



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 5 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

TITUS MBIA SINGI.....1ST ACCUSED

MARY WAMBUA NGOTO.....2ND ACCUSED

JOEL MUTIE NGAI.....3RD ACCUSED

JOHN MWINZILA MWANZIA.....4TH ACCUSED

J U D G M E N T

1. **Titus Mbia Singi, Mary Wambua Ngoto, Joel Mutie Ngai, and John Mwinzila Mwanzia**, for ease of reference that I will refer to as the 1st, 2nd, 3rd and 4th Accused respectively, were jointly charged with two (2) others who were acquitted pursuant to provisions of **Section 306(1)** of the **Criminal Procedure Act**, with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **30th day of March, 2010** at about **9.30 p.m.** at **Malili Village, in Kibwea Location of Mutomo District** within **Eastern Province**, jointly murdered **Benrodgers Mutua Kamanza** (Deceased).

2. Facts of the case as presented by the Prosecution are that on the night of **30th March, 2010**, the family of the Deceased were inside their house. Soon after they retired to their respective beds they were attacked by some intruders who demanded for cellphones. They seriously injured the Deceased who on being rushed to hospital he was pronounced dead. The postmortem done on his body established the cause of death which was massive subdural haemorrhage secondary to skull fracture due to the penetrating injury. The case was reported to the police who investigated, arrested the Accused persons and charged them.

3. To prove the case the Prosecution called ten (10) witnesses. PW1 **Agnes Muthini Mutua** the wife of the Deceased was inside the house with him when they were attacked. She was made to lie on the bed. An item was placed on the nape of her neck therefore she was not able to see the intruders but it was her testimony that she recognized the voices of the 1st Accused, the 2nd Accused and the 3rd Accused.

4. PW2 **Timina Kalimi Mutua** the daughter of the Deceased and PW1 was inside the bedroom preparing to sleep when the intruders banged the door that gave way. It was her evidence that she heard a woman's voice at the outset. She heard the people demanding for cellphones and money from her father. She switched on the light and walked towards the sitting room where she encountered a man who carried a panga. She identified the person as the 4th Accused. He ordered her to go back to her bedroom and make no sound. She complied and he closed the door. She remained in the room but two (2) minutes later she heard a voice of a woman stating that the person was still bleeding, a voice that she recognized to be for the 2nd Accused. Thereafter she heard footsteps of persons leaving the house and she did not hear any other sound until her uncle called out her father's name that is when she got the courage to leave the room. She encountered her uncle, **Mwamuli Kamanza** in the sitting room where her father's body lay.

5. PW3 **Lawrence Mwamuli Kamanza** the brother of the Deceased stated that the Deceased had a dispute with **Mzee Wambua Ngoto** the father of the 2nd Accused and **Titus Mbia** (1st Accused) whose animals had grazed on his land. The matter ended up in Court as the Deceased was receiving alleged threatening messages. Further, it was his testimony that on the **30th March, 2010** he was with the Deceased and his wife upto **9.00 p.m.** They sat outside their houses which are in the same homestead. After they parted ways while inside his house he heard the voice of **Japheth Mutinda**, the Deceased's employee. He opened the door and saw **Kitili Wambua** chasing him and they ran past his house into the bushes. Prior to closing the door, he saw the 1st Accused some three (3) metres away. He held a bow and arrows. He asked him for a cellphone. He pushed the door so as to close it but three people pushed it. On realizing he was being overpowered he tried hitting one with a panga which got bent. The three (3) persons flashed torches at his bedroom window and asked his wife for her cellphone,

that she handed over. When the thugs left he went to his brother's house and found the door having been forcibly opened with a stone. PW1 and PW2 came out. They told him what transpired. He found the body of the Deceased in the sitting room. He went to report the matter to **Mutomo Police Station**.

6. PW4 **Shadrack Muia Mbatha** a bar owner stated that in June, 2010 while in **Mombasa** at his pub, he heard his patrons, the 4th Accused quarrelling with his in-law thrice allegedly over involvement in threats to kill someone and somebody having been killed; therefore notified the OCS who arrested the 4th Accused.

7. PW5 **Thomas Isalu Kiema** a Senior Assistant Chief, **Vote Sub-Location, Mutomo Sub-County** heard screams emanating from the home of the Deceased on **30th March, 2010** at about **9.30 p.m.** On going there he found the Deceased having died, the door to the main house was broken. He observed that the body of the Deceased lay in a pool of blood; next to the body was a jerrican containing petrol, and a huge stone weighing about **7 – 10kgs**. The body was naked and had injuries on the head and neck. He took a bed sheet which he used to cover it. He testified further, that he learned of another neighbor who was attacked on the fateful night when he encountered the thugs and a businessman at **Malili Centre**. The following morning in company of other members of public they followed footmarks of the attackers, after walking for about **8kms** they found a bow and arrow and a sim card and many airtime scratch cards. Items that he took possession of and took the sim card to the wife of the Deceased, on testing, it turned out to be for PW1 (wife of Deceased). He collected some broken pieces of arrows which he took to the police. Three (3) weeks later he was called by the police who showed him a list of suspects. He took the police around and identified the persons who were arrested while others disappeared. PW6 **Jacinta Kanyaa Kamanza** a sister of the Deceased identified his body at the hospital to the Doctor who performed the postmortem.

8. PW7 **Doctor Patrick Mutuku** was called to produce a postmortem form on behalf of **Doctor Doris Mbithi** but the defence objected.

9. PW8 **No. 49090 Corporal Painito Ingosi** took over investigations of the case from **Mutomo Police, OCS**, on the **20th April, 2010**. Suspects except the 4th Accused had been arrested. He took over exhibits that had been recovered. The 4th Accused was arrested in **Mombasa** on the **7th May, 2010** and he went to collect him. He also took over the postmortem report.

10. PW9 **No. 231245 Yufnalis Barasa, S.S.P.** booked the report of murder received at the police station from the brother of the Deceased and visited the scene. He found the door to the house damaged. The body of the Deceased was in the sitting room. There was blood next to his head and so was a big stone. The neck at the nape had a cut wound. On interrogation the wife of the Deceased (PW1) stated that they could only identify the suspects physically as they did not know them. Witnesses said the thugs were 6 – 10 in number and were armed with weapons, arrows and bows and they had torches. He took over items that were recovered by the Assistant Chief of the area. Thereafter the area Assistant Chief and witnesses gave him the names of the suspects and he arrested the 1st Accused, 2nd Accused. The 3rd Accused was arrested by the Assistant Chief. The issue of offending texts being sent was mentioned to him but they never established who was doing it.

11. PW10 **Doctor Doris Nthenya** conducted a postmortem on the body of the Deceased and formed the opinion as to the cause of death.

12. When put on their defence, the 1st Accused stated that the Deceased and neighbor who lived 4 kilometers away from his home was known to him and they had a cordial relationship prior to the **30th March, 2010**. That on the stated date he woke up at **4.00 a.m.** and went to the prayer room where he prayed with his wife and children. He took a bath and left going to open his shop where he stayed until **11.00 a.m.** He went to **Mutomo**, returned and stayed with his wife until evening then went to sleep. The following day they heard from a customer that **Mutua** had been attacked. He recollected having seen him the previous day when he passed by the shop and purchased various shop goods, petrol in a jerrican inclusive. At **7.30 a.m.** he got information that a businessman had been attacked by thugs and injured; with his workers, one of them who was his paternal uncle; on the stated date they closed the shop at **9.00 a.m.** and in company of his wife, **Christopher, Mama Kasyoka** and **Juma** went to the home of the Deceased where they found many people. They condoled them and even gave their contribution. That he participated in funeral arrangements and the police would visit the home. That on the **2nd February, 2008** **Lawrence Kamanza** hired for him a power saw at **Kshs. 1,500/=** per month but he sold it off after paying him for only four months. He reported the matter to the police and the power saw was recovered. On the **22nd April, 2010** he was arrested following allegations that he was connected to the death of the Deceased. He denied knowing his Co-Accused.

13. The 2nd Accused stated that she knew the Deceased as a Teacher, a customer at her shop and a former tenant. That they stayed some **200 metres** away from her shop where she lived. Their relationship was cordial. As at **30th March, 2010**, seven (7) years had lapsed since they vacated her house. On the material date she was at her shop until **1.00 p.m.** when she closed down to attend a funeral where she stayed until **4.00 p.m.** She returned and opened the shop until **9.00 p.m.** On **31st March, 2010** goods were delivered from **Mutomo** by a delivery motor-vehicle and there were allegations that a businessman at **Malili** had been attacked and a watchman was also wounded. A second motor-vehicle arrived and the salesman alleged that the Teacher had also been murdered. A business woman, **Rose Kawenyi** was sent by the business community to relay their condolences. On the **22nd April, 2010** she was pointed out to the police by the Assistant Chief who arrested her. She denied having had any disagreement with the Deceased or his family members. That she rarely interacted with PW1 and PW2 when they were her tenants. She acknowledged having been told by her father of the case of illegal grazing but denied having followed up the issue. She denied having had any reason to kill the Deceased.

14. The 3rd Accused, **Joel Ngai Mutie** stated that he knew the Deceased as his children's Teacher. That on the **30th March, 2010** he was at his **Kyani** home planting. He got a report from his children of the passing on of the Deceased. He denied knowing the wife of the Deceased and stated that she lied when she alleged that she heard his voice. He alluded to have purchased a donkey which ran away. He followed it and was ordered to avail a receipt. The Assistant Chief identified him as one of the suspects. He blamed the Assistant Chief for falsely accusing him.

15. The 4th Accused, **John Mwinzila Mwanzia** denied having known the Deceased. He stated that he was at a bar in **Likoni** with his cousin **Alex Musya**. They had an altercation following a land dispute that they had and they broke glasses. The police arrived and arrested them. They were taken to the police station where they stayed for three (3) days. The owner of the bar withdrew the case but the police refused to release him on allegations that he was required at **Mutomo Police Station**. Subsequently, he was moved to **Mutomo Police Station** where

he was held in custody for five (5) days prior to being taken to **Kitui Police Station**. That no identification parade was conducted for purposes of being identified and the dispute between him and **Alex** still subsists.

16. **Mr. Muema** learned Counsel for the 1st, 3rd and 4th Accused persons urged that the charge sheet is defective as it is at variance with evidence adduced by all Prosecution witnesses. That the charge alluded to the fact that the Deceased was murdered at **9.00 a.m.** when the Prosecution witnesses alluded to **9.00 p.m.** and even after noting the glaring variance there was no application made to amend the charge. This, it was argued that was a material defect that was not curable under **Section 382** of the **Criminal Procedure Code**. That though the evidence adduced was of voice identification, nothing unique about the voice was pointed out that stood out from other persons' voices as the Prosecution did not allude to any intonation. That circumstances under which PW3 alleged he identified **Titus Mbia Singi** (1st Accused) did not favour positive identification. In that regard the case of **Maitanyi vs. Republic (1986) KLR 198** was cited where the Court of Appeal stated thus:

“Subject to well known exceptions. It is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence whether it be circumstantial or direct pointing to guilt from a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

17. With regard to the 2nd Accused, it was urged by **Mr. Mulu** learned Counsel, that there was no evidence of a relationship or interaction between the Accused, PW1 and PW2 which could have created familiarity between them to enable PW1 and PW2 to positively identify the voice of the 2nd Accused. That her name was mentioned as an afterthought following the alleged ‘enmity’ between the families of the Deceased and that of Accused.

18. On voice identification it was argued that it must be treated with caution. The case of **David Nyamai alias Kijana vs. Republic (CA 158 of 2009)** was cited where the Court stated thus:

“... The learned magistrate did not evaluate the circumstances and particulars of the voice identification to satisfy himself that it was positive and free from error. The incident was a robbery. All the three witnesses, PW1, 2 and 3 must have been terrified ... None of the witnesses stated that specific words used by the Appellant, among the 5 robbers, that could make them identify him by voice. Though PW4 PC Bakari Self Adan testified that he was informed at the scene that PW1 had recognized the voice of the appellant, this information was given after some items were brought by members of public which included a bag said to resemble a bag previously used by the appellant. ... In our view, the evidence of voice identification leaves much to be desired. it is not free from possibility of error. We give the benefit of doubt to the Appellant...”

19. He called upon the Court to consider evidence of PW9 who confirmed that nobody was identified at the scene by victims on the day of the incident and the following day. Names and words uttered came up after two (2) weeks.

20. A defence of alibi was raised which the defence called upon the Prosecution to disapprove. That the area Chief pointed out suspects on suspicion which could not be a basis of conviction and that there was no evidence to link the 4th Accused to the offence.

21. In response, the State through learned Counsel **Mr. Mamba** urged that evidence of who killed the Deceased was corroborated. He cited the case of **Wamunga vs. Republic (1989) KLR 424** where it was held that:

“Where the only evidence against the defendant is the evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error...”

That PW1 and PW2 recognized the 1st and 2nd Accused. That the Deceased met his untimely death due to the serious injuries inflicted by all the Accused who were armed with a sole purpose of causing mayhem at the Deceased's homestead. That Civil Cases filed against **Wambua Nguto** and **Titus Mbia Singi** made them form malice aforethought.

22. In the case of **Anthony Ndegwa Ngari vs. Republic (2014) eKLR** the Court held that elements of the offence of murder are listed as follows:

“i) The death of the Deceased occurred.

ii) That the Accused committed the unlawful act which caused the death of the Deceased; and

iii) That the Accused had malice aforethought.”

These are the crucial ingredients of the offence the Prosecution was required to prove beyond any reasonable doubt in the instant case.

23. Evidence was adduced by witnesses who went to the scene and found the Deceased's motionless body on the floor of the sitting room in a pool of blood. Ultimately an autopsy was conducted on the body by PW10 **Doctor Mbithi** who found the Deceased having sustained a deep cut on the dura and skull on the left parieto – temporal, bruises over the right side of the neck below the right ear. On the head he had a segmental skull fracture extending from the temporal region to the occipital parietal lucure which extended to the right ear. There were fragments of the skull and extensive subdural haemorrhage. The spinal cord was compressed at the cervical column around the neck. As a

result she formed the opinion that the cause of death was massive subdural haemorrhage secondary to the skull fracture due to the penetrating injury.

24. This was undisputed evidence of the fact of death.

25. The unlawful act that resulted into the death of the Deceased was committed at night. PW1 and PW2 stated that they recognized the voice of the 2nd Accused as one of their attackers; while PW3 identified the 1st Accused as one of the intruders. This was a case of visual and voice identification. In the case of **Choge vs. Republic Criminal Appeal No. 69 of 1994** the Court stated thus:

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

26. In the case of **Francis Kariuki Njiru & 7 Others vs. Republic Criminal Appeal No. 6 of 2001 (UR)** the Court of Appeal stated that:

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:

‘.....It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.’

27. PW1 heard a person tell the husband “to get ready or prepare”. She recognized the voice to be for the 2nd Accused who was their land lady in 2007. She also recognized the voice of the 1st Accused, a person she stated to have been a neighbor to the school where she taught. That they used to exchange pleasantries. With regard to the 3rd Accused, she stated that she recognized his voice and was aided by the light from torches to see him. In particular she stated that it was the 3rd Accused who put an object on the nape of her neck. This was a person she used to meet at the market. On cross examination she stated that they had solar lights but they had already switched them off. That she was not able to tell the colour of clothes the assailants wore because the light from torches was not sufficient. That she would interact with the 2nd Accused whenever she would go to the shopping centre after they moved out of the house.

PW2 alluded to having encountered the 4th Accused and seen him as she had switched on the solar lights. She stated that she also heard the 2nd Accused saying that the person was still bleeding. In her defence the 2nd Accused stated that PW2 was a child of tender age when they lived in her house therefore could not have identified her voice. With regard to the 4th Accused on cross examination she stated that she had seen him the previous year seated at **Vote Market** and in **2004** she had interacted with him as a neighbour while she was in primary school. She alluded to having recorded her first statement 5 days after the incident and another statement after the burial of her father but did not at the outset disclose the names of the attackers. She admitted the fact that her father had a grudge with the 1st and 2nd Accused persons following a land dispute and having sued them. On cross-examination by the 2nd Accused’s Counsel she stated that per what was recorded in the statement when she heard a bang she ran and hid in her bedroom. She denied the allegation that their house was lit by a lantern per her mother’s statement and stated that it was lit by solar lights and by the time she saw the 2nd Accused in **2009** she was no longer her friend due to the land dispute but she could still recognize her voice. Regarding the 4th Accused she stated that he even attended her father’s burial and she pointed him out to her uncle from a distance. She also stated that she heard voices of the attackers who were demanding for money and cellphones from her father but she did not identify them.

28. According to PW3 what prompted him to open the door was the voice of **Japheth Mutinda** an employee of the Deceased. He was being chased by **Kitili Wambua**. The bright moonlight enabled him to see the 1st Accused before he closed the door. He shot the arrow which hit the door. This person was well known to him as a neighbour, such that he called him by name. The thugs also asked his wife to give them a cell phone and through the window and she complied.

29. From the testimony of witnesses (PW1, PW2, and PW3) indeed they were sure they recognized their attackers by voice and visually. In the case of **Maitanyi v Republic [1986] KLR 198** It was stated that:

“... many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the convicting Magistrate, State Counsel and Defence Counsel. In the absence of these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these enquiries themselves.”

30. In the case of **Anjononi & Others vs Republic [1981] eKLR** the Court states thus:

“...recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailants in some form or another.”

31. The evidence of these witnesses (PW1, PW2 and PW3) was in regard to personal knowledge of the attackers which should not have been doubted. There was a discrepancy as to which light they used and whether it was sufficient due to its nature. It was not in doubt that the Deceased ordinarily used solar lights. Whether or not the solar lights were on in the sitting room at the time is what was not certain.

32. The first person to arrive at the scene was PW3. It was his testimony that he found the Deceased bleeding profusely and was already dead and the wife (PW1) and daughter (PW2) explained to him what happened. Then, he went to **Mutomo Police Station** and made a report whereafter they returned to the scene with the police. In the meantime PW5 the Assistant Chief went to the scene. He found PW1, PW2, the wife of PW3 and three (3) workers. These were the people screaming. He waited for the police to arrive. PW9 the **OCS Mutomo Police Station** took up investigations at the outset. He led his team that accompanied PW3 to the scene of crime. His evidence was as follows:

“I interrogated witnesses. The wife and brother of the Deceased. They said they could only identify the suspects physically as they did not know them. Witnesses said the thugs, 6-10 were armed with weapons, arrows and bows and they had torches ... I continued with investigations. The following day we went back to the scene. Witnesses were not able to give us statements. He went back to record statements later. It could have been on 7/4/2010. The Assistant Chief of Vote, Thomas Kiema narrated to me how he was informed by villagers of having seen arrows, bows, sim cards at one of the dips within the Sub-Location. He recovered them and handed them over to me...”

33. PW5, the Assistant Chief testified that this was not an isolated incident as he learnt of another attack on a neighbour the same night, **Mbiti Mayuku**. He interrogated him and **Mbiti** allegedly stated that he encountered the thugs as they were getting away. And there was also a businessman at **Malili Shopping Centre** who was wounded and taken to hospital by the police.

34. The following morning PW5 went back to the home of the Deceased and with other members of the public they followed footmarks that ended at a dam, some approximately 8 kilometres away, they recovered a bow, arrow, a telephone set sim cards and many airtime scratch cards (used and unused). According to him one of the sim cards turned out to belong to the deceased, though the Investigating Officer did not pursue that line of investigations to establish if that was the case. He collected a broken arrow that was at the home of PW3. Then three weeks later he was summoned to **Mutomo Police Station** and given a list of suspects that consisted of sixteen (16) names, persons he was to arrest.

35. The first person who went to the scene was PW3. He had a cordial relationship with the Deceased and his family. It is however surprising that when PW1 and PW2 explained to him what happened they did not mention their attackers, individuals that they knew very well. PW3 went and reported to the police but failed to mention the person who attempted to attack him. The Assistant Chief their Administrator a person who went to their home that night and assisted was also not told the names of the assailants. The following morning he was there but they did not divulge the information. The **OCS of Mutomo** visited the scene on the fateful night when they were still shocked. But, he returned the following day, but, the information was concealed. During the burial of the Deceased, some of the suspects attended the burial but PW3 did nothing about it. PW2 alleged she pointed at the 4th Accused but the information did not reach the police.

36. PW5 was shown a list of sixteen (16) people by the police three (3) weeks later. He acted as required by identifying the individuals to the police. In his evidence, it is not known how the police came up with the list. In his evidence PW9 alleged that the Assistant Chief and witnesses gave him the names while recording statements. On cross examination PW9 was emphatic that immediately, the wife of the Deceased and even his brother were not able to identify any of the attackers. The following morning they said they could identify them if they saw them as they did not know them by names but when recording statements they now alleged they could recognize them by voice. The discrepancy noted was not explained.

37. PW8 the Investigating Officer who ultimately took over investigations stated that he formed the opinion to charge the Accused following the identification alluded to.

38. It was proved that a grudge existed between the family of the Deceased and that of the 1st and 2nd Accused following an illegal grazing dispute. It was established that there was a case pending in Court but the proceedings were not availed to the Court for perusal. The question that remained unanswered was whether the grudge prompted the witnesses to imagine that the 1st and 2nd Accused were some of the thugs who attacked them.

39. According to PW3 the first person he encountered was **Japheth Mutinda** an employee of the Deceased. There were three employees at the home of the Deceased screaming when the Assistant Chief arrived but none of them was called to testify. The person who was alleged to have been pursuing him was known to the witness who gave his name as **Kitili Wambua**. His name does not seem to have been on the list of sixteen people. On the fateful night PW5 encountered **Mbiti Mayuku** who was allegedly attacked by the same gang. These two (2) individuals were crucial witnesses. If the worker of the Deceased was chased it was possible that he may have seen the attackers and could have played a big role in identifying them.

40. Regarding the 4th Accused, at the outset his name was not mentioned just like the 1st, 2nd and 3rd Accused persons. However, he was arrested in **Mombasa, Likoni**. PW4, a bar owner and village elder as per what he stated heard him quarrelling with his brother-in-law **Alex**. He heard of words “threats to kill and someone having been killed.” The two (2) had created a disturbance in his bar when he called the police. What he did not state is who uttered the offending words. PW8 stated that he caused him to be arrested but did not require **Alex** to adduce evidence as a Prosecution witness.

41. In the case of **Bukenya vs Republic** it was stated that:

“(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

The Prosecution was under no obligation to call **Alex**, the employee of the Deceased or any other relevant witness like the wife of PW3, but, evidence adduced by the Prosecution regarding circumstances in which ultimately the police came up with the list of the suspects, it would have behooved them to call the employee of the Deceased. Failure to do so makes this Court believe that his evidence may have been adverse to the Prosecution.

42. What was established was the fact that the Accused persons were suspected to have been part of the gang who attacked and did the unlawful act that caused the death of the Deceased. In the case of **Mary Wanjiku Gichira v Republic, Criminal Appeal No. 17 of 1998**, the Court of Appeal 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 at times of life.”

43. Having considered evidence in totality I find that evidence adduced by the Prosecution was not sufficient to prove that the unlawful act that caused the death of the Deceased was perpetrated by the Accused persons. Therefore such evidence can not sustain a conviction. In the premises the case against the Accused persons is not proved to the required standard. Accordingly, each Accused is acquitted of the offence of murder.

44. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of January, 2019.

L. N. MUTENDE

JUDGE