REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 67 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

SUSAN NDUKU KITULYA.....ACCUSED

JUDGEMENT

1. The accused, **Susan Nduku Kitulya,** was charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged on the night of 11th – 12th day of August, 2015 at Mungala Sub-location, Mumbuni Location within Machakos County, the accused murdered **James Muia Kitulya** (**Deceased**).

2. The prosecution's case was based on the evidence of 11 witnesses.

3. From the material presented by the prosecution, the deceased herein represented to his members of his family that the accused was his sister. That this was so was confirmed by the accused herself in her evidence. I say represented because the evidence was that the accused was away from home till a few months to the deceased's death when she resurfaced and the deceased introduced her to members of his family as his sister. The whole family was staying in one compound sharing one toilet. In the same compound the deceased was constructing a permanent house and the accused also had been given a portion of the said land by the deceased where she had constructed her house. The prosecution's evidence was that upon the accused's return, these seems to have arisen a land dispute between the accused and the deceased arising from an alleged sale of the family land by the deceased. The dispute however seemed to have been resolved by the area Assistant Chief, PW5.

4. According to PW6, **Lucy Mwikali Wambua**, one of the deceased's daughter in law, on 11th August, 2015 at about 5.00pm being a hairdresser, she was outside her house taking care of a customer when she saw the deceased carrying a carton from his house to the house where the accused's children were sleeping and then left and entered the accused's. PW6 never saw the deceased leaving the house till she shopping at 6.45 pm. However, ten minutes after the deceased entered the accused's house PW6 saw the accused leave her house carrying a cement bag which she dropped into a latrine and returned to her house. That night at about 8.30pm when PW6 went to refund the accused her money which PW6 owed the accused she found the accused taking bath outside and the accused informed her that she was bathing fast so that the deceased does not find her while she was bathing. PW6 then handed over the money to the accused without entering her house returned to her house and slept. It was however her evidence that she never heard any screams coming from the accused's house which was 20 metres from where PW6 was.

5. The following day at about 7.00 am PW6 found the accused outside telling PW1, **Caroline Mwende Anthony**, that she was going to sell soaps and would for her upon her return. Ten minutes later the contractor who was constructing the deceased home arrived and asked for his tools and was informed by PW6 that the accused had gone to sell her soaps. However, upon leaving the said contractor came across someone's body lying somewhere and went to inform PW6 of the same. When PW6 went where the body was she confirmed that it was the body of the deceased which was face down with the head covered by a nylon paper bag though he had the same attire the deceased wore the previous day. PW6 then called her husband, **Elijah Wambua Muia**, PW3. When the police arrived the nylon bag was removed and PW6 saw that the face was deformed.

6. On 11th August, 2013, **Elijah Wambua Muia**, PW3, a son of the deceased and a driver with Machakos Sacco, returned home from work at Machakos late at 7 pm and was informed by PW6 that she had no paraffin. When they went for the paraffin at the accused's the accused informed them that the deceased had not come back and they returned home and slept. In the morning as he was leaving he heard PW6 whom he had left behind in the house screaming and when he went to the scene which was in a place with many trees, he found many people including his brother, **Antony David Muia**, PW2. At the scene was the body of the deceased with a bag over his head and when the bag was removed he saw that there were serious injuries on his head. After the Assistant Chief, PW5, and the police arrived they proceeded to the

accused's house where they found blood inside in the sitting and bedroom and outside the house. They also found sand with blood where the deceased was building and also a blood stained cement bag was removed from the toilet. According to PW3, there were difference between the accused and the deceased over the proceeds of the sale of land by the deceased and PW5 was called to resolve the dispute. Though he had no problem with the accused, he testified that the accused once abused them and threatened to remove their mother's body and return it to their grandmother's home. He identified the photos taken at the scene and the home.

7. On her part, PW1, **Caroline Mwende Anthony**, one of the deceased's daughter in law and the wife of PW2, **Anthony Daniel Muia**, testified that on 11th August, 2015, at 1 pm she left the deceased at home building a house with a worker and the accused on her way to river to wash clothes. and another woman. Upon her return at 7 pm, she went to the accused to buy paraffin and the accused asked whether she was aware that the deceased father-in-law had not returned from Machakos where he had gone to buy iron sheets. PW1 then returned back to her house to prepare the meal for her children and informed PW2 about her conversation with the accused. They waited for the deceased till 10 pm and went to sleep. At 7 am the next morning the accused called her and informed her that the deceased had not returned. After a while she heard a woman scream from trees behind her house and when she proceeded there, she found PW6 together with the body of the deceased who had injuries on the whole head which was covered with a paper. According to her though the deceased's head was badly injured and could not be recognised but she saw his legs and knew it was him from the shoes he was wearing and his clothes. PW6 then called the neighbours as well as the Assistant Chief, PW5 while the accused arrived at 9.00 am. PW5 called the police who went to all houses and in the accused's house they found blood in her bedroom on the floor, walls and bed. However there was no blood in the sitting room did not have blood. Though she had no differences with the accused, she stated that the accused had differed with her husband. She was however unaware of any differences between the accused and the deceased. PW1 proceeded to identify the photographs which were taken at the scene. In cross-examination, she stated that by the time she left she only left the deceased and the worker. Though the accused and her sister-in-law were left at home.

8. PW2, **Anthony David Muia,** PW1's husband and a son to the deceased on 11th August, 2015 woke up in the morning at 7am and greeted the deceased who was outside building a house with a worker in the presence of two sons of the accused who were assisting the deceased with the construction. He proceeded to his work as a matatu driver leaving PW1, PW6, the accused and her sons at the homestead. Upon his return at 9.00 pm he was informed by PW1 that the accused had informed her that the deceased had left to buy iron sheet at 4 pm and had not come back. They waited for him till 10 pm and slept. The following morning at 5 am the accused informed them that she was going to get soap. At 7 am they heard screams from the trees behind their home and when he proceeded there, he found PW6 with the body of the deceased who had head injuries and his head was tied with a paper. He removed the paper and recognised the body as that of the deceased and proceeded to call PW5 who in turn called the police. Upon the arrival of the police they proceeded to inspect the houses and in the accused's house they found blood in the sufuria, clothes and wall. The blood was inside and outside the house. They also found a cement bag with stones which had blood. There was also blood mixed with sand and found one with water in the house. According to him the accused arrived later and was asked to open her house and that is when the search was done. According to him the accused used to antagonize them with the deceased threatening to kill them all and used to demand that they be removed from their father's home so that she remains as she wanted their portion of land to be hers. She also started farming where they used to farm and wanted to be given land. He however confirmed that the deceased and the accused did not have any difference over land apart from her claim for money. He proceeded to identify the photographs which were taken.

9. On 12th August, 2015, PW5, **Jackline Syokau Vuva**, the assistant chief Mungala sub location in Mumbuni location was called from her home by one **Musyoki Mwangangi** and told the deceased had been killed and thrown in the bush. She then called the OCS Machakos Police Station to relay the information and proceeded to the scene where she found the body of the deceased with head injuries. The bush where the deceased was between the home of the deceased and the neighbours, about 30 meters from the deceased's house. When the police arrived about 30 minutes later, they started searching peoples' houses and in the accused's house they found blood stained stick and clothes with blood and there were blood stains on the floor inside the house and at the entrance to the house and on the walls of the house. In the house there were three blood stained cooking pans on the floor, two nylon blood stained bags and a blood stained red top. Outside in the toilet they recovered two blood stained sacks inside. The identified the cooking pans, the nylon bags, the stick and the manila sacks. According to PW5 the accused's house was near the deceased house about 30 meters away, in the same compound. The accused however declined to sign the inventory of what was found after which the body of the deceased was then taken to the mortuary and the accused arrested after the photographs of the scene were taken which PW5 identified. According to PW5, she did not know the accused well before the incident as she had just moved to the area and only saw her once before that day when they went to her office about a land dispute with the deceased's family.

10. In PW5's evidence, the house had a sitting room and bedroom and in the sitting room there were blood stains on the floor though she never mentioned this in her statement. Neither did she mention the recovery of the sacks. In her evidence, the blood stained stick was recovered from the sitting room while the blood stained clothes were recovered from the bedroom.

11. PW9, **CIP James Mose**, was on 12th August, 2015 in the office when he was called by PW5 who informed him that a body had been recovered in Kisooni Village. Upon receipt of the report, PW9 called PW10, **PC Pius Ngila**, the investigating officer and together they proceeded to scene where the met PW5 and many people and were taken where the body was inside a bush. According to him the deceased had a bleeding injury on his scalp and near the nose. The head was covered by a polythene paper though the face was not covered. They also found the accused there and they proceeded to the accused's house since the accused informed them that the deceased had been with her the previous day at 4 pm when the accused borrowed from her Kshs 1,000/- for the purchase of construction materials after which the deceased left. At 8.30pm the accused left to go and inform the deceased's daughter in law that the deceased had not yet returned and asked them to wait for him. It was his evidence that the deceased's and the accused's house were very close 2-3 meters apart. Upon entering the deceased's house nothing unusual was seen. They proceeded to a house which was under construction by the deceased. Inside the room that appeared as the bedroom, the found blood mixed with soil over which water was poured and saw blood droplets leading from the house towards the accused's house while some drops were in the direction where the body was found. After the accused opened her house they saw blood on the floor of the bedroom, blood stains on the wall, below the bed was a bloodstained stick, three blood stained cooking pans, red bloodstained polythene bags, blood stained buckets, blood stained nylon bags and white bags. They then proceeded to the toilet where they removed bloodstained cement bags. It was PW9's testimony that due to the unavailability of the scenes of crime officers, he took the photographs of the scene using his camera and later took the films to PW11, the scenes of crime officer for processing. They also took blood samples from the scene which were preserved for analysis. He identified the photos he took as well as the cooking pans, the stick, the two red shopping bags, the while shopping bag, the cement sack, the bucket, the bloodstained open shoes and a bloodstained pink top camisole which were

taken to the Government Chemist for analysis. According to him present were PW10, the accused, the deceased's children and PW5. He testified that PW10 prepared an inventory of the items they picked and the accused was asked to sign which she did and he and PW5 witnessed the same and he identified the inventory certificate. In cross-examination he admitted that his statement did not mention the item which were recovered in his presence but insisted it was him who recovered the stick but could not remember who picked it. Apart from collecting the exhibits, PW9 went to a nearby chemist where he bought cotton materials and distilled water and using them improvised a swab stick which he used in collecting blood samples from the wall while wearing gloves. The same was taken to the Government Chemist for analysis by PW10.

12. For the purposes of post mortem examination, the deceased's body was identified by PW4, **James Makau Kisuli**, a cousin of the deceased on 18th August, 2015. The said post mortem examination was carried out by PW7, **Dr. Waithera Githendu**, on 18th August, 2015. Upon examination, she established that the head which was crushed had injuries majorly on the left side. There were other injuries involving the lest jaw and the skull was fractured exposing the lacerated brain and the fracture depressed the brain. In his opinion the cause of the deceased's death was head injury secondary to blunt force trauma. He exhibited the post mortem report. In his opinion there must have been a lot of bleeding.

13. From the testimony of PW8, **Lucy Waithera Wachira**, the Government Analyst, on 28th August, 2015 they received exhibits from PW10. These were the deceased's blood samples, the accused blood samples, two red nylon bags, 2 cooking pans, pink top dress, pair of shoes, white polythene bag, white nylon bag, swab, stick, red bucket, soil and cement bag. They were required to determine whether the said items were stained with either the deceased's or the accused's blood. She analysed the same and found that the cement bag was not blood stained while the other items were either moderately stained or lightly stained with human blood. From the DNA samples generated it was found that the swab matched the DNA generated from the deceased's blood. However, the DNA profiles for the other items apart from the stick and the soil revealed profile of an unknown male origin. The stick and the soil did not however generate any profile. She proceeded to exhibit her report.

14. PW10, **PC Pius Ngila**, the investigating officer, on 12th August 2015 accompanied PW9 to the scene where the deceased's body was recovered. Upon arrival through the guidance of PW5, they proceeded to the scene where they found about 200 people and the body of the deceased which had severe smash head injuries. Upon investigations, they found that the deceased was staying with her two orphaned sons and the accused, his sister, in the same compound though the accused's house was 10 meters away from the deceased's. In the compound was a house which was under construction in which they saw blood drops covered with water on the floor at the corner covered with a bucket. They decided to go round the compound in each of the houses. At the accused's house they saw blood drops over which water was poured. In the accused's bedroom they saw blood spots on the two walls covered with soil and water poured over it. He then heard PW5 say that there was a blood stained stick and he saw a blood stained bucket, blood stained red bags, bloodstained top, blood stained shopping bag, bloodstained open shoes and bloodstained cooking pans. From there they proceeded to the pit latrine where they found blood stained sacks. PW9 then took photos of the items using his cameras after which the body was taken to the mortuary. Later they prepared an inventory of the items collected but the accused declined to sign for the same. The witness produced the items recovered as exhibits. He also took the blood samples from the deceased and the accused to the Government Chemist for analysis. The films which were taken by PW9 were handed over to him and he handed the same over to PW11 for processing.

15. PW11, IP **Ndunda Maurice**, a Forensic Crime Scene Investigator's role in the matter was limited to processing the films which were handed over to him by PW10 from the camera which films were taken by PW9. He produced the same as exhibits.

16. In being placed on her defence, the accused in her sworn evidence testified that the deceased was her blood brother. On 11th August, 2015, she was at home selling charcoal, jik, soaps and kerosene/paraffin. After taking lunch at 1 pm and cleaning utensils she left briefly at about 2pm to visit her deceased cousin who was unwell returning home at about 3.30pm. At about 4pm she heard the deceased calling outside and he requested her to advance him Kshs 1,000/= to purchase 2 iron sheets. After giving the money to the deceased, the deceased went away and she never saw him again till she went to sleep. In the morning when she got up, at about 7.30pm she proceeded to a market known as Mareria to visit her customers and returned at about 8.30am. Upon her return she found the door to her house open by PW2 who was in the company of his aunt, one Katumbe and PW5 who directed her not to enter the house without giving her any explanation and she stood 6 metres away. Shortly, she saw police officers and PW5 informed them that she was the deceased's sister after which she was told to board the police vehicle to the Police Station after being told that she would know later. It was then that she was informed that the deceased had passed away and she was the one who had killed him. In her evidence, she had never quarrelled with the deceased and it was the deceased who asked her to go and stay in the family land. She denied that there was any land dispute between her and PW2. It was therefore her position that she was not involved in the deceased's death and was unaware of what was recovered in her house since she was prevented from accessing the same. She denied that on 11th August, 2015 she saw PW3. She however testified that PW2 did not like her because of her return home.

Determination

17. The prosecution's case in summary is that on 11th August, 2015, the deceased in the company of his worker and the accused's sons were working in the construction of his house. Late in the afternoon, PW6 while hairdressing a customer outside her house saw the deceased entering the accused's house. Ten minutes later, she saw the accused leaving her house carrying a sack which she dropped inside the latrine. She never saw the deceased again after he entered the accused's house. The following day the deceased's body was found lying in a bush some 30 metres away from the home with his head smashed and covered in a polythene bag. Upon investigations by the police some blood stained items were found in the accused's house whose wall was similarly bloodstained. Other items which were similarly bloodstained were found in the incomplete construction. DNA samples generated from the blood samples from the accused's wall showed that the same matched the DNA generated from the deceased's blood.

18. On her part the accused testified that on 11th August, 2015, the deceased went to her and requested her to advance her Kshs 1,000/- for the purchase of iron sheets which she did after which the deceased ledt. She never saw the deceased again. The following moring she went for her business and upon her return found her house open and was denied access therein. She was then arrested and charged with the offence which she had nothing to do with.

19. 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.**

20. 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."**

21. 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.**

22. 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."**

23. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence from all the witnesses at the scene that the deceased's head was smashed and the body of the deceased was found lying in a thicket. His cousin, PW4, identified the body at the mortuary for the purposes of post mortem examination.

24. As regards the cause of death, according to PW7, upon examination, she established that the head which was crushed had injuries majorly on the left side. There were other injuries involving the left jaw and the skull was fractured exposing the lacerated brain and the fracture depressed the brain. In his opinion the cause of the deceased's death was head injury secondary to blunt force trauma.

25. 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.''**

26. 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."**

27. 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."**

28. 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."**

29. 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."**

30. 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."**

31.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."**

32. 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."**

33. 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."**

34. 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."**

35. 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."**

36. 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."**

37. 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."**

38. 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."**

39. In this case, the prosecution's case seems to be partly hinged on the fact that the deceased was last seen entering the accused's house before his body was found with his head smashed. This was the evidence of PW6. 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."**

40. 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."**

41. 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."

42. 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."

43. In this case, according to PW6, ten minutes later, the accused was seen carrying a sack which she proceeded with to the latrine and threw the same inside. However, it is clear that what was thrown inside the latrine was never retrieved. The sacks which were allegedly recovered from the latrine were however found not to have been bloodstained contrary to the evidence of some of the witnesses. Therefore, the fact of the accused being seen by PW6 carrying the cement bag, even if true could not corroborate the "last seen with deceased" doctrine. It was however the evidence of PW6 that she never saw the deceased leaving the accused's house till she left for the shopping at 6.45 pm. PW6's evidence was that during the period she was outside her house she was hairdressing a customer. There was no evidence regarding her level of concentration on her customer vis-à-vis the surrounding events in order to be certain that there was no possibility that she could have missed the departure of the deceased from the accused's house. According to her, she was within the vicinity yet she never heard any screams or anything unusual happening in the accused's house. Considering the nature of the injuries sustained by the deceased one wonders whether the same could have been inflicted without even a whimper from the deceased. It is however, noteworthy that the accused denied that she saw PW6 on that day.

44. The other circumstantial evidence was the alleged recovery of the bloodstained items from the accused's house. Apart from the swab, whose authenticity was highly disputed by the defence, none of the bloodstained items allegedly recovered from the accused's house linked the accused with the commission of the offence. To the contrary the same seemed to have exonerated the accused from the same. According to PW8, though some of the said items were bloodstained, the DNA generated therefrom did not match either the blood samples taken from the deceased or the accused. They were however from a male person. So that not only was the accused not connected with those stains but she could not have been connected since the stains were positively identified to belong to a male person other than the deceased.

45. The foregoing raises the question: whose blood stained the items which were recovered in the accused person's house? Was there a third male person involved in the commission of the offence? If so, who was he? From the foregoing evidence, it is clear that if the bloodstains found in the accused's house are to be relied upon to be connected with the death of the deceased, as I understand the prosecution to be implying, then it clearly brings to fore the fact that the death of the deceased is linked to the participation of a third person other than the accused.

46. That brings me to the evidence of the swab. It was admitted that the particular swab was not the conventional one but was an improvised one. That the blood of the deceased was on the wall of the accused could mean any of two things. First, that the deceased sustained injuries inside the accused's house and; secondly, that the deceased sustained the injuries somewhere else than in the accused's house but somehow the culprit could have come into contact with the deceased's blood and somehow carried with him the same to the accused's house. That the other items revealed blood other than that of the accused or the deceased would be consistent with the latter position. If that was the position, then it would be clear that the fact of the bloodstains being found in the accused's house would fail the circumstantial evidence test.

47. The evidence of the accused was that she never saw the deceased after the deceased left her house to go and look for materials. The following day when she returned from her business contacts, she found her house open and was denied access therein. Whereas there was heavy evidence against her as to her presence during the search of her house, and whereas one may be tempted to disbelieve part of her testimony, in **Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004** the Court of Appeal expressed itself *inter alia* as follows:

"We cannot see any evidence adduced either by the prosecution or by the appellant that would justify the conclusion the learned Magistrate came to, namely that the appellant's alibi was an open lie and an indication of guilt. *He may not have been truthful when he said that PW4 summoned him and asked him if he knew about the robbery at the complainant's home but the burden was on the prosecution to displace his alibi*." [Emphasis added].

48. I am further guided by the holding of this Court in **Julius Juma vs. Republic Kisumu High Court Criminal Appeal No. 405 of 1981** where **Trainor, J** expressed himself as follows:

"When an accused person pleads not guilty he is saying in a technical way: you say I am guilty, prove it. At the end of the prosecution case, without giving any explanation of his alleged behaviour, he is entitled to ask the Court to dismiss the charge against him because the evidence does not prove his guilt beyond reasonable doubt. If, however the court considers that a prima facie case has been made out against him, it may refuse to dismiss the case and call upon the accused to make his defence. If the accused declines to give or call evidence then the court must assess all the evidence before it for truth and reliability (not necessarily the same thing) and decide whether or not it establishes beyond reasonable doubt that the accused is guilty. The fact that the accused has not given or called any evidence does not per se have any bearing on the assessment of the evidence that has been given by the prosecution's witnesses. I emphasise the words "per se" because by declining to give evidence the accused is exercising his right to conduct his defence in the way he thinks best, but his silence may have a bearing in that that evidence remains uncontradicted. If the accused does give or call evidence the Court must at the close of

the case examine the totality of the evidence of the prosecution and the defence, and ask itself does that totality establish beyond reasonable doubt the guilt of the accused. It ought not analyse the evidence of the prosecution and then the evidence of the defence and decide which it prefers; it must not decide that the prosecution case is stronger or is more credible than that of the defence; that is deciding the issue on the balance of probabilities. The State must be able to say at the close of the case: on all the evidence before the Court there is only one logical conclusion, guilty. If the totality of the evidence is such that the Court cannot accept that then its finding must be not guilty. It might be said that it is only possible to have one logical conclusion. That might be possible in an exact science but it does not apply in a criminal trial. For example, the prosecution might give evidence from which the Court considers there must follow a certain logical conclusion, but if the evidence produces evidence which, if believed, could produce a different conclusion, the Court must consider the two together. *If it considers that both could be correct, and I emphasise "could, then the totality of the evidence has failed to prove that there is only one logical conclusion: guilty as charged. I cannot over-emphasise the importance of the words "could be believed" because a trial judge might consider something incorrect or untrue nevertheless if he considers it could be correct or true then the proof has not been beyond reasonable doubt*. It is of course different if he thinks it could not be true or disbelieves the evidence. To summarise the foregoing: An accused never has to prove his innocence, or anything, in the usual criminal cases (there are a few exceptions). The onus on the State to prove guilt beyond reasonable doubt really means that at the end of the day the Court on a consideration of all the evidence, that of the prosecution and the defence, must be able to say that there is only one logical answer, the accused is guilty; or put another way the accused is guilty beyond reasonable doubt." [Emphasis added].

49. Whereas there are situations where an accused's lack of candour may be taken into account in determining his culpability, that alone is not sufficient to return a verdict of guilty against him. The totality of the evidence must be considered. In this case, the totality of the evidence point to the involvement of a third party in the commission of the crime other than the accused.

50. Having considered the evidence presented in this case, I am unable to find that the the inculpatory facts against the accused person are incompatible with her innocence and are incapable of explanation upon any other reasonable hypotheses than that of her guilt. In my view, the possibility of the involvement of a third party in the commission of the crime introduces other existing circumstances which weaken the chain of circumstances relied on by the prosecution. 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."

51. 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."

52. 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."

53. 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.'"

54. The Court of Appeal noted in the case of **Mwangi & Another vs. Republic [2004] 2 KLR 32** as follows:-

"In a case depending on circumstantial evidence, each link in the action must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that he accuse is guilty of the charge".

55. The same Court in **Omar Mzungu Chimera vs. Republic Mombasa Criminal Appeal No. 56 of 1998** reiterated that:

"It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances

taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The complete chain is as strong as its weakest link and the weak link here is that the alleged murder weapon had not been produced in the superior court in the manner in which it ought to have been done…In a case based on circumstantial evidence such missing links can create sufficient doubt to entitle a court to say that the evidence adduced is not sufficient to sustain a conviction of murder. It has been said time and again that circumstantial evidence in order to sustain a conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused. Circumstantial evidence which falls short of the required standard on all material particulars cannot in law form a basis for a conviction."

56. On my evaluation of the evidence I have come to the conclusion that the circumstantial evidence relied on by the prosecution was so weak as to amount to a mere suspicion and cannot be a sound basis for a conviction. In other words, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant the conviction on the basis of the evidence on record.

57. As regards the motive, it was held by the Court of Appeal in the case of **Choge vs. Republic (1985) KLR1**, as follows:-

"Under section 9(3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not."

58. It therefore follows that even if the prosecution had established the motive for the killing of the deceased by the accused, which I regrettably do not find so, that without any other corroborating evidence cannot establish the degree of culpability required in such cases. In this case the witnesses were unaware of any bad blood between the deceased and the accused. In fact, according to PW5 it was the deceased who went to her to request that the accused be allowed to stay with the deceased. This tallies with the accused's evidence that it was the deceased who requested her to return and stay in the family land. The allegation of bad blood was only made between the accused and the children of the deceased.

59. Accordingly, I find that the prosecution has failed to prove that the accused person herein on the night of 11th – 12th day of August, 2015 at Mungala Sub-location, Mumbuni Location within Machakos County, murdered **James Muia Kitulya** (**Deceased**). I find the accused person not guilty of the offence with which she is charged. She is accordingly acquitted and I direct that she be set at liberty forthwith unless otherwise lawfully held.

60. Judgement accordingly.

61. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic, the Accused having consented to that mode of delivery.

Read, signed and delivered in open Court at Machakos this 8th day of May, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Langalanga for Mr Muthama for the accused

Mr Ngetich for the State

CA Fridamela

Accused in attendance through skype.