



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL CASE NO. 43 OF 2015**

**REPUBLIC.....PROSECUTOR**

**Versus**

**NARU OLE SAGUDA.....RESPONDENT**

**JUDGEMENT**

**NARU OLE SAGUDA** hereinafter referred as the accused was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that the accused on the 19/1/2015 at Nalepo village in Kajiado North Sub- County within Kajiado County murdered one Margaret Nkatha Maina hereinafter referred as the deceased. The accused pleaded not guilty to the charge. He was represented by Mr. Saenyi advocate and Mr. Akula led the prosecution at the trial to prove the offence of murder beyond reasonable doubt as required by Kenyan Law. In Kenyan law in the event an accused person is found guilty of murder and a conviction ensues the only penalty prescribed in section 204 of the Penal Code is the death penalty.

The prosecution called eleven witnesses to prove the following ingredients of the offence:

- (1) That the deceased Margaret Nkatha Maina is dead.**
- (2) That the deceased died of an unlawful act of omission and commission by the accused.**
- (3) That in causing the death of the deceased the accused had malice aforethought.**
- (4) That it is the accused who killed the deceased.**

The summary of the prosecution story is that the deceased and the accused lived together as married couples at Nalepo village, Kajiado North. The 19<sup>th</sup> day of January 2015 was a normal day to the Sagudas like any other day when they woke up and set out to undertake activities of their choice. The deceased and accused virtually spent the day together between Ngong and within Nalepo village.

The first witness to take the stand was PW1 Sarah Wanjiku Mungai a neighbour to the Saguda's. PW1 stated before this court that on 19/1/2015 on or about 3.00 pm she heard the voice of the deceased calling her children as the accused was chasing her from behind. This call by the deceased and the chase attracted the attention of PW1. According to her testimony she saw the deceased fall down and in a little while got lifted up by the accused. According to the testimony of PW1 she saw the accused undress the deceased remove a Maasai sworn which he had in his possession and used it to cut the deceased. The incident occasioned PW1 to rush to the scene where she confirmed that the deceased had suffered cut wounds and bleeding from the injured neck area. PW1 further stated that in response she made distress screams and alarm which caught the attention of the neighbours. In the testimony of PW1 she told this

court that the Sagudas are well known to her and they used to pass through her homestead quite often. In one such occasion she heard the accused threaten the deceased that he will one day kill her.

**PW2 KOILAL NONKIBA** a neighbour to the Sagudas also told this court that on the material day the 19/1/2015 at about 2.00 pm she saw the accused and the deceased walking along though with difficulty. In her estimation she suspected that disability was occasioned by drunkenness. As she observed them PW2 further stated that the deceased seemed to be impaired and did sit on the ground. The accused gave a helping hand by lifting her up so that they could proceed with the journey. According to PW2 thereafter she lost the presence of the deceased and only managed to see the accused walking alone towards a nearby river. PW2 young daughter ran to the scene to check what must have happened to the deceased only to find her lying down in a pool of blood. That is when PW2 heard screams being raised about the incident regarding the deceased. In her testimony PW2 also ran towards the scene confirming that the deceased had been assaulted and her body laid next to the river bank.

**PW3 WAIRIMU MAINA** also a neighbour to the deceased and accused confirmed that she heard screams on the material day the 19/1/2015 while at her farm. On arrival at the scene she saw the deceased body lying naked and with multiple cut wounds to the back and the neck. She attributed to having known the Sagudas and even their children for a long time as neighbours within the village.

**PW4 TERESIA NYAMBURA** testified that at 2.00 pm on the 19/1/2015 she responded to screams from downstream her farm. On learning that the deceased who was the wife to the accused has been killed she took action of securing the safety of their children. According to PW4 she picked the Sagudas' children and for their own safety following the information that their mother has been killed.

**PW5 MILCAH MURUGI** a neighbour to the Sagudas also testified that while in a meeting with other ladies at Nalepo village she heard screams at about 2.30 pm on 19/1/2015. In a little while one of the ladies in the meeting received a telephone call with a message that the accused has murdered his wife. As a neighbour and well known to the Saguda family she ran to the directions of the screams. PW5 stated on arrival she saw the body of the deceased which had sustained cut wounds lying in a pool of blood on the ground.

**PW6 JENNIFER WANGUI** testified that on 19/1/2015 on or about 2.00 pm she heard screams concerning the death of the deceased. PW6 told this court that she decided to run to the scene where she found the deceased lying on her back with cut injuries on the right side of the neck. She was later called by the police to record the statement on the matter.

**PW7 ALICE MUMBI** a neighbour to the Sagudas gave a chronology of events touching on the 10/1/2015. In the evidence of PW7 she told this court that Njoki and Douglas who are children to the Sagudas went to her house. On inquiry from the children what was the concerns they have, PW7 heard from them that they fear for their lives because the accused attempted to strangle Douglas. PW7 further testified that for their own safety she took the children into her house. PW7 further told this court that the deceased and accused picked the children the following day. PW7 testified that she again received the children after two days complaining that they have been chased from home. This matter of the children and parents caught the attention of a Child Rights Organization who issued a letter to the deceased and accused on the protection of their children otherwise they will face the full force of the law. PW7 further testified that on 19/1/2015 she was one of the neighbours who learnt of the death of the deceased. According to PW7 she became one of those people who went to the scene and verified that the deceased had succumbed to death from the inflicted injuries.

**PW8 FRESHIA WANGUI** testified that on 19/1/2015 at about 1 – 2.00 pm she met the deceased and accused along the road walking from Ngong side. PW8 further stated that they walked together heading towards their homes as members of the same neighbourhood. According to PW8 on the way the accused removed a Maasai sword from the right side of the body and knocked it against the ground three times. In the evidence of PW8 the accused issued threats of cutting a neighbour by the name Daniel but the deceased pleaded with him not to cut anybody. It was PW8 statement that deceased also pleaded with the accused to return the Maasai sword to where he had gotten it from the right side of the body. PW8 further

told this court that on a spur of a moment the accused told the deceased that he will no longer beat her but finish her completely. In a short while they parted ways with the Sagudas but soon thereafter she heard screams that the deceased is dead. PW8 confirmed seeing the accused walk towards his home as the screams reigned the air regarding the death of the deceased.

**PW9 PC JOSEPHAT MUGO** a scenes of crime officer was called in to visit a murder scene at Nalepo village on 19/1/2015 at 19.30 hrs. PW9 told this court that he arrived at the scene and took various photographs of the deceased body. He confirmed that the body had sustained a deep cut on the neck. The photographs and certificate were admitted in evidence as exhibit 1 (a) and 1 (b).

**PW10 PC BRYAN MUTUNGI** evidence was to the effect that he received instructions to take over investigations of the murder incident involving the accused person. PW10 told the court that he organized for the scene to be visited by PW9. It was PW10 testimony that he made arrangements for the body of the deceased to be taken to the mortuary so that a postmortem could be conducted to establish the cause of death. PW10 further alluded to the incident and had occasion to record statements from the witnesses and also interviewed the accused who later stated that he was on his way to the police station. According to PW10 testimony upon completion of gathering evidence he recommended the accused to be charged with the offence of murder.

**PW11 DR. DOROTHY NJERU** conducted a postmortem examination of the deceased body on 23/1/2015. PW11 confirmed to this court that the examination revealed a fracture to the cervical spine extending from antero-lateral to posterior lateral about 22 cm. According to the doctor the death was caused by the injury to the neck due to sharp force trauma.

At the close of the prosecution case this court considered the evidence under section 306 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya). After weighing the evidence i arrived at a finding that a prima facie case has been made out to warrant the accused person to be called upon to answer. The accused elected to give unsworn defence in answer to the charge of murder under section 203 of the Penal Code. According to the accused version of denying the charge he stated that on 17<sup>th</sup> January in the year 2015 he was escorted by the deceased to travel to Birika to purchase some goats for slaughter. As he left for the goat market the accused told this court that the deceased and the children were left in good health. It was while in a hotel taking tea waiting for the goats to be slaughtered that a man confronted him with the message about the death of his wife. According to the accused he boarded a vehicle to travel home to obtain more information on the death. That while on his way he met a police vehicle which spotted him and required that they interrogate him on the murder of his wife. During interrogation the accused told this court that he explained to the police of having travelled to Kisaju on the material day allegedly when offence was committed. He denied participating in killing the deceased and that he was at the scene where his wife was murdered.

#### **SUBMISSIONS BY THE DEFENCE COUNSEL MR. SAENYI**

The defence counsel Mr. Saenyi submitted that the prosecution has failed to prove the charge of murder under section 203 of the Penal Code beyond reasonable doubt. Mr. Saenyi highlighted the evidence of the eleven witnesses and urged this court to find that the *mens rea* and *actus reus* of the offence were not proved. Mr. Saenyi further submitted that the prosecution witnesses were categoric that the accused person was totally drunk which could have impaired his judgement. Mr. Saenyi further submitted that the murder weapon was never recovered and the injuries suffered by the deceased could be inflicted by falling down and hitting a sharp object. Mr. Saenyi contended that the accused gave evidence on alibi that he was at Kisaju and not at Nalepo village where the murder took place. According to Mr. Saenyi the prosecution never rebutted the alibi defence. Mr. Saenyi basing his submissions on alibi defence and intoxication urged this court to acquit the accused of the offence of murder.

#### **SUBMISSION BY THE PROSECUTION COUNSEL**

Mr. Akula, the senior prosecution counsel submitted that all the eleven prosecution witnesses proved the ingredients of the offence of murder beyond reasonable doubt. Mr. Akula submitted that the failure by the

prosecution not to tender the murder weapon as an exhibit is not fatal to the case against the accused. Mr. Akula invited the court to find that there is overwhelming direct and circumstantial evidence that the deceased died, that her death was unlawful, and the death was accompanied with malice aforethought on the part of the accused. It was Mr. Akula's contention that the accused hatched the plan to kill the deceased sometime back as shown by the evidence which he concluded with finality on 19/1/2015. Mr. Akula argued and submitted that the alibi defence raised by the accused was an afterthought. Learned senior prosecution counsel drew my attention to the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 which points to the accused being at Nalepo village on 19/1/2015 where the murder took place. The learned prosecution counsel further referred to the direct evidence of PW1, PW2, PW3 and more specifically PW8 who walked from Ngong in company of the deceased and accused to Nalepo village on the material day. In the light of the evidence the learned senior prosecution counsel submitted that the prosecution has provided a watertight and overwhelming evidence against the accused person.

On my part i have heard, evaluated the evidence in totality, the submissions of the defence counsel Mr. Saenyi and a rejoinder by the senior prosecution counsel Mr. Akula on the murder charge and proof of essential elements of the offence.

### **Burden of Proof:**

The prosecution bears the burden of proof against the accused person which must be discharged beyond reasonable doubt. This is consistent with the Republic Constitution 2010 under Article 50 (2) (a) which provides that:

**“Every accused person has a right to be presumed innocent until the contrary is proved”**

The law is settled that for an accused person to be found guilty and convicted of an offence the prosecution must establish the elements of the offence beyond reasonable doubt. See the legal proposition in the case of Miller v Minister of Pensions [1947] ALL ER 462 and Woolmington v DPP [1935] AC 462. It is that burden i endeavour to make a finding on by going through each of the ingredients of the offence of murder a subject matter of this trial.

### **(1) The death of the deceased:**

According to PW8 on 19/1/2015 she walked from Ngong in company of the deceased and accused person towards their homes at Nalepo village. PW8 parted ways with the accused and deceased between 1.30 and 2.00 pm. In a short while PW8 heard screams and the deceased was confirmed as having been totally assaulted. PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 all neighbours to the Sagudas responded to the screams from downstream river. The witness confirmed that they rushed to the scene where the alarm and screams directed them to proceed and attend to the matter. Their testimony is in unison that on arrival they confirmed the deceased had suffered injuries and already dead. According to the postmortem report by PW11 Dr. Njeru the body of the deceased was examined on 23/1/2015 duly identified as that of Margaret Nkatha Maina. The doctor (PW11) recorded the cause of death as deep cut to the cervical spine and neck injuries. Her observation was that the injuries were caused by a sharp force trauma. PW9 the scene of crime officer took photographs of the scene including the deceased body on 19/1/2015. The photographs were admitted in evidence as exhibit 1 (a). The body of the deceased was removed from the scene by arrangements under supervisions of PW10 PC Bryan Mutungi. The accused in his defence confirmed that his wife Margaret Nkatha Maina is dead.

I am therefore satisfied that ample evidence has been presented by the prosecution to proof the death of the deceased.

### **(2) The second ingredient as to whether the death of the deceased was unlawful:**

The general principle of law is that a person is guilty of murder under section 203 if he or she kills a person unlawfully and not in self defence or defence of another or property or death was not caused through misadventure or accident, each of which provide an absolute defence to the accused in a charge

of murder. For this proposition see the case of *Guzambizi Wesonga v Republic [1948] 15 EACA 65.*

Under section 213 of the Penal Code a person is deemed to have caused the death of another if any of the following circumstances exist:

**(a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.**

**(b) He inflicts injury on another person which would not have caused death if the injured person had submitted to proper medical surgical treatment or had proper precautions to his mode of living.**

**(c) He by actual or threatened violent causes such person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused.**

**(d) He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death.**

**(e) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.**

According to the prosecution evidence the deceased was last seen alive on 19/1/2015 on or before 2.00 pm while in company of the accused. PW1 a neighbour to the Sagudas and who knows them well confirmed that she saw the accused chasing the deceased along the perimeter of her farm. In her observation they appeared drunk incapable of walking normally. She was able to see the deceased sit down at one time and accused person lifting her up. PW1 also saw the inability by the accused to lift the deceased up to be on her feet. In the testimony of PW1 the accused took the option of undressing the deceased instead, removed a Maasai sword in his possession and hit the deceased. PW2 corroborated the testimony of PW1 of seeing the deceased and accused walking together. She also saw the deceased sit down in the course of the journey. PW2 later lost the presence of the deceased and only managed to see the accused walking alone. What followed thereafter were screams of a sad incident involving the death of the deceased. PW8 testified that on 19/1/2015 she walked together from Ngong to Nalepo village with the deceased and accused person. At one time in the course of the journey the accused threatened the deceased that he will no longer beat her but finish her completely. PW3, PW4, PW5, PW6 and PW7 corroborated the evidence of PW1, PW2 and PW8 that the deceased body was discovered with deep cut to the neck next to a river bank. All along the prosecution witnesses maintained that there was no quarrel or fight between the accused and the deceased. The prosecution witnesses PW1 and PW8 also confirmed that the accused was armed with a Maasai sword which was used to inflict the fatal injuries. The postmortem report by PW11 point to the aspect that the deceased suffered fracture to cervical spine and neck cut wound. These injuries caused the deceased to bleed to death.

The inference i draw from the evidence is that the deceased died because of the grave injuries inflicted upon her by the accused. There was no rebuttal on the part of the accused that he assaulted the deceased accidentally or justifiably in self defence. I also note that Mr. Saenyi vehemently submitted that the accused was heavily intoxicated which impaired his judgement. What i find interesting is the accused failure to plead the defence of intoxication in his testimony to the court in answer to the charge. Even if he pleaded it at any stage the prosecution evidence before me paints a picture of self-induced intoxication to commit the crime.

It is my conclusion that the submissions on intoxication as an intervening factor cannot hold as to occasion the unlawful acts of assault by the accused against the deceased. The prosecution has therefore satisfied the element of the unlawful death of the deceased.

**(3) Whether the accused had malice aforethought:**

The offence of murder under section 203 of the Penal Code has been defined in the following manner:

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

Malice aforethought has been defined and provided for under section 206 of the Penal Code to guide the courts for what to infer from the evidence to prove this element against an accused person. The section provides as follows inter alia:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

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

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

The prosecution must prove beyond reasonable doubt that the accused in causing the death of the deceased had the necessary intention to cause the death or do grievous harm. It is also crystal clear that under section 206 of the Penal Code the prosecution ought to prove that accused had the knowledge that his unlawful act or omission which resulted in the death of the deceased would probably cause death or grievous harm to the deceased.

The other critical element of section 206 is the recognition of transferred intent and knowledge on the part of the accused charged under section 203 for the offence of murder. This is where the person killed need not necessarily have been the person the perpetrator set to kill. The prosecution had a duty to establish the requisite intention or knowledge on the part of the accused. The existence of any such circumstances would suffice to prove the offence of murder against the accused.

As what circumstances malice aforethought is a question which has occupied the minds of the superior courts and widely discussed in a plethora of cases. In the case of *Bonaya Tutut Ipu & Another v Republic [2015] eKLR* the Court of Appeal held inter alia that:

**“Malice aforethought is the *mens rea* for the offence of murder and its presence or absence of it determines whether the unlawful killing amounts to murder or manslaughter.”**

In the case of *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996* the court adopting the holding in the case of *Chesani v Uganda Cr. Appeal No. 95 of 2004* observed as follows:

**“In determining the charge of murder where malice aforethought has been proved the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”**

This element on malice aforethought confronted the Eastern Court of Appeal way back in 1945 in the case of *Tuper S/O Ochen v Republic [1945] 12 EACA 63* where the court held:

**“The court has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established and it will be obvious that ordinarily an inference of malice will flow readily from the case of a spear or knife than from the use of a stick.”**

In *Nzuki v Republic [1993] KLR 171* the Court of Appeal pronounced itself on the subject on malice

aforethought that:

**“Before an act can be murder it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subject to the actual accused:**

**(i) The intention to cause death.**

**(ii) The intention to cause grievous harm.**

**(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as a result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in more of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.**

The principle of law which runs through the thread of these cited authorities is that malice aforethought may be express or implied from the circumstances of each case. Malice is express when the accused person with deliberate intention unlawfully takes away the life of a fellow creature created in God's own image prematurely. It is also implied when no provocation exist the unlawful acts attended by the accused results from an intention to cause death or grievous harm which endangers life with conscious disregard for life. Mr. Saenyi learned counsel submitted that the prosecution failed to prove malice aforethought against the accused person. Mr. Saenyi delved into the conduct of the accused from the death of the deceased. Learned counsel alluded to the testimony by prosecution witnesses that at one time the deceased had difficulty in walking due to drunkenness. Mr. Saenyi contended that it was the accused who lifted her up from the ground. According to learned counsel the accused had no intention to kill the deceased and the same was not proved by the prosecution.

The question i ask myself is whether from the prosecution evidence there exist circumstances whether direct or indirect to implicate the accused with malice aforethought. In so far this case is concerned PW8 Freshia Wangui was with the accused on 19/1/2015 walking from Ngong to Nalepo. PW8 gave direct evidence that she saw the accused with a Maasai sword. It is on record from the testimony of PW8 that the accused took out the sword from the right side of the body knocked it down three times. PW8 further added that the accused uttered threats of death to one Daniel a neighbour but who was not present with them at the time. In the same time and day PW8 confirmed to the court that the accused told the deceased in her presence that he will no longer beat her but finish her completely. It is unfortunate that the sword was never retrieved from the accused person by the police during arrest and investigations. However that non recovery of the murder weapon is not fatal to the prosecution case. According to PW1 she saw the accused take out a sword and hit the deceased after undressing her all the clothes she was wearing on that day. The murder weapon used by the accused was that seen by PW8 in the hands of the accused before a few minutes before the deceased was killed. The sword fitting the description of a Maasai sword which PW8 saw in possession of the accused is a dangerous weapon and when used against the body of a human being the consequences are disastrous.

The evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 who visited the scene after the murder confirmed that the deceased neck was severed and at the cervical spine. PW9 took photographs of the deceased body at the scene. The photographs depict serious cut wound to the neck and back side of the cervical spine. There is no dispute that the cervical spine and the neck is one of the delicate and vulnerable part of the body of a human being. The sensory nerves and muscles support the entire neuro system of the human body. By targeting it the accused intention was to cause death or permanent disfigurement. The deceased in this case did not have a chance to live as she died on the spot soon thereafter the assault. According to the postmortem the deep cut to the neck and fracture of the cervical spine caused the death of the deceased. The witnesses who visited the scene PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9 and PW10 confirmed that the deceased naked body was lying in a pool of blood. The accused who had been with the deceased was nowhere to be seen. He had accomplished the

mission which he promised to do to the deceased a few minutes earlier while in company of PW8. The deceased's life was prematurely terminated by a fatal strike by the accused. The brutal killing seemed to me to have been planned and well executed by the accused. The plan here can be deduced from the circumstances that accused armed himself with a Maasai sword. He took the deceased out for a drink. As they walked back home the accused issues death threats to the deceased to the effect that he will no longer beat her but completely finish her life. The blow on the neck though as isolated one was severe, forcibly inflicted to occasion death. The accused first action before cutting the deceased was to undress her of all the clothes she was wearing. The accused stood in a position of care and trust with the deceased as a spouse. The least thing she could have expected was the brutal murder to come from the accused.

In this case in addition the accused being armed with a sword and using it against the deceased his conduct after the murder is telling. The accused was seen walking away from the murder scene. It is on record that he took flight from Nalepo village – his home area to Kisaju area to go and hide as he monitors the after match of his actions. The fact that the accused ran away and did not even bother to assist the deceased to urgently visit a medical facility is a pointer to malice on his part. There has been no explanation from the accused in mitigation during the defence as to why he acted in the way he did on the 19/1/2015.

This case the accused wait out with the deceased and they seemed to have had some alcoholic drinks. I found no evidence from PW8 that as they walked home the accused was suffering from any temporary insanity because of intoxication. What can be inferred from the actions of the accused is one who drinks alcohol to obtain a little courage as a smoke screen to inflict harm to the deceased. I would agree with the views expressed in the English case of *A.G for Northern Ireland v Gallagher [1963] AC 349* on the defence on intoxication where the court held:

**“If a man, whilst sane and sober, forms an intention to kill and makes preparation for it knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot on his self induced drunkenness as a defence to a charge of murder not even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the all which he intended to do and did do.”**

From the entirety of the evidence by both the prosecution and the defence this court is unable to point at any action on the part of the accused that his mental judgement was impaired. I therefore rule out any defence to do with intoxication to negative the accused's intention to commit the offence.

The inference I draw from the evidence and the applicable legal principles in the cases cited is clear manifestation of malice aforethought on the part of the accused.

#### **(4) Identification of the accused and his presence at the scene**

The evidence of identification against the accused can be deduced from direct testimony of PW8 who was with the accused on 19/1/2015 at Nalepo village. PW8 who is a neighbour

to the Sagudas parted ways in a few minutes she heard screams involving the death of the deceased. The testimony on identification by PW8 is corroborated by PW1 who saw the deceased and accused together prior to the killing. PW1 further confirmed seeing the accused draw a sword and hitting the deceased. PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 further revealed that they arrived at the crucial scene of the murder the accused was nowhere to be seen. It is also on record from the evidence of PW2 that she saw the deceased and accused walk together initially but after a while only spotted the accused alone. The witnesses to the murder were neighbours to the accused. He was well known to them the proximate time they saw the accused with the deceased. In relation to the murder was that the chain had not been broken by any intervening circumstances. The prosecution witnesses who saw the accused and the deceased on

the fateful date were frank and trustful in narrating the events of the 19/1/2015.

The evidence on recognition was not only based on direct testimony of PW8 but other prosecution witnesses who positively identified the Sagudas walk along the path leading to their home. See the principles in *Abdalla bin Wendo & Others v Republic [1984] KLR 739*. The evidence was watertight and free from error or mistake.

I am satisfied that the witnesses were familiar with the accused and the conditions obtaining at the time of around 1 – 2.00 pm in the afternoon was favourable for a positive identification. I find no mistake or error on identification of the accused and placing him at the scene of the crime. My reading and evaluation of the evidence of PW1 – PW11 I am satisfied that the testimonies confirm the commission of the offence and participation of the accused in causing the death of the deceased.

As this was the principle in the case of *Republic v Baskervenville [1916] 2 KB 658* where the court held:

**“Corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime and we agree that it must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him. That is, which confirms in save material particular not only the evidence that the crime has been committed but also the person committed it.”**

This evidence tears apart the alibi defence by the accused that he learnt of the deceased death while at Kisaju area. There is no iota of evidence that the alibi defence weighed together with the prosecution case is capable of raising a doubt as to who the perpetrator of this heinous crime of murder was on the 19/1/2015. All evidence points to the accused person with such precision and certainty.

I therefore find that the prosecution has proved the offence of murder contrary to section 203 as read with section 204 of the Penal Code beyond reasonable doubt. I do therefore find the accused guilty of the charge and convict him accordingly of murder as charged under section 203 of the Penal Code.

**Dated, delivered and signed in open court at Kajiado on 6<sup>th</sup> day of March, 2017**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Accused present

Mr. Mokaya for Saenyi for the accused present

Mr. Akula Senior Prosecution Counsel - present

Mr. Mateli Court Assistant - present