REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 49 OF 2011

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES MASAKU NGEA.....ACCUSED

JUDGEMENT

1. The accused herein is charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that on the 9th day of February, 2010 at Kithimani Sub-Location, Kithimani Location of Yatta District within Masaku County, he murdered **Joash Kyalo Kazungu** (the deceased).

2. In support of its case the prosecution called 7 witnesses.

3. According to PW1, **Jeremiah Mutiso Kasungi**, on 10th February, 2010 he was working in Matuu town when he received a report from his father, **Reuben Mulandi**, that his brother, **Joash Kyalo Kasungi**, the deceased had gone for trip and had not come back. According to the said father, that information was received from the deceased's younger wife, PW4. Accompanied by PW4**,** PW1 proceeded to Matuu police station for assistance but were told to report at Kithimani police station where the said PW4, made the said report. On 12th February, 2010 PW1 received a telephone from PW4, who asked him to go to Kithimani where the body of a dead person had been thrown into a well with water. When PW1 proceeded there, he found a crowd of people and police officers at the place where the body was. The body, whose skin had already peeling off, and which only had a white shirt while the head was covered with a polythene paper, was removed from the water well with water and the skin had started peeling. It also had a wire round the waist with stones attached to it. Both the deceased's wife and PW1 identified the body as that of the deceased, from the shirt he was wearing. The body was then removed to Matuu District Hospital for preservation. PW1 then identified the electrical wire in court as similar to the one he had seen tied around the deceased's waist.

4. According to PW1, the deceased was a business man in Matuu. PW1 then received information from Equity Bank, Matuu Branch, that some money had been withdrawn from the deceased's account though he was unable to recall the account number or amount. PW1 then went to the Matuu police station to make a report and to make his statement.

5. On 19th February, 2010 PW1 together with his cousin, **Japheth Mutuku Kimeu**, went to Matuu Nursing Home Mortuary where he identified the deceased's body for the post mortem which post mortem examination was conducted by **Dr. Muya** of Matuu District Hospital. According to the said doctor, the deceased had been strangled. PW1 stated that there was a tight sock around the deceased's neck.

6. In cross-examination, PW1 stated that he was working in Mbeere but at the time of the deceased's death there was a national exercise and he was working at Matuu while the deceased was staying in Kithimani. He however only came to know the deceased's house when he visited the deceased's house wife after the deceased's death. According to PW1, the place where the body was found was about 500 metres from the house. The said well where the deceased's body was discovered looked like a toilet and had been constructed behind a plot. PW1 could not however recall whether there were people residing in the said plot and could not remember who discovered the body. Though the base of the well could not be seen, the water could be seen but he did not know the depth of the well though the water was not very deep –about 1 – 2 feet from the surface. PW1 did not know how the body which was tied to a stone came to the surface or the circumstances in which it was recovered.

7. In PW1's opinion, since the deceased was well built, it must have required more than one person to tie him, remove his clothes and strangle him with a sock. He stated that he did not know who did the transaction at Equity – whether it was deceased or not. Since he did not know the accused person, he could neither say that he did not suspect him nor that he committed the crime. He confirmed that the stone tied to the wire around the deceased waist was a big building block.

8. In re-examination, PW1 clarified that he could not see the bottom of the well and that he did not know if one or more people pushed the body into the well. The wire on the deceased body looked like the one in court.

9. PW2, **Rehema Musa Abdallah**, on a certain day whose date she could not recall, the deceased went to the plot where she was staying with the accused, **James Masaku Ngea**, whom she knew as the deceased's friend. According to her, the deceased used to live in their plot in the next house while the accused was looking for a house in the same plot. The deceased then moved to another house in another plot which was about two blocks away, while the accused stayed in a house opposite PW2. According to PW2, the deceased used to go and visit the accused from time to time in the said plot where PW2 was staying, in front of which plot there was a tree. One morning PW2 was sitting under a tree, in front of which plot when she saw the deceased approach. When the accused and the deceased met behind PW2, they had a discussion after which the deceased passed PW2 and greeted her. The next day PW2 saw the deceased's wife, PW4, talking to the accused when PW2 was picking her child from school. The following day the PW4, went with two police men who were looking for the accused, but the accused was not in. In the evening PW2 saw the accused come in and take a jacket and bag and left. Pw2 did not ask the accused, who was a painter, where he was going but just greeted him.

10. One morning, PW2 heard that a dead body had been found in a well and people were passing and going there. PW4 also passed by the gate and asked she had heard the news. PW1 proceeded to the scene where she saw a body being removed from the well but due to the fact that it was in a swollen state, she was unable to know whose body it was but saw PW4 crying under a tree. Later, she learnt that the body was that of the deceased. According to PW2, she was not very close to the accused and they were just acquainted being neighbours. She recorded her statement at the police station.

11. In cross-examination, PW2 stated that the accused had stayed in their plot for some months though she could not remember the exact number. Before the deceased moved out, the accused had stayed for more that one month. She confirmed that the accused and the deceased were friends. She however was not aware of the relationship between PW4 and the accused and whether PW4 could inform the accused if anything happened to the deceased though it was possible that the accused would be the first person to tell. The witness was however unaware of any other activities the accused undertook with the deceased and did not know how many days the deceased was dead before he was found in the well.

12. According to PW2, she did not notice anything suspicious about the accused during the time he was living at the plot and that even when the accused took his bag and left it was not suspicious as he used to travel often and could stay away for a month on his trips. PW2 stated that the deceased moved to a nearby plot but was visible from my gate. According to her, the day she saw the deceased with the accused, it did not look like a planned meeting. It was her evidence that the well where the deceased was found was not very far from their plot and the deceased plot and was 10 – 15 minutes' walk. It was behind an unoccupied plot with a building being constructed and the workers used to get water for the construction from the well. PW2 did not know if anyone from the site reported on finding the body. It was PW2's testimony that she used to see the well before the discovery of the body and that it had been covered with wooden plank with an opening for drawing water with a bucket. She could however not tell whether a person could get into the well alone though in her view, someone could not enter into it without the assistance of another person. She however did not know what killed the deceased.

13. PW.3**, Dr. Danson Muya,** conducted a post mortem examination on the body of the deceased, **Joash Kyalo Kasungi**, on 19th February, 2010 at the Matuu Nursing Home at 11.00 a.m. According to him, the deceased wore a black shirt torn on left side, was in his 30's in good nutritional status, well build and had a height of 185 cm. By the time of post mortem the body was already decomposing with skin peeling off from most parts of the body as it was about a week old. On external examination, there was a yellow polythene tag covering his head which was partly torn; there was a dirty rope hanging loosely from his neck about 1.8 Metres long; there was a grey sock tightly tied on his neck which had a circumference of 35 cm; beneath the rope and sock there was a ligature mark on the neck which neck was mobile in all places; there was a grey electrical cable of 1.6 Metres long tied around his waistline; no fractures were noted on the body; there were no sight of bleeding or clotted blood on the body; and the teeth were intact.

14. With regard to respiratory and cardiovascular, digestive and genito – urinary system there were no abnormal findings. There were no injuries on the head or bleeding from orifices. Regarding the spinal system there was hypermobility due to ligature motion.

15. PW3 formed the opinion that the death was due to asphyxiation due to ligature strangulation. He filled in a death certificate while the clothing, sock, robe, electric cable were handed over to the investigating officer. He filled in a post-mortem report which he signed and produced as an exhibit.

16. In cross-examination, PW3 stated that he received instruction to conduct the post-mortem on 19th February, 2010 and not 19th March, 2010 which was erroneously entered. From the deceased's weight and height, PW3 was of the view that the deceased was a strong man though he was not in a position to comment if the strangulation injuries were caused by one man. He however could not rule out the probability that more than one person could have caused the strangulation.

17. On the 9th February, 2-010 at 9 a.m. PW.4, **Catherine Syombua Kyalo,** the deceased's wife was with her deceased husband, **Joash Kyalo Kasungi**, at Kithimani, when the deceased received a phone call and informed her that it was from, **Pastor Masaku**, the accused, who had called him to go to his house. According to PW4, the deceased informed her that he was going to the accused's house to measure mercury which the pastor was selling to some people. The deceased informed her that after that, he would proceed to Matuu to a hardware store of someone called **Kijana** where he had left some goods he had bought in Nairobi the previous day. The deceased then left for the Pastor's house while PW4 went to farm to harvest maize. When PW4 called the deceased at 10.00 a.m. to remind him to buy bags for storing the maize, she found the deceased's phone was off and despite further attempts to get in touch with the deceased, the deceased's phone was not going through.

18. PW4 then bought food and I went home at 4 p.m. and prepared supper. Once again she tried getting in touch with the deceased but failed to do so. At 8 p.m. she called her father in law, the deceased's father and relayed to him the information that the deceased had given to her. At 10 p.m. her child got sick and once again she called the deceased but his phone was still not going through and again called her father in law.

19. The following day, PW4 went to the neighbour's house to find out where the accused was staying. Outside, PW4 met PW2 who told PW4 that she had seen the accused and the deceased the previous day standing next to a bush. When she left the plot PW4 met the accused and though she did not know the accused previously, the deceased had described him to her. She asked him if the deceased had gone to his house but the accused denied that the deceased had been there. From there, PW4 proceeded to Kithimani police station to report.

20. On 12th PW4 heard people screaming and her landlord, **Mukuva**, went and informed her that there was someone who had been killed along Thika-Mwingi main road. She followed the crowd and came across a wailing gathering. When she moved closer and peeped into the well she saw a body covered with polythene bag. His clothes had been removed save for his black shirt which he was wearing and which was open at the chest. She identified the body as that of the deceased by the said shirt which he was wearing when he left the house and his chest. As a result, PW4 collapsed and lost consciousness. Though she was unable to observe body for long, she saw that the face was swollen from the neck and the mouth was wide open. On the buttock the skin had peeled. The body was taken to the mortuary the same day in company of his elder brother, PW1 and she went to Kithimani police station to record her statement.

21. According to PW4, the deceased had told her he had been called by **Masaku Ngie** and he showed her the phone and I saw the number and name showing **Masaku Ngie**. It was her evidence that she only used to see the said person at the market and that he was staying in a nearby plot about 800 – 900 metres. She however did not know what he was doing though she used to hear him being called prophet **Masaku**. They were however unrelated with the deceased and PW4 never saw him in her house. The deceased informed her that he was going to pass by the accused's place on his way to work. There was no disagreement between PW4 and the accused.

22. In cross-examination, PW4 stated that she could not remember the date the deceased left the house but from her statement recalled that it was 9th February, 2010 and was found on either 2nd or 3rd day since he left. From the accused's house to the place where the body was found was about 300 – 400 metres and from their house to the said place was about 800 – 900 metres. She confirmed that there was a construction going on there and that there was a road passing by though she did not know if there was a car wash. The well was covered with thick wood planks and in her view, to remove them it required more than one person. While she did not see the stone tied to the deceased, she heard about it. She testified that the deceased was strangled and thrown into the well, a process which in her view would have required more than one person. According to her the deceased's phone got lost and she was not certain if I gave the phone number of deceased to the police. She never heard of any dealings between the accused and the deceased and did know where the accused was arrested. PW4 confirmed that PW2 was staying in the same plot with the deceased.

23. In re-examination, PW4 explained that the body was off the road in a pit under construction about 10 metres from the road. It was a plot that had been under construction but was no longer being constructed.

24. PW5, **Gebby Wanjala,** a retired inspector of police was in 2011 in charge at Matuu police post. On the August 2011, he was at the police lines with his colleague **Isaac Ongeri**, when a report was made by one **Isaac Kazungu** that a suspect in the murder of his brother called **Joash Kasyoka Kazungu** was seen at the market and he had runway. In the company of **Isaack Ongeri** they went with the said person who had made the report who showed them the suspect and they arrested him and informed him of the reason for his arrest but he did not respond. The suspect, the accused herein, was then taken to Kithimani police station and handed over to the investigating officer.

25. PW6, **PC Abdalla Kong'ani** testified that on 12th February, 2010 he was on duty at Yatta Police Station when the OCS **George Machatha** went to the office and PW6 with and **Cpl. Shikuku** at 11.00 a.m. The OCS asked them to accompany him to Kithimani market since there was a body that had been discovered there. Upon reaching Matetha bar they saw a crowd and found a body floating on water inside a pit that was being used as a latrine. The pit was covered with logs which they removed and there was an opening between the logs. They then removed the body from the water. The body had long sleeved black shirt but at the bottom was naked. The head was covered with yellow paper bag and the back had a stone tied with a wire on the waist. When they removed the paper bag from the face, the wife of the deceased, **Catherine Syombua** (PW4), who was among the crowd saw the body, identified it as her husband's and started wailing. The face was swollen and the legs were beginning to peel off the skin. On the neck there was a grey school sock tied tightly. PW4 had earlier reported that her husband had been called by the accused **James Masaku** on 10th February, 2010 to confirm if the deals in mercury and since then had not returned and was not receiving his phone. The deceased's body was photographed by a private photographer in the presence of PW6 and were then taken for development at the CID. He identified the four (4) photographs, the bag the electric wire and the building stone which he exhibited. According to PW6, before discovery of the body they had gone to the accused's house but they neither got the deceased nor the accused. They only found the neighbour. After discovery of the body they went back to his house but did not find him and they were told by neighbours the accused had come back and left. Later after some months, the accused was arrested by AP officers, was taken to Matuu police station and taken to Yatta police station. It was his evidence that they learnt the accused and deceased were neighbours and acquaintances.

26. After the arrest of the accused, PW6 went to see him at the station and it was his first time to see him. He was later asked to see some of the items discovered from the accused house which was a bottle of mercury. He was however not aware if the contents were examined and he marked the said bottle with some liquid.

27. In cross-examination, PW6 stated that he was the investigating officer in 2013, the matter having been first investigating officer by **CIP William Cheruiyot** and **Cpl Michael Shikuku**. By the time he took over the investigations, the case was already in court. While confirming that a report was made on 10th February, 2010 vide the OB No. 25 of 10/02/2010 at 6.05 p.m. he stated that he was not the one who received the report. Neither did he record PW4's statement according to whom the deceased disappeared on 9th February, 2010 and she reported on 10th February, 2010 and the body was discovered on 12th February, 2010. Based on the report it must have been there for 3 days because it was peeling. It was in a public place near a car wash. Though he could not say if it the water in the well was being used he stated that that was the only water source I saw. According to him, the place is busy and there is a public road. He could not however say whether the crime was committed by one person and he did not know who discovered the body. While he stated that the body was taken to mortuary with the sack, he could not see the sack.

28. He stated that the stone was kept in Exhibit store which was a separate dry room. Referred to the said stone he confirmed that he could see fresh mud and therefore was unable to tell if it was removed. According to him, since the stone was in the store it ought to have been dry.

He reiterated that they went looking for the accused thrice but did not get him though he could not say for how long he had been absent. He also could not say how long he took before he returned and where he was. He did not recover the bottle and did not know its contents since he did not take it to the forensic laboratory.

29. In re-examination, PW6 stated that he was in this case before he became the investigating officer. At the scene was a bar, a car wash and another construction. The pit was about 100 metres behind and was not in use but was covered although it could have been used to draw water by removal of the logs. He could not tell if it was being used by the car wash though it was possible someone was going to withdraw water. He reiterated that they went to look for the accused for 3 weeks. The first time they found he had returned, left and after that he was not seen till the landlord reported.

30. **Japheth Mutuku**, PW7, was on 19th February, 2010 at about 11.30 a.m. with **Jeremiah Mutiso** and his 2 brothers whose names he could not remember when they proceeded to Matuu Nursing Home where the body of **Jeremiah Mutiso's** brother, **Joash Kyalo**, was. They went to identify the body which they did in the presence of a police officer and post mortem was conducted by **Dr. Danson Muya** from Matuu district Hospital. According to him, the deceased was his cousin and he knew him since his childhood. He identified him from his face and leg. The body was naked and there was a yellow polythene sack on his head and an electric cable on his waist and sock tied on the neck. The polythene wrapper was removed before he identified him. He did not observe any other injuries. The body was however slightly swollen but was not decomposed.

31. At the close of the prosecution case, the accused person was placed on his defence and he all opted to give sworn testimony.

32. According to the him, at the material time he was staying in Kithimani in Yatta where he used to do business though he used to travel to other places and sometimes would stay away for days or even weeks. According to him, he deceased was his neighbour and also his client. PW2 was also his neighbour while PW4, the deceased's wife was also known to him.

33. On 8th February, 2010 the deceased asked him to assist him in looking for a market where he could sell mercury. The deceased told him that he would go to his place in order to test the same. On 9th February, 2010 the deceased went to see him and after they discussed he left and went on his way. According to the accused, the deceased wanted to know where to sell the mercury. He admitted that they were seated with PW2. After that he did not know where the deceased went as this was around 9.00 am. The accused remained ta the plot and never saw the deceased after that. In the evening he went to Nairobi for his business using nation newspaper vehicle and returned the following day in the morning when he heard that the deceased's wife was looking for him (the accused). So he went to see her and she informed him that she wanted to know if the accused knew where the deceased was but the accused told her that after they parted with the deceased, he never saw him.

34. Three days later when he was in Mombasa, PW2 called him and informed him that the deceased was found dead in a pool. He later returned to pick his documents to take to a Ministry. It was his evidence that the pool where the body was, was next to the road. Though it had water, it was covered with off-cuts and a space had been left for drawing water. While nobody told him the condition of the body, he was informed that the body was found naked. In his evidence, the deceased was heavily built. Referring to the testimony of PW1 and PW3, he said that he never had any bank transaction and did not know when the deceased died as he was not involved in his death since they had not quarrelled or disagreed with him. According to the accused, the deceased was his partner.

35. In cross-examination, the accused stated that he was doing business with the deceased and that the deceased went to him on that day. He was however unable to tell whether the deceased left with anybody else. He stated that he had no evidence that he went to Nairobi. He stated that afterwards, he went to Mombasa to visit a fellow pastor though he had no evidence that he went there. According to his evidence the deceased was his friend and associate and when he was found dead, he was away. According to the accused, they were buying water from the borehole and that he was arrested in Matuu and was not taken to the scene but read about where the body was found from the witnesses' statements. He denied that he disappeared and stated that he was not involved in the deceased's funeral because he was away and that the borehole where the body was found was known to him.

36. While the prosecution relied on the record and did not submit, it was submitted on behalf of the accused that from the testimony of the doctor, PW3, it is evident that there was nothing to link the accused person to having committed the offence. There were no finger prints of the accused person on the deceased's body to provide a nexus of the alleged commission of the offence by the accused person. To that extent, the evidence of this witness is only confined to the issue that the deceased was strangled to death.

37. It was submitted that from the witnesses availed by the prosecution, it is crystal clear that none of them witnessed the alleged offence against the accused person. The only issue at hand here is the testimony of the **Rehema Musa Abdalla**, PW2 whose that on 10th February, 2010, she had seen both the accused person and the deceased together beside the road. The accused person confirmed that he had met the deceased person on 9th February, 2010 which was the previous day and that they were discussing about a mercury business. The accused person then travelled to Nairobi that evening. It was contended that it is noteworthy that the evidence of PW2 is not corroborated by any other witness and this therefore cannot be the only evidence to be relied upon to convict the accused person. Upon investigations, the investigating officer did not explain as to why the accused person was arrested for the murder of the deceased. The allegation fostered by the deceased's wife that the accused person had called the deceased on his phone before he disappeared is a clear falsity. If indeed this was the position, the investigating officer ought to have conducted a forensic examination on the phone records to establish whether the aforementioned allegations are truthful. This evidence would have been very crucial on the prosecution so as to corroborate the evidence of PW2. As of now; no such evidence has been produced before this court.

38. According to the accused, the burden of proof lies on the prosecution to adduce evidence to prove that the accused killed the deceased. The prosecution must not only prove that it is the accused who killed the deceased. The prosecution must adduce evidence to prove that at the time the accused killed the deceased he had formed the necessary intention to either cause death or grievous harm to the deceased. It was submitted that the evidence produced by the witnesses is clearly circumstantial since there is no direct evidence implicating the accused person to the alleged offence.

39. Based on **Rep vs. Kipkering Arap Koskei & Another 16 EACA 135** and **Abanga alias Onyango vs. Rep CR. A No. 32 of 1990 (UR)**, it was submitted that there is no doubt that this is a case based purely on circumstantial evidence. It is therefore necessary that this court considers each of the ingredients of the offence vis-à-vis the evidence produced to establish whether the prosecution has discharged the burden of proof of beyond reasonable doubt against the accused person. It was submitted that the prosecution has not proved its case beyond reasonable court and this court can only settle its mind on a finding of acquittal. In this regard reliance was placed on **Miller vs. Minister of Pensions [1947] 2 ALL ER 372**.

40. According to the accused, strictly considering the elements provided in the above mentioned locus classicus regarding circumstantial evidence, it is evident that none of them has been proved before this court. The prosecution is majorly relying on suspicion yet it is widely established by precedents that suspicion can never from a basis of a conviction. The accused submitted that since there is no eye witness to the murder, it follows therefore that circumstantial evidence of identification must be cogent, credible and consistent for this court to safely rely on it in convicting the accused person. That aspect of identification and placing the accused persons at the scene of the crime is tainted with suspicion. It is trite law that suspicion however strong cannot be used to enter a verdict of guilty in favour of the prosecution. There was a murder yes but it was not established that the accused person committed it. Accordingly, the *actus reus* of the offence of murder has not been proved to the standard required in law and this court ought to acquit the accused person.

41. Regarding the issue of malice aforethought, the accused relied on **Libambula vs. Republic [2003] KLR 683** and **Republic vs. Tubere S/O Ochen [1945] 12 EACA 63** and submitted that that the prosecution did not show any motive that the accused person had that could have prompted him to commit the alleged offence in this case. There is also no testimonial evidence from the witnesses that indicated any strife existed between the accused person and the deceased person. It was the accused's view that none of the evidence provided by the prosecution has proved that there was malice aforethought that would lead the accused person to commit the offence of murder against the deceased. It was his submission that this court finds that there did not exist any malice aforethought and therefore the accused can only be acquitted of this grievous charge against him.

42. In conclusion, the accused submitted that the evidence presented to this court lacks cogency and leaves many questions unanswered. The evidence cannot by any means be said to be water-tight. There certainly exists the suspicion that the accused person may have been involved in the death of the deceased persons but our courts have severally held that suspicion alone, no matter how strong cannot form the basis for a conviction. There must exist tangible and concrete evidence adduced to remove issues in dispute from the realm of suspicion and into the realm of proven facts. This standard has not been met in this case. It is therefore his prayer that this court acquits him.

Determination

43. The prosecution's case in summary is that on 9th February, 2010, the deceased informed his wife, PW4, that he had received a telephone call from the accused who wanted him to go and measure mercury. He then left to go and see the accused with the intention of proceeding to his work thereafter at Matuu to a hardware store of someone called **Kijana** where he had left some goods he had bought in Nairobi the previous day. According to PW2, on the same day, she had seen the accused and the deceased in a discussion after which the deceased left. After that the deceased was never seen alive again. Three days later, his body was found lying in a borehole half naked with a stone tied to his waist. He had been strangled to death according to the evidence of the pathologist.

44. I have considered the evidence on record. 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.***

45. 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."**

46. 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.**

47. In Mombasa High Court Case Number 42 of 2009 between **Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang** the court expressed itself as hereunder:

> **"The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:**

a) Proof of the fact as well as the cause of the death of the deceased persons.

b) Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.

c) Proof that such unlawful act or omission was committed with malice aforethought."

48. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence from PW1, PW3, PW4 and PW7 that the deceased was found dead and that he had been strangled. Those witnesses clearly proved beyond reasonable doubt that the deceased died.

49. As regards the cause of death, according to PW3, the deceased's death was as a result of asphyxiation due to ligature strangulation.

50. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no direct evidence that the accused caused the death of the deceased. 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 the case of **H.L. (E)* 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.''**

51. 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."***

52. 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."**

53. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 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."**

54. 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."**

55. **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."

56. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated: -

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

57. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

58. In this case, as stated above, in the absence of any direct evidence linking the accused with the death of the deceased, this court must rely on the circumstantial evidence if the case against the accused is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held.

"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 hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

59. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

"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."

60. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

"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 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."

61. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."

62. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** as follows:

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

63. In **Teper v. R [1952] AC at p. 489** the Court had this to say:

> **"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

64. In this case, the prosecution's case seems to be hinged on the fact that the deceased was last seen with the accused before his body was found strangled and dumped in a borehole. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of **Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006**. That court, while considering the *'last seen alive with'* doctrine held:

> **"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."**

65. In yet another Nigerian case the court considering the same doctrine, in the case of **Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** opined thus:

> "**The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."**

66. It was however held in the case of **Ramreddy Rajeshkhanna Reddy & Anr. vs. State of Andhra Pradesh, JT 2006 (4) SC 16** that:

> **"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."**

67. **Lesiit, J** in **Republic vs. E K K [2018] eKLR** held that:

> **"The prosecution has adduced evidence which establishes that the deceased was last seen alive in the company of the deceased. That was in the evidence of PW5. Time was 9.30 a.m. Her evidence was not corroborated by any other witness. The accused has denied that and has countered the evidence of PW5 by stating that in fact, it was PW5 he saw with the deceased last. Given that the evidence is the word of the accused against that of PW5, the court has to look for corroboration or other evidence implicating the accused. I am persuaded by the Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is advisable to exercise caution and look for some other corroboration. I will get back to this later."**

68. In this case, there was clearly no corroboration. In fact, after the deceased left PW4 to go and meet the accused, both the deceased and the accused were seen by PW2 in a discussion after which the deceased was seen leaving the accused and going his own way. From that evidence, it is clear that the deceased parted with the accused safely and must have met his death after their parting with the accused. There was no other evidence that the paths of the deceased and the accused crossed after that. A similar scenario arose in **Republic vs. Bonface Agoyi Kwavalai [2019] eKLR** where **Musyoka, J** expressed himself as hereunder:

> **"The first question would be whether there is credible evidence that the two were together on 24th August 2013. Or put differently, whether the accused person was the last person to be seen with the deceased. PW1 gave an account which was wavery. She said in examination-in-chief that the deceased left her home that day with the accused and PW2for his. Then during cross-examination, she said that the accused person was not in her homestead but somewhere outside along the road, but within earshot, and that he joined the deceased and PW2 when they left the compound. PW2, who, according to PW1, left the homestead together with the deceased and the accused, was emphatic that the accused was not with them on the way to his house. Instead, she said they found him at his house at around 2.00 PM. The question to ask would be which of these two versions was the correct one. PW2 then said that once she and the deceased got into his house, the accused left his house alone. That must have been around 2.00 PM when they arrived. She went on to say that the deceased then decided to follow the accused, leaving PW2 in the house alone with the baby. Clearly, the two did not leave the accused person's house together. There is no evidence of what happened thereafter. There is no evidence whether the deceased caught up with the accused. There is also no evidence whether the two ended up at the same destination. Neither is there evidence that the two eventually came back to the house together. There is therefore a fairly lengthy gap between 2.00 PM when the accused left the house alone and later followed by deceased and the next morning when the deceased's body was found at his compound. It cannot really be said that they were last seen together as they did not leave the house together. Indeed, PW2 said that she**

could not tell whether the deceased caught up with the accused."

69. In this case, PW2 saw the accused and the deceased together in the morning of a day which going by the evidence of PW4 must have been 9th February, 2010. The body of the deceased was not found till 12th February, 2010. There was similarly no evidence that the accused was ever seen with the deceased thereafter. As **Musyoka, J** held in the above matter, it cannot really be said that they were last seen together as they did not leave where PW2 saw them together.

70. The prosecution seems to allude to the fact that the "disappearance" of the accused from the vicinity thereafter was evidence of his guilt. In **Trikabi vs. Uganda [1975] EA 60**, it was held that:

> **"[The appellant] left the village and his home very soon after the fatal attack, and could not be found until he returned several months later. The assessors and the Judge were satisfied that this conduct on the appellant's part was indicative of his guilt and corroborative of the truth of the deceased's dying declaration. They were satisfied that the appellant's explanation for his sudden departure, and long absence, from his home, that he had gone to look after a sick sister, was a lie; and explanation first put forward in his own unsworn statement in his defence. This case has caused us much concern, but we are unable to say, after anxious consideration, that the judge was wrong in holding that the appellant's conduct, in leaving his house and disappearing for several months, knowing of the attack on the deceased, was sufficient corroboration of the deceased's dying declaration that he (the appellant) was the man who had attacked him, a declaration which the judge believed to be true. The attack took place in broad daylight and the appellant was well known to the deceased, so that the deceased's identification of the appellant as his attacker is unlikely to have been mistaken."**

71. Similarly, in **Malowa vs. The Republic [1980] KLR 110**, **Madan, Law and Potter, JJA** held that:

> **"The judge held, on the authority of Terikabi vs. Uganda [1975] EA 60, that corroboration of the evidence of Paulina and of the dying declarations of Blazio was provided by the conduct of Malowa, in disappearing from his home immediately after the murder to avoid arrest, and in remaining absent for six months; and he was left with no reasonable doubt that Malowa was guilty of the murder of Blazio. We see no reason to differ."**

72. In this case, however, the accused explained his whereabouts. The burden was not upon him to prove his defence if the evidence for the prosecution was insufficient to sustain the charge. The accused had no obligation to stay within the vicinity unless there was evidence that he disappeared at a time when he knew that the police were looking for him. There was no such evidence. A person's freedom of movement is not necessarily restricted by the mere fact that a crime has been committed in the area where he ordinarily resides unless there is convincing evidence that the fact of his leaving the area was to escape an imminent arrest. After all, as was held by **Omolo, J** (as he then was) in **Kastelo vs. Republic [1992] eKLR:**

> **"Even if the appellants had run away from the police, as they alleged, mere running away from the police, in the Kenyan circumstance, cannot be conclusive proof that the person so running away is necessarily guilty of some crime."**

73. The circumstances in this case were similar to those in **Robert Achapa Okelo vs. Republic Kisumu Court of Appeal Criminal Appeal No. 3 of 1999** in which the Court of Appeal expressed itself as hereunder:

> **"In this appeal the superior court convicted the appellant of the murder of Margaret Atieno Ouma which was said to have occurred at Kondele Estate in Kisumu District on 14th June, 1993. The evidence relied on by the trial Judge (Wambilyanga, J) in convicting the appellant was all circumstantial. That evidence did not, however, irresistibly point to the appellant to the exclusion of any other hypothesis as the killer of the deceased. It was mostly guess work based on traditional values and principles like failure by the appellant to attend the deceased's funeral, the appellant's going away from and returning to the place where the other members of the family were seated and so on. We agree with Mr Karanja for the State that these activities did not constitute evidence from which an inference of guilt could be safely drawn. The State having conceded the appeal there was no need for Mr Menezes to argue his grounds of appeal. Consequently the appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be set free forthwith unless he is otherwise lawfully held."**

74. Having considered the evidence presented in this case, I am, similarly, unable to find that the the inculpatory facts against the accused person are incompatible with his innocence and are incapable of explanation upon any other reasonable hypotheses than that of his guilt. In my view there are other existing circumstances which weaken the chain of circumstances relied on by the prosecution such as the fact that the accused's meeting with the deceased came to an end and he was seen going his own way thereafter by PW2. Accordingly, the facts adduced by the prosecution do not justify the drawing of the inference of guilt to the exclusion of any other reasonable hypothesis of innocence. There may well have been suspicion that the death of the deceased was caused by the accused person but as was held by the Court of Appeal in **Joan Chebichii Sawe vs Republic [2003] eKLR**:

> **"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt…Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

75. In that case the court relied on **Mary Wanjiku Gichira vs. Republic,** Criminal Appeal No 17 of 1998, where it was held that:

> **"suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."**

76. The rationale for this position was explained in **John Mutua Munyoki vs. Republic [2017] eKLR** where the Court of Appeal opined that:

> **"…in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged."**

77. As was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR**:

> **"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-**
>
> **'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"**

78. Accordingly, I find that the prosecution has failed to prove that the accused person herein on the 9th day of February, 2010 at Kithimani Sub-Location, Kithimani Location of Yatta District within Masaku County, murdered **Joash Kyalo Kazungu** (the deceased). I find the accused person not guilty of the offence with which he is charged. He is accordingly acquitted and I direct that he be set at liberty forthwith unless otherwise lawfully held.

79. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 17th day of February, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mulei for the Accused person

Miss Wambugu for Ms Mogoi for the State

CA Geoffrey