



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 1 OF 2014

REPUBLIC

VERSUS

MOHAMED JIRO GODANA

JUDGMENT

INTRODUCTION

1. The Accused person, Mohamed Jiro Godana, 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 20th day of June 2013 at Maungu trading centre within Taita Taveta County murdered Mambo Kiloki Musale.”

2. This matter was initially heard by Muya J on 4th March 2015 when he took the evidence Masale Kishalia (hereinafter referred to as “PW 1”) and Ayub Mwavule Mwangalo (hereinafter referred to as “PW 2”). This court took over conduct of this matter on 9th October 2015 and continued from where the said Learned Judge had reached after counsel for the Accused person and counsel for the State confirmed to the court that it could proceed accordingly.

3. The Prosecution called a total of eight (8) witnesses to demonstrate the following ingredients of murder:-

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.

4. The Accused person’s and the State’s Written Submissions were both dated and filed on 7th February 2017.

THE PROSECUTION’S CASE

5. The Prosecution summarised the evidence of all the Prosecution witnesses in its Written Submissions, which evidence it submitted was cogent and consistent sufficient to have proven a *prima facie* case against the Accused person herein. It relied on the cases of **Bhatt vs R [1957] EA 332** and **R vs**

Cornelius Kipkosgei Kogo [2013] eKLR which made reference to the case of **R vs Jagjivan M Patel & Others 1 TLR** where the common thread was that when deciding whether a *prima facie* case had been established, the court will not put an accused person on his defence to fill the gaps of the prosecution's case.

6. It pointed out that there was no direct evidence of an eye witness who could testify to the effect that he or she saw the Accused person actually murder Mambo Kiloki Musale (hereinafter referred to as "the deceased") and as a result, the case had to be decided on the basis of circumstantial evidence.

7. It submitted that the principles of the application of circumstantial evidence were set out in the case of **GMI vs Republic [2013] eKLR** which echoes the *locus classicus* case of **R vs Kipkering Arap Koske & Another 16 EACA 135** (sic). It set out the said principles as follows:-

a. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

b. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

c. 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 person and no one else.

8. It discredited the Accused person's sworn evidence and argued that the following facts pointed to his guilt:-

a. The deceased's body was found sixty (60) metres from where the Accused person was residing;

b. It was highly unlikely that the deceased picked a passenger as there was no housing or stage;

c. The deceased was not mugged as none of his personal belongings were stolen;

d. The deceased was found lying next to the motor cycle and if he had been thrown off the motor cycle, his body would not have been in close proximity with the motor cycle due to the impact; and

e. The Accused person was the last person to have been seen with the deceased.

9. It contended that though no motive was shown on the part of the Accused person, the same was irrelevant as motive and *mens rea* are totally separate and distinct concepts. It was its further argument that there was no requirement in law that motive had to be proved and that it only assisted in explaining the reason for an act of murder but did not negate a charge of murder.

10. It therefore submitted that the circumstantial evidence irresistibly pointed to the Accused's guilt and urged this court to return a finding of guilty against him.

THE ACCUSED PERSON'S CASE

11. After the court found that a *prima facie* case had been established against the Accused person, it put him on his defence. He gave sworn evidence but did not call any witnesses to support his case. It submitted that the Prosecution's case was based on suspicions and that mere suspicions alone were not sufficient to hold an accused person culpable in a criminal offence.

12. In his evidence and submissions, he was emphatic that he was not responsible for the deceased's

murder or connected in any way with the same. It was his argument that the Prosecution had failed to prove the case against him, beyond reasonable doubt. He therefore urged this court to acquit him of the charge of murder of the deceased.

LEGAL ANALYSIS

13. The fact that the deceased sustained injuries that resulted in his death was not in dispute. Rather, the question that faced this court was whether or not the deceased met his death as a result of the unlawful acts or omissions of the Accused person and whether or not the said unlawful act or omission was committed with malice aforethought on the Accused person's part. To answer this question, this court carefully analysed the evidence that was adduced by both the Prosecution witnesses and the Accused person,

14. PW 1 said that the deceased was his son. He stated that the deceased had completed Standard Eight (8) and was employed as a Boda Boda driver as he awaited his results. It was his testimony that on 21st June 2013, he proceeded to Maungu Power and Lighting after being called and on reaching there, he found the deceased, lying facing upwards. When he was Cross-examined, he admitted that he did not know the deceased's customers and he did not also see the Accused person at the scene of crime.

15. PW 2 was a Boda Boda rider. His testimony was that on 20th June 2013 at about 8.00pm, the Accused person, who he identified in the dock, approached him to take him to the Camel Boma. However, he told him he had already closed his business for the day. It was then that the Accused person went to the deceased and after chatting with him briefly, they left together. He said that he never saw the deceased again until 7.30 am the following morning when he went to the scene of crime and found the deceased lying on the ground with injuries on his head.

16. During his Cross-examination, he averred that the deceased had only operated as a Boda Boda rider for about four (4) months and that he had never worked throughout the night with the deceased. He further stated that he saw the Accused person for the first time on 20th June 2013 and admitted that he did not hear what he had discussed with the deceased or see him leave with the deceased. However, he was emphatic that he saw the Accused person's face as there were street lights on the road.

17. Clayton Muliwo Ali (hereinafter referred to as "PW 3") was the deceased's uncle. He said that he was at home on "20th June 2013" when an unknown female called and informed him that his nephew was dead in a thicket near Kenya Pipeline (Power), having been killed at night. He was present when the Postmortem examination was conducted on the deceased and in fact signed the Postmortem Form as a witness.

18. In his Cross-examination, he stated that he was certain that the deceased was his nephew and that he was aged nineteen (19) years. He discounted the Accused person's counsel's suggestions that the deceased may have been involved in a motor accident on Mombasa Road because there was evidence of there having been a struggle at the scene where the deceased's body was found.

19. No 61751 Sergeant David Chege (hereinafter referred to as "PW 4") was the Scene of Crime Officer and confirmed having taken the photos at the scene of crime. His evidence was that the deceased was lying next to Motor Cycle Registration Number KMCT 812G (hereinafter referred to as "the Motor Cycle") and that his face was covered with blood, the right eye was sunken and he had a deep lacerated injury on the back of his head that had been caused by a blunt object.

20. He agreed that he could not tell how the deceased met his death but in his observation, he said that the deceased did not appear to have resisted the attacker as he was lying in a position that suggested that he was caught unawares. He stated that the place where the body was had not been disturbed but the area surrounding the scene had been disturbed because there was big crowd of onlookers.

21. In his Cross-examination, he contended that the deceased was found in an area where motor vehicles

passed but it was his view that motor cycles passed there more frequently than motor vehicles. He opined that the deceased was hit while he was on the Motor Cycle and having prior experience in road traffic accidents, he was certain that the deceased could not have sustained injuries as a result of a road traffic accident due to the proximity his body to the Motor Cycle. This is a fact that he reiterated during his Re-examination and added that if it was a motor accident, the Motor Cycle would have been damaged but it was not.

22. Omari Juma Mwambuni (hereinafter referred to as “PW 5”) was a cousin to the deceased. He said that he had worked as a Boda Boda operator for about four (4) years while the deceased had only been in the Boda Boda business for less than a year. He contended that the deceased never worked throughout the night, similar to what PW 2 had told this Court.

23. His evidence was that twice before the 20th June 2013 at night time, the Accused person had asked him to ferry him to the Camel Camp in Ndara area but he declined to do so. He said that the Accused person approached him again on 20th June 2013 8.00 pm to take him to the same place but he declined yet again. He stated that the Accused person came back at about 10.00 pm on the same night and requested the deceased to take him to the same place.

24. It was his testimony that he warned the deceased against taking the Accused person to the Camel Camp which the deceased ignored with the deceased telling him that he was dropping the Accused person in town. He operated his Boda Boda business until 6.00 am during which time the deceased never returned. He said that he received news at about 7.00 am to the effect that the deceased had been found dead at “Spaki”. He immediately went to the scene and found the deceased dead with his Motor Cycle and phone simcards lying next to him.

25. He stated that he identified the Accused person four (4) days after the said incident. It was his averment that he was able to see the Accused person’s face sufficient to have identified him as the Boda Boda Stage was well lit with street lights and lights from nearby shops. It was also his evidence that the Accused person had carried a black bag at all times that he approached him.

26. In his Cross-examination, he said that the area the deceased was killed had no shops or lights. He averred that he used to collect milk from the Camel Camp often and that he dropped camel herders at the Camel Camp during daytime and at nighttime. He contended that he knew many herders in the Camel Camp but was categorical that he had never seen the Accused prior to meeting him on 20th June 2013 at the Boda Boda stage. He said that he refused to ferry the Accused person to the Camel Camp due to the distance and because he did not know him. He reiterated the fact that on all occasions the Accused person approached him, he was carrying a black bag.

27. It was his averment that the road to the Camel Camp had good security despite there being no lights. He added that it was difficult for a Boda Boda rider to pick random passengers from the Camel Camp area to come back with to Maungu town as it was a deserted area. He, however, said one could get lucky and pick a herder from the Camel Camp during the day or night but the usual practise was that a passenger from the Camel Camp would call a Boda Boda rider to be picked from there. He was of the view that it would have been harder that one could get a return passenger at 10.00 pm which was the time he said the deceased took the Accused person towards the Camel Camp.

28. He agreed that although he saw the deceased ferrying the Accused person, he did not know what happened to the deceased who was killed about eight hundred (800) metres from the Boda Boda stage, in an area where there were no shops or light.

29. In his Re-examination, he reiterated that he refused to ferry the Accused person to the Camel Camp because he had offered to pay little money and also because he did not know him.

30. Dr Nashat Fadhil (hereinafter referred to as “PW 6”) tendered in evidence the Postmortem Report on behalf of Dr Eunice Ouma who conducted the Postmortem examination on 22nd June 2013. She stated that from the said Postmortem Report, the time and date of the deceased’s death was not indicated but the

examination showed that the deceased was already stiff.

31. She said that no internal examination was done on the deceased. However, the examination had shown that the deceased had dried blood on the neck and head. He had sustained a depressed skull fracture on the head, a cut wound on the right ear, a deep cut wound above the right eye brow measuring four (4) centimetres deep and a cut wound on the occipital area measuring three (3) centimetres deep. The immediate cause of death was shown to have been cardio respiratory arrest secondary to severe head injury following an assault.

32. During her Cross-examination, she stated that the injury caused to the deceased was not necessarily caused by an assault and there was a possibility that the same could have been caused by a fall from a motor cycle. She conceded that Dr Ouma did not indicate the margins which could have made it easier to conclude that the injuries were caused by a sharp object like a knife.

33. She added that it would have been safer for Dr Ouma to have indicated the cause of death as cardio respiratory arrest secondary to severe head injury and leave out the “assault” part unless her margins pointed to the fact that the deceased was assaulted.

34. No 223640 Corporal Douglas Mwangima Mwakarambu (hereinafter referred to as “PW 7”) said he and his colleagues were instructed by his superior Sergeant Limo at Maungu AP Post to go and arrest the person who had been suspected of killing the deceased herein. He said that he did not know the suspect’s name by this time.

35. They were given a physical description of the said suspect, the clothes he was wearing, his ethnic group and religious persuasion and on following the leads, they found the suspect at Sanghanyi Check Point where he was chewing miraa. They arrested and took him to the Maungu AP Post. One (1) hour after his arrest, several Boda Boda riders came and identified the suspect as the person who was ferried by the deceased on the material date.

36. In his Cross-examination, PW 7 said that the suspect, who was the Accused person herein, did not escape when he and his colleagues approached him. He said that an Identification Parade was done at the AP Post.

37. No 46265 Sergeant David Makhakha (hereinafter referred to as “PW 8”) was the Investigating Officer in this matter. He recorded statements of three (3) persons who witnessed the deceased ferrying the Accused person. This included PW 2 and PW 5. He re-hashed the evidence that was adduced by the said witnesses and added that before PW 5 helped the deceased to kickstart the Motor Cycle, they asked him where he was going because they were suspicious of the Accused person and he told them that he was taking him within town.

38. It was his evidence that he charged the Accused person because he was identified as having being ferried by the deceased, he was the last person to have been seen with the deceased and the position of the Motor Cycle and the deceased’s body were found was evident that it was not a motor accident.

39. In his Cross-examination, he stated that Boda Boda operators ordinarily stopped operating at 2300 hours and agreed that there were about two (2) hours between the time the deceased was said to have ferried the Accused person and 2300 hours when Boda Boda business used to close. He reiterated the testimony he adduced during his Examination-in-Chief to the effect that the scene of crime had been disturbed as there were many people when they got to the said scene.

40. He added that he interrogated the Accused person but he was talking in a language that no one could understand. He did not, however, take his statement.

41. In his sworn statement, the Accused person said that he had been a herder at Maungu since 1998 after he moved from Wajir. He said that he was also an elder of the Somali community overseeing the herding of cattle and the only one who could translate Kiswahili in the community.

42. He admitted that on 20th June 2013, he called the deceased, whom he had known from 2004, to ferry him to the water tank within Ngutuni area. He had been summoned to the said water tank following complaints by Kenya Wildlife Services (KWS) that there were too many cattle at the said water tank. He said he met many people who knew him. These included Jillo, Chief Inspector KWS, several KWS officers and Haji Hassan Roble who had constructed the said water tank.

43. He stated that the deceased left him at the water tank with no passenger. He said that when the deceased reached Maungu, he called him to ask him to give him a sum of Kshs 5,000/=. He averred that he referred the deceased to Abdullahi at the Al Shukrani Shop where he was given the said sum of money. He then requested the deceased not to go very far as he had wanted to go back to the Camel Camp at about 5.00 pm.

44. He contended that he arrived at Maungu at about 5.30 pm and went to the Mosque for prayers. He then went to Joseph's place where he purchased one (1) kilogramme of miraa. Since he had finished all his money, he asked the said Joseph to give him Kshs 50/= credit so that he could call the deceased. He said that Joseph was his friend and so, he could borrow the credit which he had promised him, he would pay the following day.

45. He said that he called the deceased at about 7.30 pm to take him back to the Camel Boma and the deceased asked him to give him until 8.00 pm as he was eating his dinner at Msendo Hotel. It was his testimony that when he arrived at the Boda Boda Stage, he met the deceased and his colleagues and PW 5 helped the deceased kick start the Motor Cycle. He said that they left at 8.15 pm and at the material time, he was carrying a black bag which had miraa and cigarettes. He said he was surprised why the deceased told PW 5 he was ferrying him to Maungu instead of telling him that he was dropping him at Ndara area.

46. He averred that they arrived at the Camel Camp (Boma) at 8.45 pm and found Ibrahim Farah, Abdullahi Roble and Abdi Hassan Guhd. He then asked Abdullahi Roble to give the deceased some camel milk to take to his family. He said that the deceased was given five (5) litres of camel milk. He requested him not to switch off his phone as he wanted him to take him to the water tank the following morning.

47. He said that the deceased informed him that he would take the milk to the fridge at Joseph's place and then transport another customer from Mgeno by which time it would be morning and allayed any fears that he had that his phone would be switched off. This Joseph was the same who had sold him the miraa. He then bade the deceased farewell and asked him to be careful because there were many elephants and monkeys along the way.

48. At about 6.00 am, his boss, one Haji Hassan Farah, came to the Camel Boma and informed him that other Bomas had no herders as several of them had been arrested by KWS and were being held at the Voi Police Station. He asked his boss to see the OCS Voi Police Station but before he responded, a police officer called Mugo called him because he knew he was the manager for the herders and he gave him his boss' number so that they could resolve the issue of the arrested herders.

49. He said that his boss left and he remained at the Camel Boma. He tried to reach the deceased on his phone from about 7.00 am to 9.00 am as he had wanted him to ferry him but he was unable to reach him. He, however, got a lift from a KWS vehicle and reached the water tank. He was given a lift by the driver of one Dirie Olow to Komoro's place at Maungu. He stated that the aforesaid Mugo, Kofa and Ali, also police officers from Voi Police Station called him and said they were coming to Maungu because they wanted to be facilitated for having released the herders.

50. He paid for their taxi from Voi and took them to his boss' shop where they met his boss. After they finished with his boss, Mugo and Kofa left and he went with Ali to Zanghani Hotel that was owned by one Medina. They found Roba Buiya Dadi, an Orma from Tana River, Ibrahim Kone and Mahamud Bashir. They ate camel meat, tea and drinks that he ordered and paid for. They chewed miraa until the following morning.

51. He was arrested from the hotel by PW 7, who he said was an Administration Policeman at Maungu and taken to the Chief's Camp. He was left with Chief Inspector Maina and six (6) Boda Boda riders were called. The Boda Boda riders came one by one, pointed at the direction he was seated with the Chief, also called Medina and left. He was then handcuffed and taken to the Police Station.

52. It was his further testimony that he met the deceased in 2004 and that they had never had any disagreement and that they respected each other. He added that on 5th May 2013, the deceased had even taken him to Mgeno Ranch which was thirty (30) kilometres from Maungu at 9.00 pm and returned to Maungu all by himself at about 10.35 pm. He contended that he could not liaise with his witnesses as he had no phone having been taken by the aforesaid Maina and that most of his witnesses had relocated to Wajir, facts he reiterated during his Cross-examination.

53. During his Cross-examination, he admitted that the deceased ferried him on the night of 20th June 2013. He said that he had no documentary evidence to show that he liaised with the deceased several times on the material date said or any witnesses who could corroborate his evidence. He averred that Medina of Zaghani Hotel relocated to Kikambala, Hassan Farah currently lived in Holland while Ibrahim, Abdullahi and Abdi relocated to Wajir. He conceded that he had never asked this court to order for the release of his said phone.

LEGAL ANALYSIS

54. Notably, there was no direct evidence to point at the person who killed the deceased herein or to show how he was killed. The case was therefore based on circumstantial evidence as the Prosecution had correctly pointed out. The principle in a case which is based on circumstantial evidence is that there must be no other co-existing circumstances that would weaken or destroy the inference of an accused person's guilt.

55. This principle was well set out in the case of **Musoke vs Republic [1958] EA 715** citing with approval **Teper vs Republic [1952] AL 480** where it was 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.”

56. Evidently, the Accused person did not deny that on the material date of 20th June 2013, he hired the deceased to ferry him to the Camel Camp (Boma) from the Boda Boda Stage at about 8.00 am. He had also said that the deceased was well known to him as he was his longtime customer. This court did not therefore see any value in analysing the evidence that touched on his identification as the same was not in dispute.

57. The court's interest was limited to establishing who caused the deceased's death on the material day of 20th June 2013. It was required to establish whether or not there were other co-existing circumstances that would weaken the inference of the Accused person's guilt.

58. PW 5 was emphatic that on the material time of 20th June 2013, he refused to ferry the Accused person because he had approached him twice before that date and he did not know him. He said that the Accused was carrying a black bag all the times he approached him, the same bag the Accused person admitted to have been carrying on the material date.

59. The fact that PW 5 adduced the same evidence regarding the bag and gave a description of the person who had approached him and was subsequently ferried by the deceased, which person turned out to be the Accused person herein, led this court to find that he was a credible witness.

60. In fact, as PW 2 and PW 5 identified the Accused person in the lighting conditions that were prevailing at the material time, this court was persuaded to conclude that PW 5 could not have been

mistaken when he stated that the Accused person approached him twice before the 20th June 2013 to ferry him to the Camel Camp.

61. Appreciably, this court set out the Accused person's evidence in great detail to show how meticulous he was in advancing his case. He gave names of several people he associated with between 20th June 2013 and the day he was arrested. However, all that did not assist his case because his alibi could only have been corroborated by his fellow herders at the Camel Camp, namely, Ibrahim Farah, Abdullahi Roble and Abdi Hassan Guhd.

62. This court noted his assertions that he could not call them as they all had relocated and he was unable to liaise with them because his phone had been taken by the aforesaid Maina when he was arrested. This court could not begrudge him for not having called any witnesses because firstly, it is not the duty of an accused person to prove his innocence in a case and secondly, it is not out of the ordinary for witnesses to decline to testify in support of accused persons.

63. Be that as it may, where burden shifts on accused person to prove his alibi, his case will crumble if he does not call witnesses who can corroborate his alibi. In the case of **Stephen Ondieki Ongeto & 2 Others vs Republic [2016] eKLR** while citing the cases of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** and **Karanja vs Republic [1083] KLR 501**, the Court of Appeal rendered itself thus:-

“... in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused's guilt is established beyond reasonable doubt, take into account the fact that he has not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that it is an afterthought.”

64. In view of the fact that the Prosecution's evidence presented a case that showed that he was the last person to have been seen with the deceased, which he himself admitted, the Accused person was obligated to provide proof that he indeed arrived at the Camel Camp after which the deceased left on his own.

65. Notably, throughout the trial, the Accused person never suggested in his Cross-examination of the Prosecution witnesses that his alibi, to the effect that he arrived at the Camel Boma on the material night, could be corroborated by his fellow herders at the Camel Boma. This was fatal to his case.

66. As he did not raise his defence of alibi during the entire Prosecution case, his alibi evidence remained untested. Having been raised only during his defence hearing, it appeared to have been an afterthought cleverly crafted to get him off the hook by whatever means.

67. Going further, it appeared from the Accused person's evidence that he seemed to insinuate that PW 5, his colleagues and PW 7 were previously known to him. This is because he mentioned them by name and in a very personalised manner. Of PW 7, he said as follows:-

“I saw Douglas Mwakarambo. He was a police officer from the AP Post Maungu.”

68. In respect of PW 5 and his colleagues, he stated that:-

“At Msendo Hotel, there were many Boda Boda riders, Omari, Joseph, Katana and others. They knew me from before. Omar was the first person who talked with Maina when I went to the AP Camp.”

69. Notably, PW 2 said that on 20th June 2013 at about 8.00 am, a man of Somali origin, the Accused person herein, asked him to take him to the Camel Boma but he declined because he had closed his Boda Boda operations for the day. He was emphatic that that was the first time he saw the Accused person.

70. On his part, PW 5 was categorical that the Accused person approached him on two (2) previous

occasions prior to 20th June 2013 to take him to the Camel Boma but he also declined to take him there because he did not know him. He warned the deceased not to take the Accused person to the Camel Boma because he did not look like a good person having approached him twice previously. The deceased did not heed to his warning and ferried him to the Camel Boma.

71. PW 5 was emphatic that before the incident herein, he had no relationship with the Accused person. On his part, PW 7 also testified that he did not know the Accused person at the time of his arrest but he told them his name and gave them his Identity Card at the time of his arrest.

72. However, throughout the trial, there no inkling whatsoever from the Cross-examination of the Prosecution witnesses by the Accused person's counsel to suggest that he knew the said witnesses in the intimate manner he wished this court to believe. If he had known them as he had contended, this court would have been interested to interrogate the question as to whether or not the witnesses, in particular, PW 5 and PW 7 who he mentioned by name, had any malicious motive sufficient to warrant them to have adduced extremely adverse evidence against him.

73. Indeed, as he did not take suggest that PW 2, PW 5 or PW 7 had any ill- motive sufficient to have fabricated the charges against him, which this court found to have been far-fetched as he was not known to any of the Prosecution witnesses herein, his evidence of previous knowledge of the deceased person and the aforesaid witnesses had to be treated with a lot of caution.

74. Having analysed the said evidence that was adduced herein, this court was persuaded to conclude that the Accused person's suggestion that he was well known to the deceased, PW 5 and PW 7 was an afterthought that was calculated at hoodwinking it that he was very well known to them prior to the incident herein.

75. This court conclusion was also fortified by certain gaps in the Accused person's evidence relating to when he knew the deceased. Notably, the Accused person testified that he knew the deceased in 2004. PW 1 told this court that the deceased was aged about twenty (20) years. PW 3 testified that the deceased was aged nineteen (19) years. The Postmortem Report that was produced in court by PW 6 showed the deceased's apparent age at the time of his death to have been nineteen(19) years.

76. Although PW 4 had testified that the deceased was a middle aged man, this court was more persuaded to believe the evidence of PW 1 that the deceased was twenty (20) years as the deceased was his son. It also believed PW 3's evidence that the deceased was about nineteen (19) because the deceased was his nephew. It also found favour in the Postmortem Report where Dr Eunice Ouma had made a general observation that the apparent age of the deceased was nineteen (19) years as at the time of his death.

77. Since the Accused person did not adduce any evidence to the contrary, this court found and held that the evidence that the deceased's age was between nineteen (19) and twenty (20) years as at 2013 remained un rebutted and unchallenged.

78. Bearing in mind that the deceased was aged between nineteen (19) and twenty (20) years of age and if as the Accused person had stated that he knew the deceased in 2004, then it followed that the Accused person knew the deceased when he was ten (10) years of age. That would not have been far-fetched as it was possible that the Accused person could have known the deceased when he was a small boy.

79. However, the Accused person did not adduce evidence to suggest that he had known the deceased in any other capacity in 2004 other than a business relationship. The Accused person was a customer while the deceased was the Boda Boda operator. Notably, it was not possible for a ten (10) year old to have operated as a Boda Boda operator as he would not have had a license to ride Boda Bodas (Motor Cycle taxis) in 2004.

80. Further, this court found the Accused person's evidence that he knew the deceased in 2004 not to have been credible because it was clear from PW 1's, PW 2's and PW 5's evidence that the deceased was not operating Boda Boda business in 2004. PW 1 stated that the deceased was awaiting his results for

Standard Eight (8) exams when he became a Boda Boda rider. PW 2 stated that

81. Further, this court found the Accused person's evidence that he knew the deceased in 2004 not to have been credible because it was clear from PW 1's, PW 2's and PW 5's evidence that the deceased was not operating Boda Boda business in 2004. PW 1 stated that the deceased was awaiting his results for Standard Eight (8) exams when he became a Boda Boda rider. PW 2 stated that the deceased had worked as a Boda Boda rider for four (4) months prior to his death. PW 5 also stated that the deceased had only been a Boda Boda rider for less than a year.

82. The Accused person had an opportunity to challenge PW 1's, PW 3's and PW 6's evidence relating to the deceased's age as he had purported to have known the deceased for a long time. However, he did not do so. In the absence of such challenge, this court made a reasonable assumption that the Accused person was not known to the deceased in 2004 as he had averred.

83. Turning to the injuries the deceased sustained, the Accused person had theorised that the deceased may have been involved in a motor accident on Mombasa Road. He did not, however, lead evidence to demonstrate the proximity of the main road to the place the deceased was found or that the deceased had been killed in an accident and his body moved to the scene.

84. Having heard the evidence of PW 1, PW 2, PW 3, PW 4 and PW 6 and having looked at the photographs that were adduced in evidence, this court formed the opinion that the injuries that the deceased sustained were clearly not as a result of a motor accident. This was because of the proximity of the body to the said Motor Cycle as PW 4 had correctly observed.

85. In addition, a depressed skull fracture, deep cut wounds on the right ear, right eyebrow and the occipital area that went to three (3) and four (4) centimetres deep appeared to have been caused by a third party.

86. From the photographs, it was also evident that the terrain where the incident occurred had no sharp stones. It was a dusty patch with loose soil which was confirmed by the evidence of PW 3, PW 4 and PW 7 that the scene had been disturbed making it difficult to re-construct the scene. It was unlikely that the surface where the deceased was found could have occasioned the injuries that he had sustained.

87. Having determined that the injuries deceased sustained were caused a third party, this court noted from the photographs that were adduced in evidence that the area was bushy with no human habitation. The Accused person had also alluded to the lack of human population in that area when he testified that there was only one iron sheet structure that was owned by one Njoroge near the power lines but he never used to stay there.

88. He was also emphatic that it was rare to see people in that area but there were many elephants and monkeys. His evidence therefore corroborated that of PW 5 to the effect that a chance of meeting with a passenger along the way, especially at night, was highly unlikely.

89. Taking the argument further, if Njuguna's uninhabited iron sheet structure was the only structure from Maungu Trading Centre to the Camel Boma and it was rare for people to walk around that area in the night, then it would not have been reasonable to have expected a person to have been lurking in that area with the intention of accosting the deceased on his way back from the Camel Boma after dropping the Accused person.

90. This court wishes to point out that it does always follow that if a person is last seen with a person who is found dead, then he must be the killer. Far from it. However, if there are gaps, inconsistencies and contradictions in an accused person's case that would not displace the evidence of prosecution witnesses, it would be reasonable to infer that such accused person who was last seen with a deceased person had a hand in such person's death.

91. In this particular case, the Accused person herein was the last person to have been seen with the

deceased. He did not have an alibi. His evidence that the deceased was a Boda Boda rider in 2004 was contradicted by the evidence of the PW 1, PW3 and PW 5 that the deceased had been a Boda Boda rider for less than a year. In view of the foregoing, this court found itself in agreement with the Prosecution had cogently and firmly established the circumstances from which an inference of the Accused person's guilt was sought to be drawn.

92. This court also found the Accused person's evidence that the deceased informed him that he was to take another customer to Mgeno Camp to have been suspicions. He had testified that he arrived with the deceased at the Camel Boma at 8.45 pm having left Maungu Trading Centre at 8.00 pm. This journey therefore took forty five (45) minutes. If the journey to Mgeno Camp would take one (1) hour and thirty five (35) minutes, which is the time the Accused person had said it had taken on 5th May 2013 when the deceased took him to Mgeno, all things remaining constant, the deceased person who have probably returned to Maungu town before the break of dawn.

93. Although these were just rough estimates, the essence of this calculation was to demonstrate that the Accused person's assertions that the deceased told him that he would not switch off his phone as it would be morning by the time he dropped the customer to Mgeno were not factual.

94. piece of evidence appeared to have been a red herring to exonerate him from the deceased's disappearance. By the time the deceased's body was discovered in the morning, his phone was off, the simcards having been removed and placed next to his body.

95. This court was baffled as to why the Accused person did not call any other Boda Boda to take him to the water tank once he failed to raise the deceased the following morning. His evidence that he was given a lift to the water tank by KWS and taken to Maungu by the driver of one Orié Olow was another red herring.

96. Notably, the Accused person failed to say who paid his fare once the deceased dropped him at the Camel Camp on the material night. This is because he had testified that he borrowed Kshs 50/= credit from Joseph after his money got finished after he purchased the one (1) kilogramme of miraa.

97. His evidence that he paid for the taxi that police officers from Voi Police Station to Maungu used did not sound plausible because he had no money if the borrowing of Kshs 50/= from Joseph was anything to go by. If he had money by the following morning, he did not adduce evidence to show where he got money from to pay for the taxi. It was also not clear to this court why he would pay for the taxi for the police officers from Voi Police Station when his boss was already at Maungu.

98. The same question of money arose in respect to the treats he gave Ali and the other people he found at Zanghani Hotel. Since it was the following day after he had been dropped to the Camel Boma when he had no money, it was not clear where he got money to pay at the hotel.

99. Appreciably, the deceased's body was found in the direction of the Camel Camp that the Accused person said he resided, which was the place PW 5 confirmed where the Accused person had wanted to be ferried to on that material night and on two (2) other previous occasions before then.

100. Having found that the issue of identification was not an issue as the Accused person admitted to having boarded the deceased's Motor Cycle, the Accused person's conduct of approaching PW 5 twice before 20th June 2013 was indicative of ill motive on his part as the deceased was found the following morning after he had also asked the deceased to ferry him to the same Camel Camp.

101. It is instructive to note that the Accused person tried to remove this court's mind from what was really the issue in contention by bandying names to show that he was a well-known person in Maungu area and could not therefore have been the deceased's killer. Unfortunately, he had no one to corroborate his alibi. Indeed, despite his evidence having been so detailed, he failed to show how the deceased was known to Joseph and why the deceased would have opted to take the five (5) litres of camel milk he had supposedly given him for refrigeration to Joseph's place, in particular, before going to Mgeno.

102. Appreciably, the legal and evidentiary burden lies on the Prosecution to prove its case beyond reasonable doubt. However, there are instances where that burden of proof can shift to an accused person as envisaged in Section 111(1) of the Evidence Act Cap 90 (Laws of Kenya).

103. The said Section provides as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

104. As was pointed hereinabove, this was a case that was based on circumstantial evidence. However, the circumstances showed that it was one instance where the burden of proof shifted to the Accused person to displace the Prosecution’s evidence by demonstrating that another person other than him could have caused the deceased’s death.

105. In the case of Republic vs Mjomba Jason Mwambili [2016] eKLR, this very court rendered itself on the issue of circumstantial evidence when it stated as follows:-

“Circumstantial evidence can be accepted when an accused person’s guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of.”

106. There was no doubt in the mind of this court that the circumstances that were placed before it were of a definite tendency unerringly pointing towards the Accused person’s guilt. Taken cumulatively, the circumstances established by the Prosecution formed a chain so complete that there were no escape from the conclusion that within all human probability the crime was committed by the Accused person and no one else.

107. Accordingly, having carefully considered the evidence that was adduced by both the Prosecution and the Accused person, the court found that although there was no direct evidence implicating the Accused person in the death of the deceased herein, the Prosecution proved its case to the required standard, which was proof beyond reasonable doubt by demonstrating that the deceased met his death as a result of the unlawful acts or omissions on the part of the Accused person and that the alleged unlawful acts or omissions were committed with malice aforethought on his part.

108. It is important to point out that the Prosecution’s case would have been harder to prove, as it was the evidence of the Prosecution witnesses against that of the Accused person were it not for the Accused person’s assertions that knew the deceased in 2004 and the fact that there were numerous gaps and inconsistencies in his evidence that completely weakened and/or destroyed his defence.

DISPOSITION

109. For the foregoing reasons, the Accused person is hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

110. It is so ordered.

SENTENCING

1. Having convicted the Accused person for the murder of the deceased herein, the court is therefore called upon to pass sentence on the Accused person in accordance with the law as required under the provisions of Section 322 (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

2. I have heard the Accused person’s mitigation that he is a family man with two (2) children and that this court should exercise leniency having found him guilty. I have considered the said mitigation against the backdrop of the fact that the deceased was a young man who had not lived his life into mature adulthood and he and his family deserve justice and the fact that there is only one (1) sentence prescribed where an accused person is convicted of murder.

3. Whilst I empathise with the Accused person’s family situation, my hands are tied by the mandatory sentence that is prescribed under Section 204 of the Penal Code Cap 63 (Laws of Kenya).

4. Accordingly, having considered the Accused person’s mitigation, justice for the deceased and his family and the mandatory sentence, I have no option but to sentence the Accused person to death in accordance with Section 204 of the Penal Code and the same to be carried out as provided for under the law. Right of Appeal within fourteen (14) days from today.

5. Orders accordingly.

DATED and DELIVERED at VOI this 16th day of MARCH 2017

J. KAMAU

JUDGE

In the presence of:-

Were – for Accused

Miss Anyumba - for State

Josephat Mavu – Court Clerk

DATED and DELIVERED at VOI this 16th day of March 2017

J. KAMAU

JUDGE

In the presence of:-

Were.....for Accused Person

Miss Anyumba.....for State

Josephat Mavu– Court Clerk