



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MURDER CASE NO. 13 OF 2018

REPUBLIC..... PROSECUTOR

-VERSUS-

BERNARD KARANJA NG'ANG'A alias BENNA

alias NYAMBANE.....ACCUSED

JUDGMENT

1. Bernard Karanja Ng'ang'a is charged with offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap.63 Laws of Kenya**. It is alleged that on 29/07/2017 at Ngorika Trading Centre, Mirangine Sub-County Nyandarua County, murdered Samuel Wambugu Ngure alias Sammy.
2. Bernard had tied black paper round the neck.
3. He pleaded not guilty and prosecution called 14 witnesses. The accused was put on his defence and he tendered sworn defence but did not call witnesses. He was represented by **Ms. Ndegwa Advocate** and the State by **Ms. Rugut – State Counsel**.
4. The summons of evidence as captured from witnesses is set out as hereunder.
5. **PW1 Wilson Thuku Ndung'u** testified that on 29/07/2018. He said that at 7.00pm he saw Sammy in Bonus Bar. They left together to go collect Jerican he had left in brother's shop. Later parted company with Sammy. However, he went to Bugus Club where Bernard found him.
6. He left Bernard in that Bar and proceeded home. at 11.00pm while at home, he heard a bang on the gate and somebody saying he had to be paid. He also heard Sammy loudly saying 'mummy mummy'. The small gate was opened. The noise became louder thus called Rose and asked her to call police. She called Nyumba Kumi policing official who came.
7. When the said 2 officials of Nyumba Kumi came he came out and entered Sammy's mother compound, found Sammy and Bernard. Bernard was insisting that he had to paid for his damaged goods. Both were covered by mud and were drunk. Elders of Nyumba Kumi intervened and resolved that Kshs.670/- of Bernard was to be paid next day, which PW1 delivered to Bernard as promised. Sammy's health worsened and died on 06/08/2017.
8. On cross – examination he said when he saw the 2, accused and deceased, they were quarreling but not fighting. However, Sammy's clothes were muddy so was Bernard's clothes.
9. **PW2 Patrick Ng'ang'a Mwangi** neighbour of PW1 testified that on 29/07/2017 while at Bugus Bar with Njuguna, Bernard (Nyambane) appeared in possession of paper bag. Sammy entered same Bar and grabbed the paper bag. Sammy entered same Bar and grabbed the paper bag with Bernard and they started struggling over same which contained items therein Sugar, Bread, etc.
10. Njuguna and Bernard were sent out by owner of Bar for bringing problems in the Bar. Sammy was left inside. Then PW2 left for home.
11. **PW3 Rose Ngina Ngure** mother of Sammy testified that on 29/07/2017 at 10.00pm, she heard somebody knock her window who said he was Bernard. He said he had gone for his things which had been damaged by Sammy. He started insulting her and her family. She saw Sammy standing out his own house.
12. She asked Bernard why he had beaten Sammy but he said he was going to beat and finish him and that he would give him up to next morning to pay Kshs.670/-. However, he said he would not leave without money.

13. Village elders were called and came. Witness assured the elders she would pay Kshs.670/- next morning. The elders left with Bernard (Nyambane). Money was paid next day. Sammy slept but could not wake up next day. He was given medicine in a dispensary then sent to police station Mirangine where a P3 form was issued and was filled. Later he was taken to Nakuru Nursing where he later died.
14. Postmortem was done and witness identified body for same exercise. On cross – examination she said she never saw the two (2) fight. She said she reported at Wiyumiririe Police Post, Assault Case and P3 form was filled.
15. **PW4 Samuel Ndung'u Ng'ang'a** was on material night in Bugus Bar when Bernard entered bar with items in a bag at his neck. Sammy entered the bar, and went to Benna to claim same things with Bernard. They struggled over same and paper got torn and items poured on the floor. It contained rice, maize flour, oranges. Njuguna stood to separate them. The owner of Bar chased all of them outside the Bar and witness went home.
16. **PW5 Stephen Waweru Kamau** testified that on 29/07/2017 at 11.00pm, Rose Ngina mother of Sammy called him to go to her home. witness is the Chairman Kikobe Welfare Group. Rose said there was an emergency. He proceeded there and found Bernard and Sammy in the compound and Rose in the house.
17. She said I see how Sammy was beaten by Bernard for destroying his things. Chairman Nyumba Kumi also arrived and Rose also informed him of what had happened. Sammy was covered by mud all over, whole body. Sammy said he was beaten but Bernard denied. Rose agreed to pay for damaged items by next day. Bernard said if he was not paid he would finish off Sammy at their own gate.
18. Later was called by Rose and told his condition had worsened. He was taken to dispensary, then general hospital and he died.
19. **PW6 Immanuel Wanjohi** brother to Sammy testified that on 03/08/2018, he received call from mother saying Sammy was crying vomiting saying he was dying thus to look for motor vehicle. They took him to Riruta Hospital. His condition worsened and was taken to Nursing Home. He died next day.
20. PW3 told him Sammy had been beaten – witness identified body for postmortem. Doctor said Sammy had punctured stomach and intestines were being pushed out.
21. **PW7 James Maina Githuka** also narrated the incident at Bugus Bar on 29/07/2017 at 8.00pm. he said when Sammy arrived in Bar he pulled Bernard's paper bag with items therein which was on the table and scuffle arose over same items. The items poured on floor as paper bag got torn. The two were removed from the Bar. He and Bernard went home. He was drunk and did not know what happened next.
22. **PW8 Isaac Wambugu Thakira** Chairman Nyumba Kumi Policing Community was called and went to Rose's home. He found a lot of noise with Bernard claiming his things damaged at the bar. Rose agreed to pay same. Sammy's clothings were very muddy. He was very drunk and Bernard also was drunk. Bernard left and was paid money next day. Witness learned that Sammy condition worsened.
23. **PW9 Sworn;** he was **Cpl James Omuse** based at JKIA. That on 02/08/2017 while at Mirangine Police Station as Investigating Officer deceased with witness on 01/08/2017 that he was assaulted at Ngorika. P3 for was issued on 01/08/2017. He was beaten at Bar – Bugus Bar on 29/07/2017. He said he was beaten by Bernard a Kisii. Witness recorded statements. He said Bernard boxed and kicked him.
24. **PW10 Caroline Wanjiku – Clinical Officer** she examined him on 31/07/2017 and noted injuries – swollen lips, adorned stained clothes, torn shirt with no buttons. There was evidence he had been hit with fist. P3 form and medical report **P-Exhibit 1 & 2** produced.
25. **PW11 Jane Marigu Njiru** who worked at Bugus Bar, scene of incident testified. That on 29/07/2017 8.00pm she saw bodaboda rider come, she didn't know him by name then. After 5 minutes Sammy arrived. The two (2) went to back bar and was left in main bar. She was told that later there was fracas.
26. **PW12 AP Sgt. Paul Ndonyo Njenga** testified that on 31/07/2017 he was attached at AP Post Wiyumiririe Ngorika. A lady came with son Sammy. Sammy said he was beaten on 29/07/2017 while drinking at Bugus Bar – Ngorika and when going home, Ben beat him. He was given P3 to go to dispensary. He said he was injured on chest and ribs. OB was recorded.
27. **PW13 Dr. Titus Ngulungu** did postmortem of Sammy and observed perforation pyloric area and roof intestines and inflammation arising thereof caused death.
28. **PW14 PC Mark Kagunda** attached to Homicide Section DCI Nairobi investigated the case and gave report culminating with charging of accused.
29. On close of prosecution case, accused testified on oath – his defence after court found he had case to answer. He stated that he used to live in Narok before arrest doing potato business. On 29/07/2017 in the morning worked up to 1.00pm. Then went to a campaign rally at Ngorika Katess where he stayed up to 4.00 pm. later went to Ngorika Trading Center where after shopping and went to buy fruits for family and other items then went to butchery and bought meat.
30. Then with the butchery owner, went to Ngani Bar. While there with butcher, they took Kenya Cane and then left to butchery place. It had rained so he put the bag with items on his neck and left with Boda (motorcycle) then proceeded to Mbugus Bar at 9.00pm from Ngorika.
31. Then he parked outside near a bar and entered via butchery to Mbugus Bar and proceeded to spirit wine part of bar. He took ½ Kenya Cane and carried 1 take away. While at the bar, he was with Shamba worker of deceased's family one Thuku. Then they left the bar and as he was leaving bar, at a table he met Jimmy and Njuguna, Mukaru, Ndung'u. Njuguna who told him to sit down.

32. Njuguna ordered Keg 1 cup and before taking the half of it, Sammy Wambugu Ngure entered. He took the items accused had bought as they were on the table. He threw them on the floor and then held by neck with left hand. He slapped me.
33. They were separated. The people in the bar took Sammy out of the bar and chased him. When he slapped accused, slapped him on the face for him to release his neck. Accused then collected his items from the floor. At 9.00pm, accused and Jimmy to accused's home. Upon arrival, they found ugali was ready and meat which they ate same with his family.
34. By then, Jimmy left after they arrived. After eating, he stayed with his children up to 11.00pm. Then Samuel Ngure came and opened gate and started calling him. He said he wanted milk Mutungi, and he wanted to pay accused items.
35. They went with him to their home as they are next neighbours. He woke his mother and she opened curtains and asked what it was. She called some village elders who came. They enquired what problem was and he explained.
36. One elder Francis Wambugu enquired what happened. Deceased said he was not beaten. Sammy's mother said my money was to be paid next day.
37. Accused left for his home. By the time he left, Jimmy was okay but just drunk and muddy clothing as he was falling and it had rained. The following day, he came at accused gate, took milk and left for his business. He didn't see him since day of incident.
38. Earlier, on their way back home with Jimmy on material day, they never saw Sammy on the way. He never absconded/escaped after the incident.
39. After 29/07/2017, accused wife was pregnant and delivered in August and He took her to private hospital but could not pay all bills. Children were also going to school thus he went to Narok where he was working and worked for a month. He came after 1 month. again returned and stayed 1 week.
40. Also he came again 2018 April for weeding and left for Narok. Then when he came again thereafter, 3 elders said he had sold charcoal to lorries. They arrested him and took him where lorry was supposed to be. They beat him and told him that he killed somebody then put him in boot of car and drove him overnight.
41. Eventually he was booked with his motorbike at Mirangine Police Station. He was locked in and later charged.
42. He was working in Narok from 1998 up to 2018 when he was arrested. he used to go and come back home. He never hit Sammy deceased other than one slap on the face.
43. **On cross – examination**, He stated that, he was working in Narok since 1998 and he used to come home. He used to saw potatoes sacks and move them from where they could not be taken by lorries. He had nothing to show documents as police took them on arrest. He went to Narok on 04/05/2017 his motorbike. He owned motorcycle since 6 years before arrest.
44. He didn't have receipt showing he was travelling to Narok but was using his motorcycle. He never went to police to report over any incidence. He collected some items, others like sugar, salt poured on the floor. He left with Jimmy and at the time he didn't know where Sammy was as he had been kicked out of the bar before they left.
45. The roads to their home are many. Sammy could use any road to home. Accused went home with Jimmy. He wanted to go for his items next day at Sammy's place. Elders ordered him be paid. Accused only took 1 cane alcohol and 1 keg. Accused was drunk and not over drunk as he could ride home my motorcycle.
46. The police never asked for him even at home at Ngorika. He was a bit drunk. He had taken 1 Kenya Cane ½ plus 1 Keg.
47. On close of defence case parties put submissions and exchanged.

PROSECUTION'S SUBMISSIONS:

48. The prosecution submitted that, the ingredients of murder are well set out in the case of **Republic v Henry Obisa Ouko [2018] eKLR** as:

a. The death of the deceased has occurred.

b. That the accused committed the unlawful act which caused the death of the deceased.

c. That the accused had malice aforethought.

a) The death of the deceased has occurred:

49. The prosecution submits that the death of the deceased occurred: that indeed, Sammy Wambugu Ngure was properly identified as the deceased. A postmortem report was properly filled and confirmed that the deceased died as a result of acute peritonitis due to a cut wall tear in a body whose pyloric area had an ulcer (not perforated). The perforation (tear) was caused by blunt trauma to the abdomen from an assault.

b) That the accused committed the unlawful act which caused the death of the deceased:

50. It is contended that, in as much as there were no eye witnesses to the murder of the deceased Sammy Wambugu Nguni there are a number of witnesses who saw the deceased being slapped by the accused at Mbugus Bar. This is where the matter began.

51. **PW2 Patrick Ng'ang'a Mwangi** was an eye witness to the fight at the Bar and he stated that both the accused and deceased were thrown outside the bar after the fight. It was his testimony that as he was leaving the Bar he saw Nyambane (accused) and, Sammy (deceased) and Njuguna.

52. **PW4 was the Investigating Officer**, he produced a report of the OB extract as P-Exhibit 5. This was the initial report of assault made at Mirangine Police Station on 01/08/2017 by the deceased. He was issued with a P3 form that was duly filled at Ngorika Health Centre.

53. **PW9 Cpl James Omuse** a police officer at Mirangine Police Station corroborates this.

54. **PW12 Paul Ndonyo Njenga** testified that on 31/07/2017, he was on duty at Wiyumiririe Police Post. He states under oath that the deceased reported that he had been assaulted by somebody known as Ben. PW12 states that he recorded the same as OB 3/31/07/2017 and issued him with a note to enable him get treatment at Ngorika Health Centre.

55. It is submitted that in as much as the evidence on record is circumstantial the chain of events of the night of 29/07/2017, can only point at the accused as the guilty party. The evidence on record all points at the culpability of the accused having murdered Sammy Wambugu Nguni.

56. The postmortem report stated that the perforation (tear) was caused by blunt trauma to the abdomen from an assault. This confirms that the deceased died as a result of an assault to his stomach.

57. Furthermore, as earlier stated, the deceased upon reported at Wiyumiririe Police Post stated that it is Ben who assaulted him.

58. On whether there was malice afore thought, it is submitted, the offence occurred on 29/07/2017 and the accused was only arrested on 18/07/2018 in Narok. It was the accused's testimony that he left to Narok after he was paid the money by the deceased's mother. He could not produce any receipts or documents to show that he was indeed working at Narok and not hiding from the police.

DEFENCE SUBMISSIONS:

59. The defence submitted that, there is no doubt Samuel Wambugu Nguni is deceased. His body was identified by PW6 Immanuel Wanjohi Nguni, his brother, before the postmortem was conducted. PW13 conducted the autopsy on the deceased and filled a postmortem report dated 10/08/2012. The doctor established the cause of death as ***"Acute Peritonitis due to cut wall tear in a body whose pyloric area had an ulcer (not perforated). The perforation (tear) was caused by blunt trauma to the abdomen from an assault."*** In layman terms, the deceased sustained a fatal internal abdominal injury due to being hit in the abdomen.

60. **On whether the accused caused the death of the deceased;** the answer to this question is NO. The accused person did not cause the death of the deceased. To effectively answer the question, we must first analyze the prosecution evidence vis-à-vis the defence evidence.

61. The prosecution led evidence that the deceased died as a result of an assault by the accused Mbugus Bar. The Investigating Officer (I.O.) testified as PW14 and produced an OB extract (**P-Exhibit 5**) of the first report made by the deceased at Mirangine Police Station. According to that report, the deceased reported that he was assaulted by the accused at Mbugus Bar at around 11.00pm.

62. **PW9, Cpl Omuse James** of Mirangine Police Station gave similar evidence, save for the time of assault. According to PW9, the assault took place at around 9.00pm.

63. **PW12 Paul Ndonyo Njenga** was the very first officer to whom an assault report was made. At the time, he was working at Wiyumiririe AP Post. Although the deceased person said he was beaten up by the accused, according to this witness, the deceased said that the beating happened along the road home.

64. PW12 likewise did not avail the written statement of the deceased or even the OB report where this was first noted down. More importantly and of particular note is that the place and time of the beating was different from that which was reported to PW9 at Mirangine Police Station. PW12 on being questioned by the trial Judge stated quite firmly that the report made to him indicated that the deceased had been beaten along the road.

65. Amazingly, although both PW9 and PW14 claim that the deceased did a written statement pointing an accusing finger at the accused person, none of these two witnesses availed the said statement.

66. In the absence of that statement by the deceased, defence contend that, what can only be relied on is the testimony of those who were at the scene when the assault allegedly happened. Those are PW2, PW4, PW7 and PW11. Curiously, none of these witnesses witnessed a fight the likes of which would cause death. The most any of the witnesses admitted to having seen was a slap to the face of the deceased.

67. It was confirmed by the pathologist (PW13) that a slap to the face could not have caused the death. According to the pathologist, the thing that likely led to the death of Sammy was blunt force trauma to the abdomen. None of the eye witnesses saw Bernard, the accused, give the deceased any blow to the stomach or abdomen area.

68. Assuming the beating happened along the road home as reported to and by PW12, there would still be the question of sufficient proof. **PW7** stated that he was carried home by the accused person on his motorbike.
69. They did NOT encounter Sammy along the road. Several witnesses confirmed that there are various routes from the trading Centre to Sammy's home. It could be true that Sammy was beaten up along the road home. It is however doubtful that it was by Bernard as Bernard's companion would have without doubt witnessed it.
70. It could very well have been someone else and Sammy was simply unable to recall who. It will be remembered that Sammy had reportedly been drinking heavily on the date of the alleged assault and his perception of things was likely to be skewed. Further, none of the witnesses testified as to the lighting or lack thereof on the various routes to the home of Sammy and the beating was at night time. The case of *Ephantus Gakindu Nyaga v Republic [2017] eKLR (Nyeri High Court Criminal Appeal No. 99 of 2014)* was cited.
71. The defence contend that, the prosecution appears to have relied heavily on circumstantial evidence. Since the accused person is the one who was last witnessed quarrelling with the deceased, the prosecution assumed he was responsible for the death. The case of *Sawe v Republic [2003] KLR 364* was cited on circumstantial evidence.
72. The prosecution witnesses, including the Investigating Officer could not explain the whereabouts of the deceased in the hours between 9.00pm when he left Mbugus Bar and 11.00pm when he arrived home. Anything could have happened to him during this unaccounted for period.
73. The accused person on the other hand had a reasonable explanation, corroborated by the prosecution witnesses, for everything he did on the fateful day. He admits to having slapped the deceased deliberately and unapologetically spilling his shopping.
74. The accused left the bar at least ten minutes after the deceased and he did not encounter the deceased again until around 11.00pm when the deceased came by his home. Several prosecution witnesses confirmed that the accused and the deceased are next door neighbours. If the deceased had been beaten in between the two homes, PW1 (an employee at Sammy's home namely Thuku) and PW3 (the mother of Sammy) would have heard it. They didn't.
75. Further, PW1, PW3, PW5 (village elder) and PW8 (village elder) did not observe any fist cuffs between the accused and the deceased when they were in their presence. When asked by the village elders why he beat up Sammy, the accused outright denied having beaten up the deceased did NOT name the accused.
76. This was captured in the testimonies of the village elders PW5 and PW8. Lastly, these witnesses observed that while Sammy was extremely muddy, Bernard was in contrast clean. If the two had been involved in a tussle, Bernard too would have had dirt on him.
77. Over and above the testimony of the lay witnesses, Defence draws court's attention to the testimony of PW10. PW10 was Caroline Wanjiku Muiru the clinical officer who first examined the deceased and filled his P3 form (**P-Exhibit 1**). The P3 form was filled on 01/08/2017 but the medical officer had examined the deceased the previous day 31/07/2017.
78. Of interest is that the clinical officer did not observe any injuries whatsoever on the deceased person's abdomen, yet the deceased's cause of death was trauma to the abdomen. If a blow is hard enough to cause internal injury, one would expect for there to at least be some observable bruising on the outside of the body especially where the medical examination is conducted soon after the alleged assault.
79. **PW10's** testimony raises an alternative reasonable theory. There is a real likelihood that the deceased acquired his death-causing-trauma-to-the-abdomen on a date other than 29/07/2017. After all, his brother PW6 testifies to having seen the deceased going about his business normally prior to 03/08/2017. The deceased was well able to walk and talk then.
80. Defence submission in sum is that the death of Samuel Wambugu was NOT caused by the accused person.

c) Whether there was malice aforethought:

81. Malice aforethought it is submitted that, assuming the *actus reus* is established, which is however vehemently denied, it is contended that the *mens rea* has not been established. The *mens rea* in murder cases is essentially malice aforethought as defined hereinabove.
82. As has been established, when the accused person slapped the deceased, it was in response to the actions of the deceased. The deceased had spilled the accused person's goods worth Kshs1,670/- and was unapologetic about it. The deceased picked a fight with the accused.
83. The accused person was justified in responding as he did. Any reasonable man in his position would probably have done the same or even worse. The accused's actions towards the deceased were not actuated by malice but rather by provocation. The defence cites the case of *Republic v Ismail Hussein Ibrahim [2018] eKLR (Kajiado High Court Criminal Case No. 4 of 2016)*.

ISSUES, ANALYSIS AND DETERMINATION:

84. The core issue is whether the ingredients of murder were proved beyond reasonable doubt?

85. I have considered the evidence presented by the prosecution as well as the defence. I have also considered the submissions by learned counsels. The offence of murder is defined by section 203 of the penal code as:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” Section 206 of the Penal Code provides as follows:

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

- **an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- **knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- **an intent to commit a felony;**
- **an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony. The burden of proof rests squarely upon the shoulders of the prosecution.”**

86. The three ingredients of the offence of murder which they must establish beyond reasonable doubt under **Section 203 as read with section 206 of the Penal Code** are as follows: -

“proof of the fact that and the cause of death of the deceased. That the cause of deceased’s death was as a result of the direct consequences of the accused’s unlawful act or omission which is the actus reus of the offence. Proof that the unlawful act or omission was committed with malice aforethought.”

87. It is not in dispute that the death of the deceased occurred: that indeed, Sammy Wambugu Ngure was properly identified as the deceased. A postmortem report was properly filled and confirmed that the deceased died as a result of acute peritonitis due to a cut wall tear in a body whose pyloric area had an ulcer (not perforated). The perforation (tear) was caused by blunt trauma to the abdomen from an assault.

88. In as much as there were no eye witnesses to the murder of the deceased Sammy Wambugu Ngure there are a number of witnesses who saw the deceased being slapped by the accused at Mbugus Bar. This is where the matter began.

89. PW2 Patrick Ng’ang’a Mwangi was an eye witness to the fight at the Bar and he stated that both the accused and deceased were thrown outside the bar after the fight. It was his testimony that as he was leaving the Bar he saw Nyambane (accused) and, Sammy (deceased) and Njuguna.

90. PW4 was the Investigating Officer, he produced a report of the OB extract as P-Exhibit 5. This was the initial report of assault made at Mirangine Police Station on 01/08/2017 by the deceased. He was issued with a P3 form that was duly filled at Ngorika Health Centre.

91. PW9 Cpl James Omuse a police officer at Mirangine Police Station corroborates this.

92. PW12 Paul Ndonyo Njenga testified that on 31/07/2017, he was on duty at Wiyumiririe Police Post. He states under oath that the deceased reported that he had been assaulted by somebody known as Ben. PW12 states that he recorded the same as OB 3/31/07/2017 and issued him with a note to enable him get treatment at Ngorika Health Centre.

93. The prosecution contention is that in as much as the evidence on record is primarily circumstantial the chain of events of the night of 29/07/2017, can only point at the accused as the guilty party. And that, the evidence on record all points at the culpability of the accused having murdered Sammy Wambugu Ngure.

94. Thus the key question for determination is whether the Accused herein is the person who, of malice afterthought, inflicted these injuries on the deceased. Admittedly, the prosecution case against the Accused person primarily rests on circumstantial evidence. It is not uncommon for legal practitioners to attack and deride circumstantial evidence in criminal cases, almost suggesting that it has little probative value or at the best, rate such evidence as weaker, in comparison to direct evidence.

95. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR**, the Court of Appeal had this to say on this point:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” See also Musili Tulo v Republic Cr. App. No. 30 of 2013.”

96. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

(see also Sawe v Republic (2003) e KLR and GMI v R Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

The postmortem report stated that the perforation (tear) was caused by blunt trauma to the abdomen from an assault. This confirms that the deceased died as a result of an assault to his stomach.⁵⁴ Furthermore, as earlier stated, the deceased upon reported at Wiyumiririe Police Post stated that it is Ben who assaulted him.

97. On whether there was malice afore thought: **the court is of the view that** as has been established, when the accused person fought the deceased, it was in response to the actions of the deceased. The deceased had spilled the accused person’s goods worth Kshs.670/- and was unapologetic about it. The deceased picked a fight with the accused in a bar and they were separated. The deceased reported an assault occasioned along the road by the accused.

98. The question was accused person justified in responding as he did. Any reasonable man in his position would probably have done the same in the fight in the bar but the court is satisfied that a follow up fight along the road occasioned the injuries noted by the doctor. That implying accused applied excessive force. The accused even followed the deceased to their home and threatened to finish him off if his Kshs.670/ was not paid. It had to take the village elders of Nyumba Kumi intervention to save deceased being finished off by the accused. Vide testimonies of PW3,5 and 8.

99. However, the court is convinced that the accused’s actions towards the deceased were not actuated by malice but rather by provocation and excessive anger fomented by the deceased. There was no prove that there was intention on the part of the accused to kill or to do grievous harm to Sammy but in course of anger excessive force was meted out on the deceased.

100. The real point of this case thus turns up on whether or not legal provocation as defined under **section 208 (1) of the Penal Code** was disclosed to trigger the actions taken by the accused. In order to answer this question, it is appropriate at this stage to set out the law relating to provocation. **Section 207 of the Penal Code** provides:

“When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter.”

101. **Section 208 (1) of the Penal Code** defines the term provocation as follows:

“The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

102. This question on provocation and provisions of section 208 (1) of the Penal Code have been a subject of interpretation and discussion in our courts in several cases. In the earlier case of Republic v Hussein S/O Mohamed [1942] EACA at pg 66 the Eastern Court of Appeal held as follows:

“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”

103. In the case of Peter Kingori Mwangi & 2 Others v Republic [2014] eKLR the court stated that, “for provocation to exist the following

two conditions must be established:

- i. The subjective condition that the accused was actually provoked so as to lose his self-control and*
- ii. The objective condition that a reasonable man would have been so provoked.”*

104. In deciding a similar situation on provocation the Court of Appeal in the case of *Elphas Fwambatok v Republic [2009] eKLR* held thus:

“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims.....”

105. In *Mabanga v Republic [1974] EA 176* the court further held inter alia on this subject as follows:

“The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the court was in the particular circumstances of this case provocation sufficient to have rendered the offence of murder to manslaughter.....”

We have on our own revisited the content of Section 208 of the Penal Code and construed it. To us content of provocation means any wrongful act of insult of such a nature as to be likely when done to an ordinary person.....To deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

106. The excessive force is manifest from injuries noted by the doctor, thus in all the circumstances of the case the accused is responsible for occasioning manslaughter. Thus the court makes the following orders;

- (i) The accused is acquitted on the charges of murder however he is convicted on offence of manslaughter.*

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 5TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE