



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 38 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

SOLOMON MULOVE MUSYOKI.....ACCUSED

JUDGMENT

Solomon Mulove Musyoki, the accused, is charged with the murder of Erick Nzioki contrary to section 203 as read with section 204 of the Penal Code. This offence is alleged to have been committed on the 29th day of November 2010 at Ole Serian area opposite Airtel Headquarters along Mombasa road in Nairobi. The accused pleaded not guilty to this charge necessitating the full trial. In support of the case against the accused, the prosecution called a total of fourteen (14) witnesses. The defense called two (2) witnesses, the accused and his brother Stephen Mwendwa Musyoki (DW2).

The evidence on record shows that the deceased, Erick Nzioki, travelled from his parent's rural home in Kaani Village Machakos County to Nairobi on 29th November 2010. He left home at about 11.00am with the intention of returning the following day. According to his father Justus Musyoka Mwathe (PW7) the deceased was travelling to Nairobi to make plans for his graduation at Moi University Eldoret to be held later in December 2010. He called his aunt Miriam Kasui Kasina (PW5) on the same day to ask her to source for a vehicle for him for the purpose of ferrying relatives to the said graduation. He also told her that he would be going to her home in Nairobi later on that evening at 8.00pm. The deceased made appointments to meet several people that evening. He was to meet Florence Mukonyo Muia (PW1) a former colleague at Debut Image Consultants. The purpose of their meeting was to discuss about business opportunities in Djibouti where the deceased had been. That meeting did not take place because the deceased was not reachable on his phones later on that evening.

The deceased was also to meet Erick Cooper Kilonzo (PW2) that evening. The purpose of the meeting according to PW2 was to receive a present that the deceased had brought for PW2 from Djibouti. Deceased was also to meet Francis Kioko Mbate (PW6) that evening. Francis had asked the deceased to assist him to get PW2 Cooper Kilonzo to agree to meet him that evening because PW2 owed Francis some money and Francis had failed to reach Cooper. On the same date (29th November 2010) the accused called the deceased at about 11.00am. They met later that day at about 2.00pm when the deceased went to see the accused at his office in CFC Stanbic Bank Kimathi Branch according to the evidence of the accused. The deceased left the accused at about 3.00pm to meet his friends. At about 4.30pm the deceased sent a text message to the accused informing him that he was through with meeting his friends and that he was going to Tananger Restaurant to wait for PW2 Cooper Kilonzo. Evidence shows that the deceased, the accused, Francis Kioko Mbate (PW6), Cooper Kilonzo (PW2) and a cousin of the deceased whose name was not given met at Tananger Restaurant located in Rehani House in the Nairobi Central Business District. Subsequently, PW2 and PW6 were left behind while the accused, the deceased and the cousin left together. According to the evidence of the accused, they parted ways with the accused walking towards the Ambassador Hotel bus stage to board a Matatu to go home while the deceased and his cousin went their way.

Other than the people he met on the evening of 29th November 2010, the deceased communicated with Kwame Onderi Odenyo (PW4) through text messages. Kwame was a friend of the deceased. The deceased also communicated with Rachael Koki Mbili (PW10), a friend of the deceased from childhood earlier that day. The deceased had told Koki that he was still in Machakos but would be travelling to Nairobi on the same day. They talked again at about 5.00pm on the same day when the deceased informed Koki that he was in Nairobi and was going to Hurlingham to book a vehicle to take people to Moi University Eldoret for his graduation. They agreed to meet on 30th November 2010. The deceased was not reachable later that day and also on 30th November 2010. His father, PW7, and his friends were not reaching him. His parents were frantically calling deceased's friends and relatives to ask them whether they knew the whereabouts of the deceased. No one seemed to know where the deceased was. A report of a missing person was made at the Central Police Station Nairobi. PW7 went to the Central Police Station to find out if there was any report about the whereabouts of the deceased but found nothing. In company with other relatives, PW7 started searching for the deceased in the hospitals and the mortuaries in Nairobi. They started with the City Mortuary. This is where they found the body of the deceased. Records in the Mortuary Register showed that the body of the deceased had been taken to the Mortuary by police officers from Industrial Area Police Station on 30th November 2010.

In the course of investigating this matter, police arrested some of the people who had communicated with the deceased on 29th November 2010 including Florence Mukonyo Muia (PW1) and Erick Cooper Kilonzo (PW2). Francis Mutua Kivuva (PW3) was also arrested. He was found in possession of a phone Nokia 1616 (Ex. 15) that the accused had given him. This phone has featured extensively in evidence. The

evidence on record shows that this phone belonged to CFC Stanbic Bank, the employer of the accused at the time. It had been officially issued to the accused. He had given it to the deceased to use on several occasions. He had also given it to Francis Kivuva, his friend, to use. Francis had exchanged this phone with a Blackberry phone belonging to one Jane. The phone was traced to Jane who led police to Francis. Francis took police to the home of the accused. Both were arrested. All the arrested suspects including the accused were released from police custody and told to report to the police as investigations were ongoing. They were later released. Further investigations led to the arrest of the accused, a second time, in May 2012. He was charged with this offence.

After considering the evidence of the prosecution witnesses on record, this court placed the accused on his defense. The accused gave unsworn evidence in defense. He told the court that he met the deceased in 2006 in Moi University Eldoret and they became friends; that he graduated from the University in 2007 and that the deceased used to visit him in Nairobi during vacations. He told the court that their respective families knew about their friendship. He stated that the deceased was employed at Visions Plaza along Mombasa Road but he was not paid for August and September 2010; that the deceased picked two projectors to sell since he had not been paid; that at the end of September, one Tom called the deceased and told him of a contract in Djibouti for one month with ticket and accommodation paid for and that the deceased left for Djibouti. The accused testified that he kept in touch with the deceased while the deceased was in Djibouti through Facebook. He stated that that he sometimes used to give the deceased his phone Nokia 1616 (Ex. 15) to use. He said that the phone had been issued to him by his employer CFC Stanbic Bank for official duties and that the deceased had left this phone with Miriam Kasina (PW5) deceased's aunt who gave it to one Mark Ndiso to return to the accused.

The accused further testified that he picked the deceased from the airport when deceased returned to Kenya from Djibouti. He did not specify when the deceased returned to Kenya but there is evidence on record from other witnesses showing that the deceased came back on 24th November 2010. The accused testified that after picking him from the airport, they dropped deceased's bags at his aunt's place in Kariokor and went to town where they met Rachael Koki (PW10) and thereafter they went to his (accused's) place. This meeting with Rachael Koki was confirmed by her in her evidence.

The accused further testified that on 27th November 2010 the deceased called him and told him that he was travelling to Machakos and that Koki would give him a lift to Machakos; that the deceased went to his place which is near City Kabanas to await Koki to pick him from there; that they met again with deceased on 29th November 2010 in accused's office at about 2.00pm after the deceased returned to Nairobi from Machakos; that they parted ways but met later that evening at Tanenger Restaurant in company of Erick Cooper Kilonzo, Francis Kioko Mbate and a cousin of the deceased; that they subsequently parted ways leaving Cooper and Mbate behind; that he took his phone (Ex. 15) from the deceased and he left the deceased with his cousin and went home. He stated that the deceased was not reachable after they parted. He testified that he was called by one Mwathe on 1st December 2010 and told to go to the City Mortuary where the body of the deceased had been found. He said he went to the City Mortuary and met the relatives of the deceased and also saw the body of the deceased.

He testified that in January 2011 he remembered that the deceased had told him that he (deceased) had some money in his Mpesa account. He said that he informed the father of the deceased about it; that they agreed to meet in town the following day when they confirmed that the account had Kshs 7,000; that they renewed the deceased's SIM card and deceased's father was able to withdraw the money. He said that he had used some money from the deceased's Mpesa account but he refunded it. He said that he was arrested because of Nokia 1616 (Ex. 15) but he explained to the police that the phone belonged to his employer. He said that the police confirmed this. He said he stayed in custody for three days and then he was released and that in July 2011 CPL Mutisya called him to Industrial Area Police Station to identify a suspect in connection with the death of the deceased but he did not know the person.

He testified that he was arrested again in May 2012 and told to produce a SIM card he had used. He did so and explained to the police that the SIM card was a renewal but he was nevertheless charged with this offence. Stephen Mwendwa Musyoki (DW2) brother to the accused corroborated the evidence by the accused that the accused went home on 29th November 2010 at about 7.30pm; that they had dinner together and retired to bed. Stephen also confirmed that he knew the deceased as a friend of the accused and that the deceased used to visit the accused both in his Nairobi home and also in the rural home.

At the close of the case Mr. Njagi for the accused adopted the submissions made by the defense at the close of prosecution case and submitted further that the prosecution has failed to prove beyond reasonable doubt that the accused with malice aforethought killed the deceased. He submitted that there was no Safaricom and Airtel call data presented in court that connected the accused with this offence. He submitted that the accused has raised defense of alibi that after he parted ways with the deceased he did not see the deceased again. He submitted that it was mere allegation by PW12 that accused's phone had been traced at the place where the body of the deceased was found and that this remains an allegation that requires prove beyond reasonable doubt by producing data to that effect. Counsel submitted that the accused did not see the deceased again after they parted ways on 29th November 2010 and that the evidence of the accused that he went home on the evening of that day is corroborated by his brother Stephen whose evidence remains unchallenged since he was not cross examined by the prosecution. He submitted that the accused does not assume the burden of proving his alibi defense, which duty to prove the same remains with the prosecution.

Mr. Njagi further submitted that PW12 said in his evidence that the handset (Ex. 15) was in use around 7.51pm on 29th November 2010 at Parkside Towers on Mombasa Road; that the accused lived in Embakasi and used public means to go home through Mombasa Road and that there is a possibility that the signal was picked by the mast at Parkside Towers when the accused was using the phone while going home. He submitted that the case for the prosecution is based on circumstantial evidence; that the investigations were poorly conducted and the evidence on record is disjointed and cannot therefore be relied on to convict. He submitted that the police did not track the phone the deceased was using that day; that this phone would have showed the last location of the deceased that day and that the Investigating Officer did not explain why this was not done. He submitted that there are several theories leading to how the deceased may have been killed and that the accused had nothing to do with the death of the deceased. He submitted that the prosecution has failed to prove murder against the accused and urged that this court acquits the accused person forthwith.

On the other hand, the Prosecution Counsel adopted the submissions made at the close of the prosecution case and submitted further that the death of the deceased is not disputed; that the death of the deceased was unnatural; that it is not disputed that the deceased and the accused knew each other and were together on the material day; that the accused was the last person with the deceased and this evidence is not

controverted and that communication data shows the deceased and the accused were at the scene where the body of the deceased was found. It was submitted that the prosecution has proved its case against the accused beyond reasonable doubt. The prosecution urged this court to find the accused guilty and convict him for murder.

This court has a duty to determine whether the prosecution has proved beyond reasonable doubt that the accused, with malice aforethought, caused the death of the deceased by an unlawful act or omission. This mandate on the part of the prosecution does not shift to the accused. He has no duty to prove his innocence. I agree with Mr. Njagi that even where the accused raises the defense of alibi, the accused does not assume the duty of proving that alibi. The duty always remains with the prosecution to prove beyond reasonable doubt that the accused committed the offence as charged.

The evidence is clear, and it is undisputed, that the deceased died. He was last seen alive on 29th November 2010. None of his friends including the accused or his relatives knew of his whereabouts that evening. There is no direct evidence as to how the deceased met his death. There is however circumstantial evidence that this court must closely analyze and consider to determine whether it proves beyond reasonable doubt that the accused with malice aforethought unlawfully killed the deceased.

The body of the deceased was found at the City Mortuary. It had been taken to the City Mortuary on 30th November 2010 by police officers from Industrial Area Police Station. The witnesses who saw the body including deceased's father Justus Musyoka told the court that it had stab wounds on the chest with missing genitalia. The body of the deceased was examined by Dr. Peter Muriuki Ndegwa (PW8) on the 1st December 2010 at the City Mortuary. The doctor captured his findings in a post mortem report produced in court as Ex. 1. Dr. Ndegwa found the following injuries:

- (a) Penetrating stab wound below the left nipple.***
- (b) Penetrating stab wound below the right rib cage.***
- (c) Two penetrating stab wounds on the left side of the chest.***
- (d) Both lungs had been stabbed with bilateral haemothorax of 3 litres.***
- (e) The heart had been stabbed.***
- (f) Pericardium (membrane enclosing the heart) had been perforated.***
- (g) External genitalia had been chopped off.***

The opinion of the doctor is that the deceased died due to exsanguination due to genital and chest injuries due to sharp force trauma. Without a doubt this is a death caused by an unlawful act of stabbing. The injuries were severe and were viciously inflicted. According to SGT Peter Mwangi (PW9) who took photographs at the scene where the body of the deceased was found there were no signs of disturbance at the scene. He told the court that the grass where the body of the deceased was lying was not disturbed. In his view, the deceased was killed elsewhere and the body dumped at the scene. He testified that there were no bloodstains on the grass at the scene and that he did not recover the missing genitals. He told the court further that no weapon was recovered. PW9 did not see any holes in the clothes of the deceased to suggest that the stab wounds were inflicted on the deceased when he was dressed leading him to believe that the wounds may have been inflicted on the deceased when he was naked. This evidence satisfied me that the unlawful death of the deceased has been proved beyond reasonable doubt.

Turning to the twin issues of who killed the deceased and whether the person(s) had malice aforethought this court will consider the evidence of several witnesses. There is no dispute that the accused and the deceased were close friends. The deceased used to visit the accused at his home in Nairobi and spent nights twice in a week or the whole weekend according to the evidence of Miriam Kasina (PW5) an aunt to the deceased. The deceased lived with Miriam at her home in Kariokor from April 2010 after he completed his university studies to September 2010. He then left for Djibouti in October 2010 and returned on 24th October 2010. Although Miriam had not seen the accused at her home or anywhere until she saw him on 1st December 2010 at the City Mortuary, she had heard of him because the deceased used to talk about him often. Miriam knew of one Solomon who was a friend with her nephew the deceased. Once in a while, the deceased would call Miriam to inform her that he would not be going home but would be spending the night at the home of the accused. Justus Musyoka, the father of the deceased, also knew the accused as a friend of her son. The nature of the friendship between the accused and the deceased is not clear but it is on record, as per the evidence of Erick Cooper Kilonzo, that the accused and the deceased were very close friends and they may have been living together. Cooper told the court that he had seen the two touching each other inappropriately the way men and women touch each other.

It is on record that the deceased had many friends including Erick Cooper Kilonzo (PW2), Francis Kioko Mbate (PW6), Kwame Onderi (PW4), Rachael Koki (PW10), one Tom (not a witness) among others. Evidence shows that the deceased was employed by a company known as Debut Image Consultants. It was alleged that this company did not pay the deceased for the period he worked there. According to the evidence of Rachael Koki (PW10) the deceased had informed her that he (deceased) had taken a projector from Debut Image Consultants and sold it. The proceeds of that sale, it is alleged, were used by the deceased to buy a mobile phone and a lap top. There is no evidence from Debut Company to corroborate this evidence by Koki. In the defense of the accused, he told the court that he was aware that the deceased had stolen two projectors from Debut and sold them because the company had not paid him for the period he worked for them.

There is evidence that the deceased, through his friend Tom, secured a job in Djibouti with Tom paying for the ticket and accommodation. Evidence as to what happened in Djibouti when the deceased travelled there is not available. It is stated that the deceased travelled to Djibouti with another person whose identity is not disclosed. It is stated that while in Djibouti the deceased did not work as planned and that he travelled back to Kenya after failing to get the promised job. Again evidence on this issue is scanty. It can be discerned from the cross examination of witnesses and from the evidence of the accused in his defense that the defense is advancing the theory that the deceased's

death may be connected with the theft of projectors from his former employer. The defense seems to suggest that perhaps someone connected with Debut Company may not have been happy about the theft of the projectors or that someone may have killed the deceased over the proceeds of the sale of the projectors stolen from that company.

The Investigating Officer, SGT Jairus Mbondo (PW14) told the court that together with SGT Shegu and CPL Mutisya, he was instructed to take over the investigations in this case on 3rd March 2011. One CPL Mwaniki was the initial investigator. This court was told that CPL Mwaniki had died. SGT Mbondo and his colleagues started the investigations by trying to recover the mobile phone being used by the accused after the father of the deceased called the police and informed them that the deceased's Safaricom mobile phone line was in use. SGT Mbondo told the court that investigations showed that the accused was using the deceased's Safaricom line in his handsets whose IMEI numbers were given as 35602804474765029 Nokia 1616, 353775045769070 Nokia 1616 and 3560545377397730 LG.

The evidence that is purporting to link the accused with this offence was adduced by Vincent Mabu (PW12) and Daniel Hamisi (PW13). Both are liaison officers from Airtel and Safaricom respectively. According to Vincet Mabu he acted on a letter from DCI Industrial Area Police Station requesting him for the IMEI number, incoming calls, outgoing calls and geographical area of Airtel line 0736460596 from 27th November 2010 to 29th November 2010. PW12 referred to a device whose IMEI number he gave as 353775045769410. The record shows that this device was identified as Nokia 1616 and produced in court as Ex. 15. He testified that this gadget was picked by the Airtel masts at Kimathi House, Nairobi Market 2, Electricity House, Archives and Parkside Towers on 29th November 2010. The device was located at Parkside Towers between 7.51 pm and 7.57 pm. PW12 testified that between that time there were several outgoing and incoming calls on that device and that out of those calls, telephone numbers 0731963442 and 0733000810 were common. PW12 did not specify in his evidence whether 0736460596, which belongs to the accused, was paired with the device in question at the quoted time (7.51 and 7.57 pm). From the record, I note that PW12 did not produce the document that showed the records he was referring to in his evidence! This court is left to speculate that PW12 was referring to the device whose IMEI is cited above as having been paired with 0735460596.

The evidence from the accused is that he picked his phone (Ex. 15) whose IMEI is given above from the deceased at the time the two parted ways after the meeting at Tanenger Restaurant. If this is the case and the accused had inserted his SIM card with telephone number 0736460596, which is not stated in evidence, then it means that the accused was using this device and this number that evening at the quoted time. The time cited coincides with the time the accused said he was travelling by Matatu to go home in Embakasi. In his defense and the submissions by his counsel, the accused used Mombasa Road to travel home that evening and therefore, according to the defense, Airtel masts may have picked his number and Ex. 15 as he travelled home. The evidence on record shows that this device, whether being used by the accused or by the deceased on 29th November 2010, was traced at several places including Archives, Kimathi House, Electricity House and Parkside Towers. Evidence points to accused and deceased meeting in town on the evening of 29th November 2010 and it is certain that the device was in the city centre that day.

This device (Ex. 15) was given to Francis Mutua Kivuva (PW3) by the accused in December 2010. Francis exchanged Ex. 15 with Jane Wairimu, a neighbour of his, with a Blackberry. Police became aware after writing to Safaricom that this device was in use with Safaricom number 0722655409 as at 21st March 2011. Police traced this device to Jane who led police to Francis. Francis informed the police that he had been given the phone by the accused and led police to the home of the accused. He was also arrested by the police but later released.

Evidence shows that the accused was arrested a second time in May 2012. The circumstances leading to the arrest of the accused the second time in May 2012 are that Justus Musyoka (PW7), the deceased's father, called police and informed them that deceased's number 0724206390 was in use. Police found out that accused had been using deceased's number 0724206390 in his handsets IMEI numbers 356028044765029 Nokia 1616, 353775045769070 Nokia 1616 and 3560545377397730 LG. Police went to the home of the accused in Fedha Estate on 24th May 2012. They recovered an Airtel and Safaricom SIM cards. Safaricom SIM card Serial No. 89254027541014247794 was bearing number 0724206390 in the name of the deceased. The Airtel SIM card was not relevant to this case according to the evidence of SGT Jairus Mbondo. After contacting Safaricom it was confirmed that three handsets belonging to the accused were at one time of the other paired with deceased's telephone number 0724206390 on the dates shown below.

On 13th and 23rd October 2010 deceased's telephone number 0724206390 was paired with Nokia 1616 IMEI No. 353775045769070. It is not clear whether by 13th October 2010 the deceased had left for Djibouti but he must have been away from Kenya as at 23rd October 2010. No witness was specific about the date the deceased travelled from Nairobi to Djibouti. The closest witnesses came to in stating the date was that the deceased travelled to Djibouti in October 2010. On 25th November 2010 deceased's telephone number 0724206390 was paired with accused's Nokia 1616 IMEI No. 353775045769410. This is Ex. 15. The evidence on record shows that the deceased came back to Nairobi from Djibouti on 24th November 2010. It is therefore clear to me that by 25th November 2010 the deceased was using Ex. 15. This is also what the accused has stated in his evidence. On 15th October 2011 the number was paired with Nokia 1616 IMEI No. 356228044765020. By this time the deceased was not alive so it is obvious to me that he could not have been the one using his line in this device. The mystery as to who was using this line is resolved by the evidence from Safaricom as narrated by Daniel Hamisi (PW13).

Since the evidence shows that the device and its SIM card belonging to the deceased was not recovered this court did not benefit from the record from Safaricom in respect of the same. However, the evidence show that on 12th February 2011 at 12.23pm a SIM card bearing Serial No. 89254027541014247794 was configured into deceased's telephone number 0724206390. On 14th February 2011 deceased's Mpesa account PIN was changed. The Mpesa account belonging to the deceased became active on 14th February 2011 at 12.27 pm after these changes with the purchase of airtime to accused's number 0722115943. On 24th February 2011 the accused transferred Kshs 6,200 into the Mpesa account of the deceased. My calculations show that this is almost all the money he had used from that account either on buying Airtime, Mpesa charges and funds transfers to himself. Subsequent to this purchase, other Mpesa transactions were conducted by the accused up to 1st March 2011 at 03.03 am. On the same date at 13.37 pm the balance of funds held in deceased's Mpesa account to the tune of Kshs 7,048.00 was transferred into Archived Funds Holding Account. All these details are shown in Ex. 9 (b). Ex. 10 (b), Mpesa statements of the accused, also reflects some of the transactions in Ex. 9 (b).

The evidence on record shows that on 25th November 2010 at 12.46 pm deceased's number 0724206390 was paired with the device

produced as Ex. 15. It is not clear whether this was the number in the original SIM card belonging to the deceased. It seems to be the case since deceased had arrived in Nairobi on 24th November 2010 and taken the accused's phone to use, at least according to the evidence of the accused. However, on 15th October 2011 at 9.52m deceased's number 0724206390 was paired to 356228044765020. Deceased was not alive at this date. It would therefore be logical to conclude that this was the renewed SIM card. This court heard evidence by PW13 to that effect. He told the court on cross examination that the SIM card as of 12th February 2011 was a replacement of the previous one. This is reflected in Ex. 11.

It is clear from the exhibits presented in court from Safaricom and the evidence of PW12, PW13 and PW14 that the deceased's SIM cards, both the original and the renewal, were paired with accused's several devices as shown in evidence. This pairing was taking place when the accused was alive and perhaps away in Djibouti and when he was not alive as can be seen in the Mpesa statements. Why did the accused transact in deceased's Mpesa account? The evidence on record does not provide answers to this question. The accused did not say anything about this, either in his evidence in defense or in submissions by his counsel. He is completely silent about this thereby leaving the evidence of these transactions as testified by the prosecution witnesses uncontroverted. This court is certain that the accused transacted in deceased's Mpesa account. This is evident in the records from Safaricom produced in court. Can the evidence that the accused transacted in Mpesa account of the deceased be used proof that the accused committed this offence?

To answer this question, I think it is prudent to consider all the evidence against him. It is clear from the recorded evidence that there is no direct evidence linking the accused with the death of the deceased. The only evidence that may be taken as adverse against him is the Mpesa transactions. The rest of the evidence is circumstantial. But, in respect of the Mpesa transaction evidence against the accused, the question that begs an answer is whether the accused's actions of replacing the deceased's SIM card and changing the deceased's Mpesa PIN is an indication that he had anything to do with the death of the deceased or that he was just helping himself to the funds in the account. Evidence shows that he refunded the money he had "borrowed" from the Mpesa account of the deceased. Was accused's actions of taking that money an innocent act by someone who was in need of funds as at the time of taking it with the intention or refunding it or did he have anything to do with the death of the deceased? This action by the accused is highly suspicious. But the law is that suspicion alone, no matter how strong, cannot be a basis for a conviction which must be based on evidence by the prosecution proving a case beyond reasonable doubt (See *Joan Chebichii Sawe v. Republic [2003] eKLR*).

It was submitted by the prosecution that the accused was the last person to be seen with the deceased. However, the evidence of Cooper Kilonzo and Francis Mbate is that the accused, the deceased and a third man identified only as a cousin to the deceased left Tananger Restaurant together. This unidentified cousin of the deceased was among the five people who met on the evening of 29th November 2010. These were the deceased, Cooper Kilonzo, Francis Mbate, the accused and the cousin. What happened after the deceased, the accused and deceased's cousin left is not clear. There is no evidence by the prosecution to inform this court about what happened. This leaves the evidence of the accused to the effect that he parted ways with the deceased and his cousin at Hilton Hotel and went home where he arrived at 7.30 pm. The evidence that the accused went home is corroborated by his brother Stephen Mwendwa. I have no reason to doubt this was the case since I do not have any other evidence to the contrary. It is the law that an accused person does not assume the duty of proving his alibi (see *Jonathan Mutisya Valaiu v. Republic [2001] eKLR*). There is no other evidence to controvert the evidence of the accused and his brother and this court is satisfied with this alibi as required by the law.

The defense put up the theory that the deceased's death may be connected with the projectors he is said to have stolen from his former employer, Debut Image Consultants or the proceeds from that sale. I have considered that theory. There is no evidence from Debut that the deceased stole the projector(s). There is also no evidence from one Tom the man who is said to have paid for the deceased's trip to Djibouti and secured a job there for the deceased. The trip to Djibouti is shrouded in mystery and there is no evidence to inform this court as to what happened when the deceased went there and who travelled to Djibouti with him. The evidence shows that Tom did not travel to Djibouti with the deceased but that another person who is not identified travelled with him. It is also not lost to this court that the scene where the body of the deceased was recovered was not disturbed according to the evidence of the scenes of crime officer SGT Peter Mwangi (PW9). According to him it seemed that the accused was killed elsewhere and his body dumped at the scene. The clothes the deceased was wearing had no stab tears leading him to conclude that the deceased may have been killed while naked. I have observed the photographs. It is true that for the injuries of this magnitude including chopping off of the genitals, it is expected that the victim would bleed profusely. But the clothes the deceased was wearing were not soaked in blood to testify to the fact that he was wearing them when he was stabbed and his genitals cut off. This may lead to another angle that the death of the deceased could have been connected to a love gone sour. Without disrespecting the accused and the deceased or their sexual orientation if they professed a different type of sexual orientation than what is conventionally held to be normal, it seems that they were in a relation of some kind. The deceased had many friends as I have shown. On the evening of 29th November 2010 the deceased was in a hurry according to Cooper Kilonzo and he kept on talking on his mobile phone. Obviously he was talking on the phone to someone or some people who were not present at Tananger Restaurant.

According to the evidence of Vincent Mabu (PW12) and PW13 Daniel Hamisi (PW13) police did not request Safaricom or Airtel to disclose the subscribers who communicated with the deceased or the accused. No request was made to disclose the contents of the text messages from 0731963442 and 0733000810 the two numbers that commonly communicated through texts to EX. 15 on the evening of 29th November 2010. It is also clear that the police did not seek call data from Safaricom in respect of the telephone handset held by the deceased. Evidence shows that the deceased was said to be going to Hurlingham to follow up on the vehicle to take his relatives to his graduation in Eldoret. He was constantly on his phone that evening. It was therefore possible at the time to get his call data and find out who he was talking to. Through call data police would have managed to trace his movements from Tananger Restaurant to the time of his death.

For the court to rely on circumstantial evidence to base a conviction on, that evidence must irresistibly point to the accused person to the exclusion of all others as the one who committed the offence. This is the import of *R. v. Kipkeri arap Koske & Another 16 EACA 135* where it was held that:

"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis that that of his guilt."

With many friends in tow, with allegations of stolen projector(s) from the former employer, with the mystery surrounding the trip to Djibouti

and with an unidentified cousin in the company of the deceased on the evening of 29th November 2010, would it be safe for this court to find that the accused killed the deceased or that the evidence points irresistibly to the accused to the exclusion of all others as the person who killed the deceased? As required by the law, I have carefully examined the evidence against the accused which is to a large extent circumstantial and I find that this evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the accused. The evidence connecting him with operating the Mpesa account of the deceased is weak against the accused. He is the one who alerted deceased's father of the Mpesa balance in that account and evidence shows that he refunded the money he had withdrawn from that account. He may just have acted dishonestly but he saw the better of it and refunded the money. It would be pure speculation to connect him with the death of the deceased basing it purely on his actions in operating that Mpesa account. I will give him the benefit of the doubt.

The prosecution case has its weaknesses. Crucial evidence, specifically call data from Airtel and Safaricom, was left out; witnesses who may have held vital information were left out; police took too long to investigate this matter and between 29th November 2010 and May 2012 when a decision to charge the accused was made, crucial evidence may have been lost and police did not follow several links especially the issue of projectors, Djibouti mystery or even a love gone sour. Police also failed to follow up with mobile service providers the last movements of the deceased. On its part, the prosecution failed to follow and controvert the alibi defense.

I think I have shown that the evidence on record does not prove beyond reasonable doubt that the accused caused the death of the deceased. The circumstantial evidence on record fails to satisfy the legal requirement to lead to a conviction of the accused. Consequently, I find that though there are suspicions, these cannot be a basis for finding the accused guilty. There are doubts in my mind and these doubts will be applied to the benefit of the accused. I find that the evidence on record does not prove that the accused killed the deceased. Having found so, the remaining issue as to the malice aforethought does not come up. Therefore, the prosecution has failed to prove the murder case against the accused person. I will therefore make a finding, which I hereby do, that the accused is not guilty and acquit him of the offence of murder as charged. I order that he is free to enjoy his liberty unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Delivered, dated and signed this 11th day of October 2018.

S. N. Mutuku

Judge