REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 5 OF 2015

REPUBLIC……...……...……PROSECUTOR

Versus

PETER MAINA MUGEREKI…….…….....ACCUSED

JUDGEMENT

Criminal Law *– whether the facts prove that the deceased was killed by the accused or someone else not in the dock? Whether circumstantial evidence in this case is sufficient to make a finding of guilty and convict the accused for murder?*

Held *– the evidence not cogent and credible to place the accused at the scene. The circumstantial evidence falls short of the threshold set in the law to convict the accused.*

The accused **PETER MAINA MUGEREKI** was arraigned before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) of the Laws of Kenya. The brief facts as alleged by the state are that on the night of 6th May 2015 at Ngong Township at Kajiado North, within Kajiado County murdered one **JAMES MWAI CHEGE** hereinafter referred as the deceased.

The accused pleaded not guilty necessitating the case to be scheduled for a trial in order for the prosecution to adduce evidence to prove the disputed facts. At the trial he was represented by Mr. Itaya advocate while the prosecution was led by Mr. Alex Akula a Senior Prosecution Counsel. The prosecution called a total of six (6) witnesses to proof its case against the accused and produced exhibits associated with the witnesses who adduced evidence.

The accused in this case is indicted with the offence under section 203 which states:

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

It is against this background the prosecution must establish the following ingredients of the offence beyond reasonable doubt:

(1) That the deceased is dead.

(2) That the death was unlawful.

(3) That in killing the deceased the accused acted with malice aforethought.

(4) That the accused was the one who caused the death of the deceased.

The prosecution led evidence from the witnesses can be summarized as follows:

PW1 PAUL CHEGE told this court that on the night of 6th and 7th May 2015 the deceased and accused were drinking together in a bar at Ngong. He stated that in the course of their drinking a fight ensued between them where accused hit the deceased with a piece of wood occasioning grievious harm. Following the injuries according to PW1 the deceased was rushed to Ngong Sub-District Hospital as per exhibit 2 (a) dated 7/5/2015. PW1 further stated that on examination at Ngong – Sub-District Hospital the medical doctor certified the nature of injuries as serious and referred the deceased to Kenyatta National Hospital for better management. This was vide referral letter admitted as exhibit 2 (b) indicative of the evidence that the deceased was received at Kenyatta National Hospital on 8/5/2015 as an inpatient. PW1 further stated that the deceased succumbed to death on 11/5/2015 while undergoing treatment.

PW2 LUCY WANGARI CHEGE testified that on 7/5/2015 she received a telephone call regarding the admission of the deceased at Ngong Hospital due to injuries inflicted the previous night. She further stated that on arrival at the hospital the deceased who was still in pain but talking narrated to them that he had been hit by the accused over a dispute involving a pair of shoe.

PW3 ANTONY MWANGI was the employer of the accused. He testified that on the 6/5/2015 they were together in his workshop till 3.00 pm when he released the accused to go and attend to his personal matters. PW3 further testified that it is only the following day when the accused failed to report on duty but was not aware of his whereabouts. In the course of the day PW3 stated that he learnt that accused had been arrested in connection with the death of the deceased and was held at a police station as a murder suspect. He was therefore asked to record a statement by the police regarding the movement of the accused person on the previous day.

PW4 JAMES MUGO testified that in company of his wife they participated in identifying the body of the deceased to the pathologist at Kenyatta National Hospital Mortuary. PW4 and PW2 further stated that on visual observation they noticed that the deceased had sustained injuries to the head.

PW5 PC HILLS MOSES attached to Ngong Police Station testified that a report was made concerning a suspect of murder seen walking within Ongata Rongai. According to PW5's testimony they made arrangements through communications satellite to locate the exact location of the suspect with the help of family members to the deceased. They managed to apprehend the accused person.

PW6 PC BENARD BOIT the investigating officer attended to the incident by compiling the witness statements and arranging for the postmortem to be conducted at Kenyatta National Hospital Mortuary. He testified that on interrogation of the witness like PW4 they alleged that the deceased had fought with the accused in the night of 6/5/2015. PW6 further told the court that the accused admitted that they were together with the deceased on the fateful day. According to the investigations carried out by PW6, the deceased sustained injuries inflicted by a piece of wood which was not recovered. In his testimony PW6 produced in support of the prosecution case pair of shoe, referral letter to Kenyatta National Hospital, death summary report, burial permit, sketch map and p3 form as exhibit 1 – 5 pursuant to section 77 of the Evidence Act. In support of the investigation resulting in the accused indictment with the offence of murder.

At the close of the prosecution case the accused was placed on his defence where he elected to give unsworn testimony. The accused denied any knowledge of the incident nor the sale of the shoe to the deceased. In essence the accused set up a defence of alibi and gave an account of his whereabouts between the 6th and 7th May 2015. According to the accused on the 6th day of May, 2015 he had sought permission from PW3 to leave work earlier than usual to travel to Ongata Rongai. He further stated that the following day he was within Ongata Rongai. The accused denied being with the deceased on the fateful night he is alleged to have been killed.

SUBMISSIONS

Mr. Itaya learned counsel for the accused submitted that the prosecution failed in its endeavour to prove the case against the accused beyond reasonable doubt. Learned counsel argued that there is no direct or circumstantial evidence that the accused was with the deceased on the night he was assaulted. He further argued that the theory of purchase of a pair of shoes by the deceased from the accused could not hold in view of the different pairs exhibited in court. Learned counsel further submitted that the dying declaration relied upon by the prosecution was not corroborated. In his contention learned counsel argued that the alleged dying declaration was made on the 7/5/2015 while the deceased died on the 11/5/2015. In a nutshell learned counsel contended that the circumstantial evidence the prosecution placed reliance was not cogent nor sufficient to enter a verdict of guilty and convict the accused. Learned counsel invited the court to apply the principles in the cases of ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990 (UR)*** and ***Solomon Kirimi Mrukaria v Republic [2014] eKLR.***

In a rejoinder, Mr. Akula the Senior Prosecution Counsel on the law submitted reiterating the evidence of PW1 – PW6 that the case against the accused has been proved beyond reasonable doubt. Mr. Akula further argued that from the evidence all the three elements of the offence of murder facing the accused were proved satisfactory without iota of doubt as to how the deceased met his death. Mr. Akula placed reliance on the cited authorities of ***Limambula v Republic [2003] KLR 683*** and ***Charles O. Maitanyi v Republic [1986] KLR 198***.

ANALYSIS AND RESOLUTION

The starting point at this stage is to deal with each of the ingredients of the offence and evaluating the evidence to establish whether the threshold of a case of beyond reasonable doubt was met by the prosecution. This proposition in law is well illustrated by none other than Lord Denning in the case of ***Miller v Minister of Pensions [1947] ALL ER 372 at 373*** who stated as follows:

> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond (a) reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail 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 of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**

In our Evidence Act Cap 80 of the Laws of Kenya under section 107 it states as follows:

> **"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist."**

It is therefore trite that the burden of proving an accused person's guilt rests on the prosecution throughout the trial save where there are admissions by the accused.

The first ingredient - Death of the deceased - James Mwai Chege

There is ample evidence that prior to the night of 6th and 7th May 2015 the deceased was well and going about his chores at Ngong Township. However in the morning of the 7/5/2015 PW1 and PW2 received a telephone call that the deceased had been taken ill and rushed to Ngong Sub-District Hospital for treatment. It was while at the hospital the deceased was diagnosed with a head injury which required to be further managed at Kenyatta National Hospital. PW6 produced a referral letter dated 7/5/2015 to Kenyatta National Hospital where the deceased was admitted on the 8/5/2015 to undergo treatment. See exhibit 2 (b) tendered by PW6.

According to PW2 the deceased succumbed to death on 11/5/2015 while undergoing treatment at Kenyatta National Hospital. This was confirmed by the autopsy report prepared and signed by Dr. L.A. Muchelenganga and Dr. Walong. The report was admitted in evidence by consent under section 77 of the Evidence Act. In the postmortem report the pathologist revealed that the deceased had sustained severe head injury due to blunt trauma, acute lung injury, oesophagus and gastric atrophy. Pursuant to the

findings and confirmation a death certificate number 831566 in respect of the deceased was issued.

It is not in dispute that the deceased is dead and the prosecution proved that beyond reasonable doubt.

The second ingredient to prove is that the death was unlawful

Under Article 26 (1) of the Republic Constitution - every person has the right to life. Subsection 3 provides that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law. **William J** in his book on ***Criminal Law at pg 299*** making reference to J.M Nyasani scholarly works on analysis of causation observed as follows:

> **"Homicide is the taking of human life by a human being. All killing is homicide but not all killing is criminal or not all homicides are unlawful. Lawful homicides are committed in execution or advancement of justice, in reasonable defence of a person or property and as a result of an accident or misadventure."**

In the case of ***Gusambizi Wesanga v Republic [1948] 15 EACA 65*** the court stated thus:

> **"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property."**

In the instant case PW1 and PW2 testimonies refers to a telephone call regarding the admission of the deceased at the hospital. The major complaint at the time by the deceased was a head injury. It was diagnozed initially at Ngong Sub-District Hospital and later a reconfirmed on referral at Kenyatta National Hospital. The deceased died three days later on the 11/5/2015 while undergoing treatment at the facility. The death summary report exhibit 2 (b) references this fact.

During the postmortem carried out on 15/5/2015, the deceased was found to have sustained laceration 15 cm long on the occipital region of the head trunk posterior abrasions covering 50 x 50 cm. The cause of death was attributed to the injuries to the head due to blunt force trauma. The medical evidence is indicative of the fact that the deceased did not die of natural causes nor a traffic road accident. The postmortem report confirms severe head injury caused by a blunt force. In the persuasive authority of ***Republic v Lamb [1967] (51 Cr. Appeal R415)*** the court stated thus on the *mens rea* to the unlawful act:

> **"An unlawful act causing death of another could not simply because it was an unlawful act render a verdict of manslaughter or murder/inevitable (for such a verdict inexorably to follow the unlawful act must be such that all sober and reasonable people would inevitably recognise it as an act which must subject the other person to at least the risk of some harm resulting therefrom, albeit not serious harm."**

As deduced from the evidence adduced by the prosecution, the deceased death cannot be brought within the exceptional circumstances under the constitution or statute law. The nature of injuries and the cause of death as a result of severe head injury occasioned by a forced blunt trauma is crystal clear that whoever carried out the unlawful act intended to cause grievious harm or death.

I am therefore in agreement with the senior prosecution counsel that the death of the deceased was unlawful.

The third ingredient touches on ***'malice aforethought'***. This element has been defined in section 206 of the Penal Code. According to section 206, malice aforethought shall be deemed to be established by way of evidence by the prosecution in proving one or more of the following circumstances:

(a) An intention to cause the death of another.

(b) An intention to cause grievious harm to another.

(c) Knowledge that the act or omission causing death will probably cause death or grievious harm to some person, whether that person is the person killed or not, accompanied by indiffence whether death or grievious injury occurs or not or by a wish that it may not be caused.

(d) An intention to commit a felony; and

(e) An intention to facilitate the escape from custody of or the flight or any person who has committed a felony or attempted.

The acts which constitute grievious harm under section 231 of the Penal Code include interalia:

> **"Any harm which unlawfully wounds or does any grievious harm to any person by any means whatever or unlawfully attempts in any manner to strike any person with any kind of projective or with a spear, sword, knife or other dangerous or offensive weapon……"**

Under section 206 to establish malice aforethought the prosecution must prove the intention or knowledge on the part of the perpetrator or assailant. This principle of law is well illustrated in the following cases: In ***Petero Sentalisho Lemandwa v Republic [1953] EACA 20***. In this case the deceased died as a result of violence inflicted on her by the assailant in furtherance of him committing a felony in his house. The court held that malice aforethought was established on the part of the assailant who caused death through unlawful act with an intention to commit a felony. In ***Fadhili Gumbao alias Malota & 3 Others v Republic [2006] TLR*** the appellant had been charged with the offence aggravated robbery with violence where the victim died in the course of the robbery. The court of appeal held that the law is clear that ***a person who uses violence measures in the commission of a felony involving personal violence does so at his/her own risk and is guilty of murder if these violence measures result in the death of the victim.***

It is trite law that malice aforethought can be inferred from the circumstances in which the offence was committed. The celebrated case of ***Tubere S/O Ochen v Republic [1945] EACA*** 63 outlined the circumstances as constituting the following:

(a) The nature of the weapon used against the deceased to inflict injuries.

(b) The part of the body targeted by the attacker whether vulnerable or not.

(c) The manner in which the lethal weapon was used. Whether in furtherance to cause grievious harm the assailant used the weapon repeatedly.

(d) The conduct of the accused before, during and after the attack of the deceased.

(See also the commentaries by **Musyoka J** ***in his book on*** **Criminal Law at pg 311 – 319***)*

In applying the above principle to the facts of this case, I am of the considered view that malice aforethought is present as against the perpetrator of the crime of murder against the deceased. This can be deduced from the medical report by Dr. Walong and Dr. Machelenganga produced in evidence by PW6. The murder weapon was not recovered but according to the medical evidence the severe head injury was as a result of blunt forced trauma.

From the postmortem report which was conducted on 15/5/2015 to establish the likely cause of the death of the deceased, the report by Dr. Walong and Mucheleganga admitted in evidence by consent revealed the following injuries: sutured injury to the head measuring 15 cm long on the occipital region, trunk abrasions covering 50 x 50 cm, epidural hemorrhage of the head and esophagus hemorrhage. The two doctors opined that the cause of death was severe head injury due to blunt force trauma, acute lung injury and oesophagitis and gastric atrophy.

I have evaluated the evidence, there is no controversy that the death of the deceased was caused by another person. The intention of that person was to cause death or serious grievious bodily harm to which the probable consequence will be death. The evidence by the prosecution establishes on attach against the deceased on the night of 6th and 7th May 2015. The deceased sustained injuries from which he succumbed to death while undergoing treatment at Kenyatta National Hospital.

The application of section 206 of the Penal Code and the legal principles in the case of ***Tubere v Republic (Supra)*** clearly point to an existence of malice aforethought in absence of any evidence to the contrary. I am therefore satisfied that the prosecution evidence to establish malice aforethought is watertight and the degree of proof is that of beyond reasonable doubt.

The cardinal question which begs for an answer in this trial is whether the prosecution positively placed the accused at the scene of the crime. According to Mr. Akula senior prosecution counsel submissions PW1, PW2, PW3 and PW6 placed the accused at the scene as the one who assaulted the deceased. Mr. Akula further submitted that PW5 confirmed that the accused lived together at Ongata Rongai. Mr. Akula further contended that the testimony of PW3 confirmed that the accused and deceased were close friends prior to occurrence of the offence. Mr. Akula further invited the court to draw an adverse inference on the conduct of the accused after the death of the deceased in view that he never visited the deceased at the hospital nor assisted in administering first aid or rush him to any nearby medical facility. The accused in his defence denied any knowledge or being involved with the commission of the offence, nor the fact that the deceased was injured the previous day requiring his attention.

From the evidence there are two dimensions the prosecution pointed at to prove the case against the accused beyond reasonable doubt. One source of evidence upon which the prosecution depended is in respect of the testimony of **PW2 LUCY WANGARI CHEGE** before his death captured as follows:

> ***"I managed to talk to my brother (deceased) that he had been hit by someone by the name Peter Maina over a dispute about a grey pair of shoe."***

The second issue revolves around circumstantial evidence by PW1, PW3 and PW6 touching on the night of 6th and 7th May 2015 and the relationship accused enjoyed with the deceased prior to his death. I shall now proceed to deal with the two issues which hold the key to an adverse finding against the accused person. The first issue falls under the principle of evidence referenced as a dying declaration under section 33 of the Evidence Act Cap 80 of the Laws of Kenya. Under this section statements of relevant fact by person who is dead or cannot be found written, oral or electronic made by a person who is dead or who cannot be found or who has became incapable of giving evidence, or whose evidence cannot be produced without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable are themselves relevant facts in the following cases:

(a) Where it relates to cause of death.

(b) Or is made in course of business.

(c) Or against interest of the matter

(d) Or gives opinion as to public right or customs or matters.

(e) Or relates to existence of a relationship.

(f) Or is made in will or and relating to family.

(g) Or is made by several persons and expenses filling relevant to the matter in question.

As expounded under section 33 (a) when the statement relates to the cause of death in which the statement is made by a person as to the cause of his death, or as to any of the circumstances of the

transaction which resulted to his death, in cases in which the cause of that person's death comes into question, such statements are relevant whether the person who made them was or was not at the time when they were made under exception of death and whatever may be the nature of the proceedings in which the cause of his death comes into question.

CASE LAW AND COMMENTARIES

The rationale behind this evidential principle was well illustrated in the decision by the supreme court of India in the case of ***P.V. Radhakrishna v State (AIR 1989 SC of Kamataka)*** in the following words.

> **"The principle on which a dying declaration is admitted in evidence is indicated in latin malent, *nemo morturus procsomitur mentr*i, a man will not meet his maker with a lie in his mouth**.

The principles on admissibility of the evidence of a dying declaration are well illustrated further in the case of ***Republic v Andrew [1987] AC 281*** where **Lord Ackner** laid down the following tests:

> **(1) Can the possibility of concoction or distortion be disregarded.**
>
> **(2) To answer this, ask if the event was so unusual, startling or dramatic that it donated the thought of the victim causing an instinctive reaction without the chance of reasoned reflection, on conditions of approximate but not necessarily exact contemporariety.**
>
> **(3) To be sufficiently spontaneous the statement must be closely connected with the event causing it.**
>
> **(4) There must be no specific features making concoction or distortion wisely.**
>
> **(5) There must be mo special features likely to result in error for example drunkenness.**

The key consideration from this proposition is that the victim or declaration must be in a fix condition to give statement. The second most important point as deduced from this authority, the victim should not be under the influence of anybody or prepared by prompting tutoring or imagination. See also ***(Nram v State AIR [1988] SC 912***. The court of appeal in Kenya has correctly and authoritative restated the law on admissibility of a dying declaration under section 33 (a) of the Evidence Act. There are many decisions which abound on this topic in domesticating our local jurisprudence. In the case of ***Choge v Republic [1985] KLR*** the court set out the admissibility of the dying declaration in the following passage:

> **"The general principle on which a dying declaration is admitted in evidence is that is in a declaration made in extremely when the matter is at a point of death and the mind id induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarent being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."**

The predecessor of the court of appeal in the case of ***Pius Jasunga S/O Akumu v Republic [1954] EACA 333*** succinctly held as follows:

> **"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval....it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (Republic v Eligu S/O Odel & Another [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been**

> **mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration."**

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends upon section 33 (a) of the Evidence Act Cap 80 of the Laws of Kenya. It has been said by the court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (See also ***Republic v Muyovya bin Musuma [1939] 6 EACA 128, Republic v Premananda [1925] 52 Calcutta 98***7.

The Court of Appeal emphasizing the need for caution and necessity for corroboration in relying on a dying declaration extensively cited the principle from ***the 7th Edition on Evidence by Field*** as follows:

> **"The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The deceased may have stated his inferences from facts concerning which he may have omitted important particulars from not having his attention called to them."**
>
> (***Republic v Olulu S/O Eloku [1938] 5 EACA 39, Republic v Muyovya bin Msuma (Supra***).

The court went to state ***that particular caution must be exercised when an attack takes place in darkness when the identification of the assailant is usually more difficult than in day light. The fact that the deceased told different persons that the appellant was the assailant is evidence to the consistency of his belief that such was the case, it is no guarantee of accuracy although there is no more rule of law that to support a conviction there must be corroboration of such statements. It is generally recognized that it is very unsafe to base a conviction solely on them. (See also Misengo Mibinga v Uganda [1964] EA 71, Republic v Ramazau bin Mirandu 1EACA 107***).

This court armed with the above legal principles ought to answer the question whether there are reasonable grounds to believe the testimony of PW2. It is now plain that PW2 Lucy Wangari Chege was a single identifying witness who did not see the death of the deceased. She came to the scene later after other people have interacted with the deceased. The explanation given by the deceased to PW2 why he was assaulted revolved over a grey shoe. The only difficulty presented by PW2 testimony is the value to be placed on the evidence in view of the missing link between the shoe and the assault. The prosecution produced in evidence one open sandal red in colour as exhibit 1 (c) and a second shoe grey in colour. There is no indication as to the links of the two exhibits and involvement of the accused with the murder of the deceased. There was no positive identification as to the ownership of shoe prior to the death of the deceased to bring in the theory of sale and the debt by the accused.

As the records stands PW2 introduces the names of James Mugo PW4 to the transactions involving the murder of the deceased, but surprisingly PW4 makes no mention of any dying declaration by the deceased. It is not in dispute that the deceased had been diagnosed at Ngong Hospital as having suffered severe head injury. This is the same period PW2 is making reference to a dying oral statement by the deceased.

Given the severity of the injuries inflicted upon the deceased it could have been prudent that the doctor at Ngong Hospital be asked to certify about the fitness and condition of the deceased at time the statement was made to PW2. The prosecution failed to call the doctor and the first witness who saw the deceased immediately after the incident. The court is therefore entitled under the general law of evidence to draw an inference the evidence of those witnesses if adduced would have been adverse to the prosecution case. See ***Bukenya & Others v Uganda [1972] EALR 549 at 551***.

Missing any single ingredients of a dying declaration as set out in the case of ***Republic v Andrews Supra, Republic v Choge Supra*** makes it suspicious and the benefit of doubt should be resolved in favour of the accused. I also impugn the testimony by PW2 on the basis that the exact words uttered by the deceased were not crystal clear. There was no question and answer from which resulted the deceased to confide in PW2 in exclusion of other people who also testified in this trial. The deceased allegedly made the statement while undergoing treatment at Ngong Hospital. The question is whether such statement was ever uttered to any other person save for PW2 cannot be answered in the affirmative from any other evidence placed before this court.

I am in agreement with the decision in the case of ***Choge v Republic Supra*** regarding the caution to be applied before placing reliance on uncorroborated evidence on a statement made by the deceased who the accused has no chance of cross-examining. In view of the circumstances of this case the dying declaration allegedly made by the deceased to PW2 does not inspire confidence to this court as being true and voluntary statement admissible in evidence under section 33 (a) of the Evidence Act. The testimony of PW2 under the cautionary and necessity of corroboration principle is hereby rejected as it falls short of the probative value piece of evidence to be used against the accused.

I now turn to the vital question in respect of the sufficiency of circumstantial evidence which the prosecution relied upon to indict the accused. The starting point is therefore to restate the law. In the persuasive case of ***Chandreal v State Rajasilan AIR [1976] SC 917*** the court held on circumstantial evidence three conditions have to be fulfilled:

> **(1) The circumstances on which we rely for evidence must be established firmly.**
>
> **(2) The circumstances have to be precise and they must point towards the guilt of the person who is accused.**
>
> **(3) When all the circumstances taken as a whole they must form a complete chain and there must be no loophole in the chain it must indicate that the accused only could have committed the crime and nobody else could have done it.**

The same apex court in the case of ***Sathya Narayan v State [2013] 80 ACC 138 SC*** reviewed the pigeon of the three principles in the earlier decision of ***Chandreal Supra*** to a five principles test on circumstantial evidence. The court pronounced itself thus:

> ***"(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances must be or should be established.***
>
> ***(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explained on any other hypothesis except that the accused is guilty.***
>
> ***(3) The circumstances should be of a conclusive nature and tendency.***
>
> ***(4) They should exclude every possible hypothesis except the one to be proved.***
>
> ***(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion of the accused and must show that inconsistent with the innocence of the accused and must show that all human probability the act must have been done by the accused."***

The principle of circumstantial evidence has also been reiterated by the Kenyan courts in a plethora of cases like ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990 UR*** the court of appeal stated as follows:

> **"It is settled law that when a case rests entirety on circumstantial evidence such evidence**

must satisfy three tests:

(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(2) Those circumstances should be of a definite leniency unerringly pointing towards guilty of the accused.

(3) 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."

See also the case of ***Musoke v Republic [1958] EA 715, Sawe v Republic [2003] KLR 314, Republic v Kipkemong Arap Koske & Another 16 EACA 135, Mwendwa v Republic [2006] 1KLR 133, Mohammed & 3 Others v Republic [2005] 1KLR 722***. In a nutshell circumstantial evidence has often been described as the best evidence because of its characteristics of following a chain, leaving no gap in the chain, consistency only with the hypothesis of pointing at the guilt of the accused in exclusion of none else. The prosecution case therefore relying on circumstantial evidence must prove the case against the accused beyond reasonable doubt.

Subject to the above principles I have subjected the evidence of PW1 – PW6 to scrutiny and evaluation. PW1 Paul Chege adduced evidence that the deceased was hit with a piece of timber in a bar at Ngong. Unfortunately the accused was not present at the social place where the deceased was assaulted. Secondly he did not witness the accused being hit with a piece of timber. The source of that information conveyed to PW1 was never called as a witness. The testimony by PW1 falls under hearsay evidence. The witness did not know the accused before and whether a debt owing and due could be established to link him with the death of the deceased.

PW2 Lucy Wangari Chege testimony has been described while dealing with the issue on a dying declaration of the deceased. PW3 James Mugo role was to participate in identifying the body of the deceased to the pathologist who performed the postmortem. PW4 never alluded to any knowledge regarding the circumstances the deceased met his death or any involvement with the accused in committing the crime.

PW5 PC Moses testimony founded on the role he played in re-arresting the accused from the members of the family to the deceased. PW6 PC BOIT who investigated the case alluded to the evidence gathered during statement under inquiry from the accused how the killing took place. At the end of his testimony no such statement was exhibited to court as to content recording. Secondly PW6 refers to a quarrel between the accused and the deceased. Thirdly PW6 makes reference to the deceased being hit with a piece of timber on the head by the accused. Fourthly PW6 alludes to the fact that the accused and deceased were close friends who lived together at Ongata Rongai. Fifth PW6 testified that the accused was seen last with the deceased in a social place.

What is surprising in the case at hand the investigating officer neither recovered the murder weapon nor recorded statements from the witnesses who saw the accused and deceased drinking together on night of 6th and 7th May 2015. There was no explanation as to the source of information PW6 tendered before this court implicating the accused with the death of the deceased. The theory of the shoe and debt owed to the accused by the deceased was not conclusively pursued by the investigating officer PW6. There is variance between the charge and the evidence adduced by PW1 – PW6 in support of it against the accused.

It is trite that for the prosecution to establish the guilt of the accused on the basis of circumstantial evidence the circumstances should be of a definite tendency towards the guilt of the accused. Those circumstances should form a firm chain with no gaps that the accused guilt is inconsistent with his innocence. See the case of (***Abanga Supra***).

Based on the evidence before me i am satisfied that no inference of guilt can be drawn from the case

advanced by the prosecution. The case falls short of the threshold and guiding principles set out by the court of appeal in ***Abanga v Republic (Supra)*** on circumstantial evidence. I accordingly resolve the benefit of doubt in favour of the accused. There is no cogent evidence that the accused murdered the deceased in the night of 6th and 7th May 2015 at Ngong Township. The charge of murder against the accused under section 203 as read with section 204 of the Penal Code hereby fails. The accused who is currently in remand is ordered acquitted and set free forthwith unless otherwise lawfully held.

Dated, delivered in open court at Kajiado on 10th day of January, 2017.

……..

R. NYAKUNDI

JUDGE

Representation:

Accused - present

Mr. Akula for Director of Public Prosecutions - present

Mr. Itaya for the accused - present

Mr. Mateli Court Assistant - present