



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CRIMINAL CASE NO. 39 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES MUTISO.....ACCUSED**

**JUDGEMENT**

1. The accused herein, **James Mutiso**, is charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that the accused, on the nights of 11<sup>th</sup>/ 12<sup>th</sup> November, 2012 at Kithunguini Market in Machakos District within Machakos County, murdered **Mutua Mutiso Kasimu**. In support of its case the prosecution called 10 witnesses.

2. According to PW.2 **Patrick Kioko Makenzi**, a watchman at Kitituwareini Market, on 1<sup>st</sup> November, 2012 at about 2.00am, he was at his place of work when he heard the sound of somebody who sounded like he was being strangled and was vomiting. He called PW3, **Peter Mutuku Muli**, a fellow watchman and together they proceeded to the scene. About 5 metres away from the scene, they heard voices of two male persons with one telling the other to lift up his leg or he would be killed while the other was pleading not to be killed. According to PW1, there were security electric lights from the nearby shops which were about 50 metres away illuminating the area. When they neared the scene, the man who was on top of the other ran away, and disappeared, leaving the other, the old man, (the deceased), lying on the ground at the scene was half dressed, his body bent with the head touching the knees. According to PW2, the deceased's trousers and the inner wear had been lowered to the knees and there were faeces oozing from his anus.

3. Since the other person who had run away took the direction which had a dead end, PW2 and PW3 decided to hide nearby and see if he would return and after five minutes he came back. PW2 had observed that he was wearing worn out shoes and a green T-shirt. When he returned, he lay on top of the old man again and started sodomizing the old man again. According to PW2, the scene was at a foundation of a building in the outskirts of the town. From different directions PW2 and PW3 silently approached the scene, reached the man and arrested him. The said man according to PW2 was known to him as **Mutiso** (the accused) who was a casual labourer at the market. Though the accused attempted to run away, PW2 apprehended him about 10 metres away and returned with him to the scene where PW3 joined them. However, the accused managed to free himself and ran away leaving his sandals behind. Once again they ran after him arresting him about 20 metres away and they started beating him but the accused disentangled himself from their grasp and disappeared completely. When they returned to the scene, they realized that the deceased was known to them and they called those whom they believed were his relatives whose home was next to the market. However, the person whom they called, PW5, **Wambua Kitonyi**, upon going to the scene informed them that the deceased was not his father but assisted them in carrying the deceased to the market. The following day after work, they escorted the deceased to his home and left him nearby after the deceased informed them that he would report the matter to the authorities. PW2 however later learnt that the deceased passed away.

4. In cross-examination, he stated that on the night of 12<sup>th</sup> November 2012 at 2 a.m. he heard noise and screams as if someone was being strangled about 20 metres away at the edge of the market. According to him, he and PW3 were employed by different employers and while he (PW2) was guarding a shop, Pw3 was guarding a bar and cars about 20 metres away from PW2. He said that the last shop there at the edge was an unguarded bar though by the time it was closed. It was his evidence that the bar and the adjoining shop were unlit. It was his evidence that the first time the accused ran away he did not recognise him and that he ran towards the direction of the barbed wire and shops where there was a dead end and disappeared. It was his evidence that the accused was wearing slippers which he left at the scene and PW2 handed them over to the police. It was his evidence that the accused wore a stripped t-shirt but since it was dark, he was unable to tell its colour. When they asked the accused what he doing the second time they found him lying on the deceased, the accused told them that he was waking up the deceased so that they could go home. It was his evidence that the accused was not armed. He stated that when PW5 arrived, he identified the deceased from his hat, belt and trousers as belonging to a person called **Philip**. In the morning after drying up the deceased, they left with him but left him on the way after he informed them that he wanted to go home to rest and would later report the matter to the sub-chief.

5. However, two days after the incident, on after two days after the incident on Monday the 13<sup>th</sup> November, 2012, when PW2 went to the sub chief to report he found that no report had been made by the deceased. It was later that he was later called by the sub-chief – **Joseph Mumo** of Kaliluni location - to go and write a statement at the police station on Wednesday. He had by then left the slippers which he found at the scene with the said sub-chief which the sub-chief later handed over to him to take to the police station. He however did not see the said slippers in court. I have not seen the slippers in court. According to him they identified the accused from the lights at the market as someone he used to see. It was his testimony that the deceased was drunk and was unable to walk. In the morning when he asked if he could take him home the deceased said he was okay as he looked alright and fine and could walk.

6. PW3, **Peter Mutuku Muli**, on his part substantially testified along the lines of PW2's testimony. According to him, in 2012 he was working at a market at Kitunguni. On 11<sup>th</sup> November, 2012 he was at his place of work as a watchman when at 2 am in the night he heard screams as if someone was being strangled from the upper part near the workplace of PW2. When they approached where the screams were coming from he heard someone saying "lift up your leg or I will kill you". Upon reaching the place, 50 metres away, they found two people lying on each other. When they asked the one who was lying on the leg of the other one whom he identified as **Mutiso**, the accused herein, from the lights in front of the club, what they were doing, he said he was trying to lift the other one up. The person who was being lied on, the deceased, had watery stool coming out of his anus. The accused then got up and tried to beat them ran away and disappeared into the club leaving the deceased on the ground was passing watery stool from his anus. When they talked to the deceased, he said that he had been sexually assaulted by the accused. The duo then called a neighbour at the market who assisted them in placing the deceased on the veranda of a shop till the morning when they asked the deceased if he was strong enough to go home and the deceased said that he would try to do so and PW3 left him as he went home and the deceased also went home. According to PW3 he knew the deceased who was called **Phillip Mutiso**. He also knew the accused, **James Mutiso Kyoa** prior to that date as he used to see him loitering late in the night at the market. Later he was informed by PW2 that though he had reported the matter to the chief and the chief had not taken any action and that the deceased had passed away after 3 days. PW3 explained that on the day of the incident the accused went back to the scene after having run away the first time and was later arrested. He testified that he went to the police station the day the old man died after being called at Machakos police station to record his statement.

7. In cross-examination PW3 stated that by the time of the incident he had worked at the market for 3 years though prior to getting that job he had known the accused for 10 years and even knew the accused's home which was about 10 km from his home and that he used to see the accused carry loads and luggage from cars and take them to the market. On 11<sup>th</sup> November, 2012 he saw the accused at the market at around 3 p.m. during which time he was just passing through the market and the accused was sitting next to the road. He similarly had known the deceased, who hailed from his home area, for 20 years before he died for about 20 years. According to him, he was the one who notified PW2 when the noise started though he found PW2 on his way to where he was working. He stated that he was taking care of a bar, shop and the cars and while the bar and shop were in different location, the cars were parked in the middle of the market in front of the shops. While he was employed by one employer, PW2 was employed by about 6 employers who owned a bar and 5 shops in the market. Upon meeting PW2, pw2 informed him that he had heard the shouts and noises – like someone who was being strangled and sought to know if PW3 had heard similar noise. Then then proceeded to the place which was outside the bar which PW2 was guarding. It was his evidence that he recognised the accused who was wearing a stripped t-shirt. In recognising the accused, he relied on the security lights outside the bar. From a distance you could see using the light. When the accused tried to beat them they shone the torch when he ran away to the bushes but there was no through way and the accused later passed near them and they saw and caught him but the accused overpowered them. He disclosed that while the accused was unarmed, they had *rungus* which the used in beating him before he escaped.

8. After that they went and informed PW5 who was a friend of the deceased and he went and saw what had happened. He however denied that they went to inform PW5 because they thought PW5 was the deceased's son When PW5 went to the scene the accused was not there but PW5 recognised the deceased after PW3 informed him who the deceased was. PW5 then suggested that they place the deceased at a safe place and make a report the following day. They accordingly placed the deceased on the veranda of the bar outside where he was found. According to PW3, that day the accused was wearing white open slippers which he left at the scene the first time he ran away and never took them. The said slippers were handed over to the police after they were initially kept by PW2 in his house. By that time PW3 got the information from PW2 that the deceased had died, PW3 had not made any report of the incident and it was the sub chief who sent someone to tell him to go to the police station. Although on his way to the police station he was in the company of PW2 and PW5, it was his evidence that they record their statements separately.

9. In re-examination PW3 explained that he knew the accused since childhood and that during their primary school days, he used to meet with the accused during games though they were not in the same primary school and that he had seen the accused at the market for about 20 years. He explained that where they found the deceased lying was about 10 metres from the bar. He explained that they shone the torch on the accused when he appeared the second time. The first time they did not do so since there was sufficient light from the bar. At the place where they apprehended the accused, there was no light and he asserted that he saw the accused sexually assaulting the deceased.

10. PW5, **Wambua Kitonyi**, confirmed that on 11<sup>th</sup> November, 2012 at about 2 a.m. when he was asleep, PW2 went to his home and informed him that there was an old man who had been sexually assaulted at the shops and who looked like his father. PW2 told him to take a torch as their torch was lost. Armed with a torch and stick they left and on the way PW2 informed him that it was the accused who had assaulted the said old man. On reaching a hilly area outside the shops he put on the torch and saw a man looking like his father as he was wearing a red sweater that resembled his father's. However, upon a keener look PW5 realised that the old man was not his father. The old man was lying on the side with his legs bent and his trousers removed up to the knees. His buttocks were swollen and he had passed stool which the dogs were licking. PW5 told PW2 and PW3 that since the man was badly injured he should be attended to. Since it was raining they then removed him and placed him outside a shop and the man thanked them. PW5 then told PW2 and PW3 to guard the man and he would return the next day. The following day when he returned he found that the man had been taken to his home. When the said man's wife went to his home, the following day, PW5 explained to her what he had observed and told her that the man was injured and she should take him to Hospital. The following day, being a Tuesday, the old man was taken to the Hospital but PW5 was informed on Thursday afternoon that he passed away. On Friday morning he was called by the village elder who told him the sub – chief was calling him at Machakos. Together with PW2 and PW3 they recorded their statements. It was his evidence that he did not know the deceased and that it was PW2 who informed him that it was the accused who assaulted the deceased. While he did not know the accused, he stated that he used to see him on the road. He however admitted that there were other persons called **Mutiso** in his area home but he did not know it was him when he was told it is **Mutiso** who did the act.

11. In cross examination he stated that it was him who identified the man that day. Since the man was lying at a place near the shops where it was dark, one could not identify him without a torch and the watchmen did not have torches that day as he had been informed by PW2 that he had a torch which got damaged when it fell down in the process of running after the person who was molesting the man that night. Though the watchmen could not recognise the old man without a torch, PW5 stated that when he shone his torch on the man, PW2 and PW3 were present and they recognized and identified him. It was however his evidence that the watchmen knew the old man from before. He confirmed that there were greenish/greyish slippers at the scene which did not belong to the old man and that they were taken to the police by PW2 when he accompanied PW2 to record their statements. He was however unaware of where they were kept before Friday. According to him, he talked to the man who hailed from his grandfather's clan that night.

12. PW4, **Aloys Kioko Kasimu**, on 12<sup>th</sup> November 2012, left his house in the evening and went to Kithunguini market where someone inquired from him how the deceased was doing. Upon him answering that he did not know, he was then informed that the deceased was hurt. The next day (on a Tuesday) in the morning he went to the deceased's house where he met his wife from whom he inquired the whereabouts of the deceased and was informed that he was in bed asleep and that she had been told he had been hurt. After being woken up, PW4 noticed that the deceased walking slowly like he had a problem and he was not looking like his normal self. When PW4 inquired from the deceased's wife why the deceased had not gone to hospital, the deceased's wife informed him that it was normal for the deceased to sleep when he was drunk. When PW4 talked to the deceased and asked him how he was, the deceased simply touched his stomach, but did not talk. Thinking that the deceased had stomach problems, PW4 then arranged for the deceased to be taken to the Hospital and he accompanied him. However, at the market where they intended to board the vehicle, the people informed PW4 that the deceased was raped and that he should first go and report to the sub chief. In the company of PW2 they proceeded to the sub chief who gave them a note which they took to the police station from where they were given a document to go with to the Hospital where an x-ray was done and they were told to return the following day. The following day they did not find the doctor with the x-ray and we were told return the next day when they found the doctors were in a meeting. During this period the deceased who was unable to walk was in wheelchair. Upon his return from checking x-ray PW4 found the deceased had fainted and with the help of a nurse he carried him and placed him on a bed and the nurse told me to wait outside. After a while he returned and was informed by the nurse that the deceased had passed away.

13. According to PW4 during the time he was with the deceased, the deceased was not able to talk coherently and did not disclose to him what happened. He then called the deceased's family and relayed to them the sad news and together with the deceased's son, they proceeded to report the deceased's death. The following day PW4 attended the deceased's post mortem examination. According to PW4, the last time he went with the deceased to the hospital was on 15<sup>th</sup> November, 2012. When they were at the police station on that day after the deceased died they had been told the suspect had been arrested. They attended the post mortem on 16<sup>th</sup> November, 2012. It was his evidence that he was informed by PW2 and PW3 that it was the accused who committed the offence.

14. PW1, **Bernard Maingi Philip**, the deceased's son was on 13<sup>th</sup> November 2012 informed by his mother that the previous night his father had been attacked by thugs who sodomized him and had been scratched on the face. When he went to see his father, the deceased, he found that the deceased was unable to speak but he noticed scratches on his face. Accompanied by his mother and an uncle to his father, PW4, they went to the sub-chief and made a report though by then, the found that the sub chief had already received the report from one of the watchmen who had witnessed the incident and the sub chief referred them to the police station where they were to get the documents to take the deceased to the hospital. The following day they went to the police station then took the deceased to Machakos Level 5 Hospital where the deceased was treated and discharged but was to return the following day for X-rays. The X-rays were eventually taken after two days but the deceased passed away while undergoing the X-rays at the Machakos Level 5 Hospital. PW1 confirmed that he attended the post mortem examination where they were informed that the deceased died due to injuries caused when he was sodomized and the person who disclosed to them that the deceased had been sodomised by the accused was PW2.

15. DW.10, **Dr. John Mutunga**, testified on behalf of **Dr. David Githimi Mwaura** who was away on medical studies and who had filled in the PRC form for the deceased on 13<sup>th</sup> November, 2012. According to the said report, the deceased had stool incontinence and abdominal pains. The complaints were that the deceased was going home drunk when he was confronted by the perpetrator who threw him down and strangled him. The perpetrator tried to anally assault him penetrating with his penis. At the examination he was calm but withdrawn and he was not in the same attire. Upon taking history it was disclosed the attacker was known by the family. It was reported that both the victim and the attacker had been arrested severally with the same offence. Upon examining the deceased, it was found he had scratches on the neck and face and his right eye was red. Upon examination of his anus it was loose and could not hold faeces. Accordingly, he formed the opinion that there was evidence of anal assault and it was recommended that he be placed on post exposure prophylaxis and STI treatment. There was loose anal splinter. Upon urine examination, both HIV and STI infection examination were negative.

16. PW7, **PC Stephen Koshomar**, in the company of **Corporal Priscah Cherop** arrested the accused on the instructions of IP. Rose Officer in Charge of Crime Machakos Police Station. According to him, they found the accused washing clothes at a plot in Kyumbi and after identifying themselves and explaining their mission, they arrested the accused and took him to Kyumbi police station and put him in custody. In the afternoon police officers from Machakos police station took him for further investigations. It was his testimony that the accused was identified by a member of the public and the accused confirmed that he was **James Mutiso**.

17. PW6, **Dr. Fredrick Okinyi**, a pathologist testified that he conducted a post mortem on **Mutua Mutiso Kasina** on 16<sup>th</sup> November 2012. According to him, the abdomen was extended with was faecal matter coming from the mouth. The anus was loose with faecal material, it was inflamed and torn on the mucosa at the anterior wall. The intestines were distended and peritonitis lining had pus and faecal material with external inflammation. The anterior rectal wall was torn – 2 by 2 cm and the pouch of douglas – (a space between the intestines anterior rectal wall) was filled with faecal bacterial peritonitis resulting from perforation of the rectum caused by blunt object. (the faecal from the torn anus went to the stomach and caused inflammation). However due to the contamination they were unable to take DNA material. It was his opinion that the tear of the anus was a result of some trauma and that the perforation was by a blunt object. It then resulted in inflammation. He signed the report which he exhibited. According to him, his attention was not drawn to the fact that the deceased had been attended to at Machakos Hospital Level 5 before he died but confirmed that there were tears and laceration at the anal opening and a tear under the rectum about 6 cm. from the anal opening hence the possibility that the deceased could have been sodomised. He however could not rule out that the blunt object which was inserted in the deceased's anus was another object other than the male genital organ. He however confirmed that the injury was within the normal range of a male genital organ.

18. PW8, **PC Ibrahim Gedi** testified that on 13<sup>th</sup> November, 2012 he was in the police station when a case of assault and rape of the deceased was reported and the complainant was referred to Machakos Hospital. According to him, the deceased reported that he had been sodomised when he was from Kithunguini market on way to his home. He was diagnosed of recto-perforation on his rectum and died while being treated and a post mortem was conducted and the report revealed a perforation on his rectum which caused his death. Before his death he was examined and post rape care form was filed by **Dr. David G. Mwaura**. After the investigations were completed, the accused was arrested. According to PW8 the deceased mentioned the accused who was his neighbour as the assailant in his presence. According to PW8, he was the one who picked the accused from Kyumvi police station after his arrest in the company of a police driver. According to PW8, the deceased reported the matter 2 – 3 days after the incident and he was given a note to go to hospital where he was admitted for 2 days but died at the hospital before being discharged.

19. PW8 confirmed that he recorded the statement of PW.1 and PW2 and that he visited the scene of crime after being taken there by the deceased's son though he never went there at night. The report was however that the offence was committed around midnight. According to him, there is some lighting from the nearby shops about 40 metres. He however denied that the deceased reported that he was assaulted when he was drunk. Though the medical document stated that the patient was under influence of alcohol as drunk.

20. Upon being placed on his defence, he accused chose to give sworn testimony. According to him, the charges against him were trumped up. He testified that he was working with PW2 and PW3 from 2009 to 2011 at Kithunguini Market as loaders where the incident allegedly occurred. It was his evidence that in the course of their duties he disagreed with PW2 and PW3 who wanted to take over his work after which he left the said work and went to stay in Makutano from where he used to commute to work.

21. According to the accused person on 11<sup>th</sup> November, 2012 he went to work at Makutano and returned home and was not aware of the incident. He only became aware of the same when he was arrested at Makutano while washing clothes in his place of employment. It was his evidence that he used to leave home at 6.00am and would return at 5.00pm. During that period, he never used to go to Kithunguini.

22. In cross examination, the accused admitted that he knew the deceased and that his home area was within Kithunguini area where he was well known. He also admitted that PW2 and PW3 were employed as night watchmen while his work was during the day but insisted that they used to be together even during the day. According to him both PW2 and PW3 were neither his relatives nor his neighbours. He however insisted that he left working at Kithunguini Market 2 years before the incident but conceded that by the time of the incident he was in the same area though the distance from the Market to Makutano is far. He however explained that he only used to work whenever work was available. He however denied having killed the deceased.

### **Determination**

23. The prosecution's case in summary is that on the nights of 11<sup>th</sup>/12<sup>th</sup> November, 2012, PW2 and PW3 were guarding business premises at Kithunguini Market when they heard screams from outskirts of the centre and approaching the direction of the screams they realised that they were coming from the foundation of a construction. When they approached the place they saw the accused lying on top of the deceased and when the accused saw them, he ran away towards the dead end direction of the market. PW2 and PW3 decided to hide and the accused returned and once again went to where the deceased was and continued to sodomise the deceased. The said two witnesses then apprehended the accused, a person who was well known to them and whom they recognised using their torches. However, the accused managed to extricate himself from their grasp and ran away and in their attempts to chase the accused, the said witnesses damaged or lost their torches.

24. The two witnesses, thinking that the deceased was the father of PW5 went and awoke PW5 and informed him of what had transpired. PW5 then left his house and proceeded to the scene where he found the deceased and confirmed that the deceased was not his father though he knew him. He observed that the deceased was injured and faeces oozed from his anus. PW2 and PW3 informed him that the injuries to the deceased were caused by the accused. After making arrangements for the deceased to be removed to a safer place, PW5 went home and the next day when he returned to the scene he found that the deceased had been accompanied home by the said witnesses. He later learnt that the deceased had been taken to the Hospital and died while undergoing treatment.

25. It was PW4 who upon getting information that the deceased had been injured took action to take him to the Hospital two days after the incident in the company of PW1, the deceased's son. However, there was a strike by the doctors which intervened in between and the deceased passed away while still undergoing medical treatment. The said treatment was undertaken **Dr. David Githimi Mwaura** on whose behalf PW10 testified and produced the PRC form. According to the said report, the deceased had stool incontinence and abdominal pains. The history was that the deceased was going home drunk when he was confronted by the perpetrator, who was well known by the family who threw him down and strangled him and attempted to anally assault him penetrating with his penis. At the examination he was calm but withdrawn and he was not in the same attire. According to the information furnished to the said doctor, the attacker had been arrested severally for the same offence. Upon examining the deceased, he found that his anus it was loose and could not hold faeces. Accordingly, he formed the opinion that there was evidence of anal assault and it was recommended that he be placed on post exposure prophylaxis and STI treatment.

26. The post mortem examination which was conducted by PW6 who formed the opinion that the tear of the anus was a result of some trauma and that the perforation was by a blunt object hence resulting in inflammation. According to him, the cause of death was bacterial peritonitis caused by bowel injury resulting from perforation by blunt object.

27. 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.***

28. 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.”**

29. 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.**

30. 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.”*

31. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence from PW1, PW4, and PW6 that the deceased died. The evidence of these witness taken together prove beyond reasonable doubt the fact of the death of the deceased.

32. As regards the cause of death, according to PW6 who performed the post mortem examination formed the opinion that the tear of the anus was a result of some trauma and that the perforation was by a blunt object hence resulting in inflammation. According to him, the cause of death was bacterial peritonitis caused by bowel injury resulting from perforation by blunt object. The evidence of PW6 corroborated the evidence of PW2 and PW3 who testified that they witnessed the deceased being sodomised.

33. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, the evidence of PW2 and PW3 was that they knew the accused person well. This was conceded to by the accused person who testified that they used to work in the same market together though PW2 and PW3 were employed as night watchmen. It was however his evidence that during the day they used to work as loaders and that it was during the course of their work that a disagreement arose between them. There is clearly no doubt that the accused, PW2 and PW3 knew each other very well.

34. On the night of the incident, PW2 and PW3 testified that they heard screams and upon approaching the place where the screams were coming from the found the accused on top of the deceased demanding that the deceased lifts his leg under the threat of being killed while the deceased pleaded with the accused. When the accused sensed their approach, he ran away but took the wrong direction since that direction led to a dead end. Upon his return, PW2 and PW3 who had hidden themselves accosted him and temporarily apprehended him but he managed to escape and ran away and the said witnesses were unable to catch him.

35. It is therefore clear that the said witnesses on two occasions saw the accused and they even managed to talk to him before the accused ran away. According to the said witnesses they had their torches when they recognised the accused. It is therefore clear that the evidence against the accused was not that of identification but recognition. As was held in by the Court of Appeal in Peter Musau Mwanzia vs. Republic [2008] eKLR:

**“...for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”**

36. In this case, arising from both the evidence of the accused on one hand and the evidence of PW2 and PW3 on the other, it is clear that the evidence of the latter was that of recognition. These three people knew each other very well before the incident. In Anjononi & Others vs. the Republic [1980] KLR 59, it was held that:-

**“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of**

*the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”*

37. It has been held in R vs. Turnbull (1976) 3 ALL E.R 549 that while it has to be appreciated that mistakes in recognition of close relatives and friends are sometimes made, recognition may be more reliable than identification of a stranger. In this case there was no doubt that the accused and PW2 and PW3 knew each other very well. When the accused saw them he ran away but returned soon thereafter and continued from where he had been interrupted. When confronted by PW2 and PW3 who caught him in act, he said that he was waking up the deceased so that they could go home. He however ran away after he was apprehended. PW2 and PW3 therefore had ample time to properly recognise the accused. As soon as they had the opportunity to do so they reported to PW5 and relayed to him the information that it was the accused whom they had found sodomising the deceased. It is therefore clear that PW2 and PW3 were consistent in their evidence regarding who the culprit was. The importance of the first report was restated in Tekerali s/o Korongozi & 4 Others vs. Rep (1952) 19 EACA 259 where it was held that:

**“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”**

38. The accused however testified that PW2 and PW3 trumped up the evidence against him due to prior disagreement between them emanating from their competition over the source of their livelihood. That disagreement allegedly took place about two years before the incident and long after the accused had left the area where they used to operate. There was no evidence that PW2 and PW3 knew where the accused had relocated to and it was the accused’s evidence that he never used to be in the vicinity. If the accused’s evidence is to be believed there would be no plausible reason why PW2 and PW3 would make up evidence against the accused who was no longer a threat to their means of livelihood and whose whereabouts, they no longer knew.

39. It is my finding that the evidence of PW2 and PW3 as regards the recognition of the accused the night of the incident was water tight and was free from error. The accused’s evidence that the said witnesses had a grudge against him is not satisfactory and does not cast any doubt on the evidence of PW2 and PW3 which I find credible.

40. It is however not enough to simply prove that the action of the accused caused the death of the deceased. In Joseph Kimani Njau vs. Republic [2014] eKLR the Court of Appeal stated that:-

**“In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that *mens rea* for murder was not proved. Failure to prove *mens rea* for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”**

41. A charge of murder may therefore not be sustained unless the *mens rea* for murder is proved. The element of intention in committing the offence was examined in the English case of Hyam v DPP [1974] 2 ALL ER 41 where Lord Diplock observed as follows:

**“No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.”**

42. As to whether malice aforethought has been established, Section 206 of the **Penal Code** sets out the circumstances which constitute malice aforethought as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

**(a) An intention to caused death or to do grievous harm to any person whether such person is the person actually killed or not.**

**(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.**

**(c) An intention to commit a felony.**

**(d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.**

43. In the case of Nzuki v. Republic [1973] KLR 171 the Court of appeal stated that in the commission of the offence of murder it must be committed with the following intentions: -

“(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;  
(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

44. In Nzuki vs. Republic (1993) KLR 171, the Court in substituting Nzuki’s charge of murder with manslaughter observed:

“there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

45. In this case, it is clear that the action of the accused in so far as the deceased’s death was concerned can be traced to the offence of sodomy. Based on the holding in Nzuki vs. Republic (supra) I am unable to find that the ingredients of murder have been proved.

46. Apart from that there was evidence that during the period that the deceased was unwell there intervened a strike by the medical personnel. In John Muia Muli vs. R. Mombasa Court of Appeal Criminal Appeal No. 96 of 1999 it was held that:

“...a person inflicting injury on a deceased person is not deemed to have caused the death of that person if the surgical or medical treatment which is the immediate cause of death of the deceased person was negligent...The deceased had been hospitalized for eleven days during which period, according to PW10, he was given proper medical attention. Unfortunately, the nature and extent of that medical attention was not disclosed to the superior court since the notes relating to his medical treatment were never tendered in evidence at the trial of the appellant. Whether or not the deceased’s medical treatment at Taveta District Hospital was the cause of his immediate death and that such treatment was employed in good faith or with common knowledge and skill was anyone’s guess. It was the bounden duty of the prosecution to establish this aspect of the case against the appellant. This was not done. Consequently, the deceased’s cause of death as was found by PW10 became unreliable. Nonetheless, the learned trial judge on the evidence available before her proceeded to convict the appellant of the murder of the deceased as is mentioned above. Whether therefore the deceased’s cause of death was as a result of medical negligence or sheer medical incompetence is conjectural. In these circumstances, the appellant’s conviction for the charge of murder contrary to section 204 of the Penal Code is unsustainable. Nevertheless, the arrow injury that resulted in the deceased’s being admitted in Taveta District Hospital for eleven days was grievous. Consequently, and as the appellant’s appeal turns on whether or not there was proof that the deceased’s cause of death was as a result of the injury inflicted on him by the appellant, we allow the appellant’s appeal to the extent that his conviction for the offence of murder contrary to section 204 of the Penal Code is quashed and the death sentence set aside but substitute thereof a conviction of doing grievous harm contrary to section 234 of the Penal Code. However, as the appellant has been in custody since his arrest on 7<sup>th</sup> January, 1992, we, in the circumstances, sentence him for the latter offence to a term that would lead to his immediate release from prison subject to his undergoing corporal sentence of two strokes of the cane.”

47. Having considered the totality of the evidence placed before me, I find the accused person not guilty of the offence of murder.

48. Section 179 of the *Criminal Procedure Code* provides that:

*179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*

*(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

49. For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the accused of the charge of murder but convict him of the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

50. It is so ordered.

51. 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.

**Judgement read, signed and delivered in open Court at Machakos this 13<sup>th</sup> day of October, 2020.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Mwangangi for the Accused**

**Mr Ngetich for the State**

**CA Geoffrey**