn DEXB2.
30. He admitted having been to the deceased's with his brother upon her invitation in 2018. They got a logbook for a motorbike they had bought from Mutinda a brother in-law of the deceased.
31. In cross examination he said his parents would quarrel and fight at times. He knew the deceased as a vegetable hawker and mother to PW3 but he did not know if she related with his parents. He denied knowing of any quarrel between the deceased and the 1<sup>st</sup> accused. He explained that EXB2 had a cuff and it's a common marvin hat. That the marvin he wore in DEXB2 was DEXB1.
32. **DW1 Joyce Zinza Kioko** reiterated the 1<sup>st</sup> accused's evidence on having gone to DW1's on 11<sup>th</sup> August 2019 after a beating by her husband. She stayed with them for a week and left for their brother's place in Machakos. They heard of a woman who had been killed. Police officers later came to her home looking for the 1<sup>st</sup> accused. She was taken to Kibwezi police station. Her husband took them to where the 1<sup>st</sup> accused was. She recorded a statement but was never called as a witness. Her evidence is that the 1<sup>st</sup> accused was at her home when this incident occurred.
33. **DW2 Dick Mutiso Kioko** is a son to the 1<sup>st</sup> accused and a brother to the 2<sup>nd</sup> accused. He testified that when this incident took place he was with the 2<sup>nd</sup> accused in Nairobi having brought him from home on 10<sup>th</sup> August 2019 and he returned home on 7<sup>th</sup> September 2019. He learnt of the 2<sup>nd</sup> accused's arrest on 8<sup>th</sup> September 2019. He said his family had no grudge with the deceased. He identified the marvin hat DEXB1 as belonging to the 2<sup>nd</sup> accused. It was his evidence that on 25<sup>th</sup> August 2019 he had gone to church at AIC Mukuru kwa Reuben in Nairobi. That the census was also undertaken when the 2<sup>nd</sup> accused was there.
34. In cross examination he said they had travelled to Nairobi by lorry. That several people had seen the 2<sup>nd</sup> accused on the plot and in church. He has been in Nairobi for 3 years he said.
35. The prosecution elected not to file any submissions and so relied on the evidence on record after the close of the defence case.
36. **M/s Isika & Associates** filed written submissions on behalf of both accused persons. Its their submission that indeed the deceased died on 25<sup>th</sup> August 2019. The cause of death was given by PW1 in the postmortem produced. It was submitted that the deceased suffered stab wounds which were caused by a sharp object. The exact object was not produced as the exhibits produced were not sharp objects. Further the rungu (EXB3) had no blood stains on it.
37. Its submitted that the evidence relied on by the prosecution is hearsay evidence. To the defence PW2 is a suspect from her conduct. She knew what was going to happen to the deceased. The two men who allegedly killed the deceased were never looked for. PW2 never sought for help for the deceased. The witnesses tried to accuse the 1<sup>st</sup> accused of vendetta towards the deceased following an alleged love affair between the deceased and the husband to the 1<sup>st</sup> accused. This she says was not proved. On the other hand it was shown that the deceased had once assaulted the 1<sup>st</sup> accused with a knife, while at the market.

38. On *mens rea* counsel while relying on the case of **Republic vs Mohammed Dadi Kokane & 7 others [2014] eKLR** has submitted there is no evidence to show that the accused had any guilty mind in this matter for malice aforethought to be proved.

39. Counsel faults the prosecution for not availing the call log data for the alleged call by Jairus Kioko to the deceased's phone, or even the mobile phone recovered at the scene. On the alleged love affair counsel submits that there was no proof of the same. All that was said was that the 1<sup>st</sup> accused's husband had failed to attend the meetings. She submits that the 2<sup>nd</sup> accused was charged for being the 1<sup>st</sup> accused's son and nothing else.

40. Counsel further argues that the witnesses were the deceased's relatives and they tried their best to link the accused to the murder. That they even claimed that the accused persons were threatening them but this was never proved. Further that no motive has been inferred in this case. She referred to the case of **Republic vs Tubere s/o Ochen [1945] 12 EACA 63** where the court held that:

***“An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.”***

In line with this she submits that the prosecution failed to prove any motive or intention by the accused persons to harm the deceased.

41. On identification counsel has submitted that this was critical since the incident occurred at night. The attackers were not identified and the alleged phone call by the 1<sup>st</sup> accused's husband is what seems to link the accused to this offence plus the rastafarian marvin cap. There was no evidence adduced which placed the accused persons at the scene she submits.

Learned counsel has argued that the marvin cap (EXB2) has no special mark which distinguishes it from other marvin caps in the market. No DNA was conducted on it to confirm ownership.

42. Counsel contends that the scene was not properly secured such that when the scenes of crime officer arrived EXB2 & 3 were being held by the investigating officer. It's her argument that anybody could have placed these items at the scene.

43. Learned counsel has submitted that the defence of alibi relied on by the accused persons is very strong and supported by the evidence of the two defence witnesses. Having relied on this defence they did not need to prove it. See **Ssentale v Uganda [1968] EA 36** and restated by Odunga J. in **Republic v SSM [2020] eKLR**. It is the prosecution's duty to disapprove an alibi defence.

44. Relying on the case of **Sawe v Republic [2003] KLR 354**, counsel has submitted that suspicion however strong cannot be the basis of a conviction. She contends that there is no evidence before this court to convince the court that the accused persons committed this offence. Still referring to the case **R v SSM (supra)** learned counsel quotes the court having said

***“...In my view, it is the duty of the prosecution to direct the investigators properly. Where the investigations do not measure up to the required standards, it behoves the prosecution to point out the same and give appropriate directions particularly in a matter such as this where there may be a need to call for rebuttal evidence.”***

She has urged the court to acquit both accused persons.

### **Analysis and determination**

45. The offence of murder with which the accused is charged is defined under **Section 203** of the **Penal Code** as:

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

46. It is therefore clear that in a case of murder the prosecution must establish the following beyond any reasonable doubt:

- (i) The fact and cause of death.
- (ii) That the act of commission or omission causing the death was perpetrated by the accused (actus reus).
- (iii) The act was pre-meditated and/or the accused had the intention to commit the said act (mens rea).

### **(i) Fact and Cause of death**

47. There is no dispute that the deceased was attacked and died on the same night of 25<sup>th</sup> August 2019. This has been attested to by PW2 – PW11.

**PW1 Dr Josephine Maitha** who conducted the post mortem outlined the injuries that were on the deceased's body. She found the cause of death to be *“cardio-pulmonary arrest caused by severe haemorrhage due to multiple penetrating stab wounds”*. Clearly these injuries were not naturally caused. They must have been inflicted by somebody. This takes me to the next issue.

### **(i) Is it the accused person/persons' act/acts of commission/omission which caused the injuries?**

48. There is no direct evidence on who the killers of the deceased are. Even PW2 who claims to have been with the deceased person said she only saw two men holding her but she was not able to identify them. PW3 also said the man dressed in a black overall whom she saw standing at the deceased's door was unknown to her. What is before this court is therefore circumstantial evidence. The same will be evaluated to see if it conforms with the required standards to sustain a conviction.

49. In the case of **Kariuki Karanja v R [1986] KLR 190** the Court of Appeal stated thus;

***“2. In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.***

***3. An aggregation of separate facts is inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”***

50. In **Sawe v R [2003] KLR 364** the Court of Appeal held that:

***“1. 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 explanation upon any other reasonable hypothesis than that of his guilt.***

***2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***

***3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”***

51. In **Mwita v Republic [2004] 2 KLR 60** the court of appeal stated:

***“It is trite that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”***

52. Lastly in the case of **Mwendwa v Republic [2006] 1 KLR** the court of appeal had this to say:

***“1. To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. Secondly, as is now settled law, the chain must never be broken at any stage.***

***2. The prosecution which had the burden of proving by circumstantial evidence that there was no fax machine to be sold, no person to be met at Athi River did no more than what they produced through the appellant's husband's testimony. That in the courts' view was not enough to prove that the appellant's story for going to Athi River was completely false and that she went there solely for purposes of killing the deceased.***

***3. The prosecution should have called the maker of the post-mortem report to produce it and give evidence which would have shed more light on the actual cause of death of the deceased. Further, there was no evidence adduced to throw some light as to how many tablets could have been taken by the deceased and whether it was the appellant who bought and administered the lethal tablets.***

***4. In this case, prosecution failed to discharge the burden placed on it as required by law. There were several loose ends, such that the chain which is required to be completely unbroken, in a case such as this, which depended on circumstantial evidence was unbroken in several instances. The evidence did not lead to the one and conclusion that it was the appellant who caused the death of the deceased, neither did it prove beyond any reasonable doubt that if she did so, she did so with the intent to cause the deceased's death.”***

53. The standards for relying on circumstantial evidence have therefore been set.

54. As stated above the persons who were at the scene were not identified and none was a woman. The main issue that has been said to apparently connect the 1<sup>st</sup> accused with this offence is her bad relationship with the deceased. For the 2<sup>nd</sup> accused it is the multicoloured marvin cap (EXB2) which was allegedly recovered from the scene.

55. Both the prosecution and defence in their evidence have confirmed that the 1<sup>st</sup> accused had been away from her home before, during and after the occurrence of this incident. The senior chief (PW9) confirmed that indeed the lady had been beaten by her husband and she had left to seek for medical attention. It was the 1<sup>st</sup> accused's evidence that she first went to her sister's place in Kiunduani (Kibwezi) and thereafter to her brother's place in Machakos. This was supported by the evidence of her sister (DW1). It was not rebutted.

56. **PW5, PW8 and the Investigating officer (PW11)** were among those who visited the 1<sup>st</sup> accused's home on the night of the incident. It was their evidence that they only found Jairus Kioko (1<sup>st</sup> accused's husband) and a daughter in the home. None of the accused persons

was there. All this evidence removes the 1<sup>st</sup> accused from the scene of murder.

57. **PW3 and PW5** also testified that while at the scene Jairus Kioko called the deceased and PW3 picked the call and placed the phone on “loud mode”. Mr. Kioko was allegedly warning the deceased not to go to her house but remain where she was. Unknown to him she was already dead. According to PW8 Jairus Kioko and the daughter were taken to Kibwezi police station on the material night. Its not clear whether they were under arrest or they were assisting with the investigations.

58. Later PW11 the investigating officer said he recorded a statement from the said Jairus Kioko, but could not call him as a witness because of being the husband to the 1<sup>st</sup> accused. I am convinced that the main reason why he was taken for questioning was the alleged telephone call he made to the deceased. This element was never investigated even though the police had all the opportunities of getting the two mobile phones and the call log data from the service provider/providers.

59. Therefore besides PW3's and PW5's evidence there is nothing tangible to confirm that Jairus Kioko called the deceased that night. If indeed he called her as alleged then upon his confinement the police should have found out from him why he did not want her to go to her house and if at all there was any danger, who the perpetrator of the danger was. This has remained hanging and the witnesses said nothing about it.

60. The 2<sup>nd</sup> accused denied being home during the time of incident. His brother (DW2) supported this evidence. The prosecution has placed stress on a marvin cap (EXB2) which was allegedly recovered from the scene together with a rungu (EXB3). None of them were blood stained. The issue is how EXB2 is linked to the 2<sup>nd</sup> accused. The answer is that the neighbours had been seeing him wearing it and he was the only one in that village with such a marvin cap.

61. The witnesses agreed that EXB2 is a common cap that is worn by many people. To prove that, the 2<sup>nd</sup> accused produced a similar cap (DEXB1) in his defence. The prosecution was not able through cross examination to show any difference between EXB2 and DEXB1. PW11 had indicated that he was aware that the 2<sup>nd</sup> accused and his brothers were in Nairobi but during the incident the 2<sup>nd</sup> accused was seen at the market. He had allegedly been told this by Simon Maundu Mwangangi (PW4).

62. There is nothing in PW4's evidence showing that he saw the 2<sup>nd</sup> accused at the market just before the killing. All he said was that the 2<sup>nd</sup> accused had been all over but disappeared soon after the death of the deceased. This is a very general statement which mentions nothing about the market on the date of incident.

63. I now come to the main issue of a love triangle having been the cause of the killing of the deceased. So much has been said about this issue. Infact PW4 in his evidence stated that the 1<sup>st</sup> accused had openly said that her son the 2<sup>nd</sup> accused would be one of those who would come to kill the deceased.

64. Even without analyzing this statement the only question I ask is what PW4 did on hearing the 1<sup>st</sup> accused utter such words? Did he take any step by reporting to the authorities in particular the police? The impression the prosecution witnesses have given is that they knew the deceased's life was in danger, they knew the culprit/culprits but they chose to do nothing to protect her. This is absurd.

65. Yes, the 1<sup>st</sup> accused and the deceased abused each other, they even fought at one time, but what is it that the accused persons did on 25<sup>th</sup> August 2019 that linked them to the killing of the deceased? There is for example no evidence that they are the ones who hired the thugs that killed the deceased persons.

66. Is it sufficient to conclude that just because of the rivalry between the two ladies, the 1<sup>st</sup> accused person assisted by her son killed the deceased? PW2 said its two men who committed the offence. PW3 saw a man at the deceased's door soon after the killing. The two men could not have been the 1<sup>st</sup> or 2<sup>nd</sup> accused because the accused are a woman and a boy. The 2<sup>nd</sup> accused must have been aged 15 – 16 years then.

67. I find the evidence adduced not to irresistibly point to the accused persons and no one else as the culprits. The evidence is based on high suspicion which in itself without any supporting evidence cannot be the basis of a conviction.

68. The Court of Appeal in the case of **Sawe v R (supra)** stated this:

***“7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

69. My finding therefore is that the prosecution failed to prove beyond reasonable doubt the charge against both accused. For my part I find both of them not guilty and I accordingly acquit them of the charge of murder. They are hereby released forthwith unless held under separate warrants.

Orders accordingly.

**Signed and dated this 19<sup>th</sup> day of May, 2021 at Milimani Nairobi by:**

**H. I. ONG'UDI**

**JUDGE**

**Delivered this 16<sup>th</sup> day of June, 2021 in open court at Makueni by:**

**GEORGE DULU**

**JUDGE**