



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 2 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MUTUA KIMANZI

JOSEPH MUSYOKKA

STEPHEN MUTHUI.....ACCUSED

JUDGEMENT

1. The accused herein are charged with two counts of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that on the night of 25th and 26th October, 2010 at Musuani Trading Centre, Musuani Sub location Migwani Sub-county within Kitui County, they murdered **Joseph Muthui Katu** in Count I and **Musili Munyasya** in Count II.

2. The hearing of this case started **Jaden, J** and was subsequently taken over by **Mutende, J**. However, after the delivery of the ruling on case to answer, the accused expressed dissatisfaction with the manner in which the said ruling was delivered and as a result **Mutende, J** recused herself from the matter and transferred the matter to this court for hearing. When the matter was placed before me the provisions of section 201(2) were complied with and the accused persons opted to proceed with the matter where it had reached.

3. In this case the prosecution's evidence was that on 26th October, 2010, at about 12.30am after it had rained, PW1, **Paul Munyasia Maluki**, was asleep in a rear room in his shop which is within his mother's compound when he heard his dog barking outside. The said premises are three rooms with interconnecting doors with one used as his bedroom while the other two are the main shop and the store respectively. When he got up he heard some people walking towards the rear door of his shop and heard the rear door to the shop being broken. He accordingly armed himself with a bow and five arrows. Through an opening on his bedroom door he was able to see light from one of the three rooms where the main shop was. He then moved to the room next to the shop which was used as a store which had two locks, one outside and one inside. While the outer lock connecting the store with the shop was broken, the inner one was intact. He could hear the people outside trying to break the door but upon failing to do so they started breaking the window of the room where he was and when the window was opened he saw one of the intruders flash the torch light into the room many times. Whereas he was hiding at a corner where he could not be seen, it was his evidence that he saw one of the attackers whom he identified in court as the 1st accused with the help of the moonlight. According to him, as the torch which the intruder had was being flashed inside, its light was reflected on the bearer of the torch, the 1st accused, who had some wounds on the lips and was wearing a black jacket. However, the 1st accused was not known to PW1 previously.

4. Pw1 then changed positions and moved to the door and through the opening flap hole measuring about three inches in diameter which is at the centre of the door, he saw somebody standing outside. He shot at the person using the bow and arrows and heard the man saying in Kikamba that he had been shot, though he could not recognize the voice. He then heard footsteps of the people running away from the shop and alerted his wife at home who in turn alert other neighbours. He also called the pastor and informed him of the matter. He also called and many other people seeking assistance. Once he was told that it was safe to leave, he opened the door and went outside. According to him the intruders had been in his shop for about 30 minutes from the time he became aware of their presence.

5. He, in the company of 7 other people then decided to follow the footsteps of the said attackers with the other people following of foot using torches while himself and another person called **Kyalo Kako** drove behind them. According to him there were footsteps of four people and while three of them were shoe prints, one was bare footed. One set of the shoe prints were those of "safari" boots kind of shoes. They followed the said foot prints up to near Musuani Shopping Centre where they lost the foot marks since from that point it had not rained. Their search took them to the junction of Mwingi-Kitui-Garissa road but upon failing to trace anyone they decided to return back. On their way back upon reaching Musuani Trading Centre PW1 saw two watchmen known to PW1 standing outside one of the shops. He stopped the motor vehicle and upon asking the two what was wrong, they were informed that some unknown people had damaged the security light of

the shop. When they alighted from the vehicle PW1 saw a trail of blood outside the shop on the ground. However, the two watchmen did not mention anything about the blood. They were however unable to see the third of the watchman who used to guard the next shop. Upon looking around in an ongoing construction nearby they saw a lot of blood and one pair of shoes, a wrist watch and an empty plastic crate. On further following the trail of blood, they found the body of the said missing watchman, known as **Muthui Katu**, the deceased in Count I, in the shrubs. They then notified the said deceased's employer, **Ngui Kathuli**, who soon thereafter arrived at the scene in a motor vehicle. According to PW1, the same footmarks they had followed from his shop are the same footmarks they found at the undeveloped plot where they found the body of the deceased, **Muthui Katu**. Though ground on that developed plot consisted of soil and there was no rain, they could however see the marks of the shoes on the soil.

6. After that PW1 in the company of the others together with area assistant Chief and the Chief returned to his shop where they were for about 20 minutes before returning to Musuani Trading Centre where they found police officers including the area OCS at the scene. Since there was another watchman who could not be traced they moved around other shops at that shopping centre. In the shop of **Mutemi Kavila** within the same trading centre the body of that other watchman who guards that shop, one **Munyasia**, was found dead in the small house that used to house the watchman as the sentry. Upon discovery of this body, they alerted the police to the second scene of death and the OCS and the OCPD went to the scene. By then it was around 6.30am and PW1 was told by the OCPD to go back to his shop to wait for the scenes of crime officers. When he was with the said officers till about 11.00 a.m. when the scenes of crime officers took finger prints then left.

7. On 27th November, 2010 at about 9.00 a.m. PW1 was called by the area OCS who requested him to accompany him to Mwingi Police Station. At the Police Station he went to the office of the DCIO where he was informed about an identification parade which was to take place. He was then taken to the parade which was within the police compound and was told to identify the person whom he had said he had seen in his shop. He went through the line of about eight people and picked the 1st accused whom he had seen at his shop. According to him, the 1st accused had wounds on the lips as he stated earlier so he was able to pick him out.

8. In cross-examination, PW1 reiterated that he did not know the 1st accused before the material time and he did not know where the 1st accused was arrested at. According to him, the 1st accused had wounds on the lips and had a black jacket though this was not recorded in his statement which only indicated that the 1st accused had some black clothing. According to him, he was not aware if any of the accused persons in court had any wound from the arrow he shot. Neither did he have any evidence whether any of the accused persons had safari boots and was unaware if safari boot shoes were recovered from any of the accused persons. According to him, there were some rains that night even at Musuani Trading Centre.

9. PW1 stated that he did not tell the neighbours who went to his house that he had shot somebody with an arrow and he did not witness the killing of the watchmen.

10. PW2, **Silas Musyoki Masai**, was on 26th October, 2010 at about 1.00 a.m. called by PW1 who informed him that he had been attacked by robbers at his shop and he was looking for help. According to PW2, his house is just one kilometre from PW1's said shop. PW2 got up and with the help of a torch proceeded to the shop while still communicating with PW1 on phone and when he did not see anybody around at the shop, told PW1 to open. Other neighbours who had been called by PW1 also arrived at the scene and he opened. Upon seeing footsteps of three people on the ground they decided to follow them. One of the footsteps appeared like the person wore Safari boots while the other two sets were of different type of shoes. Using torches, they followed the footsteps while PW1 followed them in his motor vehicle and when PW1 caught up with them, they got into the motor vehicle and drove to the main road to Musuani Trading Centre. By then they were unable to follow footsteps.

11. At the said Centre, a watchman who was known to them walked to the motor vehicle and from him they learnt that there had been an attack at the shops there. Upon closely checking the veranda of the shop he saw some blood stains whose trail led them to some empty plot which was not developed where they found the body of a watchman whom he knew as **Muthui Katu** (deceased) with some head injuries on the body. They then relayed the information to the owner of the shop and police officers who went to the scene and the body was removed from the scene by police officers. Since there was another watchman by the name **Kisiele** who was said to be missing from one of the shops, they started looking for him and found his body at the guardhouse near the shop he used to guard. He noticed that there was blood where the body was. Though some people dispersed since it was morning, some of them remained at the scene and decided to follow the same set of three footsteps up to an area called Kavuuwani up to another market known as Soweto. They were joined by police officers from Mwingi Police Station as well as the OCS from Migwani Police Station. They also received information from the villagers there that a person had been seen running. They however failed to trace the said person. Later, he heard of arrests having been made and recorded statement. He however never saw the people who killed the watchmen.

12. Just like PW2, PW3, **Charles Kyalo Kako**, on 26th October, 2013 at about 1.00 a.m. received a telephone call from PW1 who informed him that he had been attacked at his shop at Kwa Karanga area not far from PW3's home. He then woke up two young men and they proceeded to the said shop where they found other people. PW1 informed them that he had shot one of the attackers with an arrow. PW3, who had a motor bike then took PW1 to his house and upon his return, they then followed footsteps from the scene up to Musuani Market. He was in the motor vehicle belonging to PW1. According to him, there were three sets of footsteps, one of which had no shoes while the other two had shoe prints. At Musuani Market, the footprints which were on the soil surface disappeared. They then went up to Garissa Road but did not see anything after which they returned to Musuani Market where they found a watchman who showed them a broken light at one of the shops and said he had heard footsteps. On looking around, with the help of torches, they followed some blood stains from the said shop up to some incomplete shop where we found a dead body whom he later came to know from the crowd was that of **Muthui Katu** (deceased) where there was a lot of blood. After briefly returning to PW1's shop they returned to the said market where they heard some screams and learnt that another dead body had been recovered. Though he went to view the said body, he found that it was not of a person known to him. Since it was coming to daylight he returned home.

13. In cross examination he stated that he did not know **Muthui Katu** the deceased by name but only knew him by appearance and that he did not recognize him at the scene.

14. Just like PW2 and PW3, PW4, **Rodgers Mwangangi** was at home sleeping when at about 1.20am he received a call from PW1 who

informed him of an attack at his shop and that he needed assistance. PW4 got up and went to the road where he met a group of people walking with PW1 in a motor vehicle following footsteps of the attackers. As he joined in the tracking, he saw three sets of footprints one of which had no shoes while the other two sets were made by shoes. However, at Musuani Market, the footprints disappeared and they went in PW1's motor vehicle up to Garissa Road but turned back as there were no footprints. Upon returning to Musuani Market, a watchman known as **Kitheka** called them and showed them a shop which had a broken light. Upon proceeding to the shop, they looked around and saw some blood stains at the corridor of that shop whose trail they followed using torch light up to a nearby incomplete shop where we found the body of **Muthui Katu** (deceased), a watchman at one of the shops there. They then relayed the information to the area sub-chief who went to the scene and also telephoned police officers.

15. According to PW4, they looked around for one more watchman who could not be seen and found his body at the guard house next to the shop where he used to guard. He however did not know this second watchman by name but knew he used to guard the shops there. The bodies were removed from the scene by police officers.

16. The assistant Chief of Kasevi Sub-location PW5, **Francis Sila Ngue**, testified that on 26th October, 2010 at about 2.00 a.m. at night, he received a telephone call from a community policing member that there were thugs who had broken into the shop of PW1 and that they were trying to track them. He was also informed that a person had died. He telephoned the assistant Chief of Musuani sub-location where the attack had taken place and also relayed the information to the Chief then started off to Musuani Trading Centre. On the way he was joined by the Chief and together they proceeded to the said Trading Centre where they found the assistant Chief of the area as well as the police who collected the body of the dead person. Soon thereafter a second dead body was found at the same trading centre. The two dead people were watchmen known as **Musili Munyasia** and **Muthui Katu**.

17. According to the witness, there were footprints visible on the ground as it had rained and together with the members of public they followed these footprints up to Soweto area where one set of footprints resembling Safari Boots diverted from the rest. They split into two groups one of the groups following the Safari Boot set of shoe/footprints and the other group the other footprints with him joining the group tracing the other footprints. At some point his group again split into two because the set of bare footprints also diverted. He followed the prints from the bare footprints up to a homestead with three houses. The time was now about 2.00 p.m. At the homestead, a person spotted them from one of those houses and ran away. It was his evidence that the person was unknown to him prior to that day, though he saw him at a distance of about 30 meters. Their attempt to put up a chase did not succeed. It was his evidence that the said person was the 2nd accused (identified) whose name, **Joseph Musyoka Muvengei**, was given by one of the neighbours who recorded a statement. He then telephoned the OCS who went and entered the house of the 2nd accused. After a search, they recovered a blood stained cracked '*rungu*' which the witness identified in court. Upon failing to trace the 2nd accused, they returned to Musuani Trading Centre.

18. In cross examination he stated that he only identified the 2nd accused in court and that he did not disclose in his statement the reason why he was able to identify the 2nd accused. He was however not present when the 2nd accused was arrested and he was not called to any identification parade. According to him he heard the 2nd accused's name from the neighbours who said the house from where the 2nd accused had run out was his (2nd accused) house. In his evidence, he knew the footprints belonged to the 2nd accused because the footprints led to his house.

19. According to PW6, **Julius Kimanzi Katu**, a brother to **Joseph Muthui Katu** (deceased) on 26th October, 2010 at about 3.30 a.m. he was asleep at home when he received a telephone that his said brother had been injured by thugs. He proceeded to Musuani Trading Centre where his brother was and found many people at the scene. He learnt that his said brother who was employed at Musuani Trading Centre as a watchman had been killed by thugs. According to him, the body of the deceased was about 20 meters away from the place where he used to work and had head injuries. Another watchman known as **Musili Munyasia** of the same trading centre had also been killed. Both bodies were removed to the mortuary.

20. On 1st November, 2010 at about 2.00 p.m. he was at Migwani Hospital when a post-mortem was carried out by the doctor and he identified the body of his late brother to the doctor.

21. PW7, **Julius Nguu Kathuli**, on 26th October, 2010 at about 2.00 a.m. at night received a telephone call informing him that his watchman **Muthui Kati** who was guarding his shop at Musuani Market had been killed. He proceeded to his said shop where he found many people at the scene and saw the dead body of his watchman who had head and neck injuries. According to him, his watchman used to have bow and arrows in the course of his duties which were bought by him and the bow bore his initials "NK". They did not find the bow and arrows at the scene of death. When he went into his shop, he found that the shop had been broken into but nothing had been stolen. The body of a second watchman was also found in the same trading centre.

22. According to his evidence, there were some footprints of an ordinary shoe on the ground as well as some footprints of a safari boot and bare footprints. There were also some footprints of a dog. Upon following the footprints, up to Soweto area, the safari boot set of footprints diverted to another direction and was followed by some members of the group. He however continued following the other set of footprints. After about 500 meters beyond the stream one set of footprints of an ordinary shoe and those of a dog led to one homestead which they entered and about 20 meters from a house he saw a man get out of the house and run away. Since it was between 11 – 12.00 p.m. he saw the person well and identified him as the 3rd accused (**Stephen Muthui**). He however did not know him prior to that day. On entering the house from where the 3rd accused had run, he saw his bow and arrows under the bed bearing his initials "NK" carved on the same (seen). He identified three arrows which were also in the house of the 3rd accused and asserted that he was the one who bought them. He however stated that the arrows did not have any special mark and stated that he handed over the bow and arrows to the Chief who gave them to the police. According to him, those who ran after the 3rd accused did not manage to catch up with him.

23. On 28th November, 2010 he was summoned by the OCS to Mwingi Police Station for an identification parade where he was able to identify the 3rd accused, **Stephen Muthui Kamonzo**.

24. In cross-examination he stated that he did not know how the 3rd accused was arrested and that the first time he saw the 3rd accused was

when he ran away from his house and that the next time he saw him after arrest was at the parade. According to him, the bow which had his initials was passed to him by his father while the arrows were bought from the market from one **Munyua**. In his evidence, the bows and arrows were on the floor at a corner in the house. He explained that the reason he believed the house belonged to the 3rd accused was because he ran out of it. He however did not know the 3rd accused before. He confirmed that Chief **Samuel Muthengi Mwangangi** was one of the people he was with at the home of the 3rd accused whose appearance was general with no special mark. In his evidence, the house of 3rd accused is about six (6) to ten (10) km from Musuani Trading Centre. He disclosed that though he knew the old man from whose homestead the bows were recovered as the father of the 3rd accused, he did not know the 3rd accused. Nor, did he witness the killing of the watchmen.

25. PW8, **Samuel Muthengi Mwangangi**, the Chief of Thokoa Location on 26th October, 2010 at about 2.30 a.m. at night received a telephone call from the Assistant Chief who informed him of the death of two watchmen at Musuani Trading Centre. He proceeded to the said market where he found many people gathered there and saw the bodies of the deceased, **Muthui Katu** and **Musili Munyasia** which had injuries on the head. According to him apart from the electricity lights at the shops, they also had torches. They informed the OCS of the matter and then followed some footmarks from the scene. His group ended up following the prints of ordinary shoes up to some homestead Kavugwani where the shoeprint led to some house from where a man ran out. When they saw the man, he was about 20 meters away. According to him, the time was about 4.30 a.m. going towards 6.00 a.m. and there was light and he could see although the sun was not yet out. In his evidence, the 3rd accused (identified) is the person he saw running out of the house into the bushes. He however did not know the 3rd accused before and that was his first time to see him. He testified that a “rungu”/stick and a bow and arrows were found in the house that the 3rd accused had run out of.

26. On 28th November, 2010 he was at Migwani Police Station where he recorded a statement and participated in an identification parade where he identified **Stephen Muthui Kamonzo**, the 3rd accused. He identified the bow and three arrows. He however denied that the “rungu”/stick shown to him in court was the one he had seen in that house. He however confirmed that the bow had the initials “NK” and were identified by the owner. While there was a “rungu”/stick which was recovered from where the bodies were found, he stated that the stick that he had talked about was not in court.

27. In cross-examination, he stated that the police picked the stick found near the bodies but reiterated that the one in court was not the one recovered where the bodies were and he did not know why the stick was not brought to court. According to him, the bow and arrows were recovered in his presence and the bow was hanging in the house of the 3rd accused at the corner while the bows were on a table. He however clarified that it was PW7 who recovered the bow and arrows and that though he did not enter the house where the bow and arrows were recovered, he stood at the door way and saw the same being recovered. He however, had never seen the 3rd accused before and only came to know the name of the 3rd accused after the arrest. It was his evidence that after the identification parade the OCS gave them the name of the 3rd accused during the time they recorded statement. He however denied that he saw the 3rd accused in the cells before the parade. Though he could not recall the name of the people who gave them the names of the 3rd accused at the homestead from where he ran away, he said that his name was given to them at the homestead as **Stephen Kamonzo** and that he saw his face when he was running out of the house.

28. PW9, **David Mutemi**, testified that on 4th November, 2010 at about 2.30 p.m. he was at Migwani Hospital where he identified the body of his uncle **Musili Munyasia** to the doctor who carried out the post-mortem.

29. On 26th October, 2010 at about 2.00 a.m. at night PW10 **Makau Kithuka**, a Senior Assistant Chief in Musuani Sub-location was at his home when he received a telephone call from one **Rodgers Mwangangi Mutemi** (PW4) who is a resident of the area informing him of a robbery incident at Musuani Trading Centre where a watchman was said to have been killed. He received another call from a neighbouring assistant Chief who also made a similar report. He then proceeded to the scene and also informed his area Chief of the matter who organized for a motor vehicle to pick him up. The owner of the motor vehicle had some young men in the motor vehicle and together they proceeded to the scene where they found the body of the dead watchman just outside Musuani Trading Centre. **Julius Ngui** (PW7) the owner of the motor vehicle that picked him is the one who showed him the scene. The body of the watchman, **Muthui Katu**, who was known to him, was lying in some undeveloped part of the trading centre and had injuries while blood stains were on the ground and there were signs of struggle at the scene. He then telephoned the OCS who went to the scene together with other police officers.

30. Using torch light, they track the footprints that led from the scene made by some boots, pair of shoes, bare feet and those of a dog. The said footprints led them to another room within the same trading centre where they found a body of another dead watchman whom he knew as **Musili Munyasia** with injuries and blood. The members of public decided to follow the killers and he, together with some police officers and the Chief, accompanied the mob up to Kavugwi Sub-location which neighbours his sub-location. Since it had rained the footprints were visible. They followed the footprints up to Soweto Village in Kavugwi Sub-location where the footprints split into three directions that is barefooted, the plain shoe print and the one for the boots. The dog prints accompanied the bare footed prints. They divided themselves in three groups with one security officer in each group and he followed the shoe prints from the boots up to some homestead. Just then about three metres from him a brown man about five feet tall carrying a yellow paper bag ran out of a roofless house in the homestead. He tried to get hold of him but failed to do so. The time was about 2 – 3 p.m. Because of the slipperiness of the ground, the man skidded and the yellow paper bag fell down but he ran on through the farm and entered a nearby bush. Upon picking the yellow paper bag he checked it and saw a T-shirt that had fresh blood stains. In the said yellow bag was a piece of paper with a sketch map of some buildings and names and roads. There were also three black Safaricom SIM wallets. One of the wallets contained a voter’s card with the name **Joseph Mutua Kimanzi**. There were also some papers in the yellow paper bag containing details of how one can defend himself in court and a photocopy of a charge sheet with the same name of **Joseph Mutua Kimanzi**. In the yellow paper bag was also a religious book with the name “Yohana Mtakatifu”.

31. After the man managed to disappear, he telephoned the OCS, **CIP Charles Ouma**, who was within the area in the company of other police officers following from behind and handed over the yellow paper bag with its contents to him. They continued looking for the suspect in the forest but gave up at about 5.00pm when they could no longer see any footprints. The following day, PW10 went to Migwani Police Station to record his statement.

32. On 27th November, 2010, the same OCS, **CIP Charles Ouma**, telephoned him and asked him to meet him at Misuani Shopping Centre

where the OCS informed him that some suspects had been arrested and he was required to go to Mwingi Police Station to see if he could identify the suspect who had dropped the paper bag there. I proceeded to Mwingi Police Station the same day where he was shown eight men who were standing in a line outside at the rear of Mwingi Police Station buildings but within the compound of the police station. The said OCS left me in the motor vehicle within the police station then another police officer went for him and led him to the parade. It was his evidence that **CIP Ouma** did not accompany him to the parade and he could not recall the name of the male police officer who took him to the parade. In his evidence, the parade consisted of eight men of the same size more or less and similar complexion. He identified, by touching his shoulder, the 7th man in the parade as the one who had dropped the paper bag since the said man had looked at him when the paper bag dropped. He noted that his lips appeared "reddish" in colour and also noted a bruise that was at the back of the palm of his left hand as well as his face. According to him, he had not seen the said man again from the date of the chase to the date of the parade and he did not know him before the date of the chase. I was alone when I identified the said man at the parade.

33. According to PW10, the deceased, **Musili Munyasia**, was his uncle and he identified his body at Migwani Sub-district Hospital Mortuary for the purposes of post mortem examination.

34. He identified the yellow paper bag, the yellow T-shirt with blood stains, the piece of paper with the sketch map showing buildings and roads, the two Safaricom wallets both black in colour, the voters card with the name **Joseph Mutua Kimanzi**, pieces of paper containing defence details, the photocopy of the charge sheet with the name **Joseph Mutua Kimanzi** and the book "Yohana Mtakatifu" in court.

35. According to PW10 the 1st accused (identified) is the one who dropped the yellow paper bag and the one he identified at the parade and he came to know his name later as **Joseph Mutua Kimanzi** from Chief Mulyungi of Kavuvani Location.

36. In cross-examination, PW10 stated that the first report of the incidence was made to him at night at about 2.00 a.m. at night from **Rodgers Mwangangi Mutemi**. He also received a telephone the same night from **Francis Sila Nguwe**, an assistant Chief. These telephone calls informed him of the attack at Musuani Market. Though he could not recall the exact time he proceeded to the scene of attack he estimated that it was about 3.00 a.m. at night. At the scene he found many people over 50 gathered and crying. He reiterated that he knew the dead watchman, **Muthui Katu**. He then telephoned the OCS who arrived at the scene after about fifteen minutes and took over the scene while they looked around with a torch light. It was then the footprints led them to the place where the body of the second watchman was. According to him, it had rained on the material night and the footprints leading to the second body had not been interfered with as the footprints from the crowd did not mix up with the footprints leading to the second dead body. There were footprints of boots like boots, footprints of a plain sole of shoe, footprints of bare feet and the footprints of a dog. The OCS had a bright torch which could illuminate the area in as good a manner as electricity light. It was his evidence that the second body was in the watchman's shed next to the front of the shop. All the four sets of footprints led to the second watchman, **Musili Munyasia**, who was his uncle. He however was not at the scene at the time of the death. The said footprints led them up to Kavuwani Sub-location, about ten (10) kilometres from the scene in the homestead the 1st accused ran away from. According to him, he followed the footprints over the road and through the bushes. He however did not know the owner of the homestead and he did not enter any of the houses in the said homestead but there were 3 – 4 people standing outside the houses. These people were three men and one woman. The man who ran out of one of the houses was not among the four people they found outside the houses. It was his evidence that he was the one leading in the group that gave chase to the running man and he saw the running man drop the yellow paper bag.

37. Referred to his statement, he admitted that the same reflected the contents of the paper bag as the T-shirt which was blood stained, book with sketch map, voters card and documents with court proceedings but did not mention the two wallets. According to him, they recovered the yellow paper bag at about 4.00 p.m. in the later afternoon. Dawn found them at Musuani Trading Centre at the scene and they reached Soweto Market at about 2.00 p.m. All the time they had been following the footprints which were visible to them though over the tracking through the road and through the bushes. The search ended at about 5.00 p.m.

38. According to him, a height of 5ft is about shorter than his height and the complexion of the person they chased was brown and a bit slim. It was his evidence that **Samuel Mwangangi Muthengi**, the Chief was not in a group that led to the homestead where the chase of the man with the yellow paper bag took place though **Paul Maluki** was in the said group.

39. PW10 reiterated that he met **CIP Ouma** at Musuani Market and they proceeded to Mwingi Police Station for the parade but denied that he was shown the photograph of the suspect by CIP Ouma. Another officer led him to the parade (that is other than CIP Ouma) and he came to know the name of the 1st accused later. He denied that the documents he identified in court were found at a mortuary.

40. According to PW10, he connected the 1st accused to the offences herein because of the footprints they had followed which were similar to the ones he left behind during the chase. He insisted that the 1st accused in court was brown.

41. PW11 **Dr. Christopher Wahinya**, was called to produce the post mortem reports which were filled in and signed by **Dr. Mungai Kelvin** with whom he worked briefly and could identify his handwriting and signature. After his Masters, **Dr. Mungai** left the country for South Africa. PW11 was however familiar with his handwriting and signature through the Hospital records. He recognized the said handwriting and signatures in the post-mortem forms that he identified. According to the post-mortem form for **Joseph Muthui Katu**, the post-mortem was carried out on 1st November, 2010 at 2.00 p.m and the body was identified to the doctor by **David Kamau Muthui** and **Julius Kimanzi Katu**. The body was that of an African Male aged about 60 years old. Externally, there were blood clots covering his face, a wound 2cm above the left ear that is left temporal region, cyanosis and petechial present and bruises, blood oozing from nostrils, ears and mouth and minor grazes on the forehead. Internally, all the systems were normal except the head which was covered with blood and oozing blood from nostrils and ears with a cut wound 2cm in the temporal region. There was extradural haemorrhage at the temporal region and base of the skull fracture. The opinion was that the cause of death was basal skull fracture and extra-dural haemorrhage caused by a blunt force applied on the head on the left temporal region. The post-mortem report was filled in and signed by **Dr. Mungai** and dully stamped on 1st November, 2010 and was produced as an exhibit.

42. The other post-mortem report was for **Musili Munyasia** in respect of a post-mortem carried out on 4th November, 2010 at 2.00 p.m. by **Dr. Mungai**. The body was identified by **David Mutemi** and **Makau Kithuka** and belonged to a male African of about 70 years.

Externally, there were blood clots on the face dripping from the nostrils, ears and mouth and the body was pale. There was a 2cm wound below the left ear and blood clots were also present. The wound was also 2cm deep and several teeth were missing. Internally, all the systems were normal except the head where there was a puncture wound below the left ear with blood oozing through the mouth, nostrils and ears. There was basal scalp fracture with extradural haemorrhage. The doctor's opinion was that the cause of death was due to basal scalp fracture leading to extradural haemorrhage caused by a sharp object. The post-mortem form was dully filled in, signed and stamped by **Dr. Mungai** and was produced as an exhibit.

43. In cross-examination he said that in the first post-mortem there was only one blow and there was no indication of any struggle. The 2nd post-mortem indicated more than one blow where there the wound and the missing teeth and the blood oozing from both ears and nostrils. The blow that lead to the death was one but there could have been other blows.

44. PW12 **C. I. Sarah Rono** was the Officer in Charge Crime at Mwingi Police Station. She was in charge of investigations at Mwingi Police Station when on 28th November, 2010 at about 3.00 p.m. she was requested by **C.I. Ouma** the OCS Migwani Police Station to conduct an identification parade. I.P. Ouma gave her the list of four witnesses and three accused persons. She asked where the accused persons were and was told that they were at the CID Offices at Mwingi Police Station. She prepared the area where she was to conduct behind Mwingi Police Station at the police lines that is the area between the administration block and the police lines went to the cells and got eight parade members aged between 25 and 35 years. She had by then checked the accused persons and to her they appeared to be between the age of 25 – 35 years. She picked a mix of dark people, tall people and short people so that the witness identifying would not have it easy. However, **Joseph Mutua** the 1st accused refused to participate in the parade saying the CID Officers had circulated his photographs all over. He then went to the 2nd accused (identified) **Joseph Musyoka Muvengei** to whom she explained that she was the Investigation Officer but that he could choose where to stand between the eight parade members. The 2nd accused accepted to participate in the parade and she called the first witness, **Harrison Kivuna Kathuli**. The said witness went through the parade two times but he did not identify the witness and left. One **P.C. Joseph Kanumba** took the said witness to the office of the OCS located about twenty meters from where the parade was being conducted. The 2nd accused chose to remain in the same position that is between parade members No. 5 and 6 although he had been informed him of his right to change the position. She then called the second witness, **Julius Kathuli** (PW7) who went and checked the parade but could not identify the suspect. She then informed the 2nd accused that he was at liberty to change his position but he chose to stand at the same position that is parade member No. 5 and 6. She then called third witness after the 2nd witness had been taken by **P.C. Kanumba** to the office of the OCS. The witness went round the parade several times but failed to identify the 2nd accused and he was then taken to the office of the OCPD about 100 meters away. The 2nd accused still chose to remain between parade member No. 5 and 6 and she called the forth and last witness **Francis Sila** who went round the parade but he could not identify the 2nd accused. Being through with the first parade, he 2nd accused was taken back to the cells.

45. PW12 then arranged another parade for **Stephen Muthui Kamanzo** the 3rd accused at the same place and with the same parade members. She went ahead and brought witness. She explained to the 3rd accused of the right to choose where to stand and that she was carrying out a parade. The 3rd accused accepted to participate in the parade and chose to stand between parade member No. 4 and 5. She called the first witness, **Francis Sila** from the cashier's office who went through the parade but failed to identify the witness and was taken back to the cashier's office. She informed the 3rd accused if he wished to change his position before she called in another identifying witness but the 3rd accused chose to remain between position No. 4 and 5. She called a second witness, **Samuel Mwangangi** who was at the OCPD's Secretary's office and the said witness went to the parade like four times then identified the 3rd accused by touching him and was taken back to the office of the OCPD's Secretary. She then informed the 3rd accused that he was at liberty to change positions and he went ahead and stood between member No. 6 and 7. She then called a third witness, **Julius Kathuli** from the office of the Deputy OCS who went through the parade about 7 times about 7 times then identified the 3rd accused by touching his head and was then taken back to the office of the Deputy OCS. The 3rd accused opted to change his position and stood between member No. 3 and 4 and called the 4th identifying witness, **Harrison Kathuli** who went through the parade two times but failed to identify the suspect and was taken back to the office of the OCS.

46. Both the 2nd and 3rd accused signed the identification parade forms saying they were satisfied with the way the parade was carried out and she dispersed the parade members and they were taken back to the cells. She handed over the parade forms to the investigating Officer **C I Ouma** who was about 15 meters away from where she was carrying out the parade. She identified the said forms.

47. PW13, **Ngui Kavila**, was on the night of 25th and 26th October, 2010 on duty as a watchman of a shop at Muguani when at about 1.00pm he heard some noise outside. When he asked who the people were he heard the door being banged and the intruders ordered him to go outside. He then blew his whistle and screamed and heard many people talking outside. When he opened the door he saw blood. Upon following the stains, they found a dead body of **Muthui**. According to him the fluorescent electric light was broken that was outside the shop. It was his evidence that the voices he heard were for about three people but he did not see them. He however did not observe the body to see where it was bleeding. According to him, it was dawn when the body was found.

48. PW14, David Kamau Muthui, identified the body of his brother at the mortuary on 26th November, 2010.

49. After the accused persons were placed on their defence, they chose to give sworn evidence but had no witnesses to call.

50. According to the 1st accused, **Joseph Mutua Kimanzi**, on 25th October, 2010 he woke up and took tea and went farming till 3.30pm when he returned home. He took food at 9.00pm, listened to news and slept. On 27th November, 2010 at 9.30 pm his wife woke him up that there was light outside and that someone was knocking the door. When he opened the door he saw a police officer who was in a relationship with his sister, a relationship which his family was against since, being Muslims, the said police officer ought to have converted to Islam if he wanted to have a relationship with the said sister. The said police officer had asked for more time to think the mater over but later declined to convert after which he threatened the accused. On that day the officer was accompanied by other officers. He entered the house and conducted a search and only took away his ID Card which was never returned to him. He was then arrested and taken to Mwingi Police Station. He never saw the police officer who took the T-shirt.

51. According to him, in the affidavit sworn when the police sought to detain him for 14 days, it was indicated that the deceased was attacked by unknown people and that he was suspected of having committed murder and he produced the same.
52. According to him, PW1 lied to the court that his shoes were traced since he does not have safari boots. It was his evidence that he never saw the yellow bag or the voter's card which were mentioned by PW10. It was his evidence that no identification parade was conducted in his case and he never saw the investigating officer testify in the case and no exhibits were produced. It was his evidence that no witness testified that they saw him at the scene and insisted that he was only arrested due to the grudge by the said police officer.
53. In cross-examination he stated that his name is **Joseph Mutua Kimanzi** and his father is **John Kimanzi Ukundi** while his mother is **Ruth Ndururu Kimanzi**. He also had sisters and brothers but they were all deceased save for a sister, **Rose Nzambi Kimanzi**. He admitted that among them there is no Islamic name. He stated that the affidavit he relied on was dated 29th November, 2010 and was in respect of **Joseph Katu** and **Musili Munyasia**, the deceased in this case. It stated they were killed on the night of 25th and 26th October, 2010 and he was arrested on 27th November, 2010, a month after the alleged murder. According to him, he had no other court case and denied that he refused to take part in the identification parade. He disclosed the name of the officer who was interested in his sister as **Francis Munai** who never testified in the case though he had recorded his statement. According to the said affidavit he was arrested as a robbery suspect. He denied that he disappeared after the incident.
54. In re-examination he noted that the police officer who conducted the parade never completed her testimony.
55. DW2, **Joseph Musyoka**, the 2nd accused, testified that he did not commit the offence. It was his evidence that he was arrested on the night of 27th November, 2010 at home and was taken to Mwingi Police Station as a robbery suspect and he referred to the affidavit in which the police sought his incarceration for 14 days.
56. According to him, he heard PW5 say that a *rungu* was recovered but the same was never exhibited and no one identified him at the parade. It was his evidence that nothing was recovered from his home and no exhibits were produced in court. At the time of his arrest he was sleeping with his wife.
57. DW3, **Stephen Muthui Kamonzo**, the 3rd accused testified that he was a businessman selling stones and on the night of 25th and 26th October, 2010 he was at home and woke up in the morning and took his breakfast and then proceeded to his work. When at work, he saw a police vehicle from Mwingi Police Station and he thought they were customers who were looking for stones. He proceeded where the vehicle was and found it full of police officers. He was then informed by **CIP Leonard Lutta** who informed him that they were from Muguani Shopping Centre within Muguani sub-county, Kitui and that they had been called and informed that there was a murder and they were going round passing information to the people. The said officer gave him his telephone number as 0727760870 and also took his own number and asked him to call the officer in case he received any information.
58. On 26th November, 2010, he was at a club in Mwingi Town when he saw **CIP Lutta** and two other people refreshing themselves. The club Manager, one **Julius Mitiso** then approached him and told him that the said **CIP Lutta** wanted him to give him Kshs 3000/= for a crate of beer. Upon telling the manager that he had no such money, he saw 4 police officers entering the club and proceeded to where **CIP Lutta** was after which they went where he was and he was ordered by **CPL Francis Munai** to stand up and raise his hands saying that he was following orders.
59. According to him, he was not found with any safari boots and none were exhibited since he had none. He never saw arrows and a bow in court and the ID parade was conducted with the same people in the accused 2's parade and the person who conducted the parade never completed her testimony.
60. He denied the testimony that he escaped. He also noted that the arresting officer never testified in the case.

Determination

61. The prosecution's case in summary is that 26th October, 2010, at about 12.30am, PW1, **Paul Munyasia Maluki**, was asleep in a rear room in his shop when he heard his dog barking outside. When he got up he heard some people walking towards the rear door of his shop and heard the rear door to the shop being broken. He accordingly armed himself with a bow and five arrows. Through an opening on his bedroom door he was able to see light from one of the three rooms where the main shop was. He then moved to the room next to the shop which was used as a store which had two locks, one outside and one inside. While the outer lock connecting the store with the shop was broken, the inner one was intact. He could hear the people outside trying to break the door but upon failing to do so they started breaking the window of the room where he was and when the window was opened he saw one of the intruders flash the torch light into the room many times. Whereas he was hiding at a corner where he could not be seen, it was his evidence that he saw one of the attackers whom he identified in court as the 1st accused with the help of the moonlight. According to him, as the torch which the intruder had was being flashed inside, its light was reflected on the bearer of the torch, the 1st accused, who had some wounds on the lips and was wearing a black jacket. However, the 1st accused was not known to PW1 previously. Using his bow and arrow he shot at one of the attackers after which they ran away. He then alerted the neighbours who came and the search for the attackers ensued. Following the footsteps, they tracked the said intruders up to Muguani Shopping Centre where they lost trace of the same. However, while there the bodies of the deceased persons were recovered and from where the body of the second deceased was recovered they were able to see the same footsteps and based thereon, they proceeded with their search. The search led them to various homesteads, where the three accused persons were variously seen running away from.
62. The evidence against the 1st accused was that he was the one identified by PW1. As stated above the only source of light in the room where PW1 identified the 1st accused emanated from a torch. This torch was being shown through a window and PW1 took a position where the bearer of the torch could not see him. He on the other hand was able to see the person bearing the torch based on the reflections of the light. Prior to this incident he did not know the 1st accused. He however was never called to identify the 1st accused in the identification

parade according to his own testimony. The question that arises is whether those conditions were favourable to a proper identification. In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

“It is trite law that where the only evidence against a defendant is evidence on 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 before it can safely make it the basis of a conviction.”

63. It was appreciated in **Ogeto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult. According to the Court:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

64. That was the position in **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** where it held that:

“Subject to certain 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 the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which 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.”

65. It is true that PW1’s evidence was evidence of a single witness. As it was held in **Anjononi & Others vs. The Republic [1980] KLR 59**: -

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable.”

66. In the present case the attack upon PW1 occurred at night. He had just woken from his sleep. The only source of light was the torch and moonlight and PW1 was hiding from the attacker whom he had never seen previously. In my view the prevailing conditions could not have been favourable for a proper identification of the 1st accused by PW1. In **David Mwangi Wanjohi & 2 Others vs. Republic [1989] eKLR** it was held by the Court of Appeal that:

“The quality of the evidence has to be considered. Does starlight afford a means of illumination for observing the shape or features of a person to such a degree that proof can be had beyond reasonable doubt, or is it a state of darkness richer in imagination than fact? There is no doubt that starlight *per se* affords no scientific means of illumination at all. It may purport that there was a clear sky, against which there might be seen the semblance of a human being. But it is not an assured basis, such as moonlight, for observing the details of the features of a person. Indeed Nelson could not tell what clothes the appellant was wearing, however close the latter was to Nelson. It is plain that Nelson could not see details, and the appellant did not speak, nor move in any special way, or indicate any special feature. We are bound to say that the quality of the evidence was precarious at best, and that it was a misdirection for the High Court to conclude that the conditions for “identification were not unsatisfactory.” However long Nelson had known the appellant, if there was no light by which to see the appellant, nor other means of recognition, Nelson could only have guessed at the identity of the man near him, and in that event the failure to put the cardinal question, could Nelson have been mistaken, was a grave error. It is also surprising to find that the High Court felt that mistaken identity was not raised by the defence. The appellant had said that he had not been present. Is that not raising the issue of mistaken identity? It is said that he did not cross-examine Nelson on mistaken identity. Was that not suggested by the question to which the answer was “no, I could not recognize the clothes you were wearing when I was attacked.” But in any case, upon whom was the burden of proof? Was it not upon the prosecution who were relying on improbable evidence?”

67. In the case of **Robert Gitau –vs- Republic Criminal Appeal No. 63 of 1990 (Nakuru)** the Court of Appeal stated as follows:-

“It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R (Criminal Appeal No. 20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the Appellant’s face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was the only one from the cell.”

68. The other evidence linking the 1st accused with the offence was that of PW10, and this was at Kavuwani Sub-location, about ten (10) kilometres from the scene in a homestead where the 1st accused is alleged ran away from. As he was running away, he slipped and dropped a yellow paper bag. From the yellow bag, PW10 saw a blood stained T-shirt a piece of paper with a sketch map of some buildings and names and roads, three black Safaricom SIM wallets one of which contained a voter’s card with the name **Joseph Mutua Kimanzi**. There were also some papers in the yellow paper bag containing details of how one can defend himself in court and a photocopy of a charge sheet with the same name of **Joseph Mutua Kimanzi**. In the yellow paper bag was also a religious book with the name “*Yohana Mtakatifu*”. Here again

the only evidence connecting the 1st accused were the said voter's card which were in the wallet and the charge sheet. However, PW10 admitted that in his statement the wallets were not mentioned. However, these documents were never produced as exhibits in these proceedings. That the marked but unproduced document is hearsay, untested and unauthenticated account was set out in Kenneth Nyaga Mwigie vs. Austin Kiguta & 2 Others (2015) eKLR where the court held:-

“16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?”

17. The respondents' contention is that the appellant by failing to object to the three documents marked as “MFI 1”, “MFI 2” and MFI 3” must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case” Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they have simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document “MFI 2” that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on ‘MFI 2’ which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification.....”

69. It follows that the items allegedly recovered when the 1st accused slipped and fell having not been admitted in evidence but only marked for identification are not part of the evidence that is properly before this court and cannot be used as evidence. They are therefore of very little, if any, evidential value.

70. In his evidence, PW1 stated that on 27th November, 2010 at about 9.00 a.m. he was called by the area OCS who requested him to accompany him to Mwingi Police Station. At the Police Station he went to the office of the DCIO where he was informed about an identification parade which was to take place. He was then taken to the parade which was within the police compound and was told to identify the person whom he had said he had seen in his shop. He went through the line of about eight people and picked the 1st accused whom he had seen at his shop. According to him, the 1st accused had wounds on the lips as he stated earlier so he was able to pick him out.

71. However, the evidence of PW12 **C. I. Sarah Rono** was that **Joseph Mutua** the 1st accused refused to participate in the parade saying the CID Officers had circulated his photographs all over. There was no other evidence that there was an identification parade at which the 1st accused was identified. It is therefore clear that there were material discrepancies in the evidence of PW1 and that of PW12 regarding the conduct of the parade. As was held in **Ndung'u Kimanyi vs. R [1979] KLR 283.**

“The witness in a criminal case upon whose evidence the court is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

72. As for the evidence against the 2nd accused, the assistant Chief of Kasevi Sub-location PW5, **Francis Sila Ngue**, testified that on 26th October, 2010 testified that together with the members of public they followed the footprints up to Soweto area where one set of footprints resembling Safari Boots diverted from the rest. They split into two groups one of the groups following the Safari Boot set of shoe/footprints and the other group the other footprints with him joining the group tracing the other footprints. At some point his group again split into two because the set of bare footprints also diverted. At about 2.00 pm the prints took them to a homestead with three houses where a person, who was not known to him previously, spotted them from one of those houses and ran away. He saw this person when he was 30 metres away. The name of the 2nd accused was disclosed to them by one of the neighbours who recorded a statement. However, this neighbour did not testify in this case. After a search, they recovered a blood stained cracked ‘rungu’ which the witness identified in court. Upon failing to trace the 2nd accused, they returned to Musuani Trading Centre. In cross examination he stated that he only identified the 2nd accused in court and that he did not disclose in his statement the reason why he was able to identify the 2nd accused. He was however not present when the 2nd accused was arrested and he was not called to any identification parade.

73. It is clear that PW5 regarding the identification of the 2nd accused was dock identification. In **James Tinega Omwenga vs. Republic [2014] eKLR**, the Court of Appeal held that:

“The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless. In the case of Njoroge -vs- Republic (1987) KLR 19, this Court stated:-

“Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade”.

74. In this case PW5 did not record in his statements features of the 2nd accused that would have enabled him to identify him later. He was never called to identify the 2nd accused in the identification parade and the 2nd accused was never identified by any of the witnesses who appeared in the said parade.

75. The evidence against the 3rd accused came from PW7, **Julius Ngui Kathuli**. According to him, at the shopping centre there were some footprints of an ordinary shoe on the ground as well as some footprints of a safari boot and bare footprints. There were also some footprints of a dog. Upon following the footprints, up to Soweto area, the safari boot set of footprints diverted to another direction and was followed by some members of the group. He however continued following the other set of footprints. After about 500 meters beyond the stream one set of footprints of an ordinary shoe and those of a dog led to one homestead which they entered and about 20 meters from a house he saw a man get out of the house and run away. Since it was between 11 – 12.00 p.m. he saw the person well and identified him as the 3rd accused, **Stephen Muthui**. He however did not know him prior to that day. On entering the house from where the 3rd accused had run, he saw his bow and arrows under the bed bearing his initials “NK” carved on the same. He identified three arrows which were also in the house of the 3rd accused and asserted that he was the one who bought them. He however stated that the arrows did not have any special mark and stated that he handed over the bow and arrows to the Chief who gave them to the police. They were however unable to apprehend the 3rd accused. The next time he was able to identify the 3rd accused was on 28th November, 2010 at an identification parade.

76. The other witness whose evidence linked the 3rd accused with the offence was PW8, **Samuel Muthengi Mwangangi**, whose group ended up following the prints of ordinary shoes up to some homestead Kavugwani where the shoeprint led to some house from where a man ran out. When they saw the man, he was about 20 meters away. According to him, the time was about 4.30 a.m. going towards 6.00 a.m. and there was light and he could see although the sun was not yet out. In his evidence, the 3rd accused is the person he saw running out of the house into the bushes. He however did not know the 3rd accused prior to that day. Though he testified that a “rungu”/stick and a bow and arrows were found in the house that the 3rd accused had run out of, he denied that the “rungu”/stick shown to him in court was the one he had seen in that house. He however confirmed that the bow had the initials “NK” and were identified by the owner. In cross-examination, he stated that the police picked the stick found near the bodies but reiterated that the one in court was not the one recovered where the bodies were and he did not know why the stick was not brought to court.

77. From the evidence adduced before the court it is clear that the evidence against the accused persons was purely circumstantial.

78. 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.

79. 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.”

80. In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by M. Odera, 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.**

81. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence that the deceased's bodies were found after they had been killed. Again the cause of death was proved by medical evidence.

82. As to whether the deceased met their 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 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.”

83. 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.”

84. 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.”

85. 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.”

86. 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.”

87. **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.”

88. 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.”

89. 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.”

90. 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.”

91. 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.”

92. 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.”

93. 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.”

94. 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.”

95. In this there is no evidence that the accused persons were seen at the scene of murder. Whereas PW1 stated that he saw the 1st accused that night the prevailing conditions were not conducive for proper identification and there is no evidence he did identify the 1st accused at an identification parade. All the witnesses who testified that they saw the accused persons running away did not know them prior to the day they saw them. In the case of R –vs- Turnbull and others (1976) 3 All ER 549, an English case, Lord Widgery C.J. had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”

96. In James Tinega Omwenga vs. Republic [2014] eKLR it was held by the Court of Appeal that:

“We are of the considered view that the crux of this appeal is whether the evidence on identification was proper and safe to warrant the conviction of the appellant. This because from the evidence on record no one witnessed the incident and it is only M who testified that she was able to identify her attacker. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult... In this case, it is not in dispute that M was attacked at around 6:00 p.m and that she was brutally assaulted. We are of the view that the circumstances that prevailed during the incident were difficult due to the brutality involved. We find that it was necessary for the two lower courts to test the evidence of identification with the greatest care. We find that the two lower courts did not correctly test the identification evidence. We say so because firstly, it was the prosecution’s case that the incident took place at around 6:00 p.m in a thicket. Therefore, what was the intensity of light and/or degree of visibility in the thicket” The answer to the said question was imperative in determining whether the identification of the appellant was free from error and there wasn’t a case of mistaken identity. The prosecution did not tender any evidence as to the intensity of the light in the thicket. Based on the foregoing we are unable to determine whether there was sufficient light at the scene to afford a positive identification of the assailant.”

97. In my view the evidence of PW1 was unreliable in so far as the identification of the 1st accused was concerned.

98. In this case none of the exhibits allegedly found after the accused persons ran away were produced in court. The investigating officer never testified in court. How the accused persons were arrested also remained a mystery. The 1st accused stated that he was arrested because of bad blood between him and a police officer, one Francis Munai who was interested in his sister. As for the 3rd accused his evidence was that he was arrested because he declined to buy refreshments to one CIP Leonard Lutta. In fact, the 3rd accused even disclosed a number which he alleged was the telephone number given to him by the said CIP Leonard Lutta. While the prosecution had opportunity to call rebutting evidence it did not do so. Section 309 of the Criminal Procedure Code provides that:

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

99. In the case of Adedeji vs. The State {1971} 1 All N.L.R 75 it was held that:

“failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and

lead to the quashing of a conviction imposed.”

100. With respect to the failure to call the arresting officer, the Court of Appeal in Francis Mwaura Mwangi vs. Republic [2010] eKLR expressed itself *inter alia* as follows:

“In this appeal, the witnesses said they knew the appellant well and immediately gave his nickname “Blackie” to the police. Yet it took the police nearly four months to arrest him and no explanation at all was forthcoming as to why that was so. The officer who arrested him did not come to explain how he had connected him with the name “Blackie” and why it had taken him so long to arrest him. We are not to be understood to be saying that in each and every case, the arresting officer must come and testify. Each situation must be considered and determined on its own circumstances. The appellant said he was merely arrested in a police swoop and he did not know why he had been arrested. He denied being involved in the robberies and the prosecution was under a duty to leave no loose ends which can lead to reasonable doubt being raised. Neither the trial Magistrate in his brief judgment, nor the two learned Judges on first appeal, dealt with any of these issues.”

101. 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”.

102. Apart from the arresting officer, the investigating officer never testified in this case. 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.”

103. In this case the effect of the failure by the investigating officer to testify is that the evidence crucial to the case were never exhibited. Therefore, the only evidence that would have linked the accused to the offence was that of identification parade. Even here, the witness who conducted the parade never completed her evidence. She never produced the parade forms and was never cross-examined on her evidence. I agree that the right to cross-examination is a fundamental one, and would repeat what the Court of Appeal for Eastern Africa said in Edward S/O Msenga vs. Reginam, (1942) EACA 553 that:-

“The failure to give the appellant an opportunity to cross-examine the second accused was the denial of a fundamental right which was fatal to the conviction on the first count...We find it impossible to say that the refusal by the learned trial Magistrate to allow the appellant to cross-examine the second accused did not prejudice the appellant in his defence and did not result in a miscarriage of justice. The evidence given by the second accused undoubtedly tended to incriminate the appellant, particularly his evidence that the appellant did not hand over the money to him for, if the appellant did not hand over the money, the only reasonable inference which could be drawn was that the appellant had stolen the money himself. But if doubt were thrown on the truth of the second accused’s testimony, a reasonable doubt might well have been raised as to the guilt of the appellant. It was, therefore, clearly in the interests of justice that the appellant should have been given an opportunity of testing by cross-examination the truth of the evidence given against him by the 2nd accused. Although it is true that the prosecutor cross-examined the second accused on most of the points on which the appellant says he wished to cross-examine, we are unable to agree with the conclusion of the learned appellate Judge that ‘had the appellant been allowed to cross-examine, there is no reason whatsoever to believe that the 2nd accused would have answered differently.’ It cannot be assumed that the second accused would not have answered differently if he had been cross-examined by the appellant. The appellant might well have material which was unknown to the prosecutor and which would have enabled him to cross-examine more effectively than the prosecutor. We think that the failure to give the appellant the opportunity to cross-examine the 2nd accused was a denial of a fundamental right which was fatal to the conviction on the first count.”

104. In S v Msimango and Another (187/2005) [2009] ZAGPJHC 34; [2009] 4 All SA 529 (GSJ) ; 2010 (1) SACR 544 (GSJ) (27 July

2009), the High Court in South Gauteng High Court, Johannesburg held that:

“The right to cross-examine is trite in our criminal justice system that curtailing it inappropriately or interfering with it, may render a trial unfair, vitiating the entire proceedings. There is also an obligation on a judicial officer in criminal trials of unrepresented accused persons, not only to explain to such accused persons their procedural rights, but specifically, the right to cross-examination. For example, in *S v Mdali* 2009 (1) SACR 259 (C), the court held that the failure on the part of the magistrate to adequately explain to an unrepresented accused the right to cross-examination; how it should be conducted; the purpose and scope thereof; and the consequences of a failure to cross-examine, breached the accused’s fundamental rights to a fair trial. Indeed, the importance of the right to cross-examine in any disputed hearing, particularly in an adversarial trial system, such as ours, can hardly be over-emphasised. In *Wigmore On Evidence*, 3rd ed. Vol. V, para 1367, the learned author states:

“Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovering of truth.”

In *Carroll v Carroll* 1947 (4) SA 37 (W), at p 40, Henochsberg AJ said:

“The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.”

[6] Having sketched the importance and purpose of cross-examination, it is necessary to deal with the probative value of the evidence, if any, to be attached to the evidence of a witness who dies during cross-examination in a criminal trial. As stated earlier, s 166 of the CPA entrenches the right to cross-examination. It is settled law that evidence of a witness who gives complete evidence-in-chief but thereafter dies or becomes unavailable, for whatever reason, before any cross-examination, clearly remains untested completely and its acceptance would defeat the purpose of cross-examination...Now it seems to us that once there is a denial of a right of cross-examination of witnesses, that immediately causes prejudice to an accused person, and since we do not know what evidence this witness could have given, we cannot say that there has not been a failure of justice...criminal procedure and practice in South Africa were premised upon the right to a fair trial as enshrined in s 35(3) of the Constitution of the Republic of South Africa, 1996. That one aspect of such right was the right to adduce and challenge evidence, which necessarily included the right to examine witnesses...The approach adopted here seems to indicate that the violation of section 25(3)(d) does not lie therein that the witness was not fully cross-examined. The right is violated if the untested evidence is used against the accused. The right is not violated if adequately tested evidence is used against the accused, even though cross-examination might not have been completed. The issue arising from a finding of violation, is: Should that evidence be excluded?...The second known South African case dealing with evidence based on incomplete cross-examination...Writing in the “Virginia Law Register” Vol XII, No 10, under the heading, “Admissibility, In A Criminal Trial, Of The Former Testimony Of A Witness, Since Dead”, and as far back as 1907, Walter R Staples, said:

“It is said that in the absence of constitutional or statutory mandate the rules of evidence are the same in criminal and civil cases since they are but the means of judicially ascertaining facts in issue, and are alike in each case, “founded upon the charities of religion – in the philosophy of nature in the truths of history – and in the experiences of common life”, for, as Lord Erskine says, “a fact must be established by the same evidence whether it be followed by a criminal or civil consequence ... The rules governing the testimony of witnesses are neither numerous nor complicated, that under inquiry being the principal one of its class, to wit, that hearsay evidence is not admissible. The reason of the rule being its life, we find this in the danger which attends the presentation as evidence of statements made neither under the sanction of an oath nor the ordeal of cross-examination, and hence the requirement that the person from whose lips the evidentiary facts are taken must speak them under oath and in the presence (not of the jury or the tribunal, under the common law rule), of the party against whose contention those statements are directed, to the end that they may be also subjected to the test of cross-examination – spoken in the open, not in the dark – to the face and not behind the back.”

[14] In *Chambers v Mississippi* [1973] USSC 32; 410 U.S. 284 (1973)...Powell J, in which Burger, C.J.; and Douglas; Brennan; Stewart; White; Marshall; and Blackmun, JJ concurred, said:

“Chambers was denied an opportunity to subject McDonald’s damning repudiation and alibi to cross-examination. He was not allowed to test the witness’ recollection, to probe into the details of his alibi, or to “sift” his conscious so that the jury might judge for itself whether McDonald’s testimony was worthy of belief. *Mattox v United States*, [1895] USSC 34; 156 U.S. 237 242-243 (1895). The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the “accuracy of the truth-determining process”. *Dutton v Events*, 400 U.S. 740, 400 U.S. 89 (1970); *Bruton v United States*, [1968] USSC 88; 391 U.S. 123, 391 U.S. 135-137 (1968). It is, indeed, “an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal”. *Pointer v Texas*, [1965] USSC 68; 380 U.S. 400, 380 U.S. 405 (1965). Of course, the right to confront and to cross-examine is not absolute, and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g; *Mancusi v Stubbs*, [1972] USSC 164; 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate “integrity of the factfinding process”, and requires that the competing interest be closely examined. *Berger v California*, [1969] USSC 1; 393 U.S. 314, 393 U.S. 315 (1969).”

[27] In the present matter, I am also of the view that the right of an accused person to adduce and challenge evidence as enshrined in s 35(3)(i) of the Constitution, undoubtedly includes the right to cross-examination.

[28] For the above reasons, the view that the right to adduce and challenge evidence also includes the right to cross-examine, is pre-eminently justified even in interpreting s 35(3)(i) of the final Constitution.”

105. In Nicholas Mutula Wambua vs. Republic Criminal Appeal No. 373 of 2006 (Mombasa) the court stated that:

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.”

That thinking is expressed in Section 208 of the CPC which governs hearing of Criminal proceedings in the Magistrate’s courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

106. 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.”

107. 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.”

108. 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 them of the charge and set them at liberty forthwith unless otherwise lawfully held.

109. It is so ordered.

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 Mutinda Kimeu for the accused

Miss Mogoi for the State

CA Geoffrey