



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 10 OF 2015

REPUBLIC

VERSUS

HASSAN SUBIRA

JUDGMENT

INTRODUCTION

1. The Accused person herein, Hassan Subira, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that :-

“On the 23rd day of November 2013 at Tanzania Village within Taita Taveta County murdered MWASHIGHADI BABU.”

2. While sitting at High Court of Kenya, Mombasa, Muya J took the evidence of Julius Ngongo (hereinafter referred to as “PW 1”) on 18th December 2014. The matter was subsequently transferred to the High Court of Kenya, Voi on 18th June 2015. When the parties appeared before this court on 12th October 2015, they requested that the matter proceeds from where it had reached.

3. On 4th October 2016, this court found that a *prima facie* case had been established against the Accused person to warrant him being put on his defence. His defence case was heard on 10th November 2016. At the conclusion of his case, the State filed its Written Submissions dated 25th November 2016 on 28th November 2016. He filed his Written Submissions dated 13th December 2016 on 14th December 2016.

THE PROSECUTION’S CASE

4. The Prosecution called a total of six (6) witnesses to demonstrate the following ingredients of murder outlined in Section 203 of the Penal Code Cap 63 (Laws of Kenya) :-

a. Proof of the fact and cause of death of the deceased;

b. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused; and

c. Proof that the said unlawful act or omission was committed with malice aforethought.

5. It summarised the evidence of all its witnesses which it submitted was cogent and consistent in explaining what happened on 22nd November 2013 and on 23rd November 2013. It was emphatic that the Accused person assaulted Mwashighadi Babu (hereinafter referred to as “the deceased”) on the 22nd November 2013 leading to his death on 23rd November 2013.

6. It was its averment that from the testimonies of PW 1, Samuel Ngongo (hereinafter referred to as “PW 2”) and Anne Waithira (hereinafter referred to as “PW 5”) who were at the scene of crime, the Accused person went to the deceased’s house while he was very drunk. It said that they testified that the Accused person’s behaviour at the material time was violent, that he said that he was going to kill someone on that day, that he was holding a blunt object, that they ran out of the house after he came in violently and that he actually killed the deceased herein.

7. It was its averment that the deceased died from a blunt object which had hit him on his head (**sic**) and consequently, the fact that he was hit by a blunt object on the head and died was not an issue. It submitted that the Accused person laid out his intent and indeed made good his threat by killing the deceased which was proof that the said unlawful act was committed with malice aforethought.

8. It referred this court to the definition of malice aforethought as given in Section 206 of the Penal Code as being:-

a. An intention to cause the death of or to do grievous harm to any person, whether the person is the person actually killed or not;

b. Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.

9. It submitted that PW 1 had testified that the Accused person came to their door and said that he was going to fracture their legs or kill them and that he escaped with three (3) others and that when they came back after about twenty (20) minutes, they found the deceased lying on the floor. It added that the deceased told PW 1 that the Accused person had assaulted him, which amounted to a dying declaration in line with the provisions of Section 33(a) of the Evidence Act Cap 80 (Laws of Kenya). It was its argument that the said dying declaration was corroborated by the narration of events by PW 2, PW 4 and PW 5.

10. The said Section stipulates as follows:-

“Statements, written or oral, (sic) of admissible facts made by a person who is dead...are themselves admissible in the following cases-

a. When 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 in his death, in cases in which the cause of that person’s death comes into question and (sic) such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”

11. In this regard, it relied on the case of **Stephen Mutura Kinganga vs Republic (2013) eKLR** in which the Court of Appeal rendered itself as follows:-

“10. This Court has considered the above provisions in several cases. In Pius Jasunga s/o Okumu – v- R, (1954) 21 EACA 333, the predecessor of this court stated:

...It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R- V- Eligu s/o Odel & Another, (1963) 1- 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 he accused and not subject to cross-examination unless there is satisfactory corroboration.

11....We have evaluated the evidence on record and taken caution that the statement by the deceased to PW 1, PW 2, PW 5 and PW 6 amounted to a dying declaration. We are satisfied that there is no question of mistaken identity since the deceased, PW 1, PW 2, PW 5 and PW 6 all knew the appellant as they were neighbours...We find that the statement by the deceased is admissible under Section 33(a) of the Evidence Act and the learned judge did not err in admitting the same in evidence..."

12. The Prosecution also set out the Accused person's evidence in detail and pointed out that before the deceased died, he had pleaded guilty to the charge of assaulting him. It argued that his version of events did not add up and was merely a concoction of lies meant to deceive this court. It was categorical that it would not have been possible for the deceased to have hit the bed with his head as the distance between the stool and the bed was very short.

13. It was its submission that there were no co-existing circumstances weakening the chain of events it had relied upon, a principle that was addressed in the case of **Musoke vs Republic [1958] EA 715** citing with approval **Teper vs Republic [1952] AL 480** wherein the court therein stated as follows:-

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

14. It argued that the chain of events clearly pointed to the fact that the Accused person assaulted the deceased leading to his death and consequently, the totality of the evidence it had presented before this court irresistibly proved its case beyond reasonable doubt.

THE ACCUSED PERSON'S CASE

15. The Accused person adduced sworn evidence. He did not call any witnesses. In his Written Submissions, he also set out in detail his evidence and that of the Prosecution witnesses. He denied having caused the deceased's death for the reasons that no one saw him attack him, that the alleged metal object was not produced in court and that there were contradictions in the evidence by the said witnesses. It was his argument that these existing circumstances weakened the inference of guilt on his part.

16. He pointed out that all the said witnesses had stated in their testimonies that he was not a bad person and that in fact, the Village Elder, Jemimah Mwachofi (hereinafter referred to as "PW 6") had stated that he was a quiet man and there had never been a complaint against him.

17. He added that the assertion that he was shouting that he would kill a "person," which did not refer to the deceased person herein could not be proved and that in any event, the shouting was caused by drunkenness and failure by PW 2 to return his change. He averred that the Prosecution had failed to confirm at what point the money he was demanding from PW 2 was returned to him.

18. He asked this court to disregard PW 1's evidence regarding the deceased's dying declaration because during his Cross-examination, he averred that the deceased was not talking, a fact that he said was corroborated by PW 2 and PW 5. It was his further contention that PW 2's evidence that the deceased was eating together with them contradicted that of PW 5's evidence who had said that the deceased was in his room eating alone, a fact that she conceded to, during her Cross-examination.

19. It was his submission that the legal onus to prove his guilt beyond reasonable doubt lay with the Prosecution as was stated in the case of **Republic vs David Ruo Nyambura & 4 Others [2001] eKLR** and that the evidence it had relied upon was merely circumstantial as could be seen from the case of

Malindi Criminal Appeal Case No 223 of 2007 Khadija Mwaka Yawa vs Republic it placed reliance upon. The adopted citation of this case was **Khadija Mwaka Yawa vs Republic [2008] eKLR.**

20. It was therefore his argument that he ought to be acquitted in view of the inconsistencies in the evidence by the Prosecution witnesses.

LEGAL ANALYSIS

21. According to PW 1, on 22nd November 2013 at about 11.30 pm, he was having supper with the deceased who was his brother, Ngongo Bukari and Alice Mkanyumo when the deceased came and stood at the door saying that he was going to fracture their legs and kill them. He said that the deceased was in another room. In total, he said that there were two (2) rooms in the compound.

22. He stated that the Accused person then hit a lantern lamp that was on a stool in the room engulfing it in total darkness. He then started punching them but he managed to escape from the house with two (2) other people and called neighbours. It was also dark outside the house.

23. When they returned to the house after about twenty (20) minutes, they found the deceased lying unconscious. His testimony was that when they came back to the house, they found the deceased who had vomited, lying on his bed facing downwards. He was emphatic that while he was in the deceased's room with the said Ngongo Bukari and Alice Mkanyumo, the deceased said that the Accused person had assaulted him. He then went silent. They took the deceased to the hospital but he passed away the following morning.

24. During his Cross-examination, he stated that he did not see what the Accused person was carrying or see him attack the deceased and that when they ran into the darkness, they did not see where the Accused person went. He also said that they did not find the Accused person when they came back to the house. It was his testimony that there were people who were drunk at the material time and the said Ngongo appeared to have been drunk.

25. Ngongo PW 2. He said that the deceased who was his uncle, lived in a three (3) roomed house. He stated that on the material date at about 9.00pm, he was eating supper with the deceased, his auntie namely, Mama Kabete, Rama his friend and PW5, who was his neighbour. After they finished eating, the Accused person came and locked the door. The Accused person then grabbed his shirt but PW 1, who was also his uncle came to his rescue. He said he saw the Accused person holding a metal bar before he put off the lantern lamp. Everyone ran away but the Accused person chased them round the house for about two (2) minutes.

26. He said that when he came back to the house together with PW 1 and PW 5, the Accused person left the deceased's room and ran away after seeing them. He said that when they entered the deceased's room, they found that he had vomited and his head was hanging from the bed almost touching the floor but he was still alive and breathing faintly. He added that the deceased's trousers that had reached his knees had faeces. They took him to the hospital but he passed away on 23rd November 2013 at about 4.00pm.

27. During his Cross-examination, PW 2 was categorical that the Accused person was carrying a metal bar similar to the one used in constructions, which he said he retrieved from the deceased's room in the morning but it had no blood stains. He, however, admitted that he never saw the Accused person hit the deceased and denied that there was any alcohol in the premises.

28. Dr Ngali Mbuuko (hereinafter referred to as "PW 3") conducted the Post Mortem examination on the deceased. He did not see any external injuries. Upon conducting an internal examination, he noted that the chest, heart, bladder and kidneys were normal. There were also no fractures on the skull. However, there was a bruise on top of the head going towards the back. There was bleeding in the brain cavities and the brain was swollen.

29. He concluded that the cause of the deceased's death was due to intra-cranial bleeding. He stated that a

bruise in the scalp can kill an old man such as the deceased because the brain shrinks as people get older. He said that since the space between the brain and the skull of an old person is increased, it was easy for an old man to die from a blunt injury of the head. He added that a blunt injury could be caused by an object that is not sharp such as a wall, chair or stone and that the victim or object or surface could either be fixed or mobile.

30. In his Cross-examination, he stated that a person could fall and sustain a bruise and that a younger person would require more strength to cause a fracture. In his Re-examination, he attributed the vomiting to increased pressure in the brain which could cause a headache.

31. No 91529 PC Ruth Mbithe (hereinafter referred to as "PW 4") testified that she visited the deceased in hospital on 23rd November 2013 but he was unable to talk. She was informed by members of the public that he had been beaten by the Accused person herein the previous night. They told her that he was very drunk and was saying that he would kill somebody, without specifying a particular person. It was her evidence that the deceased's relatives saw the Accused person struggling with the deceased in the latter's home. This is evidence she reiterated during her Re-examination. During her Cross-examination, she stated that she never saw the object the Accused person was said to have used to hit the deceased with.

32. PW 5 testified that on 23rd November 2013 at about 11.30 pm, she was at the deceased's daughter's house. The deceased's daughter was called Alice or Mama Kabete. She said that they were about seven (7) people at the time and as they were eating, the Accused person came and stood at the door and said that he was going to kill somebody without specifying who it would be. He said this three (3) times. He put off the tin lamp and entered the deceased's house and also put off the tin lamp.

33. She said that they ran away and stood about three (3) metres from the deceased's house. The Accused person peeped at them and when she asked him why he had put off the lamp, he slapped her directing her to her house. Before she reached her houses and while he was still slapping her, she started screaming. He then went back to the deceased's house. Her screams attracted neighbours who came out of their houses. She said that PW 2 ran and called PW 6 who told her to come out of her house, a fact that she reiterated during her Cross-examination. She said that she re-joined the multitude of people and they stood near the house.

34. It was her evidence that after about fifteen (15)-twenty (20) minutes, the Accused person emerged from the deceased's house. They then entered the deceased's house with PW 6 who put on the tin lamp and found the deceased lying on the floor having vomited and diarrhoead on himself but he was not talking. They took him to the hospital as PW 6 had suggested. She stated that received a report the following day at about 4.00 pm that the deceased had died.

35. During her Cross-examination, PW 5 said that she never saw the Accused person enter the deceased's house as he had directed her to her house while slapping her and that from where they were standing, they could not see what was going on as there were no lights but she saw the Accused person leaving the deceased's compound as there was light. She did not, however, see him leave the deceased's house.

36. PW 6 said that on 23rd November 2013, she was asleep when PW 2 woke her up at about midnight to inform her that a young man was creating disturbance in the neighbourhood. When she went to the deceased's home, she found the Accused person, Alice, PW 1, PW 2 and PW 5 eating and the Accused person and PW 2 fighting. She asked the Accused person what the problem was and he told her that he had sent for cigarettes and all he wanted was his change. After separating and warning the Accused person and PW 2, she went back to her house.

37. When she woke up in the morning, she found that the deceased had vomited and diarrhoead on himself and but he had been treated. However, from his condition, she recommended that he be re-admitted. She was informed that the deceased died at hospital.

38. In her Cross-examination, she said that she had known the Accused person for a long time and that he was not a bad man. She said that when she went to check on the fracas at the deceased's home, she found

the deceased asleep and that the said Alice had become mentally unstable after the incident.

39. In his defence, the Accused person stated that he used to sell sand at the river bed. On 23rd November 2013, he packed a semi-trailer with sand worth Kshs 10,000/=. After he finished working, he went to Mwangaza Bar for drinks. The bar used to close between 11.00 pm- 12.00 midnight. He drank alcohol until about 11.00 pm and then went to Alice's place where illicit alcohol (Bhangara) used to be sold. Alice was his friend and a niece to the deceased, who he used to meet occasionally at Alice's place.

40. It was his testimony that he asked Alice to serve the people who were present, several litres of alcohol. After ordering the final three (3) litres, he paid a sum of Kshs 1,000/= and went to the toilet from where he asked PW 2 to buy him a packet of Rooster cigarettes so that they could get change to pay for the alcohol. After he came back from the toilet, he waited for PW 2 to bring him the cigarettes. When he asked him for the cigarettes and the change, PW 2 told him that he had given him Kshs 100/= and he should not play around with people's minds, a position that PW 5 supported.

41. It was then that a scuffle ensued between him and PW 2 which led to PW 6 coming to the deceased's house to enquire what was going on. He said that he told her that he wanted his change and cigarettes and she directed PW 2 and PW 5 to give him back his change. She left for her house after warning them that she would take action against them in the event she heard more commotion from them.

42. It was his evidence that he demanded for his change and cigarettes from PW 2 and when he refused to give him the same, he kicked the three (3) litres of Bhangara that PW 2 had ordered. It was then that PW 2 grabbed him by the shirt and after he fell, PW 2 lay on him. PW 2 escaped his grip and said he was going to get a knife. He said that he slapped PW 5 and told her to go and sleep because she was supporting PW 2.

43. PW 2 then came back with a knife causing the others to flee. However, PW 5 was left at the house drinking. He then entered the deceased's house to report what had happened and found the deceased seating on a stool that was about one and a half (1½) feet in height. There were two (2) other stools, one which had a jug with water and a tin lamp while the other, had dirty dishes. He sat on a lower traditional stool that is normally used in the kitchen.

44. He said that he sat very close to the deceased and explained to him what had transpired. As it was getting late, he told the deceased that they would look for a solution the following day. When he stood up, he felt dizzy from the effects of the alcohol and fell on the deceased. The tin lamp when off as it fell together stools with the jug of water and the dirty dishes.

45. He lit his cigarette lighter and picked the deceased from the floor and placed him on his bed. He said that he did not know that the deceased had been injured at the time and that when he gave the deceased some water after he asked for the same. The deceased then waved at him and he left. It was his testimony that when he left the deceased's house, there was no one.

46. The next day, at about 7.30 am, Community Police came to his house and informed him that he had injured the deceased. He was then taken to the Police Station to record a statement. Since he had bitten himself on the chin when he fell at the deceased's house, he requested to be taken to Moi District Hospital Voi where the deceased had also been admitted. He was given a tetanus jab and pain killers. He then asked to see the deceased. He found him being given oxygen and he could not talk.

47. He was taken to court and admitted to the charge of assault which he said he admitted not because he had done it but because, he had learnt that he had injured the deceased by mistake.

48. During his Cross-examination, he admitted that his recollection of what transpired on that date was minimal and that he could not recollect everything that happened on that day as he was drunk. He was, however, emphatic that he fought PW 2 because he had refused with his change and that he only entered the deceased's room because PW 2 had gone to get a knife and he wanted the deceased to resolve the dispute between them. He further stated that he knew the deceased, who had been sitting near the wall,

had been hit on the head as he heard a thud.

49. In his Re-examination, he stated that the Community Police are the ones who informed him that he had injured the deceased. He was categorical that although he was very annoyed with PW 2 and PW 5 concerning his change, he could not have killed anyone and that even if he was very drunk on that day, he could not have killed someone and not have known about it. He ended his evidence by saying that the deceased died due to bad luck after he fell on him.

50. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

51. In this particular case, there were inconsistencies and contradictions between the testimony of PW 1, PW 2 and PW 5 regarding the Accused person's threats that he would kill somebody, without specifying who it was, their running out of the deceased's house and their return to the deceased's house. The court thus analysed PW 1's, PW 2's and PW 5's evidence with a view to establishing what inconsistencies and/or contradictions were material and which ones were not.

52. PW 1 said that the Accused person stood at the door and started threatening them with injuries and death. PW 2 said that the Accused person ambushed them and threatened to kill those who were there that day. PW 5 said that the Accused person came and stood at Alice's door and said that he was going to kill somebody.

53. PW 1 said that the Accused person kicked the lantern lamp that was in the room whereas PW 2 and PW 5 said that the Accused person put off the lamp. PW 2 was not specific in the manner that the lamp was put off. PW 1 also said that the Accused person started punching them and they ran out. PW 2 said that everyone who was there ran away when the Accused person came with a weapon. PW 5 said that the Accused person entered the deceased's house and put off the tin lamp and they ran away. The Accused person said that they all ran away after PW 2 went to get a knife.

54. Although the version of what transpired as given by the PW 1, PW 2 and PW 5 differed slightly, what came out of their evidence was that the tin lamp was put off by the Accused person and they all ran away from the deceased's house. These inconsistencies and/or contradictions were therefore immaterial and inconsequential.

55. However, the mention of a metal bar by the Accused person as had been narrated by PW 2 was a major departure from PW 1 and PW 5's evidence. PW 2 had testified that the Accused person was carrying the metal bar when he came out of the deceased's house. He was emphatic that he saw the Accused person leave the deceased's house. On his part, PW 1 had stated that upon their return to the house after about twenty (20) minutes, they saw the Accused person outside the house but he disappeared. He did not say anything about a weapon.

56. On her part, PW 5 had stated that the Accused person emerged from the deceased's compound after about fifteen (15)- thirty (30) minutes but she did not see him leave the deceased's house because it was dark as there was no light. She did not also mention anything about the Accused person carrying a weapon at the material time.

57. The fact that PW 1 and PW 5 never mentioned a metal bar was a material contradiction and/or inconsistency that led this court to question the credibility of PW 2's evidence. Indeed, this court had noted PW 2's evidence that they retrieved the metal bar, which had no blood stains, from the deceased's house the following morning.

58. The question that came in the mind of this court was, if PW 2 saw the Accused person coming out of the deceased's house with a metal bar, how could it have been possible for the metal bar to have been

retrieved from the deceased's house in the morning? There was indeed no evidence that the Accused person came back to the deceased's house after he left with the metal bar.

59. Further, if the metal bar was retrieved, why was it not surrendered to the police as the assault and eventual murder weapon as PW 4 was emphatic in her Cross-examination that she never saw the object the Accused person was said to have used at the material time? If the same was surrendered to the police as was contended by PW 2 during his Cross-examination, then why did the PW 4 not tender the same in evidence?

60. PW 2's truthfulness also came in sharp focus as he had stated that the Accused person chased them round the deceased's house for about two (2) minutes. Appreciably, neither PW 1 nor PW 5 who were with him when they ran out of the deceased's house mentioned anything about this chase. It was also not clear how he saw the Accused person leave the deceased's house if it was dark as PW 5 had contended. This court found his evidence to have been exaggerated and cautioned itself in relying on his evidence without a pinch of salt.

61. Turning to the evidence of PW 1, he testified that when they returned to the deceased's house he was in the company of PW 2, PW 5 and Alice. PW 2 said that he returned to the deceased's house with PW 1 and PW 5. PW 5 alluded to PW 6 having been present at the material time as the one who proposed that the deceased be taken to hospital.

62. Although there was a contradiction as to the persons who entered the deceased's room at the material time which would not really change the fact that the deceased was found in his room having vomited and diarrhoeed on himself, this court could not ignore the fact that it was only PW 1 made reference to the deceased's dying declaration that he had been attacked by the Accused person.

63. Neither PW 2 nor PW 5 mentioned this critical piece of evidence. In fact, it was PW 2's and PW 5's evidence that when they entered the deceased's room, he was not talking. PW 2 said that he was alive but had faint breathing while PW 5 said that he was just "looking" but was not communicating.

64. As this dying declaration was the basis of the Prosecution's case for charging the Accused person with the deceased's murder, this court was very hesitant to rely on PW 1's evidence that the deceased actually said that the Accused person was the person one who assaulted him. Whilst this court noted the Prosecution's submissions regarding dying declarations, it formed the opinion that PW 1's evidence regarding the deceased's dying declaration was also an exaggeration that was not backed by any facts.

65. This court also treated PW 5's evidence cautiously. Notably, PW 6 never said that she was present when people returned to the house after supposedly running away from the Accused person who had threatened them with death. In fact, PW 6's evidence was that she went to the deceased's house in the morning when she was informed that the deceased had vomited and diarrhoeed and had been treated but from his condition, she recommended that he be admitted at the hospital.

66. This court was also apprehensive of PW 5's evidence because it appeared illogical. She had testified that the Accused person slapped her until she entered her house. Since she, PW 1 and PW 2 made it appear that the Accused person went to the deceased's house out of the blue, it was then not clear how and under what circumstances PW 6 called her and they went to stand outside the deceased's house. There was clearly a gap in her evidence.

67. Notably, PW 1, PW 2 and PW 5 appeared to suggest that the Accused person came from wherever he had come from and started threatening them. They withheld critical information that there had been a previous altercation regarding cigarettes and change between PW 2 and the Accused person. This altercation was alluded to by both PW 6 and the Accused person.

68. In view of the fact that there were glaring inconsistencies regarding the metal bar and the dying declaration coupled by what appeared to have been exaggerations by PW 1, PW 2 and PW 5 and withholding of evidence regarding the said altercation, this court came to the conclusion that the

Prosecution did not provide sufficient evidence to sustain a charge of murder against the Accused person herein.

69. In fact, in the absence of such evidence, this court was more persuaded to accept the Accused person's evidence that he fell on the deceased who sustained injuries to head and that he could not have known that the said injuries were so serious as to have caused his death. Indeed, PW 3 testified that the injuries were internal and were not visible to the naked eye. The Accused person's act of placing the deceased on his bed was indicative that he may not have known that he had been badly injured.

70. Indeed, although the deceased suffered fatal injuries as a result of the Accused person falling on him, there was no evidence of malice aforethought as defined in Section 206 of the Penal Code on the part of the Accused person. Notably, no intention to cause the death or to do grievous harm to the deceased by the Accused person or knowledge that the act of his falling on the deceased would most probably cause his death was established by the facts or from the evidence that was placed before this court.

71. Accordingly, having considered the evidence by the Prosecution and the Accused person, their respective submissions and the case law they each relied upon, this court came to the firm conclusion that act of the Accused person falling on the deceased as a result of effects of too much drinking was not indicative of an unlawful act or omission on his part.

72. Although the Prosecution had sought to establish that the Accused person was so drunk that he would not have known that he killed the deceased, two (2) issues emerge. Firstly, if the Accused person was so drunk, then he would not have been able to find his way to his house. Indeed, the Community Police found him at his house at 7.30 am. It was thus clear to this court that although the Accused person may have been drunk, it was not to the extent that he was not aware of his actions which he explained in great detail.

73. Secondly, if he was as drunk as the Prosecution wanted to make him look, then it is obvious that a person who was so drunk could not have had *mens rea* of committing a crime as he would not be having proper faculties of a prudent and reasonable man. Indeed, for one to assert an element of criminal responsibility, a guilty mind or criminal intent must be proven.

74. The common law standard is that an act is not culpable unless the mind is guilty. The *actus rea* may have been present but in the absence of *mens rea*, then there could not be malice aforethought. In other words, criminal responsibility must consist of both *mens rea* and *actus rea* which were absent in the circumstances of the case herein.

75. These co-existing circumstances thus weakened or destroyed the inference that the Accused person was guilty of the murder of the deceased herein. On the contrary, as seen hereinabove, there were several other co-existing circumstances that weakened or destroyed the inference of the Accused's guilt. The holding in the case of **Musoke vs Republic** (Supra) was thus not applicable in the circumstances of the case herein.

76. There were irreconcilable material contradictions and/or inconsistencies that led this court to entertain doubts as to what really transpired on the material date. The doubts created in the mind of this court and the several unfilled gaps led this court to conclude that the Prosecution had not proven its case to the required standard, being, proof beyond reasonable doubts. The burden lay on the Prosecution to fill the gaps and not for the Accused person to explain the said gaps.

DISPOSITION

77. In the premises foregoing, the upshot of this decision was that as the evidence adduced by the Prosecution could not sustain a conviction herein, this court hereby acquits the Accused person under the provisions of Section 322(1) of the Criminal Procedure Code and orders and/or directs that he be set free forthwith unless he be held for any other lawful cause.

78. It is so ordered.

DATED and DELIVERED at VOI this 15th day of February 2017

J. KAMAU

JUDGE

In the presence of:-

Were h/b for Miss Munyari.....for Accused Person

Miss Anyumba for Republic

Josephat Mavu– Court Clerk