REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 24 OF 2011

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

FELIX MANENO KIAWA.....ACCUSED

JUDGEMENT

1. The accused, **Felix Maneno Kiawa,** was charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that on or about 9th April, 2011, at Nyaani, Machakos County, the accused unlawfully murdered one **Joshua Wambua Muli.**

2. The prosecution's case was based on the evidence of 7 witnesses.

3. PW1 **Scolastica Mbithe Kanyanya** a waitress at Victoria Club, Nyaani was, on the 9th April, 2011 at about 10.30 pm on duty at Victoria club Nyaani. Present were the manager **John Magide** and two (2) customers, **Wambua** (the deceased) and **Maneno** (the accused). According to her, she knew the two customers very well. That night the deceased wore a whitish pair of trouser and a yellow sweater/t-shirt while the accused wore a brownish t-shirt and a greenish pair of shorts. The witness identified the yellow long sleeved t-shirt, the pair of trouser, the greenish corduroy pair of trousers, the pair of greenish short trousers and the brownish t-shirt. She disclosed that there was electric light in the bar.

4. She testified that when she closed the bar all people inside left and she went to her room which was behind the bar. While there, she heard the accused urging the deceased that they had to go but the deceased said that he was not going with the accused as they were going in different to different destinations. PW1 then slept and the following day she was in the hotel taking tea when she heard that person had been murdered. Upon proceeding to the scene which was beside the road, she found that it was the deceased, **Wambua** who had been murdered. The body had been covered and people were checking the body. Beside the body was a big stone which PW1 identified in court.

5. In cross-examination PW1 stated that she had known both the accused and deceased since 2011, January when she started working at Victoria Bar and they were their regular customers. According to her, **Maneno** is the son of Kiawa hence she knew him by the names **Maneno Kiawa**. She stated that **John Makute Mutune,** her employer, employed her in January 2011.

6. It was her evidence that she opened the bar at 5.00 pm and the deceased went to the bar at 8.00 pm while the accused went there at 9.00 pm hence each of them arrived on their own. According to her the deceased was drinking Allsops manufactured by Kenya Breweries Limited and took two (2) of the same brand of beer while the deceased who was taking the same brand took only one beer. It was her evidence that the accused was not drunk when she went to the bar. The beers were paid for while inside the bar and the accused and the deceased sat on adjacent tables while her boss stat on a different table. She however did not notice any difference between the accused and deceased and did not hear them exchange any bitter words.

7. She testified that her employer left the premises before her followed by the deceased and accused. While she did not know their home she stated that they were within my village. Her room was approximately 10 meters away from where the accused and the deceased were arguing and she could identify their voices but she did not go out to confirm who was talking. It was her evidence that at the scene she did not see other stones of the same type as the one she identified

8. When she saw the stone, she noticed that it had a blood stain. She however confirmed that the one in court had no blood stains as it had dried up. She left the bar in February 2014. I stated in my statement that the stone had stains of blood. She however did not know if it was the accused who hit the deceased.

9. In re-examination, she stated that the walls of the room she was occupying was made of stone. Since she had known the accused and the deceased for three (3) months, she could hear them speaking in Kikamba and was familiar with their voices.

10. PW2 **Titus Mbole Musyoki,** the assistant chief of Nyaani sub location was on 10th April, 2011 at his home asleep when at 6.00 am a neighbour, **Ngina Kiawa**, went to him and reported that her son, **Felix Maneno Kiawa**, the accused, had arrived at night and broken the door to the kitchen. As the report was being made, **Susan Maku**, the chairlady of *Maendeleo ya Wanawake* rung PW2 and informed him there was a dead person along the road. PW2 decided to deal with the second report first since the scene was not far from his home. He left immediately and found that the body was 20 feet away from the road and had no clothes. There were head and back injuries and the deceased had bled through the mouth, nose, and ear. Beside the body was a big stone which was blood stained. PW2 identified the said stone in court. He saw clothes beside the body and they were familiar to him as they belonged to **Johnson Wambua Munyi**, his former school mate, the deceased herein. He saw a whitish pair of trousers and a shirt greenish pair of short trouser- bluish and long sleeved yellowish sweater sloth all which he identified in court and which were blood stained.

11. PW2 rung the said Susan who went to the scene and after observing the scene he commenced investigations. **Makite**, the owner of the bar went to the scene and said the deceased was at the bar with the accused and since he left them at the bar, he did not know what transpired. PW2 then relayed to the people gathered the report he had received from accused's mother and they decided to go and check on **Maneno** who was said to be asleep at home. When he asked the accused to open the door he initially refused but when the people threatened to break into the house he did open the door. By then it was 7.30 am. The accused was found wearing a green pair of short trousers and a brown t-shirt and his hands, legs and clothes were blood stained. PW2 identified the said clothes in court. They then apprehended the accused and took him to Wamunyu police station while the police collected the body and the exhibits that were at the scene.

12. In cross examination, PW2 stated that he had been an assistant chief for 17 years in the year 2011 and both the accused and the deceased were his subjects and were of the same Adonga clan and their fathers were related. To his knowledge they were cousins. The accused had never married and PW2 was not aware that he had any child. However, the accused had had mental breakdown and he had handled many of his cases. On completion of school, the accused went to stay in Nairobi and upon his return started causing chaos by assaulting people and behaving like a mentally unstable person. As a result of the mental issues he was not relating well with his relatives and even his mother, **Ngina Kiawa**, had lodged complainants against him. At one time he was arrested him, charged in court and he was jailed between 2008 – 2009 when he tried to beat up his mother and chased away his siblings. According to PW2, the deceased was an adult but a habitual drunkard.

13. PW3, **Simon Lonzi Mutua** on 14th April 2011 in the company of **Joseph Ntheu** identified the body of the deceased who was his younger brother at the Machakos Hospital Mortuary for the purposes of post mortem examination. He did not know what caused the deceased death.

14. PW4, **Anne Wangechi**, a holder a Master of Science in chemistry from the Jomo Kenyatta University and Technology and BSc in chemistry, working at the government analyst as a senior assistant government chemist having worked with one **Paul Waweru Kangethe**, who had since retired, for more than 10 years, testified that she was familiar with his signature. She said that she had seen the signature on the report. On 10th April 2011 at the laboratories of the government chemist in Nairobi, the following items were received from **Rose Mathenge** from Masii Police Station in a marked envelope marked accompanied by an exhibit memo:

1) Item AI- Blood sample indicated as of accused- **Felix N. Kiawa**. The blood sample was not in court since it is not normally returned because of preservation.

2) Item DI- Blood sample indicated as of deceased **Joshua W. Muli**.

3) Item AI- A t-shirt indicated as of accused.

4) Item A II- A short indicated as of accused.

5) Item DI- A long sleeved shirt indicates as of deceased.

6) Item DII- A jumper indicated as of deceased.

7) Item D3- A short indicated as of the deceased.

8) Item D4- A trouser indicated as of deceased.

9) Item D2- A rectal swab.

15. It was required to examine the items and determine the presence and source of semen, spermatozoa and blood stains. After the analysis the findings were as follows:

1. The shirt, item DI, short item D3 and trouser item D4 were moderately stained with blood.

2. The t-shirt item AI and short AII were lightly stained with spot of blood.

3. The rectal swab item D2 was not stained with semen or spermatozoa.

4. DNA analysis was carried and the DNA profile generated are indicated in the report.

16. The conclusion from the DNA analysis were that the DNA profile generated from blood stains in the shirt, jumper, short and trouser all

indicated as of deceased matched the DNA profile generated from the blood sample item DI indicated as of the deceased. The DNA profile generated from blood stain obtained from t-shirt AI indicated as belonging to accused matched the DNA profile generated from the blood sample item DI indicated as belonging to the deceased **Joshua W. Muli**. The DNA profile generated from the blood stain obtained from the short, item AII indicated as of the accused matched the DNA profile generated from blood sample item DI indicated as belonging to the deceased **Joshua W. Muli**. The report was made on 10th September, 2013 and was signed by the said Paul **Waweru** and was produced as exhibit together with the DNA report.

17. In cross-examination, PW4 stated that she was not the one who did the analysis and prepared the report. According to her, there were no sperm or spermatozoa on the rectal swab but there were blood stains on the other items. The blood stain obtained from the t-shirt said to belong to the accused matched the DNA profile belonging to the deceased. According to her, the analysis of blood sample is got from DNA profiles, probability shown are given and the analysis indicates conclusively that the blood matched that of the deceased.

18. **Dr Fredrick Okinyi**, PW5, a pathologist testified that on 14th April, 2011, he conducted a post-mortem at Machakos Level 5 Hospital on the body of the late **Joshua Wambua Muli** which body was identified by **Joseph Musyoka** and **Simon Lonzi** in the presence of police officer No. 67094 **Cpl Mathenge**. According to him, the body was well preserved. On external examination there were blood stains on the face on his shirt, with multiple bruises on the left and right forehead approximately 7 by 8 cm. There was a laceration on the left orbital ridge. There was a large abrasion on the back which is an injury that occurs by pulling a person. There were no fractures on the back and limbs. Internal examination, there was subcutaneous haematoma and contusion of the left chest wall (injuries on the chest with a lot of blood) with fracture of the P3 & 4 ribs of the same side. There were pleural adhesions (inflammation on the left chest wall and collapse of the left lung). The head had multiple abrasions, subcutaneous scalp haematoma, muscle contusions (injuries on the head caused by a blunt object). The scalp was intact but there was a large subdural haematoma on the right about 400 cc- a large clot of blood on the surface of the brain. According to him, the cause of death was a head injury causing subdural haematoma caused by blunt trauma and fracture to the ribs caused by a blunt trauma. Samples were taken for the rectal swab to check if the deceased had been assaulted and blood samples for comparison and to check if the deceased could have been under the influence of alcohol. He produced the report as an exhibit.

19. On cross-examination, he stated that they could not ascertain the time of the deceased death as the body was refrigerated and was well preserved. No chemicals were used for the preservation. They were however able to get blood sample from the refrigerated body in liquid form. The rectal swab was in liquid form but had dried.

20. PW6, **John Makite Mutune**, was on 10th April, 2011 at 7am while still asleep called on the phone by his cousin called **Susan Makau** and informed that his worker was lying dead on the road. He proceeded there and found his said worker lying dead next to the river Syonguni by the road. The body was naked but was covered with a *lesso* and was lying on its side. There were other people there and there was a big stone next to his body-next to his head. He had injuries on the left side of the head on the face and on the chest. When they lifted the *lesso* they found that he had no clothes. The big stone next to him had blood and his whole body had blood. The deceased was his worker called **Wambua Muli**, and he was staying in PW6's homestead where he had worked for 4-5 years. On the day of his death PW6 stated that he had been with him at Victoria Bar at 9 pm in a bar at Victoria Bar together with the accused and he left the deceased and the accused in the bar at around 10 pm and went to sleep.

21. After viewing the body, they went to the accused's home with other people who were present and the assistant chief and upon arrival they asked the accused to open the door and he refused. When they threatened to break the door he opened the door. He had a brownish t-shirt and a khaki trouser which had stains of blood and he was arrested. PW6 stated that from the bar to the scene of the deceased body it showed that there had been a struggle and something that had been dragged on the ground. The clothes the deceased had worn the previous day were next to his body. The stone that was next to his body was not a building stone. It was like a stone from the river. He identified the same in court.

22. It was his evidence that when he left the accused in the bar he was dressed the way they found him in his house in a corduroy trousers and green short. He also identified the same in court. It was his evidence that the accused and deceased were friends and were from the same clan. The deceased was a neighbour while the accused was related to him as their mothers were cousins and they had no family disputes with him. When questioned, the accused did not talk.

23. In cross-examination, he said that day it was only him, the deceased, the accused and barmaid who were at the bar. He was informed by the barmaid that the accused and deceased had differed by the time they left the bar and that they were fighting over her. The bar belonged to him.

24. In re-examination, PW6 stated that the barmaid said that the accused wanted to make sexual advances to her by force and the deceased was defending her and they started fighting. She then ran away and left them. The deceased had his own house in PW6's compound and he could not know if he had returned or not as it was near his home.

25. **Sgt Moses Mathenge**, PW7 was the investigating officer in this matter. On 10th April 2011 at 8.30 am in the morning he was the in charge of Wamunyu patrol base at Masii and while at the patrol base, a reportee by the name **John Makite Mutune** went and reported that his farm worker had been killed on the road from Wamunyu to Muthethini and that the body was near a seasonal river called Syonguni and that the person suspected to have committed the crime was arrested by the assistant chief of Nyaani Titus Mbui and members of the public. While recording the statement, the accused was brought by the assistant chief and members of the public at around 9.50 am. wearing a brown t-shirt and a short plus khaki trouser. His legs and hands as well as his clothes had blood stains. Because members of the public were hostile, he locked the accused first and then informed the OCS as they did not have a car at the patrol base. The OCS sent a car and accompanied by fellow police officers they went together with the assistant chief to the scene. Before they left I asked the accused to remove the clothes he was wearing and kept them as exhibits and gave him other clothes to wear.

26. When they reached the scene they found the deceased body was covered but at the time the river did not have water. When he removed the lesso, the body was in a bad state, the head had been broken in several places, it was naked with scratches all over. They also saw a disturbance on the ground where the body was, like drag marks. They followed the drag marks and after about 100 meters from the body

found a coat which members of the public identified as his. As they proceeded they found other clothes of his, he had been dragged for about 400 meters from the direction of Nyaani market from the back entrance of Victoria Bar. He was an old man was well known by the members of the public form the area. His clothes were identified by members of the public and his employer and they were kept as exhibits. When they reached the bar, **John Makite Mutune** who was the owner told them **Scholastica Mbithe** was selling at the bar the previous night. After questioning **Mbithe** she told them that the accused and deceased were her last customers and after they left she locked the bar. That after they left she heard the accused and deceased arguing and the deceased was telling the accused to leave him alone. She thought they were drunk and went to sleep. **Mutune** also told them he left the accused and deceased at the bar the previous night. They then went to the accused's home and found his mother who told him that the accused had gone home the previous night and disturbed her and then she had reported the matter to the chief.

27. When they entered the accused's house, his other clothes did not have blood. They went back to the scene and next to the body was a big stone with blood which we suspected had been used to hit the deceased head as the deceased's head was smashed. They waited for scene of crime officers but they said they could not come that day and the OCS told him to draw a sketch plan of where the body was which he did. As it was hot and the body was starting to decompose, he took it to Machakos Level 5 Hospital.

28. From his investigations, the deceased was staying at the repotee's home and his body was found in the opposite direction to the direction of the accused person's home. The accused home was about 600 meters away. He returned to the station and removed the accused, and took him to Masii police station and was subsequently charged with the offence. On 14th April, 2011 he attended the deceased's post-mortem at Machakos Level 5 Hospital with his relatives. The post-mortem was conducted by **Dr. Okinyi** who wrote his report. He then took the accused to Masii Health Centre and requested that his blood sample be taken. On 15th April, 2011 he took the exhibit, the deceased and accused clothes and blood sample to the government chemist for analysis. The exhibits were recorded and the exhibit memo was signed and he left the exhibits there for analysis. The government analyst called them later to go and get the exhibits and the report after they finished the analysis. He went for them and took them back to the station and handed them over when he left.

29. The witness identified the clothes found at the scene as well as those that the accused was wearing which he produced as exhibit. He also exhibited the memo. He identified the person who was arrested as the accused. When they interrogated him he said the deceased was following him that night as he had nowhere to stay. After completing interrogation, he charged him.

30. In cross-examination he reiterated that the barmaid said the accused and deceased were arguing when they left the bar and the deceased was telling the accused to leave him alone. He however did not get any report that they were fighting over the barmaid. When he entered the bar where the accused and deceased were drinking, there were no signs of a fight there or broken or fallen chairs and items. When he questioned the accused he said the deceased was following him because he said he had no place to stay which was false as the deceased was staying with the reportee. It was his evidence that when the accused was taken to the police station he had panicked.

31. He stated that there were drag marks on the part from where the body was to the bar. While he did not know what the motive of attacking the deceased was, the accused's mother and his sister did not want to see him as he was a person of violence and they had no peace in the home. His mother said that he was always violent and even the assistant chief had gone to investigate the violence at home before he was arrested.

32. When placed on his defence, the accused, **Felix Maneno Kiawa,** testified that he knew the deceased who was from their clan. On 9th April, 2011, he was in their farm at home and left the farm around 12.00 p.m. and went to Nyaani Victoria Bar a club at Nyaani where he drank there till about 9.00 p.m. and went home. According to him, there were many people there. In the morning I saw police went and arrested him alleging he killed the deceased and took him where the deceased body was. They told him to get out and put the body in the vehicle. They took him with the body to Wamunyu police station then transferred him to Masii police station after which he charged in court. According to him, the blood stains on his clothing could have been due to the fact he was told to carry in deceased since he had not blood stains in his house. He maintained that he did not kill the deceased and did not know anything about the death of the deceased and prayed that he be acquitted.

33. In cross-examination, he admitted that on that night he was at Victoria Bar and was being served by PW.1 **Scholastica Mbithe** and that there were many people. He however sat on his own table alone. It was his evidence that there was no reason why he would be linked with the death of the deceased. He maintained that he did not leave with the deceased. He however admitted that people went to his home and he saw the Assistant chief, PW2 but never saw PW6, **John Makite**. He denied that his hand had no blood and he did not notice any blood stains on my clothes. He stated where the body of the deceased was, were people and he did not know why they went for him to pick the body of the deceased. He however admitted that he only mentioned the issue at the hearing when giving his evidence.

Determination

34. I have considered the evidence on record as well as the submissions made on behalf of the parties. 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.***

35. 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."**

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.

36. In this case, the prosecution's case was that on the 9th April, 2011 at about 10.30 pm the accused and the deceased were drinking at Victoria Club Nyaani. After the bar was closed they left together and they were heard by PW1 who served then at the said Club arguing with the accused insisting that they go together with the deceased but the deceased insisting that he would not go with the accused since they were going to different destinations. The following day the body of the deceased was found lying next to the road having been badly injured. It was naked and next to it was a big blood stained stone. His clothes were found next to him similarly blood stained. In the meantime, the accused's mother had reported to the area assistant chief, PW2 **Titus Mbole Musyoki,** that the previous night the accused had broken the door to her kitchen.

37. When the members of the public including PW2 and PW7 who was related to the accused went to his house they found him asleep and he refused to open the door and only did so when they threatened to break the door. They found him in blood stained clothes and his hands also had blood. He was then arrested and taken to the police station. When his clothes were taken to the Government Chemist for analysis it was found that the blood stains on his clothes were those of the deceased.

38. In this case there was no doubt as to the fact of death of the deceased. There was ample evidence from those who rushed to the scene that they found the deceased dead. The fact of death was proved by the post mortem examination report.

39. As regards the cause of death, the post mortem report showed that the cause of the deceased's death was a head injury causing subdural haematoma caused by blunt trauma and fracture to the ribs caused by a blunt trauma. In other words, the deceased did not die a natural death but was murdered.

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

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

41. 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."

42. 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."

43. 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."

44. 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."

45. **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."

46. 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."

47. In this case, 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."

48. 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."

49. 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."

50. 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."

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

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

52. In **Teper v. R [1952] AC at p. 489** the Court had this to say:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

53. In this case the evidence is that deceased and the accused left the Club together past 10.30 pm. That the accused arrived home late was confirmed by the report made by his mother to the area assistant chief the following day. The following day the deceased was found dead by the roadside. There is evidence that after they left the bar there was a disagreement between the two with the accused insisting that they go together and the deceased refusing. The evidence was that the deceased was staying in PW7's compound yet the accused insisted that they proceed together. There is evidence that the deceased was dragged from the Club up to where his body was found the following day.

54. That the deceased was dragged corroborates the evidence of PW1 that the deceased had refused to go with the accused.

55. The following day the accused was found with his hand and clothes blood stained. This was the evidence from PW3 and PW7. It was found that the blood on his clothes were the deceased's blood. Whereas the accused attempted to explain that the blood on his clothes could have been due to the fact that he was compelled to carry the deceased, there was no explanation as to why PW7, his own relative would give such damning evidence against him. PW6 testified that when the accused was taken to the Station he was in a state of panic.

56. This was a case where the accused was the last person who was seen with the deceased. He left together with the deceased and after a disagreement between them the deceased was dragged away. Regarding the doctrine of "last seen with deceased" the Nigerian Court case of **Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006** states that:

"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

57. In yet another Nigerian case the court considering the same doctrine, in the case of **Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** opined thus:

"**The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."**

58. Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of **Ramreddy Rajeshkhanna Reddy & Anr. vs. State of Andhra Pradesh, JT 2006 (4) SC 16** the court held:

"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."

59. In this case there is corroboration from the DNA test results which confirmed that the blood found on the accused's clothing were those of the deceased. There was evidence that long before the accused was arrested and before he was allegedly forced to carry the body of the deceased, his body and clothes were blood stained. Based on the evidence on record, I have no doubt in my mind that the death of the deceased was caused by the accused.

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

61. 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.***

62. 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 there was evidence that the death of the deceased was head injury causing subdural haematoma caused by blunt trauma and fracture to the ribs caused by a blunt trauma and a blood stained stone was found near the body. There was evidence that the deceased was dragged away and before then the deceased had refused to accompany the accused to wherever the accused wanted him to go. By his behaviour, it is clear that the accused tried to lure the deceased to go with him and having failed to do so dragged him up to where the deceased met his death. The accused had the opportunity and was the last person to be with the deceased before the deceased was found dead. I find that malice aforethought was proved beyond reasonable doubt.

63. In this case, the fact that the accused was the last person to be seen with the deceased and the presence of the deceased's blood on his clothes satisfy me that the the inculpatory facts against the accused are incompatible with his innocence and are incapable of explanation upon any other reasonable hypotheses than that of his guilt; I am unable to find any other existing circumstances which can reasonably be said to have weakened the chain of circumstances relied on by the prosecution. As was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR**:

> **"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-**
>
> **'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"**

64. The evidence placed before me leaves me with no reasonable doubt that the prosecution has proved that the accused on or about 9th April, 2011, at Nyaani, Machakos County, murdered one **Joshua Wambua Muli.** He is therefore convicted of the said offence.

65. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 13th day of December, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for Mr Muumbi for the accused

Miss Mogoi for the State

CA Geoffrey