



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 5 OF 2010

REPUBLIC

VERSUS

ZAKAYO MURITHI M'LEWA.....ACCUSED

JUDGMENT

The accused person (herein “the accused”) was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, Cap 63 Laws of Kenya**. According to the particulars of the charge, the accused murdered **Fredrick Mwenda Kaaria** (herein “the deceased”) on the 30th day of January, 2010 at Gatune village in Nyeri North District within Central Province.

The state called eleven witnesses to establish its case against the accused while the latter gave a sworn testimony in his defence though he did not call any witness.

The case was partly heard by Sergon, J who, after hearing the prosecution evidence, ruled that the accused had a case to answer. I took it over at the defence hearing stage and therefore the only evidence I heard was that of the accused.

The first of the state’s witness was **Irene Kagwira Mathera (PW1) (Kagwira)**; she testified that she was an employee in her father’s (PW 7’s) farm. Besides her, there were five other workers employed in the same farm; amongst these workers was the deceased who was engaged as the farm manager.

According to Kagwira, her father phoned the deceased on 29th January, 2010 at 7.30 am and asked him to prepare to oversee the harvesting of potatoes; he was to do this job with the accused. The accused and the deceased proceeded to the farm and returned at about 9.30 pm. It was her evidence that the deceased entered her house and even took tea but the accused remained outside washing clothes. The deceased told her that they had harvested and sold 100 bags of potatoes for which he had been paid. On that evening, he even repaid an amount of Kshs 1,000 he had earlier borrowed from this witness.

Kagwira came out of her house and was soon followed by the deceased; the accused was still washing his clothes outside the house. At around 11.00 pm the deceased asked the accused to accompany him to his house where he was going to spent the night; the rest of the workers were already asleep.

Apparently, the house in which Kagwira lived was close to the one where the accused and the rest of the workers, except the deceased, lived.

Kagwira went to wake the deceased up the following day but there was no response when she knocked on his door. She therefore proceeded to collect milk and came back to the deceased’s house the second time;

this time round she found the door opened. She found the deceased lying dead with his body burnt from the chest downwards. The witness testified that she screamed and that one of the workers called **Stanley Muriithi** responded and came to the scene. The accused, according to the witness did not appear to be moved by her screams. As she went back to her house she met a neighbour called Githae and informed him what had happened; Githae, in turn, informed the other neighbours.

The witness told the court that one of the workers called **Nicholas Kaibera (PW2) (Nicholas)** with whom the accused shared a house told her that the accused had on the previous night left the house and came back after an hour claiming that he had a stomach ache.

The police from Naromoru police station came to the scene and arrested the accused together with **Nicholas Kaibera (PW2), Stanley Muthiritu** and **Patrick Kaimenyi** as suspects.

On cross-examination, the witness testified that she pushed the door open and found the deceased's body lying on its belly. Next to the body was a gas cylinder. The body had been burnt on the chest, abdomen and the legs. The clothes the deceased wore were also burnt.

Kagwira testified that the deceased and the accused had worked together the whole day on 29th January, 2010. Both the deceased and the accused had been employed six months before this incident. The deceased's house was about 150 metres from hers and that he lived alone. The house in which the other workers lived was closer to Kagwira's than the deceased's though all these houses were in the same farm. The witness also told the court that she had been taking count of the proceeds of the day with the deceased for the entire period they had been in her house until 11 pm when the deceased left. The accused remained outside the house washing his clothes all this while.

At around 12 am, one Kinyua who is said to have been drunk came to where Kagwira lived. Kagwira testified that the accused came back at 1 am by which time she was watering the farm. She said that she saw the accused slap Kinyua twice. She slept at 2.30 am when everybody else had slept.

Nicholas (PW2) testified that he was one of the seven employees of **David Mwangera (PW7)** and that the deceased was their manager. He testified that on 29th January, 2010, their employer called the deceased and the accused and told them to organise for the harvesting of potatoes on his Kariokor farm. The two went to the farm as instructed and came back at 9.30 pm. The deceased is said to have proceeded to the **Kagwira's (PW1's)** house while the accused remained outside washing his clothes. At about 11 pm the accused and the deceased left for the deceased's house as the rest of the workers went to sleep. At about 12.30 am, a drunken man came asking for manual work. They (apparently the workers) held this man until 1.30 am when they released him but before then, the workers attempted to contact the deceased without much success because his phone is said to have gone unanswered.

The witness testified that accused came back to the house which he apparently shared with the rest of the workers at 1.30 am. He is said to have left at 2.30 am and come back again at 3.am. When this witness enquired from him why he was waking up at that hour he informed him that he had a stomach ache. The accused again woke up some few minutes to 5.am, went outside and returned after about ten minutes.

In the morning, the witness heard Kagwira scream saying that the deceased had been murdered; he responded and rushed to the deceased's house where he found the deceased's body lying in the living room; it was said to be badly burnt. Other workers came to the scene too and a neighbour by the name Githae called their employer, David Mwangera (PW7), to inform him what had happened. The said Mwangera later came with police officers from Naromoru police station; they arrested **Patrick Kaimenyi** and the accused. **David Mwangera** told Nicholas to pack the deceased's property; they found amongst this property, a blood stained hat said to belong to the accused.

The witness testified that at times they worked at night and on the material night none of the workers had slept by 11 pm. He shared a house and a bed with the accused and the latter woke up twice before dawn; first, he woke up at 2.30 am and came back at 3.00 am and then he woke up again at 4.45 and returned at 5.am. The witness also told the court that he overheard **Kagwira (PW1)** tell deceased to spend the night

at the accused person's house. The accused, according to this witness, came back at 1.30 am when **Kagwira (PW1)**, was watering the farm.

The drunken man that the witness referred to earlier in his testimony was said to have confronted Kagwira (PW1) that night and it is then that the latter had woken them up. The accused person found them with this stranger when he came back. The witness said that he was instructed to clean the deceased's house; he arranged his clothes and he recovered the accused person's brown hat in that house and according to him it was blood-stained. The working relationship amongst the employees was cordial, according to this witness. He also testified that he found the accused person hiding in the nappier grass at 1.am.

The other farm worker who testified on behalf of the state was **Patrick Kaimenyi Mburia (PW3)**. It was his evidence that he had been a worker on David Mwongera's farm since 2005. Just like the first two prosecution witnesses, Mburia testified that the deceased and the accused had worked all day together on 29th January, 2010 and that they came back at 9.30 pm and thereafter left for the deceased person's house. The accused is said to have worn the deceased's trouser and that when both went to Kariokor farm, he was wearing a brown hat and sunglasses.

Sometimes at around 12.00 am, a drunken man whom the witness identified as Kinyua came to seek for employment on the farm. **Kagwira (PW1)** asked the witness to call the deceased and inquire whether he knew anything about Kinyua. He called but the deceased's phone is said to have been off. The accused came back at 1.30 and slapped Kinyua. The witness said that they slept at 2.30 am.

The witness heard **Kagwira (PW1)** scream at around 7.00 am; she claimed that the deceased had been murdered. He rushed to the scene and found the deceased's badly burnt body; there was a gas cylinder beside it. Police came and arrested this witness as one of the suspects; however, he was released after seventeen days in police custody.

Apart from himself and the accused, Kinyua was also arrested as a suspect. The witness said that he shared the same house with the accused, **Nicholas (PW2)** and Stanley and that on the material night, the accused person woke up twice.

When **Kagwira (PW1)** screamed, this witness was asleep but he woke up to find the accused hiding in nappier grass.

Joseph Githae (PW4) was at his home when he heard **Kagwira (PW1)** screaming; he went to check what was happening and was told by Kagwira that the deceased had been murdered. This witness proceeded to the deceased's house and indeed found the deceased's body on the floor; next to it was a jerrycan of paraffin. The witness called the deceased's employer who arrived accompanied by the police.

The deceased's father **Joseph Kaaria (PW5)** testified that he was called by **David Mwongera (PW7)** on 30th January, 2010 at about 9 am and told that his son had been murdered. He went to the scene and indeed confirmed that his son had been burnt. He also identified the body at the mortuary during the post-mortem examination.

David Mwongera (PW7) said that he was at his shop when received a phone call from **Joseph Githae (PW4)** that his farm manager had been murdered. He reported the matter to the police who, together with him, proceeded to the scene. They found the deceased's body on the floor with its face to the ground. Blood was oozing from his mouth. His cell phone was next to his hand. The scene of crime officers from Nyeri photographed the scene and the body. The witness testified that he had talked with the deceased the previous night and that he had informed him that he had harvested 89 bags of potatoes which he sold and was paid. He said that he knew Kinyua who came to where his workers lived at night; he described him as a neighbour. The deceased, according to this witness lived in a house that was away from the house where the rest of the employees resided.

One other worker, **Stanley Mutirithia Mwiti (PW8)** testified that on 29th January, 2010 at 8 pm he was together with **Nicholas Kaibera (PW2)**, **Kagwira (PW1)**, the accused and the deceased; they all took

supper together and went to sleep until such time that they were woken up by **Kagwira (PW1)**, who told them there was a drunk person who had come to inquire whether there was any work for him. They could not reach the deceased through his phone and so they decided to go to his house but while on their way they met the accused who told them not to bother since the deceased was already asleep. The accused had earlier escorted the deceased to his house. They went back and managed to persuade the stranger to leave.

The accused was said to have left and he only came back at 2.00 am; he also woke up and came back and when he was asked why he was so restless that night, the accused said that he had a stomach upset.

The following morning, **Kagwiria (PW1)** went to wake up the deceased but he was not responding. This witness and other people went to open the door and found the deceased's body on the floor of his house. Next to his body were a jerrycan, which is said to have contained paraffin and a gas cylinder. The witness said that the accused used to wear a particular hat which was found in the deceased's house and that it was blood stained.

The investigations officer was police constable **Julius Ole Parsalach (PW9)** who was then attached to Naromoru police station. On 30th January, 2010 he received a report from his colleague, the late senior sergeant Koros to the effect that someone had been murdered at Gatune village. The officer went to the scene and found a body lying on the floor of the sitting room. The body was burnt and there were cut wounds on the head. According to this officer, there was a jerrycan containing paraffin and a hat beside the body; there were also blood stains on the floor.

The witness said that the scene of crime officers from Nyeri came and took photographs before the body was taken to Nyeri Provincial General Hospital.

In his investigations, the officer established that the accused was the last person to have been seen with the deceased and therefore he was arrested as a suspect together with other people. The officer established that the deceased and the accused had spent the previous day together harvesting potatoes and that they came back to where they lived at 9.30 pm. The accused, according to the officer, escorted the deceased to his house which was said to be away from the house where the rest of the workers lived. He is also said to have been present at the scene when the police arrived.

The officer produced in evidence a blood-stained hat alleged to have belonged to the accused but which was recovered in the deceased's house; he also produced the jerrycan that was found next to the deceased's body. As part of his investigations, the investigations officer took blood samples from the deceased's body prepared an exhibits memo form and sent the samples and the hat to the Government Chemist for examination. He produced both the exhibit memo form and the government chemist's analyst report in evidence; the report showed that the blood on the hat was of the same group as that of the deceased. In cross-examination he admitted that he did not take any blood samples from the accused person; he also testified that he arrested three suspects including the accused person. Apart from the jerrycan and the hat, the officer also recovered a mobile phone that was said to belong to the deceased. This phone was not produced in evidence.

The doctor who conducted the post-mortem on the deceased's body was **Dr Charles Kurgat (PW10)**; he opined, in his report that the deceased died as a result of head injury caused by a blunt object and also from burns. His report was admitted in evidence.

One of the officers from the scenes of crime office in Nyeri **Sergeant Fredrick Simiyu Serengo (PW11)** produced several photographs from the scene of crime; they showed the deceased's house and the deceased's injured and partly charred body.

On his part, the accused person gave a sworn statement in his defence. He said that the deceased was a co-worker at **David Mwonjera's (PW7's)** farm and that he had known the deceased for about one and a half years. He said that on 29th January, 2010 their employer asked them to go and supervise the harvesting of potatoes at his Kariokor farm at Naromoru. The two of them had to look for people to harvest the potatoes and supervise them. At about 7 pm they went back home but passed through the

deceased's house where they ate supper. They then left to where the accused person lived. Both the accused person's house and that of the deceased were in their employer's farm.

Apart from himself and the deceased, the accused person testified that there were other workers whom he named as **Stanley Mutirithia, Nicholas Kaigira** and **Patrick Kaimenyi**; he lived with them in the same house.

When they came from the deceased's house, the latter is said to have gone to **Kagwiria's (PW1's)** house while the accused proceeded to the house he shared with other workers; this was around 9 pm. Sometimes later, the deceased came and told the accused and the rest of the workers that their employer had called and instructed them to check whether the potatoes that had been harvested were properly covered. They all did as instructed and thereafter parted ways; the deceased is said to have gone to his house. The accused testified that since he had stomach problems he went outside the house on several occasions that night.

At about 6 am on 30th January, 2010 he heard noise from the direction of the deceased's house. He proceeded there together with the rest of the workers. He found **Kagwiria (PW1)** who told him that the deceased had been killed and that his body had been burnt. The accused opened the door and found the deceased body lying on the floor with the face on the floor. There was also a gas cylinder and household goods in the house.

The accused person testified that he attempted to get their employer in vain. Later, he was arrested together with Patrick Kaimenyi and Kinyua. He denied having murdered the deceased or having hidden himself. He also said the hat alleged to belong to him was the deceased person's. Contrary to the prosecution evidence, he denied having ever washed clothes or escorted the deceased to his house.

The offence of murder is defined in **section 203** of the **Penal Code, Cap 63**; that section provides as follows:-

203. Murder Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

It is apparent from this provision that to establish an offence of murder the prosecution must prove two things; first, that the unlawful death of the victim was caused by an act or omission of the accused person; and, second, that the accused person did that act or omitted to act with malice aforethought; malice aforethought may either be express or implied but either way, the burden of proof remains throughout on the prosecution except in those cases where the accused person puts special defences, for instance, the defence of insanity.

Malice aforethought is the mental element or *mens rea* for offence of murder; ordinarily, it takes the form of an intention unlawfully to kill which is the express malice or an intention unlawfully to cause grievous bodily harm—the implied malice. The latter form of malice aforethought is 'implied' in the sense that it is not necessary to prove that the accused person either intended or foresaw the death of the victim. (**See R v Cunningham [1982] AC 566, 73 Cr App Rep 253, HL**).

Intent is the essential element in both forms of malice aforethought. **Section 206** of the **Penal Code** expresses the various forms or circumstances in which it may be deemed to have been established. It states:-

206. Malice aforethought

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 the death of 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 bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

The state's duty in establishing the offence of murder against an accused person is thus clearly cut out and for our purposes, the evidence adduced at the trial has to be considered in the light of the forgoing provisions.

The prosecution proved beyond reasonable doubt that the deceased did not die as a result of natural consequences; the deceased was in good or normal health before his demise, at least there was no evidence to the contrary. More importantly, the evidence by **Dr Charles Kurgat (PW10)** that the deceased died from a head injury caused by a blunt object and severe burns was not controverted. The logical conclusion one can draw from this witness' findings and opinion is that the deceased was murdered as understood in **section 203** of the **Penal Code**.

The only question that this court has to interrogate is whether the state has succeeded in establishing beyond all reasonable doubt that the accused person inflicted the fatal injuries out of which the deceased died and if so, whether he had the necessary intent, express or implied, to murder the deceased. Answers to these questions lie in the evidence of not just the state witnesses but the entire evidence proffered at the trial.

It is quite apparent from all the prosecution witnesses that none of them witnessed the murder of the deceased; indeed, except for the doctor who performed the post-mortem on the deceased's body, the rest of the prosecution witnesses only came to learn of the deceased person's murder on the morning of 30th January, 2010. In a nutshell, there is no direct evidence linking the accused to the murder of the deceased.

An analysis of the prosecution witnesses reveals that the accused person was suspected to have been behind the deceased's death only because it was alleged that he was the last person seen with him alive on the night of 29th January, 2010 and also because a hat, alleged to be his, was found in the deceased person's house; this evidence is exclusively indirect or circumstantial and the Court has to consider it with the necessary precaution that there are no inculpatory facts that are incompatible with the accused person's innocence and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. This position of the law has been adopted by the Court of Appeal in **Simon Musoke versus Republic (1958) EA page 715** at page 718 where the Court said;

"... in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

This decision was followed in the case of **Okeno versus Republic (1972) EA 32** at page 35 where the Court of Appeal said;

"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

As noted the inculpatory facts against the accused are that he was the last person seen with the deceased alive and that his hat was found in the deceased's house. The accused denied these allegations; his version of his itinerary on the material evening was that when he and the deceased came from Kariokor farm, they first went to the deceased's house where they had their supper and that it was after they finished that they

came to the accused person's residence where, incidentally, he lived with the rest of the workers, including **Kagwiria (PW1)**. As far as the hat is concerned, he denied that it was his and claimed instead that it belonged to the deceased.

The prosecution witnesses on the other hand, more particularly, **Irene Kagwira Mathera (PW1)**, **Nicholas Kaibera (PW2)** **Patrick Kaimenyi Mburia (PW3)** and **Stanley Mutirithia Mwiti (PW8)** were all in agreement in their evidence that the accused escorted the deceased to his house on the night of 29th January, 2010 before he came back at around 1 am the following morning. They also testified that the blood-stained hat found in the deceased's house belonged to the accused.

These two aspects of the prosecution evidence deserve a closer scrutiny since they basically constitute the foundation upon which the prosecution case stands, if it all it is a firm and solid foundation, or will fall, if it ends up being nothing more than quicksand.

Although all the prosecution witnesses who testified that they saw the deceased with the accused on the night of 29th January, 2010 were all consistent that they saw the deceased leave with the accused person, the evidence of **Kagwiria (PW1)** suggested that they might not have even known when the two left if at all they left together as alleged. In her evidence **Kagwiria (PW1)** testified that the accused and the deceased left at 11 pm and that by this time the rest of the workers had retired to bed. The evidence of **Nicholas (PW2)** also suggested that they could probably have been asleep when the deceased left; he testified that they were awoken by **Kagwiria (PW1)** at 12 am when Kinyua came looking for a job implying that they slept at least earlier than 12 am. This same witness said that he overheard Kagwiria tell the deceased to spend the night in the house the accused shared with the rest of the workers. I understand this evidence to mean that this witness was not with Kagwiria (PW1), the accused or the deceased at the time the latter left for his house. **Stanley Mutirithia Mwiti (PW8)** also testified that all the workers including the accused and the deceased were together at around 8 pm. I understood him to testify that they even took supper together and went to sleep after that.

In all probability therefore, except for **Kagwiria (PW1)** and perhaps the accused person, the rest of the workers had gone to bed when the deceased left. It follows that if the workers were asleep at the material time they cannot have testified with any sense of conviction that the deceased left with the accused person; their testimony in this regard is, in my humble view, mere speculation which casts doubt on their evidence that the accused person left with the deceased on the material night; it also puts into doubt the credibility of these witnesses' evidence generally. I say so because there is no reason why these witnesses should have insisted that they saw the deceased leave with the accused person when, on the other hand, **Kagwiria (PW1)** who had been with the deceased in her house all along testified that the rest of the workers were asleep when these two left.

The other angle to the prosecution evidence on the movements of the deceased and the accused on the night of 29th January, 2010 which deserves attention is the intrusion of Kinyua into David Mwongera's (PW7's) farm on the particular night. Kinyua is said to have been drunk and confronted **Kagwiria (PW1)** at about 12 am; Kagwiria herself testified that Kinyua was looking for employment and that she had to wake the rest of the workers up to deal with his case. Of all the workers who were woken up, only **Stanley Mutirithia Mwiti (PW8)** testified that they opted to walk to the deceased's house when they woke up to deal with Kinyua and that it was while they were on their way that they met the accused who told them that the deceased was already asleep. None of the other workers, including **Kagwiria (PW1)** corroborated this evidence; instead Nicholas (PW2) testified that when they could not get to the deceased because his phone went unanswered they (the workers) restrained Kinyua until **1.30 am** when they let him go, apparently after the accused person had come back.

My assessment of the prosecution evidence on the movement of the accused person on the material night and more particularly on their evidence on whether the accused person was the last person seen with the deceased alive is that it is evidence that is anything but consistent. This inconsistency, in my humble view, exculpates what would otherwise have been inculpatory evidence against the accused person. It is not the sort of evidence that can be said to be beyond all reasonable doubt as to sustain a safe conviction.

But even assuming that the prosecution was to be given the benefit of doubt, to which it is not entitled to anyway, that the accused person was the last person seen with the deceased alive, that in itself may not be sufficient to associate the accused with the deceased's death unless motive or intent to murder is proved. This, however, was not done. The accused is said to have worked with the deceased for some time; **Kagwiria (PW1)** testified that the accused had been an employee in her father's farm for at least six months. The accused himself testified that he had known the deceased for at least one and a half years. It was the evidence of **David Mwongera's (PW's)** workers and the accused person himself that their relationship was cordial. It is perhaps of this cordial relationship between the deceased and the accused that their employer instructed them to mobilise people and supervise them while they harvested his potato produce on the 29th January, 2010. They were all in agreement that the two worked together the whole day and came back home together that evening. There was no evidence of animosity that would have perhaps explained why one would have wanted to harm the other. As for the proceeds from the harvest, no evidence was led as to whether anything had been robbed from the deceased, let alone the proceeds from the sale of potatoes. In short, there was no proof of malice aforethought, which as noted, is a necessary ingredient in an offence of murder.

More importantly, is the post-mortem evidence; in considering this evidence one has to bear in mind that **Dr Charles Kurgat (PW10)** who examined the deceased's body did not attach any particular time at which the deceased was murdered. If the prosecution witnesses are right that the accused came back to the house at 1 am and assuming that he had come back from the deceased's place, it cannot equally be assumed that the deceased must have been murdered before the accused person came back home. Without any concrete medical proof or such other evidence, it is possible that the deceased could have been murdered either before or after 1 am; in the midst of this possibility, it would be speculative to assume that the deceased died before 1 am and therefore attribute his death to the accused person who is alleged to have been with him before this hour. The uncertainty created as to when the deceased person died can only be resolved in the accused person's favour; he is entitled to the benefit of doubt.

The only other inculpatory fact, at least from the prosecution's view, is the ownership of the hat said to have been found in the deceased's house. Three prosecution witnesses made reference to this hat but only one of the workers identified it in court; according to **Nicholas (PW2)**, his employer **David Mwongera (PW7)** asked him to pack and clean the deceased's house. This was apparently after the police officers who included the scene of crime officers had left with the body. It was while this particular witness was either packing the deceased's belongings or cleaning his house that he recovered the hat in issue. This brings to question the investigating officer's evidence that one of the items he found lying beside the deceased's body when he arrived at the scene was the blood stained hat. If the officer's evidence is true, one wonders why the officers left the hat behind when it was an essential exhibit in their investigations; the fact that the investigations officer produced the hat in evidence demonstrated its importance to the prosecution case. Having left it behind it is not clear how the investigations officer obtained the hat and forwarded it to the Government analyst for forensic examination.

It is also curious to note that **Sergeant Fredrick Simiyu Serengo (PW11)** who was one of the scene of crime officers who visited the scene and took photographs never made any reference to this hat yet it was said to be beside the deceased's body. If the investigating officer or the scene of crime officers did not take the hat with them after they visited the scene or at least take its photograph in proof of the fact that it was beside the body, it is quite possible that this particular item was not beside the deceased's body as alleged. This then begs the question at what point could it have been introduced to the *locus in quo* or was it simply overlooked?

Be that as it may, the accused person testified that the hat belonged to the deceased and if that was the case there is no reason why the recovery of this hat in the deceased's house should have raised any suspicion of his involvement in the murder of the deceased.

If the hat was the accused person's and was found in the deceased's house, then the investigations officer ought to have done more than seek to confirm whether the blood stains on the hat was the deceased's. In the least, the hat ought to have been dusted for fingerprints or for any DNA links to the accused person. Such tests would probably have shed some light on whether the accused person was wearing this hat at

the time it was stained with the deceased's blood and therefore whether he was present at the time of the deceased's murder. The investigations officer admitted that he never took any blood samples from the accused person and therefore there was no basis upon which to link the accused person with the hat at the material time. The omission to undertake these potentially crucial tests, in my humble view, was fatal to the prosecution case considering the accused person's denial that the hat was his. The finding that the blood stains on the hat belonged to the deceased could very well imply that the deceased himself may have been wearing this hat when he was struck on the head with a blunt object and that it is the blood from the injury that spilled to the hat. There was no evidence from the prosecution side to displace such possibility. My conclusion on this question of the hat is that it was not proved beyond reasonable doubt that it belonged to the deceased and that he was wearing it at the time of the deceased's murder.

My analysis of the circumstantial evidence linking the accused person to the deceased's death is that it has not established that the accused person killed the deceased; it is not sufficient enough to create an irresistible inference that the deceased was killed by the accused person. The possibility that the deceased may have been killed by some other person or persons combined with the deficiencies in the prosecution case are exculpatory enough to overshadow what, in the prosecution's view, are inculpatory facts. Upon careful examination of the circumstantial evidence against the accused person I cannot conclude without any shadow of doubt that the inculpatory facts proffered by the prosecution are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt; they have simply fallen short of this threshold. In a nutshell I am satisfied that the prosecution has not proved its case beyond reasonable doubt; in coming to this conclusion I adopt Lord Denning's passage in **Bater versus Bater (1950) 2 ALL ER 458** at **page 459** (and which was cited with approval by the Court of Appeal in **Andrea Obonyo & Others versus Republic (1962) EA 542**) where he said:-

It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.

There is no doubt about the gravity of the offence with which the accused person was charged; the offence attracts a death sentence if the accused person was to be found guilty. The seriousness of the offence and the penalty it carries called for a clearer proof, though it be only circumstantial; I did not find this clarity in the prosecution case. In the circumstances I find the accused person not guilty of murder and hereby acquit him under **section 215** of the **Criminal Procedure Code, Cap. 75**. He is set at liberty unless lawfully held.

Signed, dated and delivered in open court this 1st April, 2016

Ngaah Jairus

JUDGE