REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 46 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

ERIC SALALI MUTISYA.....ACCUSED

JUDGEMENT

1. The accused, **Eric Salali Mutisya,** was charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that on the 24th day of April 2016 at Tulila area in Ikalaasa location of Mwala sub-county within Machakos County, murdered **Alphonse Mutisya Kimeu** (the Deceased). The accused pleaded not guilty to the charge.

2. In support of its case the prosecution called 10 witnesses.

3. PW1, **Charles Mwendwa**, testified that on 23rd April, 2016 they were together with the accused at PW1's home discussing business till around 10:30 pm when he decided to escort the accused to the accused's sister's place where the accused was staying. On their way, they met the deceased, a cousin whose voice and walking gait was well known to him, who was drunk carrying a black paper bag with his shopping and talking to himself. The accused told the witness that the deceased owed the accused a debt and thereupon, an argument ensued between the accused and the deceased over the matter for about 5 minutes. The accused then struck the deceased with a blow and the deceased fell down on a stone and did not get up after which the accused ransacked the deceased's pocket and took Kshs.600/= together with the deceased's phone both of which he showed the witness using the light from the phone. The accused then gave the witness Kshs 300/- to buy his silence.

4. Shocked, the witness parted from the accused and he went home and slept. The following day, the witness heard that the deceased had passed away and that he met with thieves who beat him. A week later, the witness decided to report this incident to the police and recorded his statement.

5. In cross-examination the witness stated that he only recognised the deceased through his voice and not the physical appearance. He however insisted that he was near both the accused and the deceased when they were arguing mentioning each other's names.

6. On 24th April, 2016 at about 5.30am, PW2, **Domitilla Kayole Masila**, was on her way to a crusade at Tulila Primary School when she came across someone lying next to the road. Upon approaching the person, she realised that he was her brother in law, **Mutisya Kimeu**. Next to the body was a green paper bag with shopping. Thinking that the person was drunk, she called him and told him to go home but the person did not respond. She then proceeded on her way to the crusade. She was however called by the deceased's wife, **Juliana Mutisya**, to return as her husband was injured. According to her, when she saw the person, she did not notice any injuries on the body as it was still dark.

7. Upon her return she found family members and then saw injuries on his head and blood oozing from his mouth. had arrived. They then looked for a vehicle and took him to the hospital. However, at 300pm she was informed that the deceased had passed away the same day in the evening. It was her evidence that the deceased used to get drunk.

8. On 24th April, 2016, at 6am, PW3, **Christopher Mwania Nthuku**, was sleeping when he was called by his wife and informed that he was being called by the deceased's wife. When he went to where the deceased's wife was next to the road, near her home, he found the deceased, his cousin, who was unconscious, bleeding from the head with swollen lips. PW3 called the Chief who told him to pass by the AP Camp on their way to the Hospital which they did before proceeding to Machakos Hospital where the deceased was pronounced dead on arrival. It was his evidence that the body was next to the road and that there were stones at the place.

9. PW4, **Peter Wambua Kimeu**, the deceased's elder brother, testified that on 24th April, 2016at about 6am, he was called by the deceased's child who informed him that the deceased was lying on the road. Upon going there, he found the deceased unconscious with some injuries on

the back of his head and with blood oozing from the back of his head and mouth. They took him to the Chief who advised them to take the deceased to the hospital but the deceased passed away on their way there.

10. The deceased's wife, PW5, **Juliana Mueni**, testified that on 23rd April, 2016 the deceased, a building constructor, left home at 6:00 pm for Tulila shopping centre to go and withdraw money from mobile operator which had been sent to his mobile phone by his Engineer and to do some shopping. He did not return home. On the following day at around 6:00am PW5 received information that the deceased was lying down along Tulila-Custom road and was not talking. When she proceeded there, she found the deceased lying unconscious bleeding with visible injuries on the head and mouth as well as injuries on the back. The deceased also had with him a paper bag with his purchases next to him but had no phone. She arranged for the deceased to be taken to Machakos Level 5 Hospital where he passed on.

11. According to the witness, the accused was staying with his sister where he was employed as a domestic worker and the accused and the deceased were not friends. She disclosed that she was present when the accused was arrested at a Carwash at Cabanas.

12. The body of the deceased was identified by his brother who testified as PW6, **Francis Ngumbu Kimeu**, on 28th April, 2016. On 1st May, 2016, he got information that someone had disclosed that he knew the person who killed the deceased but he was not present when the accused was arrested. On the day of the identification, PW6 was in the company of PW7, the deceased's brother. He later received information that the accused and PW1 were linked to the deceased's death. On 9th May, 2016, PW7 went to Masii Police Station where he was informed that PW1 had reported that he knew the person who killed the deceased. When he got the information regarding the whereabouts of the accused, he relayed the same to the police and in the company of police officers, they proceeded to City Cabanas where the accused was arrested at the stage. According to him, PW1 was the one who disclosed to the police that he knew who killed the deceased.

13. PW8, **PC Everline Naini**, the Investigations Officer, took over the investigations from **Cpl Hamisi**. They proceeded to record the witness statements. On 15th November, 2016, they received the information that the accused was seen at City Cabanas. They proceeded there and arrested the accused. According to the witness she had no knowledge that the deceased's phone was recovered.

14. When on 28th April, 2016, the deceased's body was examined by PW9, **Dr Mutuma**, the pathologist, he found that there was a huge hematoma at the back of the head and neck and upon opening the head, he found that the deceased had intra-cranial bleeding. He formed the opinion that the cause of death was head injury by blunt object at the back of the head. According to him, there was only one injury which in his opinion was caused by a blunt object.

15. PW10, **SP Joseph Muguna**, received the on 24th April, 2016 that a body had been found at Tulila Village near Customer Road and that the badly injured person passed away on the way to the Hospital. In the company of other police officers, he proceeded to scene where he found many villagers as well as the deceased's family. They did not however find any weapon at the scene and they started recording statements from those who were there. Later on 30th April, 2016, PW1 went to the police station and disclosed that on 23rd April, 2016, he was with the deceased together with the accused at the area when the accused assaulted the deceased after which the deceased fell down and he continued beating him. The accused also took from the deceased Kshs 600/- as well as his phone before taking off. Asked why he took that long before reporting, PW1 stated that he was shocked when he learned that the deceased had passed away and he even left the area. It was after that they started looking for the accused who had also left the area. However, on 15th December, 2016, a report was received that the accused had been seen around Cabanas Area. In the company of other police officers, they proceeded there and found the accused in the company of other boys. The accused, according to him, was identified by an informer and his Identity Card. In his possession was an Itel Phone which he wrote in the inventory and took to Masii Police Station. However, it turned out that the phone did not belong to the deceased.

16. It was his evidence that only PW1 stated that he witnessed the incident and that there was no other evidence linking the accused with the death of the deceased. In his evidence PW1 stated that he was shocked at the death of the deceased and was also worried as a result and left the area. He however explained that he never treated PW1 as a suspect and none of the witnesses alleged that he was involved in the death of the deceased. He stated that he never asked PW1 how many times the deceased was assaulted and he was not aware that the deceased only had one injury since he did not see the body.

17. Upon being placed on his defence, the accused in his sworn evidence testified that he did not know the deceased and that he did not kill the deceased. According to him, PW1 was his customer when he used to assist his sister in the shop at Tulila where she was selling cereals. One time PW1 requested him to give him goods on credit which he undertook pay within 3 days but PW1 did not honour the same. As a result, a disagreement ensued between the two and PW1 threatened him with dire consequences. It was his evidence that on 23rd April, 2016, he was at the market from 7am waiting for a lorry to load but the lorry delayed because the same had a breakdown. The lorry arrived later and they offloaded the potatoes and then went home. According to him, he did not meet PW1 that day and that after their disagreement, there was no relationship between them. According to him, he did not disappear but returned to Cabanas where he was working after his sister returned. It was his evidence that nobody notified him that he was being looked for.

18. In cross-examination, he admitted that on 24th April, 2016 he was at Tulia Market at the shop where he was staying with his sister at home. He stated that they fought with PW1 though he never reported the same. According to him, he left Tulila on 28th April, 2016 and returned to Cabanas.

19. On behalf of the accused it was submitted by **Mr Muthama**, learned counsel, that there was only one witness who allegedly saw the accused person attack the deceased and that is **PW1**. He cited **Jevan Mwanjau & another vs. Republic [2015] eKLR.** In this case it was submitted that **PW1** did not come out as credible witness based on the evidence that he gave.

20. It was further submitted that in his evidence, the accused stated that there existed bad blood between him and PW1. Based on S.111 (1) and 119 of the Evidence Act it was submitted that in the present case, the defence established that there existed bad blood between the accused person and the person who was the state's star witness and who pointed the police towards the direction of the accused person.

21. According to the accused, the evidence adduced by the prosecution witnesses cannot sustain the charges facing the accused person and based on **Woolmington -V- D.P.P. (1935) A.C. 462** the Court was urged to find that the prosecution failed to establish a case against the accused person and he should be acquitted of the charges against him under Section 215 of the ***Criminal Procedure Code,*** Cap 75 Laws of Kenya.

22. On behalf of the prosecution, it was submitted that the death of the deceased persons and the cause of the death was proved by the evidence of **Dr. Mutuma** who conducted post-mortem.

23. Based on the evidence of PW1, **Charles Mwendwa**, it was submitted that the accused is the one who assaulted the deceased with a fist and the deceased fell down. PW 1 witnessed the assault on the deceased and the accused taking the deceased mobile phone and kshs600/=. He also saw the deceased fall down after he was hit with the fist. The pathologist confirmed the cause of death as head injury by blunt object at the back of the head. It was submitted that a critical evaluation of the evidence on record it places the accused person at the scene of crime. He was well known and recognized by PW1; therefore, the issue of recognition is not in dispute. As to who caused the death of the deceased the eyewitness confirmed that it's the accused who assault the deceased.

24. It was further submitted that the accused took advantage of the deceased who was drunk. I do submit that the injury on the body of the deceased were at the vital body part (back of the head and neck) therefore it can only be deduced that the person who inflicted them (accused person) had intention of inflicting injuries or grievous harm on him which he did leading to his death.

25. Regarding the accused's defence, it was submitted that his defense raises more questions than answers. It was submitted that if a person is accused of anything and his defense is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until years afterwards there is naturally a doubt as to whether he has not been preparing it in the interval. Secondly, if he brings it forward in the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped. The Court was invited to make a finding that the accused defense was an afterthought which is aimed at deceiving the court to defeat the course of justice.

26. In conclusion, it was submitted that the accused person was determined to assault the deceased and injure him. He set upon the deceased person who was drunk and overpowered him. Such action in the mind of the accused person was clearly have an outcome of grievous harm or death of the victim. Indeed, this is what exactly happened. The deceased was fatally wounded during the assault. The accused person had unlawful intention, acted on his intention with malice aforethought thus ingredient for murder has been proved beyond reasonable doubt.

27. In light of the fore going, it was submitted that the prosecution has discharged its burden of proving their case beyond reasonable doubt against the accused person who ought to be found guilty of the offence of murder and be sentenced accordingly.

Determination

28. I have considered the evidence on record as well as the submissions made on behalf of the parties.

29. Section 203 of the ***Penal Code*** under which the accused is charged provides that:-

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

30. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

> **"For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."**

31. In **Republic vs. Mohammed Dadi Kokane & & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M. Odero, J** as follows:-

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

32. In this case, the prosecution's case was that on the 23rd April, 2016, at around 9.30pm, PW1 was escorting the accused who had gone to visit him back to the accused's sister's place where the accused was saying when along the way, they met the deceased who was drunk. The accused then alleged that the deceased owed him some money and a disagreement ensued between the accused and the deceased. The accused then hit the deceased who was heavily drunk and the deceased fell down. The accused then ransacked the deceased's pocket and took from him Kshs 600/- together with the deceased's phone. To buy the PW1's silence he gave PW1 Kshs 300/- after which they parted ways. The next day the deceased was found dead.

33. The accused's evidence however was that he neither knew the deceased nor killed him. In his evidence, the evidence against him by PW1 was concocted since there was bad blood between him and PW1 arising from the fact that he had given PW1 goods on credit which PW1 did not pay and the two fought.

34. From the evidence on record, there is no doubt that the deceased died. The cause of death was a blunt injury on his head that led to internal bleeding and the injury was caused by a blunt object. The only question for determination is whether the death of the deceased was caused by an unlawful act on the part of the accused.

35. As already stated, the only eye witness in this case was PW1. From his own evidence, he did not see the deceased and only recognised him by his voice and the fact that the accused and the deceased called each other by their names. According to PW1, after the incident, he benefited from the action of the accused since he was given half of the money that the accused took from the deceased. Apart from that it was not until 30th April, 2016, that PW1 went to the police station and disclosed that on 23rd April, 2016, he was present when the accused assaulted the deceased who was his cousin.

36. In the case of **Charles O. Maitanyi vs. Republic [1986] KLR 198** the court held that:

> **"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification…The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made."**

37. Similarly, in He cited ***Jevan Mwanjau & Another vs. Republic [2015] eKLR*** **where t**he Court of Appeal held that;

> **"Under section 143 of the Evidence Act, in the absence of any provision of law to the contrary, no particular number of witnesses is required to prove a fact. It follows that there is no legal impediment in convicting on the sole testimony of a single witness. The time-honoured principle is that evidence has to be weighed and not counted, that is, whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise as opposed to whether there is a multiplicity or plurality of witnesses. It is therefore open to a competent court to fully rely on the evidence of a solitary witness and record a conviction. Conversely, it is equally true that the court may acquit a suspect inspite of testimony of several witnesses if it is not satisfied about the quality of evidence. The court must, however, where the evidence of a solitary witness relates to identification of a suspect in a criminal case, exercise extreme caution."**

38. Here we have a person who, according to his own evidence, partook in the loot that was allegedly unlawfully taken from the deceased, his own cousin. He then kept silent for about five days without disclosing what caused the death of his cousin. In the meantime, he decided to disappear from his home, a disappearance he explained was due to the fact that he was shocked at the death of the deceased and was also worried. What was he worried about? His actions after the death of his cousin were not in sync with that of a person who lost a close relative but mirrored that of a person who was guilty of something. In the ordinary course of things one would have expected that PW1 to have immediately reported the incident. By leaving his area immediately after the incident, PW1's action casts doubt as to whether his evidence is reliable particularly as the accused's case was that there existed bad blood between him and PW1.

39. As was stated in **Ndung'u Kimanyi vs. Republic [1979] KLR 282**:

> **"A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".**

40. See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

41. Taking into account the conduct of PW1, it raises doubts as to whether he was a witness of truth or he set out to settle scores with the accused. In the absence that evidence, which I find to be unreliable, the prosecution's case crumbles since there is no other evidence linking the accused with the death of the deceased and it was on his evidence that the prosecution hang its flag.

42. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in **Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

43. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

44. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

45. In 1997, the Supreme Court of Canada in **R vs. Lifchus [1997] 3SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

46. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

47. **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."**

48. Considering the evidence presented in its totality I find that it does not meet the threshold prescribed for conviction in criminal cases. In so finding, this court does not necessarily make a definite finding that the accused is factually innocent of the offence with which he is charged. It simply makes a finding that the prosecution has failed to legally discharge its obligation by proving his guilt beyond reasonable and he is therefore constitutionally deemed to be innocent. That is what our law provides. In that event the benefit of doubt must tilt in favour of the accused.

49. Accordingly, I find that the prosecution has failed to prove that the accused person herein, on the 24th day of April 2016 at Tulila area in Ikalaasa location of Mwala sub-county within Machakos County, murdered **Alphonse Mutisya Kimeu** (the Deceased). He is accordingly acquitted under section 215 of the ***Criminal Procedure Code*** and I direct that they be set at liberty forthwith unless otherwise lawfully held.

50. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED AT MACHAKOS THIS 1ST DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muthama for the Accused

Mr Ngetich for the State

CA Susan