REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 24 OF 2015

REPUBLIC..... PROSECUTION

VERSUS

SWALEH CHARO KAMBETSA ..... 1ST ACCUSED

KAZUNGU KAHINDI KAMBETSA ..... 2ND ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Ms. Chepkwony for the accused

JUDGMENT

This Judgment arises out of a charge of murder contrary to Section 203 preferred against the accused persons **Swaleh Charo Kambetsa, Kazungu Kahindi Kambetsa**. In the brief particulars its stated that on the night of 10.10.2015 at Ulaya village, Baricho Sub Location, Bungale Location accused person jointly murdered **Shauri Mwandaro Bandiko.** In their trial accused persons were represented by Legal counsel **Ms. Chepkwony** whilst the prosecution counsel **Ms. Sombo** appeared on behalf of the State.

In order to disapprove their right to presumption of innocence under Article 50 (2) (a) of the Constitution the prosecution called seven (7) witnesses.

The evidence at the trial

Samwel Shungu a fellow teacher at Dakecho Primary School testified to the effect that on 12.10.2015 he received a telephone call from **Jackson Kalama** that the deceased has been found dead in his house. The victim lived in a rented room alone where the alleged incident took place. He also told the Court that on visiting the scene later in the day he confirmed the information conveyed to him through that telephone call by **Jackson**.

PW2 – Roselyne Ngumbao a fellow teacher with the deceased at Ulaya Primary School told the Court that in early morning of 12.10.2015 he failed to attend in order to open the classes as it was normally the practice. After a few minutes she decided to go after the keys at the deceased house but there was no response. That is when on entry with one **Fredrick Kambetsa** the caretaker it was established that he has passed away.

PW3 – Kazungu Bandiko a brother to the deceased testified that he also learnt from Philip a neighbor within the village that the deceased had been found dead in his house. At that moment he visited the scene and in company of the police arranged for the removal of the body to Star Hospital Malindi for a post-mortem, examination.

PW4 – Pascal Thoya Iya watchman at Baricho where the deceased rented a room testified that on 12.10.2015 he saw the accused persons and two other people carrying a load from the 1st accused house towards the deceased's room. He went to sleep, only in the morning to be told by a clan elder that the deceased has been killed. On being cross-examined by the defence counsel the witness confirmed that he saw the accused carrying an unknown load to the house of the deceased on that 10.10.2015. He also told the Court that the 1st accused was also armed with a knife. He was only to be called later by the police to record a statement on the events of the 10.10.2015. **PW5 – Bosco Safari**, a fellow teacher testified that on 12.10.2015 he was informed of the death of the deceased. Following that message he also joined other teachers and relatives to have the body removed from the scene to the mortuary as police initiated investigations on the cause of death.

PW6 – CPL Abdalla Said testified that on instructions from the DCIO he investigated the murder which occurred on 10.10.2015 involving

the death of the deceased. After recording witness statements from the witnesses he recommended that a charge of murder be preferred against the accused persons. At the hearing PW6 did emphasize that the chronology of events on the 10.10.2015 as narrated by PW4 provided the crucial evidence on how the deceased met his death.

PW7 – Dr. Victor Nyale testified on behalf of **Dr. Gayo** with regard to the post-mortem examination which showed the deceased having suffered multiple injuries to the face, upper trunk, both arms, back, genitalia, fingers, lips, head, trachea and eyes. Regarding the cause of death **Dr. Gayo** opined that the deceased died of asphyxiation via strangulation at the level of the neck causing cyanosis. He produced the post-mortem report as ***exhibit 1.***

At the close of the prosecution case each of the accused person was placed on his defence. In his defence **Swaleh Charo** – denied being involved in any way with the death of the deceased. Concerning his whereabouts between the 10.10.2015 and 12.10.2015, the accused told the Court that he went about operating his grocery business. He also confirmed that besides the grocery business he is also a landlord with property rented out to tenants. In this respect the deceased was one of his such tenants. According to the accused, the description of the incident came from his caretaker – one **Fredrick.** What followed was a series of inquiry which culminated in his arrest and final indictment with the offence he did not commit.

DW2 – Kazungu Kahindi herein the co-accused with the 1st accused gave his defence and denied the charge as premised by the prosecution. The accused denied being at the scene during the period under review between the 10.10.2015 – 12.10.2015 as alleged by (**PW4) Pascal Thoya.** He asserted that he was arrested and brought to the police station for an offence he has no knowledge about. In essence the accused put forward an alibi defence inspite of the narrative laid out by the prosecution.

DW3 – Paul Wanjohi gave evidence that at no time did he employ **Pascal** as a watchman. He also denied any knowledge of existence of a dispute between the deceased and other persons. **DW4 – Katana Chengo** as a witness called in support of the defence case delved on the issue of a land dispute and the fact that **Pascal** was never an employee at the shopping center where the deceased met his death.

DW5 – Kaunga Charo, another witness summoned by the defence alluded to the facts of visiting the house of the deceased to find his whereabouts. It emerged that the deceased had been killed. In that case, police were informed to take over the matter. He also alluded to the facts involving a dispute of land which was also addressed by the local chief. All along the witness testified that the 1st accused had been in Mombasa. When the investigations commenced he was one of those suspected to be involved in the death of the deceased.

In light of the above evidence Learned counsel **Ms. Chepkwony** for the accused persons submitted and urged this Court to acquit each of them for reasons that the prosecution has failed to establish a charge of murder beyond reasonable doubt. Learned counsel reiterated that this case being purely a circumstantial evidence based narrative, fell short of the threshold set out in the case of **R v Taylor Weaver & Donovan {1928} 21 CR Appeal R 20, Kipkering Arap Koske v R 16 EACA 135, Joo v R {2015} eKLR, Elizabeth Gatimu v R {2015} eKLR**

It was the contention of Learned counsel that the circumstantial evidence did not prove any of the elements of the offence which the Court can rely upon strong enough to convict the accused persons. In this respect time has come for the Court to look at the evidence tendered by the prosecution and the defence to make a finding as to whether the essential elements of the offence are in place to implicate the accused persons.

Determination

The question this Court must answer is whether any of the following elements relevant to the offence of murder contrary to Section 203 of the Penal Code have been proven by the prosecution beyond reasonable doubt.

(a) The death of the deceased.

(b) That the death of the deceased was unlawfully caused.

(c) That in causing the death of the deceased accused persons were actuated with malice aforethought.

(d) That in overall evaluation the accused persons have been reasonably placed at the scene of the murder.

At the very outset it may be observed that all ingredients of the offence are in issue as it pertains to the scope and effect of Section 107 (1) of the Evidence Act. It is the duty of the prosecution to prove the guilt of the accused persons for murder since, under Article 50 (2) (a) of the Constitution) they are presumed innocent until the contrary is proved.

The basis of Section 107 (1) as read with Section 108 of the Evidence Act a fact is said to be proved ***"when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists." (Section 3 of the Indian Evidence Act).***

It is a firm rule in England as it is in Kenya as illustrated in the cases of **Woolmington v DPP {1935} AC and Miller v Minister of Pensions {1942} 2 ALL ER** that the prosecution must prove the guilt of an accused person beyond reasonable doubt. This legal burden never shifts to the accused person (s) at all material times of the indictment.

It is apparent that the prosecution case is firmly rooted on circumstantial evidence which Learned author **Starkie on Evidence, in his book 3rd Edition (published in 1842)** refers to it as follows:

> ***"Speaking of circumstantial evidence it is essential that the circumstances should, to amoral certainty, actually exclude every hypothesis, but the one proposed to be proved, hence results the rule in criminal cases that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails, nothing unless the corpus delicit, the fact that the crime has been actually perpetrated. The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstance being in the abstract is sufficient, unless they exclude every other supposition, it is essential to inquire with the most scrupulous attention what other hypothesis there may be which may agree wholly or partially with the facts in evidence."***

To buttress this principle in **Martin v Osborne {1936} 55 CLR 367 Dixon J** said:

> ***"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rationale inference. In the inculpation of an accused person, the evidentially circumstances must bear no other reasonable explanation. This means that, according to common course of human affairs, the degree of probability, that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed."***

Ms. Chepkwony raised a rather novel argument that the evidence against the accused persons did not prove the elements that can implicate them clearly with the murder of the deceased. She also took issue with the evidence of the star witnesses (PW4) for the prosecution. For reasons that he was not even an employed watchman at the shopping center where the alleged murder occurred. It was also observed by Learned counsel that the alibi defence put forward by the accused persons perfectly controverted the burden of proof, the effect of which deprived the prosecution to effectively establish the ingredients of the offence.

As **Pollock CB pointed in Exall {1866} 176 ER 850** the intersections of circumstantial evidence to the facts of particular case is both salutary and absolute as analogously inferred from this metaphor,

> ***"It has been said that circumstantial evidence is to be considered as a claim and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence there may be a continuation of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, but the whole taken together may create a conclusion of guilt with as much certainity as human affairs can require or admit of."***

The importance of this doctrine has gained prominence and value certainty in our jurisprudence as propounded in the dictum of the cases below:

In the case of **Musili Tulo v R {2014} eklr the Court of Appeal** had this to say:

> ***"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate Court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:***
>
> ***(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;***
>
> ***Those principles were set out in the case of GMI v Republic {2013} eKLR which echoes the locus classicus case of R v Kipkering Arap Koske & Another, 16 EACA 135 …. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke v R {1958} EA 715 citing with approval Teper v R {1952} AL 480, thus:***
>
> ***"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

With these principles how should the prosecution case be viewed?

In the first instance the evidence record proves that the deceased body was recovered from his rented house at Ulaya village on 12.10.2015. This was confirmed by PW1, PW2, PW3, PW4, PW5 and PW6 who at one time or another visited the scene and the hospital mortuary during post-mortem examination.

Dr. Victor Nyale produced a post-mortem report dated 12.10.2015 at Star Hospital Mortuary. From his evidence that death of the deceased is not disputed. The accused persons also confirm that the deceased died. It is trite that proof death of another human being can be proved through medical evidence or other means like circumstantial evidence. **(See R v Cheya & Another {1973} EA 500, Benson Ngunyi v R CACRA No. 171 of 1984 UR).** Therefore, the prosecution has discharged the standard of proof of beyond reasonable doubt on this ingredient.

Secondly, in this particular case the invariable rule is that the prosecution must establish a causal link between the death and the unlawful acts of omission on death of the deceased. This is what constitutes the actus reus of the offence.

(See Ndiba v r {1981} KLR 103, R v Felix Munyao Nairobi HCCRC No. 43 of 1999).

In the case of ***DPP v Newbury {1976} 2 ALL ER 365 the Court held:***

> ***"That an accused is guilty of homicide of manslaughter if it is proved that he did an act which was unlawful and dangerous and that, act inadvertently caused death and that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous."***

Further in **Paulo S/o Mabula v Reginam {1953} 20 EACA 2017.** It was held that:

> ***"in capital cases, the state should tender any medical evidence as to the death that may be available. It is also settled Law that every homicide is presumed unlawful unless excusable in any of the exceptions recognized by the Constitution written Law (See Guzantize s/o Wesonga {1948} 15 EACA 65). Some of the instances recognizable in Law are in circumstances death is excusable if it occurs in defence of self, property or defence of that other person under innocent danger."***

The element of unlawfulness necessary to qualify as an ingredient under Section 203 of the Penal Code is that act which resulted in the death of the deceased. In the instant case prior to the discovery of the deceased body in his house there is no difficulty to rule that he was alive and even attended work at the school as expected. On the fateful day it happened that his fellow teachers were unable to locate him either in school or at home.

Approximately sometime later it turned up that his body happened to be in the house. The next thing as manifested in the evidence of the prosecution witnesses **PW1 – PW7** the death was grounded on the multiple injuries suffered in furtherance of the unlawful act. The state clearly points out from the post-mortem examination in regard to matters of causation of the deceased, where **Dr. Gayo** opined that by means of asphxiation via strangulation at the level of the neck, notwithstanding anything else occasioned his death. True, **Dr. Gayo** did directly observe that given the post-mortem examination particular set of facts, the nature of the unlawful acts that aggravated the death was done without any signs of struggle on the part of the deceased. In that case in so doing the perpetrators dangerous and unlawful act did not stop at inflicting serious bodily harm but the act proceeded to pour acid on the same body.

Under the circumstances and applying the interpretation of Section 213 as read with Section 4 of the Penal Code to the present case I think its sufficient to say that the evidence surrounding the death of the deceased was through an unlawful act which endangered his life.

As far as the burden of proof is concerned, the prosecution has discharged it, that the death of the deceased was unlawfully caused. Now with regard to malice aforethought, the vital interpretation is that would suffice as culpable homicide which amounts to murder is to the extent and application of the provisions of Section 206 of the Penal Code. The main points of significance from Subsections (a – e) of that provision to be established by evidence, involves the following circumstances:

> ***"An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not. Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused. An intent to commit a felony ……"***

Therefore to ascertain the malice aforethought element to establish criminal liability of an accused person under Section 206. It is necessary for the prosecution to prove the underlying mental intent for the commission of the offence.

In approaching this question, it should be observed that the Law imposes a standard of proof upon the prosecution beyond reasonable doubt that the accused persons in pursuit of the death of the deceased did so with malice aforethought. In **Tubere s/o Ochen v R {1945} 12 EACA 63** the Court observed and adopted the philosophy that:

> ***"To attribute criminal responsibility for murder under Section 206 of the code, the underlying rationale of establishing the weapon used, the manner in which it is used, the part of the body targeted and injured, and finally the conduct of an accused person connotes malice aforethought. The mental element of murder contrary to Section 203 is what the provisions refers to as malice aforethought because intention is never defined under our penal code."***

Whether an accused intended to cause death or grievous harm bodily harm is a subjective question to be decided by the Court as to what was in the accused mind when he set to commit the offence. The authorities which have dealt with this subject have consistently ordained that the intention to kill may only be inferred from the facts of the case **(Guyo Duba v R CACRA No. 89 of 1999).**

One comparative case of **Winner v R {1995} 79 CRIM R 528 (NSWCCA)** observed that:

> ***"Because it is impossible for any Court, Judge or Jury, to actually enter the mind of an accused person and search for his or her intent at the critical time, it is inescapable that the forensic process by which intent is judged (when it is denied) will address the objective facts from which an inference of intention may be deprived. This is why it is often said that a person's act may provide the most convincing evidence of intention ….. If it were otherwise intention, absent acknowledgement or reliable confession, could scarcely ever be proved."***

Therefore, it is essential in my view that intention may only be inferred from those circumstances that implicate the accused by his words, actions or conduct at the relevant time and place that subsequently led to the death of the deceased. One approach taken by our Courts in **Ernest Asami Bwire Abanga alias Onyango v R CACRA No. 32 of 1990, Morris Aluoch v R CACRA No. 47 of 1996, Karani & 3 others v R {1991} KLR 622** include the manner of the killing, were planned and executed to cause death or to do grievous bodily harm. It is all well accepted in these cases that intention or malice aforethought to include the murder weapon used by the accused and the near inevitable particular type of killing that in ordinary sense cause death of the victim.

Whether therefore, one calls it express or implied malice aforethought. I have no hesitation in agreeing with the known definition that malice is manifested as a deliberate intention unlawfully to take away the life of another human being without any considerable excuse or justification.

More, significantly, in the present case for the prosecution to obtain a conviction for murder ought to prove that the accused persons had subjective mental state of malice either express or implied with regard to the death of the deceased. In the matter presented by the state this Court has evaluated the evidence of the seven witnesses which encompasses a wider range of conceivable possibilities on how the deceased met his death.

In considering the merits of the test on malice aforethought there is a close match between the grievous bodily harm suffered by the deceased and the resultant death. The prosecution witnesses PW1 – PW7 asserted that the multiple brutal injuries exhibited on the body of the deceased covered conduct acknowledged to incorporate an intent to kill. In addition to the categories of evidence of bodily harm seen by the witnesses, **Dr. Gayo** who carried out the post-mortem examination referred to the various grave injuries to the face, upper trunk, both arms, back, buttocks, genitalia, lips, fingers, toes, neck, eyes, stomach, tracheal and occipital region all objectively were of a nature that endangered the life of the deceased. Further, in this case the deceased was also strangled and acid substances poured all over his body. At this juncture, there need be no hesitation in saying that malice aforethought is present in the circumstances surrounding the death of the deceased. This in substance defeats any hypothesis that the unusual and brutal murder of the deceased involved bodily harm that was not sufficient enough to constitute malice aforethought. Therefore, one basic question which remains unanswered is whether the intention to kill or to do grievous harm as inferred through circumstantial evidence demonstrates that the accused persons are culpable for the murder beyond reasonable doubt.

The general principle of Law on this issue of a single witness entitles the Court to weigh the facts of the case and the prosecution evidence to sustain a conviction and proof the charge beyond a reasonable doubt. This is notwithstanding that the only evidence availed was that of a single, witness.

The law of evidence which contains the rules of evidence under Cap 80 of the Laws of Kenya is concerned with both the quantum and quality of proof needed to prevail in a trial of an accused before any adverse order on guilty or conviction can be entered.

In the case of **Sewangana Livingstone v Uganda SCCA No. 19 of 2006:**

> ***"What matters most is the quality and not quantity of evidence required for the proof of any fact."***

The principle underlying a single identifying witness in a criminal trial and the key elements to consider is well illustrated in the case of **Abdalla Bin Wendo & Another v R {1953} EACA 166, Roria v R {1967} EA 583, R v Turnbull & Others {1976} 3 ALL ER 549.** Below is the glimpse of how the Court should go about integrating as a whole to answer the question in reference to the character and larger objects of a single identifying witness.

> ***"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification of the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.***
>
> ***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our Judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the Courts to adjudge otherwise, affronts to justice would frequently occur.***

The Court went further to state that:

> ***"All these factors go to the quality of the identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a court can safely convince even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution."***

It is also stipulated in Section 143 of the Evidence Act that an accused person can be found guilty and convicted of an offence in absence of corroboration, but the evidence must be such that the reliability, admissibility and materiality in proving existence of facts must not create doubts as to the culpability of the accused in committing the offence.

In the instant case, the prosecution heavily relied on the testimony of **Pascal (PW4)** who stated on oath being a watchman within the scene when he saw the accused carrying an unknown load into the deceased house. Apparently, (PW4) was alone at the material time and date. But even as the witness gave a chronology of events some differential features in his testimony stand out for question. The intensity of the source of light, visa viz the location of the accused persons. How long did he observe the accused persons move from point A to point B where they delivered the load? Whether, on making entry to the house of the deceased, they remained *insitu* or left soon thereafter dropping the load of luggage? If, indeed the witness positively identified the accused persons, what were the special physical features he was able to capture and remember that distinguishes them from any other third parties? What kind of description did the witness give to the police given the fact that no identification parade was conducted to authenticate the evidence at the time of recording his statement? At the scene which accused seems to describe with certainty, were there any obstructions to bar and keep his visual identification of the accused persons. The witness, apparently told the Court that he was employed as a watchman therefore had the ability to recognize the accused persons. The Court of Appeal in **Maitanyi v R {1986} KLR 198** provides an answer to the level of reliability of the evidence tooled by the prosecution thus:

> ***"The strange fact is that many witness do not properly identify another person even in daylight. It is at least essential to ascertain the nature of light available. What sort of light, its size and it's position relative to the suspect, are all important matters helping to test the evidence with greater care? It is not a careful test if none of these matters are unknown because they were not inquired into."***

> ***"Eye witness testimony is the crack cocaine of the criminal justice system. Law officers know the potential risks but are addicted to its power to convict. (See Margery Koosed). "Performing identification Law and practices to protect the innocent {2008 – 2009} 42 Coeighton L Rev 595 – 598."***

Identification of the accused persons in this case was based on prior familiarity. However, the extent of his familiarity ran into problems on accuracy to the effect as to the position or near place where an act of murder constituting the commissions of the offence took place and or about the time the act was done.

Conversely, from the evidence above by the prosecution, there was rebuttal by the accused persons raising an alibi defence. The material relevance is in respect of them not being at the scene of the crime described by the star witness (PW4) in particular the place where the purported luggage was being moved from to the house of the 1st accused to that of the deceased.

It is settled Law in the cases of **Charles Anjare Mwamusi v R CACRA No. 226 of 2002** that:

> ***"An alibi raises a specific defence and an accused person who puts an alibi as an answer to the charge preferred against him does not in Law thereby assume any burden of proving that consider and it is sufficient if an alibi introduces into the mind of a Court a doubt that is not unreasonable."*** **(See also Kiarie v R {1984} KLR 739, Wangombe v R {1976 – 80} IKLR 1683)**

These principles as restated and adopted reaffirms that in order to constitute an alibi, the evidence at issue must be determinative of the final issue of guilt or innocence. The evidence on alibi contemplates that it is impossible for the accused persons to have been at the scene to commit the crime of killing the deceased because at the time they were elsewhere; with no opportunity to participate. While it is true that the accused persons disclosure on alibi defence came at the time they were placed on their defence. It does not lessen the weight to be accorded to draw an inference on the standard of proof vested upon the prosecution. Nevertheless, that as it may be the alibi defence by the accused persons did dislodge and weaken the single identifying witness with whom substantially the case for the prosecution is based.

Furthermore, what is more intriguing is the adverse inference to be drawn against the star witness on the so called employment as a watchman within the property where the offence took place. The full particulars of his employment, were never established at the investigation and trial stage to qualify him as a competent witness to testify on the matters in issue to uncover the death of the deceased. The Court further notes that the accused persons and their respective witnesses **(DW2) (DW3)**, both in examination in chief and cross-examination disputed the fact of employment of **(PW4)** by any of the accused persons. As such it is possible that (PW4) testimony may be fabricated, unreliable and or unbelievable to impeach the prosecution case. It is also permissible in this case to draw an adverse inference as to the reliability and credibility of recognition evidence of the single identifying witness. It follows that both in the case of the alibi defence and in the case of apparently unreliable single identifying witness so far as the sole decisive rule is concerned, I am not persuaded that the prosecution in their quest for justice have discharged the burden of proof beyond reasonable doubt.

The extent of that disadvantage which was dependent on the facts of this particular case rests entire prosecution narrative case on suspicion. **(See the principles in Shaban Bin Hussein v Chong Ford Kam {1969} ALL ER 1626).** The view I take of this matter is that the deceased was brutally murdered contrary to Section 203 of the Penal Code but in the circumstances of the case there is reasonable doubt that the killers are the accused persons before Court. As against the strength of **Pascalis** evidence and the alibi defence in reality his account of the incident is very weak that would not be helpful to bolster the case for the prosecution.

As a result, it is the spirit and not the form of Law that keeps justice alive (warren) and justice is the constraint and perpetual will to allot to every man his due. Consequently, I find the accused persons not guilty and shall be acquitted and released forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF JULY 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Chepkwony for the accused