



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 63 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

TONY KIPCHUMBA.....ACCUSED

JUDGMENT

[1] The accused is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, Chapter 63 of the Laws of Kenya**. The particulars are that on **28 June, 2013** at Bonjoge location within Nandi County, the accused murdered **Paul Koros**. He was arraigned before the Court on **30 July, 2013** and pleaded not guilty to the charge. The prosecution thereafter presented thirteen witnesses, who were heard between **4 July, 2018** and **24 September, 2019**. The defence presented its case on **26 May, 2021** and **9 June, 2021**. The accused was represented by **Mr. Martim**, while the state was represented by **Mr. Mugun**.

[2] The evidence of the prosecution was basically that the lifeless body of **Paul Koros**, was found lying beside the road, near the river within Bonjoge Location. The body was found lying on its side with no visible injuries; save that the deceased was foaming at the mouth and that the head seemed loose. Evidence was adduced by the Prosecution to the effect that the accused was the last person to be seen with the deceased; that he had gone to a nearby home and enquired from **Amos Kipkemboi (PW3)** whether the deceased had epilepsy; and that the accused then asked **Amos** to accompany him to where the deceased had fallen. On the way **PW3** decided to alert the neighbours who came to the scene and started beating the accused. The accused was then rescued and arrested by the Admiration Police. Thereafter police officers went to the scene and took the body to Kapsabet District Hospital to await a post-mortem. The accused who had already been arrested was then arraigned on a murder charge as aforementioned.

[3] Thus, the first prosecution witness, **Esther Koros (PW1)**, testified that she was the widow of the deceased and that on **29 June 2013** her husband left home to go and buy some bricks and cement. She told the court that at about 12.00 noon, **Julius Kipnetich (PW6)** delivered the cement along with some maize; but that her husband did not return home, and had not returned by 8.00 p.m. when she went to bed. She told the Court that she assumed that her husband had gone to the home of his second wife, **Margaret Koros. PW1** further stated that at about 9.00 pm, her daughter, **Eunice Chepkoech**, woke her up and drew her attention to some noise in the vicinity. She wanted them to go and find out what happened; and so they left home and walked towards the direction of the noise. She stated that on the way they met **Everlyne** who told them that her husband had died. She proceeded to the scene where she found the deceased body lying on his side with no visible injuries. She also mentioned that there were some villagers already gathered at the scene, some of whom had torches; and that they remained at the scene until 1.00 am when the police arrived and collected the body. **PW1** also mentioned that it was suspected that the deceased was killed by **Tony**, the accused person herein.

[4] The second prosecution witness was **Laban Kiptanui (PW2)**, a son to the deceased. He stated that he was home on **28 June 2013** and that, at about 9.00 pm, he heard screams and left his house and went to the scene. There he found many people gathered and was shocked to learn that it was his father who was lying there dead. He stated that he had a torch and was therefore able to see that the body of the deceased was lying on its side and the head was facing downwards. He also noted that the deceased's clothes, cap and shoes, which were duly identified and produced before the Court as exhibits, were muddy. It was further the testimony of **PW2** that by the time he arrived at the scene, some Administration Police officers were already there and were questioning **Tony Kipchumba**, the accused person herein, who was said to have been with the deceased when he died. He stated that he knew the accused very well as they were from the same village. He added that there was no relationship of any kind between the accused and his father, the deceased; and that he was not aware of any quarrel between the accused and the deceased.

[5] **PW3** was **Amos Kipkemboi**, who testified that on **28 June 2013** at about 9.00 p.m. he was with **Stephen Kipkemboi** and **Kipkosgey** when **Tony** approached them and asked for **Kamau** and on being told that **Kamau** was not with them, he asked to be shown the way to **Kamau's** house. It was **PW3's** testimony that the accused further asked if his neighbour, **Paul**, (the deceased herein) had epilepsy. He stated that he had known the deceased all his life and that he was his neighbour on the lower side, about 100 metres from his home. He stated that, to the best of his knowledge, the deceased was not epileptic. He explained that the accused thereafter told him that the deceased had fallen down and asked that they go and check on him. **PW3** also mentioned that the accused then gave him two Nokia mobile phones and told him that belonged to the deceased.

[6] **PW3** further testified that on their way to the scene, he decided to notify the neighbours; and that as he woke up a neighbour called **Agnes**, the accused ran away and went back to the scene ahead of him. **PW3** told the court that he found the accused at the scene crying near the deceased's body. He stated that he used one of the deceased phones which was functioning to illuminate the scene and view the body and noted that the body was lying on its side with no visible injuries. **PW3** testified that, as people gathered at the scene, including his father **Paul Tanui**, **Michael Ruto** and his wife **Rhoda (PW12)**, many wondered whether or not the deceased was dead; whereupon **Rhoda** touched the body of the deceased and confirmed that the deceased was dead. Thereafter some people started beating **Tony**, but he was rescued by the Administration Police officers who arrested him and later handed him over to the police officers who collected the body from the scene.

[7] **Nicholas Kipkosgey Mutai (PW4)** testified that on **28 June 2013** he closed his shop and left for home at about 9.00 pm; and that on the way, he saw the accused, **Tony Kipchumba**, and the deceased walking together near the home of the ex-chief, **Koros**. He stated that he had a torch that he shone on them; and added that, although he did not talk to them, he noted that **Tony** was holding the hand of the deceased, who was drunk, as they walked together. It was further the testimony of **PW4** that, about forty minutes later, he got to learn of the death of **Paul Koros** through **Julius Kemboi** and his brother. He proceeded to the scene and found the deceased lying on the ground with no visible external injuries; but noted that the deceased's head was moving round loosely, and his clothes were muddy.

[8] **PW4** further told the court that he found the accused at the scene and that he mentioned to the crowd that had quickly gathered at the scene that that he had earlier seen the accused with the accused and that he should therefore explain how the deceased died. **PW4** added that the crowd then started beating the accused before he was rescued by the police officers.

[9] The next Prosecution witness was **Stephen Kipkemboi (PW5)** whose testimony was that on **28 June, 2013** at about 9.50 p.m. he was at the home of his uncle, **John Kipnetich**, who was planning for the memorial service of his deceased wife, **Maragaret**. He stated that the accused approached them looking for **Kamau**; and that on being told that **Kamau** was not at the gathering, the accused asked **Amos (PW3)** to show him the way to **Kamau's** place. **PW5** testified that it was not long before they heard screams; and upon going to the scene, they found **Paul Koros**, the deceased, lying down; and that both **Amos** and the accused were present at the scene, along with many others.

[10] **PW6** was **Julius Kipnetich Cheruiyot**. He testified that on **28 June 2013** he was working as a *boda boda* operator; and that he had been sent by the deceased to buy cement and some maize. He stated that the deceased gave him **Kshs. 7,000/=** to purchase the said goods which he bought and took to the deceased's home. He testified that at about 9.00 p.m. that night, he heard some noise, and upon calling his brother to inquire about the cause of the screams, he got to learnt the deceased had died. He stated that he went to the scene and saw the body of the deceased lying by the roadside; and that it had no noticeable injury.

[11] **Leah Chelimo Mboka (PW7)** recalled that on **28 June 2013** at about 5.00 p.m. she was in her house with her children and some neighbours; **Jane** and **Sella**. She stated that it rained on that day and the deceased came to her house to take shelter from the rain. She testified that the deceased was drunk and started feeling nauseous and vomited in her house. She told court that after the rains stopped, the deceased got up to leave and on his way, he claimed that his money was missing but thereafter remembered that he had used the money to buy cement and bricks. It was **PW7's** testimony that the deceased later went his way. She later learned that he had died and that the accused was arrested as a suspect. She stated that she did not know of any connection between the deceased and **Tony**.

[12] **PW8** was **Jane Chepkoech**, the mother of the accused. She told the court that on **28 June, 2013** at about 5.00 pm she left her home for her sister's place when it started raining. She consequently took shelter at the house of **Leah (PW7)**. She testified that while at **Leah's** house, the deceased also arrived to take shelter from the rain; and that he was drunk and vomited inside Leah's house. She added that after the rain subsided she continued with her journey. The following day, she learned that the deceased died and that her son, **Tony Kipchumba**, was the suspect in connection with the murder of the deceased.

[13] **Solomon Kurgat (PW9)** testified that on **28 June, 2013** at about 6.00 pm he was at his place of work when he was called by **Jane (PW8)** with a request to take the deceased home. He testified that when he showed up to pick up the deceased, the deceased refused to board his motorcycle; insisting that he be given his things first. He explained that the deceased seemed okay and was not drunk. He added that since the deceased refused to board, he left him at **Jane's** house. The next day he was informed that the deceased had died.

[14] The next prosecution witness was **Elias Kipkorir Rotich** who testified as **PW10**. He told court that he was a radio technician and that on **28 June, 2013** at 9.50 pm he was at home when he received a phone call from **Jacob Choge**, a village mate, to the effect that there were screams in the village. He testified that he went to the scene and saw the body of the deceased; and that **Tony**, the accused person herein, was among the people present at the scene. He also stated that a crowd of people had gathered at the scene who wanted to beat up **Tony** but that he restrained them and advised that the law be followed. He explained that shortly thereafter police officers arrived and took away the body of the deceased.

[15] **PW11** was **Michael Kiprop Ruto**. His evidence was that on **28 June, 2013** at 10.00 pm he was at home when he received a telephone call from **Paul**, who informed him that there was a dead body on the road near his home. He rushed to the scene and found the dead body, which he recognized to be that of **Paul Koros**; and that the accused was also at the scene. He stated that the accused was talking to himself, uttering words to the effect that he had never done anything like that. He mentioned too that he did not see any injuries on the deceased's body except that his neck was loose.

[16] **Rhoda Ruto** testified as **PW12**. She stated that he was the wife of **PW11** and that she was with him when he received a report from **Paul** that there was a dead body on the road. She stated that she accompanied her husband to the scene and confirmed that the body at the scene was that of their neighbour **Paul Koros**. She explained that she touched **Paul Koros** and ascertained that he was already dead by the time she arrived at the scene. She consequently raised alarm that attracted the villagers to the scene. It was also the testimony of **PW12** that the accused was at the scene; and that he appeared restless.

[17] The last prosecution witness was **CI Kiptoo Kirui** who testified as **PW13**. His evidence was that he was on duty **28 June, 2013** when he received information from **Sergeant Zablou Nzoia** that there was a dead body lying on the road near the river. He proceeded to the scene accompanied by **PC David Rono** and **PC Moffat**. He testified that when they got to the scene, they found the body which was identified to

be that of **Paul Koros**, lying beside of the road. He testified that he saw no physical injuries on the deceased; but noted that the scene was muddy. He also noted that the deceased's clothes were muddy. The same were produced herein as the **Prosecution's Exhibit 1 to 6** along with 2 Nokia phones, said to belong to the deceased, which were handed over to them at the scene.

[18] **PW13** further told the Court that, since the suspect had already been arrested by the Administration Police officers, they collected him from the nearby AP camp after removing the body from the scene. The body was taken to Kapsabet District Hospital for purposes of post-mortem; and that it was after the post-mortem that the deceased's clothes were released to him. He added that he interrogated the accused, who was said to be the last person to be seen with the deceased and that his contention was that the deceased was drunk and he was only trying to show him the way; and that the deceased fell down accidentally at the scene and died near the river.

[19] On being placed on his defence, the accused told the court that on **28 June, 2013** he woke up and went about his duties. He stated that at about 6.00 pm he met **Paul Koros** who had fallen down and had vomited and soiled his clothes and he also had hiccups. He testified that the deceased was well known to him and that when he asked how he was doing, the deceased told him that he had taken *changa* at Mama Leah's and was not feeling well. The accused further stated that, since the deceased asked him for help because he was unable to stand on his own due to drunkenness, he decided to help raise him up and to support him as they walked slowly.

[20] The accused further stated that the night was dark and that to illuminate the way they used torches on their phones. He added that, at some point his phone battery died. Consequently, the deceased offered his phone to him for use. He explained that they would stop from time to time to enable the deceased rest; and that on one such occasion, he left the deceased and went for a call of nature; and that when he returned after about 4 to 5 minutes, he found that the deceased had fallen down and was foaming at the mouth. He called the deceased's name three times but he did not respond. He decided to go to the nearest home, where there was a memorial ceremony, for help; and that he carried Paul's phones because he feared they might be stolen in his absence.

[21] The accused further told the Court that he found **Elias alias Kamau** at the function and told him that **Paul** was not well. He added that he asked the organizers of the ceremony for assistance and was given four people, who he went with to the scene. He added that it was at that juncture that he handed over the deceased's phones to **Amos**.

[22] According to the accused, when they arrived at the scene, the deceased was unconscious and was still foaming at the mouth and it was **Paul Tanui** who touched him and said that he had died. The accused stated that he was shocked by the turn of events; and that he sat on a stone and started to weep as he did not expect **Paul Koros** to die. He pointed out that he did not have any dispute, grudge or disagreement with the deceased; and that he offered to help him out of good neighbourliness.

[23] The accused confirmed that many people gathered at the scene including the area assistant chief **Nicholas Mutai (PW4)** who asked him to explain what happened to the deceased. According to him, **PW4** was the one who incited members of the public to beat him. He stated that the members of the public pounced on him without listening to any of his explanations. He explained that the Police arrived at the scene in good time and took him to Bonjoge AP camp from where he was transferred to Kobujoi Police Station. He pointed out that no allegation was made that the property of the deceased was stolen. He therefore denied having committed the offence of murder and insisted that he was only helping the deceased out of kindness.

[24] The accused called his brother, **Kevin Kipkemboi Koros (DW2)** as his witness. **DW2** vouched for his brother's character and stated that he was not a violent person. **DW2** added that there was no disagreement between the accused and the deceased or any grudge of any sort between their families.

[25] In his closing submissions, filed herein on **11 June 2021**, **Mr. Martim**, raised one issue for determination namely, whether the Prosecution has proved the guilt of the accused beyond reasonable doubt to sustain the charge of murder. It was his submission that the Prosecution had failed to establish key ingredients of the charge of murder pursuant to **Section 203** of the **Penal Code** being; the act of murder (*actus reus*) and malice aforethought (*mens rea*). **Mr. Martim**, submitted that there is no proof that any of the Prosecution witnesses saw the accused kill the deceased or that the accused had *mens rea* to commit the murder. He also pointed out that no medical report was produced before court to ascertain the cause of death. He relied on the Court of Appeal case of **Chengo Nickson Kalama vs. Republic** [2015] eKLR in urging the Court to find that it was imperative that death and its cause be proved by medical evidence. Counsel also cited **Republic vs. James Ogwang Alichu & Another** [2018] eKLR; **Nzuki vs. Republic** [1993] KLR 171 and **Joseph Kimani Njau vs. Republic** [2014] eKLR to buttress his argument that the Prosecution utterly failed to prove the ingredients of the offence of murder beyond reasonable doubt.

[26] Regarding the doctrine of "last seen", **Mr. Martim** submitted the accused had sufficiently explained how he left the deceased to answer a call of nature; and that on return he found the deceased lying on the ground and was frothing on the mouth. In his view, the account presented by the Prosecution only gave rise to suspicion; and therefore is insufficient to found a conviction. Counsel cited **R vs. E K K** [2018] eKLR; **Sawe vs. Republic** [2003] KLR 364 and **Mary Wanjiku Gichira vs. Republic** [1988] eKLR, among others, for the proposition that suspicion, however strong cannot provide the basis for inferring guilt; and that guilt must be proved by evidence beyond reasonable doubt. He further urged the Court to note that the prosecution witnesses themselves exonerated the accused on the charge of murder as they all testified that the deceased and the accused had no known relationship and thus no motive to cause his death was established.

[27] The Court has considered the evidence adduced herein by the Prosecution as well as the defence offered by the accused person. I have also taken into account the submissions made by **Mr. Martim**, noting that Counsel for the state opted to rely on the evidence on record. **Section 203** of the **Penal Code**, pursuant to which the Information herein was laid, provides that:

"any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

[28] Thus, the key ingredients that the Prosecution must prove to warrant the conviction of an accused person of the offence of murder are

as follows:

[a] The fact of death;

[b] That the death was caused by the accused by an unlawful act;

[c] That the unlawful act or omission was committed with malice aforethought.

[29] With regard to the fact of death, there appears to be no dispute that the deceased died on the night of 28 June, 2013. His body was found lying beside the road next to a river in Bonjoge Location within Nandi County. Those who saw the body at the scene were PW1, PW2, PW3, PW4, PW5, PW6, PW10, PW11 and PW12. They all testified that the body had no visible injuries; though PW4 and PW11 observed that the head of the deceased hung loosely on his neck. It is to be recalled that PW1 and PW2 were immediate members of the deceased's family; and that the rest were neighbours. I am therefore satisfied that the Prosecution proved beyond reasonable doubt that the deceased, Paul Koros, died on the night of 28 June 2013.

[30] As to the cause of death of the deceased, no direct evidence was adduced by the Prosecution, as none of the 13 witnesses saw the accused assault the deceased. Indeed, they were all in agreement that no externally injuries were observable on the body of the deceased. It is noteworthy however that both PW4 and PW11 alluded to neck injury; and that in his cross-examination of the accused person counsel for the State suggested that the deceased may have been strangled to death. Needless to underscore the fact that the burden of proof was on the Prosecution; and the standard in such cases is beyond reasonable doubt. Hence, the question to pose is whether this burden was discharged in terms of proof of the cause of death; and if so, whether the deceased's death was attributable to an unlawful act or omission by the accused person.

[31] Ordinarily, the cause of death is best proved by calling either the pathologist or the medical doctor who conducted the post-mortem examination on the deceased's body. In this case, although several adjournments were granted to the Prosecution for the purpose of availing the doctor who performed post-mortem on the body of the deceased to adduce evidence herein as to his findings and to avail the post-mortem report in proof of the cause of death, no such evidence was adduced. The Court of Appeal had occasion to consider the impact of such an omission in Chengo Nickson Katama versus Republic (supra) and here is what it had to say:

“Our next consideration is failure by the prosecution to tender medical evidence regarding the death of the deceased. On record, there is evidence that following the death of the deceased, a post-mortem examination was conducted on his body on 7th February, 2011 by Dr. Otieno of Coast General Hospital and a report thereof prepared. However, attempts to introduce the same in evidence faltered on account of Dr. Otieno's failure to turn up in court severally for unexplained reasons. Therefore, the prosecution closed its case without the post-mortem report being placed on record. The effect of such an omission is that the death and the cause thereof was not established beyond reasonable doubt. The deceased did not die immediately. Indeed, he died two days later whilst undergoing treatment at Coast General Hospital where he had been transferred, as Lamu District Hospital was ill-equipped to manage his condition. It is also important to note that before being transferred to Coast General Hospital as aforesaid, he was first treated at Mokowe Health Centre and Lamu District Hospital. The treatment records from all these institutions could but were not availed. In the absence of these documents indicating the exact treatment which he received, it is not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause.”

[32] In the case above, the Court of Appeal followed its earlier decision in the case of Ndungu vs. Republic [1985] eKLR that:

“The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution.

Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution...”

[33] Thus, in the Chengo case (Supra) the Court of Appeal concluded that:

“...The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt...”

[34] In the circumstances hereof, it cannot be said that the cause of death was obvious. First and foremost, it cannot be said with certainty that the deceased died of strangulation as suggested by counsel for the State, granted that no such evidence was presented before the Court. Secondly, there was irrefutable evidence that the deceased had partaken of illicit brew known as *changaa*, to the extent that he was unable to walk on his own. Indeed, PW7 and PW8 told the Court that the deceased was already drunk by 5.00 p.m. and that he vomited in the house of PW7. And PW4 who was the only witness to see the deceased in the company of the accused at about 6.00 p.m. also conceded in cross-examination that he observed that the deceased was drunk and was being supported by the accused.

That being the case, the assertion by the accused that the deceased fell down accidentally and thereby caused his own death has cannot been ruled out.

[35] Hence, upon evaluating the evidence presented herein by the Prosecution, it is manifest that heavy reliance was placed on the fact that the accused was the last person to be seen with the deceased as they walked towards the deceased's home; and that it was the accused who sought for help from **PW3** after he found the deceased lying beside the road. That being circumstantial evidence, it had to be strong enough to not only point irresistibly to the guilt of the accused, but also rule out all other reasonable hypothesis other than the guilt of the accused. In **R. vs. Kipkering Arap Koske & Another** [1949] 16 EACA 135, the Court of Appeal for East Africa held that:

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

[36] Likewise, in **Joan Chebichii Sawe vs. Republic** [2002] eKLR, it was held that:

“... the evidence in this case was entirely circumstantial. 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”(see also **Makau & Another vs. Republic** [2010] 2 EA 283)

[37] And, in **Musili Tulo vs. Republic** [2014] eKLR, the Court of Appeal explained that in order to sustain a conviction, such evidence must satisfy the following requirements:

- (a) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- (b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- (c) 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.**

[38] In this case, the possibility that the deceased may have died after a bad fall in a drunken stupor was not ruled out. It was also not ruled out that he may have consumed unwholesome liquor that may have led to his death; granted the evidence of **PW7** and **PW8** that he vomited prior to his death; and that he was frothing from the mouth. The Court takes judicial notice of the countless instances in the country, and in Nandi County in particular, in which citizens have succumbed after consuming illicit liquor; this being a matter of notoriety. Moreover, with regard to the “last seen” doctrine, it is trite that, where a plausible explanation is given by the accused, the presumption stands rebutted. For instance, in **Martin Mutua Nzuki vs. Republic** [2020] eKLR the decision of the Supreme Court of Nigeria in the case of **Tajudeen Iliyasu vs. The State SC 241 of 2013 (2015) LCN 4388 SC** was relied on with approval to demonstrate that the “last seen” doctrine:

“...creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death...Thus where an accused person was the last person to be seen in the company of the deceased person, they have the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial court ...will be justified in drawing the inference that the accused person killed the deceased person”.

[39] In the case herein, the accused explained himself and stated that when encountered the deceased on the fateful day, he had fallen down, was drunk and had vomited on himself. He chose to assist him out of good neighbourliness and it was at one point that the deceased asked to rest. He (the accused) went to relieve himself and when he got back the deceased had fallen down and was foaming on the mouth. It is also significant that the witnesses were all in agreement that it had rained; a fact further buttressed by the mud-stained clothes, cap and shoes the deceased was wearing, which were exhibited herein (marked **the Prosecution's Exhibits 1-5**).

[40] It is also significant that the accused instead of abandoning the deceased at the scene opted to look for help from the closest homestead. There were no complaints of a grudge or wrangles between the accused and the deceased nor was it reported that he stole anything from the deceased to create a motive for the accused to kill the deceased. His account that the deceased had fallen down and the explanation as to how he came to be in possession of the deceased's mobile phone, namely, that he was using it to light their way, as his own phone had ran out of charge, was confirmed by **PW3**. Thus, the circumstantial evidence adduced herein falls far short of proving beyond reasonable doubt that the accused murdered the deceased.

[41] As for the third ingredient, namely malice aforethought, **Section 206 of the Penal Code is explicit that:**

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

- (a) 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;**
- (b) 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;

(c) an intent to commit a felony;

(d) 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.

[42] The Prosecution witnesses **PW2, PW3, PW4** and **PW7** all told the court that there was no known grudge or wrangles between the deceased and the accused. On his part, the accused insisted that he only assisted the deceased to get home out of kindness in the spirit of good neighbourliness. Thus, no malice aforethought has been proved against him.

[43] In the premises, it is my finding that, in this case, the Prosecution has not discharged the burden of proving the ingredients of the offence of murder beyond reasonable doubt for purposes of **Section 203** as read with **Section 204** of the **Penal Code**. I thus find the accused not guilty and hereby acquit him. It is consequently ordered that he be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

SIGNED DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF DECEMBER 2021.

OLGA SEWE

JUDGE