REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 17 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

GERALD MUA NTHIWA.....ACCUSED

JUDGEMENT

1. The accused, **Gerald Mua Nthiwa,** is charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that on 29th day of February, 2008 at Kikima Market, Mutitu Sub location in Makueni District within Eastern Province, the accused murdered **Musuu Mbithi**.

2. In order to prove its case, the prosecution called 6 witnesses.

3. PW1, **James Nzioka Musuu**, the deceased son was on 29th February, 2008 at Kikima Market when he saw people running towards the back of the shops. His friend, **Wambua**, asked him why he was sitting where he was when his father was being killed. Upon rushing to the scene he found many people including PW4. He also met PW3 30-40 metres away from the scene who informed him that his father had been assaulted by a man called 'Kingei', which was the accused's nickname. He then found his father lying down and next to him was a piece of wood similar to the frame of a bed. On speaking to the deceased, the deceased informed him that they should walk to the police station though he was unable to get up. The deceased informed him that he had been assaulted by 'Kingei'. According to PW1 blood was oozing from his ears, he had injuries on the head and his legs looked broken. With the help of Mwanzia, PW4, they carried the deceased on a bicycle though by that time the deceased was not speaking. It took them one hour to arrive at Mbooni Police Station. At Kikima, the deceased was given first aid after which he was transferred to Machakos General Hospital where he died at 1pm on 1st March, 2008. According to PW1, the accused and the deceased were friends who used to drink together and were staying in the same place in a shade like kiosk made of iron sheets at Kikima market where the deceased was a cook at a hotel while the accused was a mechanic.

4. According to PW1, the deceased was suffering from cerebral malaria and used to make a lot of noise though he was not violent. He had run away from home and whenever returned home he would go away. The previous day he had seen the deceased who was not drunk. He had also seen the accused who was drunk.

5. On 29th February, 2008 at 3.00am, PW2, **Mutunga Mulinga**, a watchman at KIkima Market saw the deceased pulling a sack and upon telling one **Munyao** to check its contents, it was found to be containing bricks. After returning to his work he heard commotion at the back of the shops he was guarding but apparently he did not check what it was about and in the morning went home. According to him it was the accused and the deceased who had passed him and he was able to seek them because there was electric light. He however did not see the deceased being assaulted. In cross-examination he however said that when the deceased passed him puling the sack of bricks, he was alone and that he only saw the accused at 6pm around the market and never saw him again that night. He stated that he knew the deceased as someone who was mentally normal who never used to loiter in the market at night. However, the accused used to sing at night.

6. In re-examination, he stated that though he saw the accused at 6pm he later saw him with the deceased.

7. PW3, **Alice Ndinda**, was staying with the deceased in the same plot at Kikima Market before the deceased passed away. On 29th February, 2008 at about 5 am she woke up and went to fetch water. As she approached the gate she heard someone screaming in Kikamba, "Why are you killing me?" She recognised the voice as that of the deceased and placed her jerry cans down and proceeded towards the direction of the screams – the deceased's home. As she approached from the rear she saw the accused holding a piece of timber similar to a bed frame but as it was dark she disclosed that she would not be able to recognise the same. There was however light from one electric bulb mounted on a wall 10 feet from the ground and she was able to observe the scene. According to her the accused was a drunkard and she had known him for a month as she used to see him repairing vehicles at the market where she used to supply water.

8. According to PW3, when the accused saw her, he dropped the timber and approached her and as they passed each other she inquired from

him what was happening but the accused told her to go see for herself. She then saw the deceased lying down bleeding from the head. While still there, PW1 arrived and though she called the deceased several times, the deceased did not respond. According to her whereas she saw the accused holding the stick while the deceased was lying down a meter away, she never saw the accused use the stick. After the arrival of PW1, pw3 left him with the deceased and went to attend to her business but later learnt that the deceased passed away.

9. According to PW3, she heard the deceased screaming "Mua why are you killing me?" It was her evidence that the accused was known as "Mua"" at his working place though he was also referred to "*Ingatui*" by his drinking mates. According to her when she first saw the accused carrying the piece of timber, he was about 4 metres away from her and the accused and the deceased were between her and the bulb. By the time the witness reached the deceased, the accused had dropped the timber which was lying next to the deceased and blood was oozing from the deceased's head and nose. PW1, according to her arrived 10 minutes after her arrival and the deceased was not talking at all while she was there and she never told anyone that she saw the accused striking the deceased. She was however unaware of what happened after she left the scene.

10. PW4, **Alex Mwanzia**, was going home from Kikima market at 7am when he found the deceased lying beside the footpath 15 metres from his house with head injuries alone and the deceased feebly told him to assist him. Shortly later PW1 arrived with 5 other people whom he did not know but he never heard PW1 talking to the deceased though it seemed that PW1 had been there earlier and had gone to look for a bicycle to take the deceased to the hospital. They placed the deceased on the bicycle and took him to Mbooni Police Station where they were given a note and directed to take the deceased to the hospital. They then took him to Mbooni District Hospital after which he went back to his place of work. Later, he learnt that the deceased passed away. Throughout the time he was there the deceased did not speak to anyone. He confirmed that he saw a piece of timber seemingly from a bed near the deceased.

11. PW5, **Joshua Gitonga Mwangi**, a police constable stationed at Kilome Police Station was on 4th March, 2008 on patrol at Tawa Market with his colleagues, **PC Muigai** and **PC Nyakundi** when they received a call from **PC Murila** from Mbooni Police Station who told them to arrest the accused after directing them to the place where the accused was and described the accused to them. They arrested the accused after the accused confirmed that he was **Gerald Mua Nthiwa**. PW5 was, however, not informed of the reason why the accused was being arrested and so they did not disclose to the accused the reason for his arrest. After the arrest the accused was booked in custody and was later collected by **PC Murila** and taken to Mbooni Police Station on 7th June, 2008 though PW5 was not present at that time. It was his evidence that the place where the accused was arrested was behind a bar where there is a garage though at the time the accused was just seated and was not repairing any vehicle.

12. PW6, **Dr John Mutunga**, on 5th March, 2008 at 11am performed a post mortem on the body of the deceased. According to him the body had blood stained clothes and were dusty. Upon examination he found the body had bruises on the temporal region and the right leg with an obvious fracture of the lower right tibia. Internally the lungs were adherent to the rear chest wall and there was left pleural effusion. He had a fractured skull and the right tibia had massive subdural haematoma. He therefore formed the opinion that the cause of death was cardiopulmonary arrest due to severe head injury.

13. In cross-examination he disclosed that the deceased had a previous infection in lungs due to pneumonia though this could not cause death as it can be treated though if not treated it can progress and after long time one can succumb to it.

14. Upon being placed on his defence, the accused testified that he was a mechanic at Kikima in Mbooni and the deceased was k own to him. On 29th February, 2008 he was on his way to work when he passed through a hotel called Eastleigh for tea at 8am when he heard people saying that his friend was injured. In the company of the proprietor of the said hotel who was his customer, he proceeded in the said customer's vehicle to the place where he saw the deceased being carried on a bicycle. According to him there were many people milling around the place and it was along a footpath off the road. He then realised that it was the person he was with the previous day who was being helped onto a bicycle by his son, PW1 with other people. According to him he returned to the customer's vehicle and continued with his work. It was his evidence that the deceased was his friend but was mentally unstable and at times the accused would give him work and buy him drinks. He confirmed that the previous day they had a drink together at Eastleigh Hotel after which the accused left the deceased amusing people there and went home. According to him, he did not know what happened to the deceased.

15. Two days later while he was looking for a gearbox for a customer, he was arrested by plain clothes police officers. He denied that his name was Kingei which means thief. He also denied that he was known as *Ingatui* and denied that he was with the deceased that morning. He further denied knowing PW3.

16. In cross-examination he stated that the deceased was just his firmed and they used to meet. He however admitted that he was with the deceased the previous day on 28th October, 2008 though he had known him for three months. He denied that he was the last person to have seen the deceased alive.

17. It was submitted on behalf of the accused that the prosecution has not proved their case beyond reasonable doubt. According to the accused, the testimony of the witnesses is full of inconsistencies and contradictions that makes the case doubtful. It was submitted that the evidence of PW1 as to who caused the death of the deceased ought to have been corroborated.

18. On behalf of the prosecution reliance was placed on the record and the submissions made in response to the accused's submissions on no case to answer.

Determination

19. The prosecution's case in summary is that on 29th February, 2008, PW1 was at Kikima Market when he was notified that his father the deceased was being killed. He then rushed to the scene and found a number of people. About 30-40 metres away from the scene he met PW3 who informed him that his father had been assaulted by a man called 'Kingei'. Pw3, who seemed to have been the first person to arrive at the scene after hearing screams however denied that the deceased disclosed to her that he had been assaulted by the accused. According to her

throughout the period she was there the deceased never uttered a word. She however saw the accused standing near the deceased holding a piece of wood. Though the wood resembled a bed frame she could not recognise the same because it was dark. According to her, upon inquiring from the accused what was happening the accused told her to go see for herself. There was however no evidence that she disclosed this information. She in fact stated that she never informed anyone else that she saw the accused strike the deceased.

20. PW2 on the other hand testified that on that day he saw the deceased pulling a sack containing bricks. In his evidence in chief, the deceased was with the accused. However, in cross examination he stated that the only time he saw the accused that day was at 6pm yet he saw the deceased puling the sack at 3am. Though he heard commotion at the back of the shops he never went to check what it was all about.

21. PW2, on the other hand apart from finding the deceased lying on the ground and helping PW1 in taking the deceased to the police station did not witness the incident.

22. It is therefore clear that the only evidence that placed the accused at the scene of the incident was that of PW3. Whereas PW1 stated that the deceased informed him that it was the accused who assaulted the deceased, none of the witnesses including PW3 who arrived at the scene earlier than PW1 heard the deceased utter any word. While PW3 stated that she saw the accused carrying the wood in question, she never disclosed this fact to anyone. She however was clear that at no time did she see the accused assaulting the deceased.

23. Section 203 of the ***Penal Code*** provides:-

> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

24. 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."**

25. 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.**

26. In this case, there was no doubt as to the fact of death of the deceased. The evidence of PW1 who identified the body as well as that of PW9 who carried out the post mortem clearly proved beyond reasonable doubt that the deceased passed away. Again the cause of death was proved by the evidence of PW9.

27. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, it is clear that there was no direct evidence that the accused caused the death of the deceased. In that case can it be said that the case against the accused has been proved to the required standards? In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

28. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

29. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397**

US 358 {1970}, at pages 361-64 stated that:-

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

30. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

31. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

32. **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."**

33. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

> **"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

34. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

> **"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**

35. In this case, as stated above, this court must rely on the circumstantial evidence if the case against the accused is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held.

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

36. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

37. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

38. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."

39. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** and **Teper vs. Republic [1952] AC 480** as follows:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

40. In this case the evidence of PW1, PW2 and PW3 had serious inconsistencies. Whereas PW1 testified that he was informed by PW3 that it was the accused who assaulted the deceased, PW3 however denied ever having given such information. In fact, according to her the deceased never uttered any word in her presence yet she was the first person at the scene. By the time she was leaving other people had arrived at the scene none of whom testified that they had the deceased declare that he was assaulted by the deceased. PW3, as would have been expected, never disclosed to anyone that she heard the deceased scream that he was being assaulted by the accused.

41. As for PW2, his evidence as to the whereabouts of the accused that night was clearly inconsistent. At one point he stated that he only saw the accused once that night at 6pm only to change and state that he saw the deceased and the accused together at 3am.

42. It is therefore my view that the evidence of these witnesses ought to have been corroborated. Though there was evidence that a plank of wood was found next to the deceased, the same was never produced in evidence. In fact, the investigating officer was never called to testify at all in this case. **Sir Udo Udoma**, the then Chief Justice of Uganda, had this to say on that point in the case of **Bwaneka vs. Uganda [1967] EA 768** at page 771 Letters H to C at page 772.

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

43. In **Harward Shikanga Alias Kadogo & Another vs. Republic [2008] eKLR** the Court of Appeal expressed itself as follows:

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

44. Whereas it is true that the mere fact that the investigating officer is not called to testify in a case is not fatal to the prosecution case and each case must be decided on its own circumstances, where, as in this case, the failure to do so, leads to the failure to produce the purported murder weapon, that fact may well weaken the prosecution's case particularly where the evidence is purely circumstantial. In this case the evidence was clearly contradictory and had the alleged weapon been analysed and pointed to the accused as the one who had the same or that it was in fact the weapon that was used in causing the death of the deceased, that may well have corroborated the prosecution's case.

45. That leads me to the last issue: whether it was proved that the said unlawful act was committed with malice aforethought.

46. Section 206 of the ***Penal Code*** on malice aforethought states:-

> ***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***
>
> ***(a) an intention to cause the death of or to do grievous arm to any person, whether that 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 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;***
>
> ***(c) an intent to commit a felony;***
>
> ***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

47. The law is however clear that the burden is on the prosecution to prove that unlawful act was committed with malice aforethought. In this case in the absence of evidence that the accused committed the act that led to the death of the deceased, one cannot say that the prosecution proved malice aforethought.

48. In this case it may well be that there was a strong suspicion that it was the accused who caused the death of the deceased. However, as was stated by the Court of Appeal in the case of **Joan Chebichii Sawe vs Republic [2003] eKLR**:

> **"We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt."**

49. In **R vs. Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71** it was held by the Tanzania Court of Appeal that:

> **"Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."**

50. Having considered the totality of the evidence adduced in this case, I find that the prosecution has failed to prove the case against the accused beyond reasonable doubt that the accused murdered the deceased. Accordingly, the benefit of doubt must go to the accused. In the premises, I proceed to acquit him of the charge. He is to be set at liberty forthwith unless otherwise lawfully held.

51. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 14th day of November, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamanda for the accused

Miss Mogoi for the State

CA Geoffrey