



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 8 OF 2012

REPUBLIC.....PROSECUTOR

=VERSUS=

JONES MUTUA ANTHONY.....1ST ACCUSED

DOMINIC NZUKI NDAMBUKI.....2ND ACCUSED

VICTOR WAMBUA KIMUYU.....3RD ACCUSED

DAVID WAMBUA.....4TH ACCUSED

JUDGEMENT

1. The accused herein, **Jones Mutua Anthony, Dominic Nzuki Ndambuki, Victor Wambua Kimuyu** and **David Wambua** were charged with the offence of murder contrary to section 203 as read section 204 of the **Penal Code**. According to the Statement of Offence, on the 31st day of January, 2012 at Mukalala Village of Mjini Location within Machakos County, the said accused persons murdered **Makau Muthoka**. They all pleaded not guilty to the charge.

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

3. According to PW1, **Willy Ngila Kasiu**, a conductor of a *matatu*, on 31st January, 2012, he was on duty at Country Bus - Machakos Town where passengers were boarding the *matatu* when he and his 5 colleagues were arrested by council officers for the offence of touting. After being arrested, they were taken to Machakos police station. However, one of them attempted to run away and the officers chased after him. Thirty minutes later they brought the person who had escaped while crying, complaining that he had fallen into a hole and was injured. He was then removed from the cells and taken to hospital and the following day they were taken to court. PW1 was however unaware of what happened to him.

4. In cross-examination by **Mr Makundi**, learned counsel for the accused, PW1 stated that by that time the Municipal Council officers were the ones in-charge of the bus park and that the accused were municipal constables and were on duty. It was his evidence that he was arrested by the 1st accused after which they were taken to the cells by the pickup belonging to the council. One of them, whom he did not know, however ran away as they were being made to enter the motor vehicle. According to PW1, the injured person was unable to stand and after he was taken away PW1 did not see him again. He however stated in re-examination that he never saw the person fall.

5. PW2, **Musembi Kili**, was working in *matatu* registration no. KPB/K though he could not recall the other numbers. The said *matatu* was plying the Machakos – Nairobi route. On 31st January 2012, he was at work at the *matatu* terminal, Machakos when he was arrested for not wearing uniform by Machakos council officers. It was his evidence that those who arrested him were the 1st and the 2nd accused persons who were officers of the Machakos council. After being arrested he was taken to the council cells in Machakos. Apart from himself, there were 5 other persons who were arrested though he did not know their names. On the way to police station cells one of the suspects who was with them ran away and he was arrested and brought back when the others were already in the police cells. PW2 was however unaware of the person who brought him back. At 8.20 pm the injured suspect started complaining that he had chest pains and that he had fallen in a hole. When the police heard his complaints they took him to hospital and PW2 later heard that he had died.

6. According to PW2, he only knew the 1st and the 2nd accused but did not know the other accused persons. It was his evidence that at the municipal council they were five people and after one of them alighted only four of them reached the police station. He however did not see

the person who ran away since he was he had left him in the car. In his evidence they were three when they entered the police cells. According to him, they were taken to the police station by the 1st and 2nd accused and the police then took them to the cells while leaving the 4th suspect in the car. After 5-10 minutes the person was taken to the cells after the others were already in the cells. According to PW2, it was the 1st and 2nd accused who remove them from the car and since they left the 4th suspect in the car, he did not see the 1st and 2nd accused following the 4th suspect (deceased). He however never saw the 3rd and 4th accused on that day or at the police station.

7. PW2 disclosed that the deceased informed him that he was feeling pain on the chest when we they in the cell and informed them that he was left behind because he had ran away and that he fell in a hole. The deceased did not allege that he had been hurt by anyone or that he had been beaten. According to PW2, he did not know what happened outside when he was in the police station.

8. PW3, **Samuel Ngila Mutua**, on his part testified that he was working with the County Government of Machakos as Enforcement Officer. On 31st January, 2012, he was in the office from morning hours being in charge as his boss, **Gideon Wambua Peter** was off duty. He deployed four officers to the bus park since his duties were to ensure safety in town and bus park and to allocate duties to officers. He therefore allocated duties to four officers **Corporals Dominic Nzuki, David Wambua, Jones Mutua** and **Victor Kimuyu** and deployed them to the Machakos Town park to ensure there was order and smooth flow of traffic at 6.00 am. In the course of the day they arrested touts and he signed six charge sheets and they were escorted to Machakos police station where they were rearrested and charged with the offence of touting and shouting. However, at around 10.00 pm the then OCS of Machakos police station, **John Mwaura**, called him and informed him that one of the touts was not feeling well and had been taken to Machakos hospital. He however did not disclose the name of the tout. According to PW3, the touts were not taken to his office and he did not see them when they were charged. The following morning on 1st February, 2012 the OCS called him to his office and informed him that the tout was dead. He summoned the four officers who had arrested the touts and they recorded statements. When PW3 asked his officers what happened he was informed that one of the touts had tried to escape when they were arrested at the police station and he was chased by the officers and the police and was caught and taken back to the police station.

9. According to PW3, the officers recorded statement and there were demonstrations held in town. He, however, did not visit the place where the body of the tout. He identified the officers he allocated duties as the accused.

10. He confirmed that the deceased was one of the offenders arrested by the four officers whose charge sheet he signed to confirm the arrest and the deceased was one of the suspect. According to hi, the four accused had a duty to ensure that the suspects reached the Machakos police station and also duty to chase the one who tried to escape and re-arrest them. From his information, he stated that the suspect was running he entered into a ditch and got injured and that is why my officers were able to re-arrest. Upon re-arrest the suspect was handed over to the police and locked up in the police station and his officers had not control over what was happening at the police station.

11. PW3 explained that there were demonstrations that were political that the four had killed the deceased and that is why they were arrested. According to him, the political competitors of the 3rd accused who was the manager of Machakos Town, **Onesmus Kimuyu**, arranged the demonstrations. He however admitted that since he was not present during the arrest, did not know what transpired though he agreed that the duty of the officers did not include causing injuries to the escapee. He however maintained that the four officers were brought to court by police officers through political pressure and that the competitor who arranged the demonstrations was chairman of Umowa Sacco, a previous councillor, who tried to be the MCA of a ward in 2013 after the deceased had died.

12. PW4, **CIP John Mwaura**, testified that on 31st January 2012 at 9 pm he was in Machakos town when he was called by PW8 informed him that he had been informed by the other inmates that there was a suspect in the cells who was sick. He then told PW8 to arrange for the suspect to be taken to hospital. After they went to hospital, PW8 called and told him the suspect had died while undergoing treatment. When he arrived at the station had already been taken to hospital. PW4 called two other officers at the station and they made a record of the inmates who were at the station that night. They then made arrangement for a post mortem to be done and opened an inquest file. After the inquest it was recommended the accused be charged. He was however, not the investigating officer in the inquest.

13. According to PW4, after the suspect died there was an outcry that he had been beaten before he was taken to the station. He disclosed that he knew the accused by appearance as they used to work at municipal council of Machakos as when he was OCS but did not know when they got involved in the case.

14. While admitting that he was responsible for the suspects in the cells as the OCS, he stated that the state of a suspect is normally recorded in OB when they are booked at the police station. Though the other suspects in the cells that night wrote statements, he did not read all the statements as there was an investigating officer. He reiterated that he heard that the deceased had tried to escape on the way to the police station not at the police station and was chased by the municipal police officers. He had no information that his police officers were involved in chasing of the suspect/prisoner in the cell after the incident.

15. He however denied any knowledge of any politics arising from the death of the suspect though he was aware of the outcry about the beating of the deceased by the council police. He however denied that they were not under any pressure as an inquest/inquiry file was opened and sent to DPP. He however admitted that he knew the then Mayor of Machakos **Kimuyu** was the father of the 3rd accused and it was said that he was the son of the Mayor but insisted that they were under no pressure to charge them. According to him, Inspector **Rose Cheptanui** was the investigating officer. He was however unaware of how many post mortems that were done.

16. In re-examination he revealed that the OB recorded that his health was not good and he had said he had fallen in a trench. According to him, he did not know the 3rd accused was the son of a mayor and only knew him as a council enforcement officer as he used to go to the station. He reiterated that the accused were charged as council police officers and he was not aware if they were involved in political activities.

17. PW5, **Dr. Goeffrey Mutuma**, on 8th February, 2012 at Machakos Hospital Mortuary conducted a post-mortem on the body of the deceased, **Makau Muthoka**, a male African aged 36 years which body was identified to him by **Jonathan M. Mulili, Joshua Kyalo** in the

presence of a police officer, **Moses Biwott**. Upon examination, he found that it had been done a post-mortem before and he was therefore doing a second post-mortem. According to him, there was a huge hematoma (Collection of blood) on the left side of the thigh and dislocation of the hip joint on the same side but no fractures were noted. There were no internal injuries noted except the bleeding on the thigh. As a result of his examination he formed an opinion that the cause of death was bleeding to the lateral thigh due to rupture of the femoral artery following blunt force trauma. He signed the post-mortem report which he exhibited. In his view, the force must have been high to cause rupture of the artery. There was however no wound and being a blunt trauma, it was his opinion that it was caused by a blunt object and not a sharp one.

18. In cross-examination he stated that blunt objects are many and that the injuries could result from a fall when someone hits a blunt object when he/she falls. He however clarified that if someone falls on the side, it is normally the hips that get injured not thigh and in this case there was a dislocation of the hip but also injury to the thigh.

19. PW6, **Dr. Fredrick Okinyi**, on his part testified that on 2nd February, 2012, he did a post mortem examination on the body of **Makau Muthoka**, after being identified by **Titus Mutua**, **Munyao Muthoka** and a police officer **James Nduva**. His findings in the preliminary examination was that the body was of an African male, 36 years of age, tall 174 cm and was well preserved by refrigeration. There were no obvious injuries except a bruise on the right inguinal region (pelvis). The lungs were normal except for carbon sooting, the heart was normal, the stomach was full of pre-digested food. He however took more tissues for analysis to come up with a conclusive report. In the supplementary report, there were bruises on the inguinal region. The liver was smooth and slightly pale. The spleen had rear capsule and cut section showed red and white pulp which were normal. The testicles were haemorrhagic and contused (beaten). The musculoskeletal system there were multiple hematoma and laceration of the left thigh tear/muscle. The right thigh muscles had hematoma and laceration. The femur were normal, there were no fracture. The liver tissue showed poor blood supply and some of it dried. In his opinion, the immediate cause of death was injuries to the left femoral nerves extensive left and right muscles contusions. The trachea were oedemas, contused and haemorrhagic. Because the post-mortem was not conclusive enough he and did not show the obvious cause of death, he did microscopic studies. From his histology, the deceased also had haemorrhagic shock causing renal failure and the post-mortem report indicated that the cause of death would await the histological examination.

20. The cause of death was the initial event, the blunt injury on both thighs, this was completed by haemorrhagic shock causing the renal injuries form haematology. According to him, the injury on the left thigh was a clot of the thigh and cutting of the nerves caused by a blunt object while it was likely the injuries to the testicles were caused by being hit by a blunt object. In his opinion, it was unlikely that the injuries were caused by a fall, only if it was from great height in which case there would also be fractures. The injuries he noted were inconsistent with a fall and he exhibited the post-mortem report.

21. PW6 conducted another post-mortem examination on 13th February, 2012 after **Dr. Mutuma** had done his post-mortem hence the third post-mortem on the deceased. This third post-mortem was conducted together with **Dr. Jonathan Oduor**. According to PW6, the only significant findings were the injuries to left femoral nerves and the cause of death was haemorrhagic shock as a result of internal bleeding to muscles resulting from blunt trauma. In his opinion, there was no difference in terms of the cause of death and finding from the first post-mortem which he conducted. The only difference were the additional findings from the first examination conducted by himself. He explained that the third post-mortem was as a result of speculation that the 2nd post-mortem was compromised and a neutral person, **Dr Oduor**, was asked to undertake the same. He exhibited the third post-mortem.

22. In cross-examination, PW6 stated that the first post-mortem was conducted by him alone on 2nd February, 2012. He agreed that depending on level of experience a doctor of similar experience would come up with similar findings. He stated that there were no cuts on the body and that the only injuries were the ones found on the left right thigh. There were no fractures though the injuries were caused by a blunt object. There were injuries to the left and right thighs and the significant one was the injuries to the nerves of the left thigh caused blunt trauma. He insisted that it could not have been caused by a fall or falling onto a blunt object because if one falls on a blunt object the injury would be in one spot not multiple. He discounted the cause of renal injury being the undigested food.

23. In his view, a second doctor conducting a second post-mortem would also realize the injuries but not as accurately as the first one and it would also depend on refrigeration of the body. It was his evidence that the injuries on the body can sometimes destroy the kidney as a result of the blood being affected. He explained that the information received by the medical superintendent was that some parties were not happy with the post-mortem conducted by **Dr. Mutuma**. According to him, he did the first post-mortem in the course of his duties as a doctor at Machakos hospital while **Dr Mutuma** was called by the relatives to do a second post-mortem hence the reason the third post-mortem was conducted by two doctors. According to him, there were bruises on the elbow and injuries to both legs of the deceased as well as injuries to the left femoral nerves which were indicated in the report though he only gave a summary of the report. His conclusion as to cause of death formed from the findings in totality as stated in the report.

24. In re-examination, PW6 stated that the deceased died on 31st January, 2012 and he did the post-mortem on 2nd February, 2012. He reiterated that the injuries were extreme from thigh to testicle which eliminated injuries from a fall. According to him, injuries from a fall would depend on the height one is falling from and what one falls on. According to him, he was told that the *matatu* owners and relatives wanted a second report and that the injuries to the elbow were indicated in the second post-mortem report and were noticed by **Dr. Oduor**. The witness stated that **Dr. Oduor's** findings were the same as his.

25. PW7, **P.C Ogutu Ombwaro Maxwell**, testified that on 31st January, 2012, he was reporting on night duty and was called by OCS **CI John Mwaura** who informed him to go to the police station and join **PW8** to take a prisoner who had complained to be unwell to Machakos Level 5 Hospital. On arrival at the station he found **PW8** and **PC Serem** who was the duty officer with one prisoner, **Makau Muthoka**, who was lying down on the floor and was neither moving nor talking though his eyes were open. He however had no injuries. They took the prisoner to Machakos Level 5 Hospital. However, as he was being examined, the doctor pronounced him dead.

26. In cross-examination, PW7 stated that he was not present when the prisoner was brought in. According to him, there is normally an officer at the reporting desk who records the prisoners who are brought in and who records the state of health they are in and if the prisoner is physically injured he cannot be put in cells.

27. In re-examination he stated that he did not observe any physical injuries on the prisoner they took to hospital.

28. On 31st January, 2011 at about 4.00 pm PW8, **PC Zachary Gitonga**, was coming from the Police Lines to the Police Station when he saw a person running away from the Police Station towards the Police Lines and was being chased by County Officers with members of the public. According to him, he could recognise two or three officers, who were in uniform and whom he knew by appearance. He believed they were the 2nd and 3rd accused. Eager to find out what was happening, he followed them. The person who was running went to a steep and was arrested by the said officers. Shortly, a Council vehicle arrived and he was placed in the vehicle which PW8 also boarded and they proceeded to the police station. According to him, he never saw anybody fall down and the person apprehended was normal. At the police station he continued with his duties. Later, at about 9.00pm he was with a fellow officer, **PC Oguttu**, from Katelembo and they were informed by the police officers at the station **PC Serem** and **PC Kinyua** that there was a person who was in custody but was unwell. Upon entering the cell, they found the person seated and stated that he was unwell. They removed him outside and realised that he was the person who was being chased. They informed the OCS who told them to take him to the Hospital for treatment. They were later informed that the person passed away.

29. According to PW8, all the accused persons were present at the scene of the arrest and though he did not know their names, he knew them by appearance. According to him, the 1st accused was in the vehicle and he used to see the 4 accused at the Station as a council officers.

30. According to PW8 when they took the deceased to the Hospital, he was walking and though he was being supported talking and said that he was running away from custody when he fell down. He however said that he could not know what happened before he was arrested. It was his evidence that the distance from the cell to where he fell is about 700 metres. The witness however did not see the deceased being beaten. His evidence was that there was a crowd of people and there were many other council officers though he was unable to state the roles played by each one of them. According to PW8, when they were returning to the station the person was well and never said that he was injured. When he went to the cell he did not notice any injuries on the deceased save for his complaint.

31. **Jonathan Muniyao**, PW9, did not complete his testimony as he was clearly unwell.

32. PW10, **Penina Sumba Muthoka**, the deceased sister was on 1st February, called by her mother and informed that the deceased had been arrested and she was requested to send money for payment of fine. She was however later informed by her relative, **Mutua**, that the deceased had passed away. When she went to the police station she was informed that the deceased passed away from injuries he sustained while trying to escape. The following day, he identified the body for the purposes of conducting post-mortem by **PW6**. According to her, she did not notice any injuries. According to her another private family post mortem was arranged by the SACCO since the deceased was a conductor though she was not present during the second post-mortem. Though she was informed that some people had been arrested, she did not know them and did not know why the accused persons were arrested.

33. In cross-examination, she admitted that there were demonstrations by the turnboys in which people demanded the apprehension of the culprits alleging that the deceased was killed by council officers and that it was the mayor's son who had killed him. According to her, the SACCO was not satisfied with the first post-mortem and organised for the second one. In her evidence, **PW6** did not want to do what the family wanted and they were dissatisfied with him.

34. At the close of the prosecution case, the accused persons were placed on their defence and they all opted to give sworn testimony.

35. According to the 1st accused, **Sgt. Antony Mutua**, he was working for Machakos Municipal Council now the County Government of Machakos in the Enforcement Department. On 31st January, 2012, between 2-3 pm he was in charge of enforcing the Bye-Laws at Machakos Bus Park by arresting the offenders. He was with his co-accused persons and a driver, **Bernard Wambua**. The 6 people they arrested were shouting and touting. They placed the said persons in the vehicle and about 100 metres from the station they alighted and one suspect took off. He however remained with the other suspects while the escaping suspect was being pursued by a police officer called **PW8** who was followed by the 2nd accused later. However, himself, the 1st accused, and the 3rd and 4th accused were left behind waiting for the other suspects to be booked. After the booking, the 3rd and the 4th accused followed the 2nd accused leaving the 1st accused behind. According to the 1st accused, he never left the Station. Minutes later the 2nd accused informed him on phone that the suspect had been apprehended and they should go for him. He then left with the driver towards Iini River through Kafoca Road since they could not access the place directly. According to him, he found the suspect with the 2nd accused and PW8 next to the road and the two put the suspect behind the vehicle, a double cabin. However, the 1st accused did not alight while the 3rd and the 4th accused boarded behind. They then proceeded to the police station and the suspect alighted and entered the station where he was booked. After that they went back to the office after preparing the charge sheet charging the said suspect with touting and escaping from lawful custody.

36. The next day, the 1st accused received a call from PW3, his boss, telling him that he was required at the police station by the OCS. Upon going there, he was informed that the escapee had passed away and they were required to record their statements which they did. He therefore denied killing the deceased and stated that he did not know what happened to the deceased after he escaped. It was his evidence that from the vehicle, the deceased walked on his own up to the counter.

37. In cross-examination by **Ms Mogoi**, learned prosecution counsel, he stated that during the arrest the deceased was well and at the station he escaped and was pursued. According to him, he was not a politician and the people who arrested him did not know him.

38. On his part, the 2nd accused, **Dominic Nzuki Ndambuki**, confirmed that he was working at the Municipal Council in the Enforcement Department. On 31st January, 2012, at about 4.00 pm, he together with the 1st accused were conducting an operation at Machakos Bus Park where they arrested 6 touts and placed them in a temporary cell while calling the driver and the 3rd and 4th accused to assist them take them to the police station. They then took them to the station and while they were alighting one of the suspects, **Makau Muthoka**, the deceased escaped. They took the other suspects inside the station. He however saw a police officer, PW8, chase the deceased. Later, in the company of the other officers, they followed them as the deceased was being pursued by many people though he only knew PW8. Later he found the

deceased placed down near a bridge by PW8. According to the 2nd accused, he was not present when the deceased was being arrested. It was however his testimony that the 1st accused was not there as he had been left at the station while the 3rd and 4th accused persons followed later on foot. He later called the 1st accused and informed him that since the deceased had been arrested, he should send the driver. The 1st accused and the driver went and found them with many people.

39. The 2nd accused denied assaulting the deceased and stated that he never saw the deceased being beaten. After placing him in the vehicle they went back to the station, the deceased sitting in the back seat in the middle with PW8 and himself. In the front seat were the driver, **Benson Wambua**, and the 1st accused. Upon arriving at the station, the deceased walked to the station and was booked.

40. PW2 stated that amongst the accused persons, he was the first at the scene. It was his evidence that from the place where the deceased escaped to where he was arrested was about a kilometre apart. While, he, the 3rd and 4th accused walked there, he denied that they called the driver because the deceased was injured.

41. The 3rd accused, **Victor Wambua Kimuyu**, confirmed that he was similarly mandated to arrest the touts and those who were shouting. On 31st January, 2012, between 3-4 pm he was at the Machakos Bus Stage controlling jam when he was called by the 1st accused and informed that they had arrested 6 suspects and wanted assistance from the 3rd accused person in taking them to Machakos Police Station. Together with the 4th accused they went and found the 1st accused with the 2nd accused and 6 suspects. At the station, he left with two of the suspects. He was later informed that one escaped. He however proceeded to book the other suspects and thereafter followed the escaped suspect. Together with the 3rd and 4th accused persons, they found the suspect sitting down next to PW8 and the 2nd accused. He however never witnessed the arrest of the deceased. After the vehicle came they put the deceased in the vehicle and took him to the station where he was booked. In his evidence the deceased looked well and walked on his own. He was, however, later informed that the suspect died. He however denied any involvement in his death. According to him when he found the deceased seated there were about 20 people there and it was on top of a hill. He however never noticed any injuries on the deceased.

42. The 4th accused, **David Wambua**, an employee of the Municipal Council in the Enforcement Department was on 31st January, 2012 working at the Bus Park controlling traffic jam at about 4.30 pm when he received a call from the 1st accused to go where the 1st accused was. He proceeded there and was informed by the 1st accused that they had arrested 6 people with the 2nd accused and they wanted assistance to escort them. He also found the 4th accused there. A vehicle was then called driven by **Benson Wambua** and they proceeded to Machakos Police Station where he alighted with two of the suspects and left with them to the entrance of the police station. He then heard that one of the suspects had escaped. He booked the two suspects while the 3rd accused went with two others and one was taken by the 1st and 2nd accused. The 2nd accused then left and went outside and followed the escapee leaving the 4th accused behind with the 1st and the 3rd accused to book the other suspects. After doing so with the 3rd accused they followed the escapee leaving behind the 1st accused. When they reached where the deceased had been apprehended they saw people standing from far while the deceased was sitting down with the 2nd accused and PW8. The vehicle they were using then arrived and the deceased was placed behind the double cabin and they returned to the station. There, the deceased walked to the OB and was booked and he left. Later, he was informed that the deceased died. The 4th accused however denied having assaulted the deceased and he did not know how the deceased died. In his evidence though the distance from the police station to where the deceased was apprehended was 200-300 metres and it took him 8 minutes to walk there, the terrain was not very good. He however saw no injury on the deceased.

Determination

43. The prosecution's case in summary is that on 31st January, 2012, the deceased was arrested by the accused persons and taken to Machakos Police Station. However, before being booked in, the deceased escaped from the vehicle ferrying him and took off. What took happened immediately thereafter, is however, not since the next episode is that the deceased was pursued and apprehended and brought back to the police station, booked and placed in police cells. Later that night the deceased started complaining that he was unwell and was taken to Machakos Hospital but he passed away when he was still being examined.

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 this case, there was no doubt as to the fact of death of the deceased. There was ample evidence that his body was identified to the doctor by **Jonathan M. Mulili, Joshua Kyalo** in the presence of a police officer, **Moses Biwott** for the purposes of post-mortem. Although these people did not testify, PW10, **Penina Sumba Muthoka**, the deceased's sister testified that she viewed the body of the deceased. The fact of death was proved by PW5 and PW6 who produced post mortem examination reports.

48. As regards the cause of death, there were three post mortem reports produced by PW5 and PW6. The first report was by PW6 who found that there were no obvious injuries except a bruise on the right inguinal region (pelvis). The lungs were normal except for carbon sooting, the heart was normal, the stomach was full of pre-digested food. He however took more tissues for analysis to come up with a conclusive report. In the supplementary report, there were bruises on the inguinal region. The liver was smooth and slightly pale. The spleen had rear capsule and cut section showed red and white pulp which were normal. The testicles were haemorrhagic and contused (beaten). As for the musculoskeletal system, there were multiple hematoma and laceration of the left thigh tear/muscle. The right thigh muscles had hematoma and laceration. The femur was normal, there were no fractures. The liver tissue showed poor blood supply and some of it dried. In his opinion, the immediate cause of death was injuries to the left femoral nerves extensive left and right muscles contusions. The trachea were oedemas, contused and haemorrhagic. Because the post-mortem was not conclusive enough he and did not show the obvious cause of death, he did microscopic studies. From his histology, the deceased also had haemorrhagic shock causing renal failure and the post-mortem report indicated that the cause of death would await the histological examination.

49. The cause of death was the initial event, the blunt injury on both thighs, this was completed by haemorrhagic shock causing the renal injuries from haematology. According to him, the injury on the left thigh was a clot of the thigh and cutting of the nerves caused by a blunt object while it was likely the injuries to the testicles were caused by being hit by a blunt object. In his opinion, it was unlikely that the injuries were caused by a fall, only if it was from great height in which case there would also be fractures. The injuries he noted were inconsistent with a fall and he exhibited the post-mortem report.

50. However, the family was not satisfied with this report and made private arrangements for a second post mortem by **Dr Mutuma**, PW5 who found that there was a huge hematoma (Collection of blood) on the left side of the thigh and dislocation of the hip joint on the same side but no fractures were noted. There were no internal injuries noted except the bleeding on the thigh. As a result of his examination he formed an opinion that the cause of death was bleeding to the lateral thigh due to rupture of the femoral artery following blunt force trauma. He signed the post-mortem report which he exhibited. In his view, the force must have been high to cause rupture of the artery. There was however no wound and being a blunt trauma, it was his opinion that it was caused by a blunt object and not a sharp one.

51. It is clear that the two reports did not agree on the nature of injuries that the deceased sustained. PW5's opinion was that the injuries could result from a fall when someone hits a blunt object when he/she falls but clarified that if someone falls on the side, it is normally the hips that get injured not thigh and in this case there was a dislocation of the hip but also injury to the thigh. PW6, on the other hand was emphatic that it was unlikely that the injuries were caused by a fall, only if it was from great height in which case there would also be fractures. He therefore concluded that the injuries he noted were inconsistent with a fall.

52. Because of clear lack of consistency in the two reports, it was decided that a third opinion be sought and **Dr Johansen Oduor** was detailed to do this. According to PW6, he carried out the post mortem with **Dr Oduor** and according to him, they jointly found that the only significant findings were the injuries to left femoral nerves and the cause of death was haemorrhagic shock as a result of internal bleeding to muscles resulting from blunt trauma. PW6 explained that the third post-mortem was as a result of speculation that the 2nd post-mortem was compromised and a neutral person, **Dr Oduor**, was asked to undertake the same.

53. The problem however is that the third report was only signed by PW6. One wonders why PW6 participated in the third post mortem if the intention was that it be carried out by a neutral person.

54. What is however, consistent in all the post mortem reports is that the death was due to rupture of the artery or nerves resulting from a blunt force trauma. This Court cannot however make a conclusive finding, based on the inconsistent reports from which PW5 and PW6 formed their opinions whether or not the same could be caused by a fall.

55. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, 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.”

56. 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."

57. 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."

58. 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."

59. 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."

60. **Mativo, J** in **Elizabeth Waithiengi 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."

61. 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."

62. 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.”

63. In this case, as stated above, 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.”

64. 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.”

65. 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.”

66. 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.”

67. 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.”

68. 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.”

69. In this case there was evidence from PW1 and PW2 that the deceased informed them that his injuries resulted from his having fallen in a hole. There was no evidence at all that he had been beaten by anybody. Although there was evidence that there were members of the public, none of them was called to testify as what they witnessed. The accused persons all testified that by the time the deceased was apprehended after he tried to escape, he was with PW8. PW8, on his part stated that he saw a person running away from the Police Station towards the Police Lines and was being chased by County Officers with members of the public. According to him, he could recognise two or three officers, who were in uniform and whom he knew by appearance. He thought they were the 2nd and 3rd accused. Eager to find out what was happening, he followed them. The person who was running went to a steep cliff and was arrested by the said officers. Shortly, a Council vehicle arrived and he was placed in the vehicle which PW8 also boarded and they proceeded to the police station. According to him, he never saw anybody fall down and the person apprehended was normal.

70. If the evidence of PW8 is to be taken as correct, then the injuries sustained by the deceased must have been inflicted after he was apprehended.

71. In this case, from the prosecution’s own evidence, it came out that the deceased stated that his injuries were caused by a fall. PW5 confirmed that the injuries could have resulted from a fall when someone hits a blunt object as he/she falls. He however clarified that if someone falls on the side, it is normally the hips that get injured not thigh and in this case there was not only a dislocation of the hip but also

injury to the thigh. In this case, there was evidence that the deceased ran towards a cliff. He himself said he fell. No one knows which side of his body he fell on and from what height. The medical opinion as to what might have caused his death was itself inconsistent.

72. Apart from that the investigating officer never testified in this case. In Kiriungi vs. Rep (2009) KLR 638, the court said: -

“...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged.”

73. Similar sentiments were expressed in Harward Shikanga Alias Kadogo & Another vs. Republic [2008] eKLR by the Court of Appeal as follows:

“But Mr. Onalo appeared to have been contending that merely because the investigating officer had not been called, the prosecution’s case had not been probed as required by law. That submission is now frequently made in the courts and it shows that for some unexplained reason or reasons investigating officers are often not called to testify...We can also only hope that the prosecuting authorities in the country will stop the emerging practice of not calling investigating officers to testify and there may well be circumstances in which such a failure may well be fatal to the conviction. But in the appeals we are dealing with the complainant herself and her cousins, Ben Otiato (PW2) and Benjamin Emusiko (PW4) all swore that they saw these two appellants during the attack on the complainant. Police constable Benard Rono (PW5) also said he arrested the appellants on 27th October, 2003 after he had received information about their involvement in robberies. Rono said he was not the investigating officer but there can be no doubt from the recorded evidence that it was him who arrested the appellants and took them to Luanda police station. So in the circumstances of these appeals, the failure to call the investigating officer did not occasion to the appellants any failure of justice and we reject Mr. Onalo’s contention to the effect that we allow the appeals because the investigation officer was not called. We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution.”

74. Sir Udo Udoma, the then Chief Justice of Uganda, however cautioned the laxity in calling investigating officers in the case of Bwaneka vs. Uganda [1967] EA 768 at page 771 Letters H to C at page 772 where he stated that:

“The prevailing practice of not calling police officers during trials in magistrate’s courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realize that it is their duty to control and conduct all prosecutions in the magistrates’ courts in criminal cases. Generally speaking criminal prosecutions are matters of great concern to the state and such trials must be completely within the control of the police and the Director of Public Prosecutions. It is the duty of the prosecutors to make certain that police officers, who had investigated and charged an accused person do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals. In the instant case the evidence was that after the appellant had been arrested by local government police, he was taken and handed over to the central government police station at Mbarara. There was no evidence as to which police officer had taken charge of the case and what steps, if any, he had taken when he had decided to arrest and charge the appellant. The absence of such evidence necessarily creates a lacuna in the case of the prosecution because it gives the erroneous impression that the central government police officers had nothing to do with the case and had taken no part whatsoever in investigating and deciding on the charge to be preferred against the appellant. It is to be hoped that in future this practice would be discontinued, because without the evidence of an accused person having been arrested and charged by the police, the proceedings of the trial with respect to the prosecution case appear to be incomplete.”

75. Whereas it is true that the mere fact that the investigating officer is not called to testify in a case is not fatal to the prosecution case and each case must be decided on its own circumstances, where, as in this case, the failure to do so, leads to the failure to produce the purported murder weapon, that fact may well weaken the prosecution’s case particularly where the evidence is purely circumstantial. In this case, it is appreciated that there was no evidence of the existence of the murder weapon which was to be produced. However, the non-existence of the murder weapon may well be taken to have been as a result of the fall by the deceased.

76. Having considered the evidence presented in this case, I am unable to find that the the inculpatory facts against the accused persons are incompatible with their innocence and are incapable of explanation upon any other reasonable hypotheses than that of their guilt. In my view there are other existing circumstances which weaken the chain of circumstances relied on by the prosecution and 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 persons but as was held by the Court of Appeal in Sawe vs. Rep [2003] KLR 364:

“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.”

77. 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.”

78. 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.”

79. 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.”

80. Accordingly, I find that the prosecution has failed to prove that the accused persons herein on the 31st day of January, 2012 at Mukalala Village of Mjini Location within Machakos County, murdered **Makau Muthoka**. I find all the accused persons not guilty of the offence with which they are charged. They are accordingly acquitted and I direct that they be set at liberty forthwith unless otherwise lawfully held.

81. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 10th day of February, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Watta for Mr Makundi for the accused persons

Miss Mogoi for the State

CA Geoffrey