REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO 10 OF 2017

REPUBLIC……

PROSECUTOR

VERSUS

MOSES NJAGI WACHIRA……

ACCUSED

J U D G M E N T

1. The Accused, **MOSES NJAGI WACHIRA,** is charged with ***murder*** contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. It is alleged in the information dated 08/11/2017 that on 18/10/2017 at Kamburaini, Kieni East subcounty, Nyeri County, murdered JOHN MAINA GATHONGO.

2. The Accused person pleaded not guilty to the charge and he was tried. A total of thirteen (13) witnesses testified for the prosecution. On 12/11/2024, this court

delivered a ruling on a case to answer and the Accused person opted to give a sworn defence.

Prosecution's case

3. PW1, Paul Kariuki Mwangi testified that on the material day, he was at his bar selling alcohol when the deceased and the accused quarrelled because the deceased had poured the accused's beer. The accused was 'kali', (stern) and PW1 asked the accused to forgive the deceased but he did not listen. The deceased was older than the accused and he feared the accused. The accused was shouting at the deceased and he requested them to leave but when they got out, the deceased pushed the door which he was closing because he feared the accused. He opened for him and he escorted him out through the back door up to the main road. When they reached the road, they found the accused who continued to claim that he must be paid for his beer. He asked him if there was something else he was claiming from the deceased apart from his beer and the accused confirmed he had no other claim against the

deceased. PW1 offered to pay for the beer the next day so that the accused would leave the deceased. The accused then asked for his phone which he had left in the bar as security and he continued quarrelling with the deceased. PW1 left the two when the accused indicated that he was not claiming anything else from the deceased.

4. He went to a matanga nearby where he stayed for about one hour. Wagucha dropped him at the gate to his bar and he saw the deceased who was lying down. He was burnt and he was asking for help. They informed his family members and with Kimondo, they took the deceased to Mathari hospital where they were referred to Kenyatta and on the following day, they were informed that he passed away. That where he left the accused and the deceased and where he found the deceased near the gate was 4 meters apart. He knew the accused who was his customer and his employer who was his customer as well. He had not differed with him.

5. On cross examination, he testified that his bar was known as Gitiga bar. The deceased would sometime be stern

but that night he was calm and when drunk, he would disturb people but, on that night, he did not disturb anyone. He had no bad blood with anyone. His disturbance was by words only. At 10:30pm, there were four people. The Meru man left. One Ndegwa left almost the same time as the accused and the deceased as he told them that he was closing. As he was closing, the deceased pushed the door inward. He was afraid. He closed the front door and they left together from the back door. He had not seen them quarrel before. He maintained that they found the accused on the road and that is when he asked him whether there was something else they had between them and he said no. The deceased was burnt from his waist to neck and front and back. His clothes were burnt and they looked like charcoal. He was in pain and was calling out his mother and wife. The accused was not around and the deceased did not call out or mention his name.

6. PW2, Simon Kiai was the deceased's brother. He testified that he was contacted by PW1 who informed him that his brother had been burnt. He was told to carry some

clothes. Together with his father, they left and found the deceased who had been burnt from waist to neck. His clothes were looking like charcoal. He was trying to talk but he could not. He was oozing foam from his mouth. He testified that when PW1 called, he asked him what had happened and PW1 stated that the deceased was quarrelling with the accused because the deceased poured the accused's beer. That PW1 took the deceased through the back door but they found the accused on the road who was insisting that his beer must be replaced. PW1 left the accused escorting the deceased home. They took him to Mathari hospital but they were referred to Kenyatta.

7. They took an ambulance to Kenyatta and while on the way, the deceased regained consciousness and he asked him where they were and he told him that they were on their way to hospital. He requested that he lift him up so that he could look at himself. He asked him what burnt him and he said it was acid and from then on he did not talk again because of pain. At Kenyatta hospital, the doctor said it was

chemical acid that had been used and they treated him but after one hour, he was informed that the deceased passed away. Postmortem was done and he identified the deceased body. He did not know the accused but came to know him when PW1 explained to him.

8. On cross examination, he testified that the deceased had no trouble with people and people were shocked because of the incident. When he was drunk, he did not disturb people. That he asked the deceased what had burnt him and he replied “Mose’. The accused counsel pointed out to the witness that, in his statement, the deceased had not mentioned Mose. Cross examined further, the witness stated the Deceased had lost consciousness but regained same on the way to hospital. He asked him what burnt him and he said ‘don’t you see it is acid?’. When asked whether the deceased mentioned who burnt him while in the ambulance, he testified that he was trying to talk to him at Kenyatta hospital and he mentioned Mose. He just said Mose.

9. On re-examination, he testified that at casualty at Kenyatta hospital, he asked him a question and he said Mose. He asked the deceased who burnt him and he said Mose.

10. PW3, Francis Mugi Kamau testified that they went for a funeral meeting and PW1 was also there. PW1 and Wagucha left and after 20 minutes, Kariuki Nderitu was contacted by PW1 and he was informed that someone had been burnt. At the scene, they found the deceased and his brother in a vehicle and he accompanied them to Mathari hospital. They were told to take him to Kenyatta. He did not go.

11. He testified on cross examination that he did not speak to the deceased.

12. PW4 testified that they were contacted by the area Assistant chief who informed them that there was a person who was facing mob justice and so they went to rescue him. He identified the Accused in court as the person they rescued. They rescued him from a crowd that surrounded him and who were hurling insults on him. He appeared traumatised but

there was no one assaulting him. They took him to Narumoru police station.

13. On cross examination, he testified that when they rescued him, some people were alleging that he had been with the deceased.

14. PW5 testified that he was informed by his boss that he had received a call on assault by fire and the suspect was about to flee and they were instructed to go and arrest the suspect. He was later informed that the suspect had been arrested by AP officers and they found the suspect under their custody and they re-arrested him. He visited the scene where he collected some ashes. It was about 10 meters from the door of a bar called Gitinga bar. He prepared a rough sketch plan of the area which he produced as Pexhibit1. Point A in the Pexhibit1 is where he collected the ashes and the burnt clothes. He handed over the matter and ashes to IP Wambua for further investigations.

15. He testified on cross examination that the information he received was that the suspect was preparing

to flee but he found him arrested already. He did not know whether he had prepared to flee. There was no other bar in the area. He did not prepare Pexhibit1 at the scene but prepared it while at the station about 9 days later. He prepared it from his memory but he had prepared a rough sketch on a piece of paper though he did not have it with him.

16. PW6, Joseph Mwangi Ndegwa testified that he went to Gitinga bar. There were other people there. The deceased went into the bar with a lot of noise. He appeared very drunk as he was staggering and, in the process, he knocked the accused's alcohol which poured on the table and on the floor. The accused demanded that the deceased must pay for his drink. PW1 closed the bar and he went home. He left the accused and the deceased outside the bar quarrelling about the drink but they were not fighting. The following morning, he was informed that something had happened to the accused and he proceeded to the bar where he found mob of people surrounding the accused and they were

accusing him of having burnt the deceased but the accused denied. He was taken by the police.

17. He testified on cross examination that there were many people in the bar but they left because of the disorder caused by the deceased. That he heard PW1 offer to give the accused another beer and that he should cool down and the accused cooled down. The bar was closed since PW1 wanted to attend a funeral. He maintained that after the bar was closed, he left the accused and the deceased outside.

18. PW7, Stephen Wagucha Wamaru testified that he was attending prayers for Isaac Muthee who had died. PW1 was also there and just before midnight, they left and he dropped PW1 at his gate where his bar is located. They heard some noise near the bar and PW1 looked into the compound and saw the deceased who was burning. He also looked and saw him and although there was no light, they could see him as it was not very dark. Smoke was coming from his clothes and he was lying down facing up. He was just murmuring.

They informed his father and brother and they all went to the scene and the deceased was taken to hospital.

19. He testified on cross examination that he did not hear the deceased screaming or calling for help. He was inside the gate of the bar which gate was closed.

20. PW8, Nahashon Kimondo King'ori testified that he was contacted by PW2 who wanted assistance to take the deceased to hospital. He found the deceased lying on the ground outside the bar in the compound. The compound was fenced but it had no gate but there was a space for a gate. He was not talking but whining. They placed him in his Matatu and they took him to Mathari hospital but he was referred to Kenyatta hospital. He thereafter went back home.

21. On cross examination, he testified that deceased was not shouting but was crying softly. There was no closable gate into Gitinga bar and he was outside the bar compound. He never spoke when he was in his vehicle.

22. PW9, Jane Njeri was the deceased's niece and she identified his body for postmortem purposes.

23. PW10, a pathologist testified that he conducted post mortem on the deceased's body and he formed the opinion that he died of complications of 49% total body surface area burns. The Post Mortem form was signed on 24/10/2017 and rubber stamped on 01/11/2017. He conducted the post mortem with Dr. Nyangi, a postgraduate student. He produced the post mortem report as Pexhibit2. When asked by court where Dr. Nyangi was, he testified that she graduated and did not know about her whereabouts.

24. He testified on re-examination that he was present during the post mortem examination.

25. PW11, a retired government chemist testified that she received exhibits listed in the exhibit memo form and was requested to ascertain the accelerant used in the spread of fire and to ascertain whether there was any acidic substance. She reduced her findings into a report which she produced as Pexhibit4 and also produced the exhibit memo as Pexhibit3.

26. She testified on cross examination that there was no acidic substance found but there was presence of diesel

after analysis of the exhibits. That diesel would accelerate a fire.

27. PW12 testified that in 2017, he was the deputy DCIO in Kieni East subcounty and he was instructed to investigate this case. PC Kobia handed him a red burned jacket Exhibit5, ashes collected from the scene and sketch plan of the scene. He proceeded to the scene which was out in open about 6 meters from a bar. He recorded statements and forwarded the exhibits to the government chemist. He charged the suspect with the murder of the deceased.

28. On cross examination, he testified that the exhibit memo form indicated that he forwarded a black long trouser and a piece of red jacket and that his memory had failed him when he said that he did not forward the long trouser to the government chemist. That he had detected smell of petroleum on the clothing.

29. PW13 testified that he took the photographs that he signed and certified. On 16/07/21, he received compact disc containing photographs under escort of Hussein Rika and

he was requested to prepare photographs print. He printed two photographs. He produced the memo form as Pexhibit 6, certificate as Pexhibit7 and two photographs as Pexhibit 8(a) and (b). The photos showed the deceased with burns on his body.

Defence's case

30. DW1, Moses Njagi Wachira, the Accused, testified that he was employed as a farm manager at Kamburaini. On 18/10/2017, he contacted two casual workers, Zakabi and Karis who were to plant maize. His boss gave him money to pay them and he called Zakabi who collected the money at around 4-5 pm. Zakabi asked the Accused to find him at the plot where he would buy him soup. He went to the plot where there was a liquor store and a butchery. He joined Zakabi and Karis and Zakabi bought him a drink and he stayed there until 9:30pm when he decided to go back to his work station and slept. His employer Julius, wife and daughter heard him when he returned. He testified that he did not know the deceased

before. That contrary to the testimony of witnesses, he never left with the deceased from the bar.

31. He testified that on the next day, he woke up and he was called by boda boda riders who asked him where the deceased had gone and they said that they were told by Muriuki that he was with the deceased. That he had not seen the said Maina. He testified that he was beaten up as they insisted that he tell them what happened to Maina and he was rescued by police officers. He was informed that he will be charged with murder the next day. That when he left the bar, there were about four persons that he did not know apart from the owner. Karis and Zakabi left before him. He did not quarrel with anyone in the bar. There was a crowd in the bar. He denied killing the deceased.

32. On cross examination, he testified that he did not know Karis' and Zakabi's full names. They met at Gitinga bar at 6:00pm and they bought him liquor. He was drunk but he knew what was happening. He maintained that he left after thy had left. That Zakabi was not John Maina Gathogo and

Zakabi was present when he was being beaten. His employer no longer communicates with him. That Zakabi cannot be the deceased since he even went to the police station when he was recording statement. Zakabi was okay at the bar and he was not drunk. PW1 had no grudge with him but he used to be rough with customers at times. That PW1 was at the bar was at the bar and he was drinking. He added that all the witnesses lied and that his employer was to be his witness but he told him that he did not want to be in contact with him given what he had been told. That he did not have a dispute with the deceased on the material day and he did not know him.

33. He testified on re-examination that his employer went to the police station after his arrest and recorded a statement. That he did not have Zakabi's and Karis' numbers and his phone was taken away by his employer. That he tried to reach his employer but all in vain.

34. That was totality of evidence before this court.

35. Counsel on record for both parties filed written submissions which i summarise as hereunder.

36. The Prosecution counsel submitted that this was a case based purely on circumstantial evidence and the statement made by deceased to PW2 that the accused was the person who attacked him. That the witness was steadfast and it is true from the evidence that the deceased made the said statement while at Kenyatta hospital. That PW2 testified that while at Kenyatta hospital, the deceased was less drunk and he revealed what had transpired. He stated that he had poured beer belonging to the accused and the accused beat him up and he lost his senses and he found himself burnt. That it is trite law that a dying declaration need no corroboration hence PW2 statement should be believed. Further, the deceased succumbed to injuries which were confirmed by PW10 as the cause of the deceased's death as a result of complications of total body surface area burns.

37. He submitted that PW1 testified that he left the accused and the deceased arguing outside the bar and later

came back and found the deceased crying in pain for help. This was corroborated by PW6 who was a customer at PW1's bar who witnessed the fracas. PW2 witnessed the deceased dying declaration when the deceased told him that he was hit by the accused and when he was receiving treatment, the deceased mentioned that it was the accused who beat him and he lost his senses. That from the evidence, the accused was in some kind of disagreement with the deceased for reasons that the deceased had poured his beer. He was also last seen with the deceased. Hence, the circumstantial evidence cannot be ignored since the witnesses saw the accused arguing with the deceased and before his death, the deceased mentioned what the accused person did to him. He submitted that death of the deceased was proved through Pexhibit2.

38. On whether the prosecution has established malice aforethought, he submitted that the accused burnt the deceased using a flammable substance which shows that he had malice of killing the deceased. He submitted that the

prosecution has proven their case beyond reasonable doubt through the testimony and exhibits that were produced in court which pointed to the accused as the person who murdered the deceased. He urged the court to find the accused guilty of murder.

39. In rejoinder, counsel for the accused person submitted that PC Kobia testified that he recovered some ashes from the scene and handed over to Inspector Wambua who confirmed to have received the same. However, the sample of ashes was not forwarded to the government chemist. PC Kobia and Inspector Wambua did not mention that photographs were taken whereas PW13 produced the photographs and there was no evidence as to the date when they were taken and as to who took the photographs. That PW1 and PW6 were drunk but yet claimed to have witnessed the altercation between the accused and the deceased. That there is a possibility of their minds being blurred by their drunkenness as to the combatants in the bar over a poured drink. They also testified that the accused and the deceased

reconciled. Further, doubt is cast as to whether there was an altercation between the deceased and the accused in view of doubted sobriety of PW1 and PW6. Additionally, the circumstances alleged to have provided a motive was not sufficient bearing in mind the manner in which the deceased met his death. The killing appeared to have been long premeditated and not in short minutes between the altercation and the commission of the crime. The preparation appeared to be so elaborate to have been conceived out of a bar brawl. The weapon used being diesel or acid was not within the accused reach and it was not suggested that he was in possession of either hence this cast doubt as to the accused's involvement and give credence to his alibi. Further, the evidence of PW1 and PW6 who were drunk to have a proper perception of the bar patrons in their midst did not displace his alibi.

40. Counsel submitted that the items that were forwarded to the government chemist were not availed to her in court and therefore she had no opportunity to identify them

thus it cannot be conclusively said that the items forwarded were the clothes that the deceased was wearing that night. Further, it cannot therefore be established the accelerant and cause of fire that led to the burns on the deceased's body. She could have been referring to exhibits different from those that were presented to her. Additionally, the ashes recovered from the scene was not presented to her for analysis raising question whether she could have been able to determine the nature of the accelerant from remains of the clothing alone.

41. It was submitted that PW10, the pathologist neither completed or signed the post mortem report which was signed by Dr. Ndanyi, a student pathologist who was not called to testify. He did not purport to produce the report under **section 33** and **77** of the **Evidence Act** but produced the same as the maker and it was during cross examination that it turned out that he did not conduct the post mortem nor completed the post mortem form. He was therefore not competent to testify. Therefore, there was no proof of the fact and cause of death of the deceased. As to whether the

deceased made a dying declaration, he submitted that from the conversation between PW2 and the deceased, the deceased could only remember the fracas he had with the accused but nowhere in his conversation while fully conscious implicated the accused for causing his injuries. He urged the court to find the accused not guilty for the reasons given.

42. I have considered the charge, the evidence adduced and learned submission by counsel on record. Of determination is whether the prosecution has proved the ingredients of the offence of murder against the Accused to the threshold set in law.

43. Section 203 of the **Penal Code** defines murder in the following terms***:***

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

44. The ingredients of murder were explained in the case of ***Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR*** as follows:-

> ***"1) The fact of the death of the deceased.***
> ***2) The cause of such death.***

3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4) Proof that said unlawful act or omission was committed with malice aforethought."

45. Thus, the central ingredients of the offence of murder are malice aforethought and an unlawful act or omission on the part of the accused.

46. Section 206 defines malice aforethought in the following terms:

"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."

47. In other words, the prosecution must prove that the accused person herein had the intention to cause the

death of or to do grievous harm to any person; that he had the knowledge that his act or omission would probably cause death either to the person intended or to some other person.

48. In criminal cases, it is trite law that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in ***Woolmington vs. DPP [1935] A.C 462 pp 481*** stated the law on legal burden of proof in criminal matters, that;

> ***"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''***

49. In ***JOO vs. Republic [2015] eKLR,*** the court held that:

> ***"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."***

50. There is no doubt as to the fact of death of the deceased. There was ample evidence from PW2 and PW9. PW2 took the deceased to Kenyatta hospital where he died while receiving treatment. He also identified the deceased's body alongside PW9 for post mortem purposes. PW10, the pathologist, conducted the post mortem alongside Dr. Nyangi. Contrary to the accused's counsel submissions that he did not sign and prepare the post mortem report, Pexhibit2 shows that the post mortem report was signed by Dr. Nyangi and Dr. Midia, PW10. He testified in court that he filled the post mortem and signed it and also rubber stamped it. According to the post mortem report, the cause of death was complications of 49% total body surface area burns. This

shows that, the deceased did not die a natural death but he was murdered.

51. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no eye witness account of the act causing the death of the deceased. The prosecution case against the Accused is based on a dying declaration by the deceased made to PW2 and on circumstantial evidence of events prior to the gruesome murder together with the fact that the deceased was the last person to be seen with the deceased alive before he was shortly after found burnt and subsequently died. This triggers the application of the *"last seen doctrine".*

52. With respect to the dying declaration ***Section 33 (a)*** of the ***Evidence Act*** provides:

> ***"Statements, written or oral, of admissible facts made by a person who is dead …… are themselves admissible in the following cases:***
> ***(a)When the statement is made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and***

such statements are admissible whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

53. The court of appeal in ***Philip Nzaka Watu v Republic [2016] KECA 696 (KLR)-CA*** held that;

"Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in CHOGE V. REPUBLIC (supra):

"The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into

evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

54. In ***Henry Mulamba Bwire & another v Republic [2019] KECA 163 (KLR)***- the court of appeal quoted the predecessor of the court of appeal in the case of ***Pius Jasunga S/O Akumu v Republic [1954] EACA 333*** where it was held as follows:

> ***"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval....it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (Republic v Eligu S/O Odel & Another [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration."***

55. PW2, the deceased brother testified on cross examination that when he asked the deceased who burnt him, he just mentioned Mose. That he asked what burnt him and he said Mose. Counsel for the accused indicated that the

statement he wrote at the police station did not mention Mose. He testified that in the car, the deceased seemed to regain consciousness and he asked where they were going and he told him that they were on their way to hospital. He asked why and he told him that ‘don’t you see you are burnt?’. He lifted him so he could see. He asked him what burnt him and he said ‘don’t you see it is acid’. He asked him who burnt him and he said Mose. It is recorded on the record that after he said he was burnt with acid-I asked him-no I made a mistake-he mentioned-he did not say anything. When asked whether the deceased said who burnt him while in the ambulance, he testified that when they reached casualty at Kenyatta hospital, he was trying to talk to the deceased but he did mention Mose. He just said Mose. When asked on re-examination when the deceased mentioned Mose, he testified that he asked the deceased a question and he did not answer that question and he just said Mose. That he had asked him who burnt him while at casualty in Kenyatta hospital.

56. It is noteworthy that the statement he made to the police did not state that the deceased informed him that Mose burnt him. It only stated that the deceased informed him that the accused beat the deceased and he lost his senses and he found himself burnt. In examination in chief, he did not testify that the deceased informed him that he was burnt by Mose. It only came out during cross examination. Neither did he testify that the deceased told him that the accused beat him in the manner recorded in his statement to the police. It is on record in his evidence in chief (which extract I reproduce here) that when on their way to Kenyatta when the deceased appeared to gain consciousness *"I asked him what had burnt him. He said it was acid. From then he did not talk again because of pain. We reached Kenyatta……. The doctor called me and told me my brother had died."*

57. There appears a misapprehension of the evidence on the part of Counsel for the Prosecution who in summing up the evidence of PW2 indicates that the deceased told him that the Accused beat him and he lost his senses and found

himself burnt. The record of the evidence of PW2 does not bear this out.

58. In the true sense of the word, PW2 did not offer evidence of a dying declaration in his evidence in chief and the mention of Mose as the perpetrator only emerges in cross examination. The prosecution cannot rely on answers in cross examination to build a case that they had not put forth in examination in chief. This is legally untenable bearing in mind the degree and onus of proof in criminal law. There thus exists no dying declaration that meets the threshold set out in the above cited cases.

59. Regarding the doctrine of "last seen with deceased" the Court of Appeal in the case *of* ***Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006 (Nigeria)*** while considering the *'last seen alive with'* doctrine explained in simple terms that:

> "***Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused***

to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

60. In the case of ***Ramreddy Rajeshkhanna Reddy & Anr vs. State of Andhra Pradesh, JT 2006 (4) SC 16*** the court added some caution stating that;

"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."

61. In ***Anjan Kumar Sarma vs. State of Assam, Criminal Appeal No. 560 of 2014*** cited in the case of ***Republic vs. Elizabeth Anyango Ojwang [2018] eKLR,*** the court stated as follows:

"The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence…There must be something more establishing connectivity between the accused and the crime…It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only

circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction."

62. It therefore follows that even when the doctrine applies, it is advisable to seek some corroborative evidence instead of solely relying on the doctrine. This evidence in my view would be either in the form of direct or circumstantial evidence.

63. According to PW1 and PW6, the accused was the one who was last seen with the deceased outside the Gitiga bar. They were quarreling over the beer the deceased had poured. PW1 testified that he left them together after the accused confirmed that he was not demanding anything else from the deceased. The deceased was however found burnt soon thereafter by PW1 and PW7 not far from PW1's bar. PW1 testified that it was about 4 meters from his bar to where the deceased's body was. PW5, PC Kobia prepared a rough sketch plan which he produced as Pexhibit1 and according to the sketch plan, he recovered the remains of burnt clothes and ashes about 10 meters from the bar.

64. Counsel for the Accused submitted that PW1 and PW6 were too drunk to have perceived the happenings at the bar and hence there was doubt as to whether they indeed witnessed a scuffle between the accused and the deceased. It is however noteworthy that no evidence was adduced either by the prosecution or the defence that PW1 was drunk. He was the one who was running his bar and afterwards he left to attend a matanga hence it cannot be said that he was too drunk to know the happenings in his place of work. PW1 and PW6 gave clear evidence of what transpired at the bar on the material night without any iota of contradiction. It is an established fact from the evidence that the Accused had a quarrel with the deceased in the bar and he was left with him outside the bar where he had escalated the quarrel, a fact witnessed by PW1 and PW6.

65. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests as was enunciated in ***Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)*** as follows;

"(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else; and

(iv) In Sawe v Republic (2003) eKLR and GMI v R Cr. App. No. 38 of 2011)-in addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt."

66. Therefore, taken cumulatively, the circumstances the prosecution must establish should form a chain so complete that there will be no escape from the conclusion that within all human probability, the crime was committed by the accused persons and no one else.

67. Further, for this court to find the accused guilty, the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of ***Simon Musoke vs. Republic [1958] EA 715*** as follows:

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

68. In ***Teper v. R [1952] AC at p. 489*** the Court had this to say:

> ***"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."***

69. The evidence of PW1 and PW6 establishes that there was a quarrel between the accused and the deceased after the deceased poured the accused's beer. PW1 testified that the accused was 'kali' (fierce, harsh) and he insisted that his beer must be replaced. PW1 ordered them to leave as he was closing the bar and when he was closing the door, the deceased pushed the door inward and he opened for him. The deceased was so afraid and PW1 escorted him through the back door. On reaching the road, they found the accused who was waiting and he continued quarrelling with the deceased demanding for his beer to be paid for. PW1 asked him

whether he had any other issue with the deceased apart from the beer and he answered in the negative. PW1 offered to pay for the beer and asked him to leave the deceased. He left the Accused and the deceased at the scene. He went for a matanga and on his return together with PW7 about an hour later, they found the deceased who was calling for help. He was burnt. They found him 4 meters from his bar. PW7 testified that there was smoke coming from the deceased's clothes.

70. PW6 also confirmed that the deceased poured the accused's beer and the accused demanded for it to be paid by the deceased. PW1 closed the bar and so he went home but he left the accused and the deceased on the road quarrelling about the drink.

71. In countering this evidence, the accused in his alibi defence denied committing the offence. He admitted that indeed he was at Gitiga bar on the material night but denied ever seeing the deceased, quarreling with anyone and ever knowing the deceased. He testified that he left the bar at

9:30pm and went to his employer's homestead who heard him when he returned.

72. The court in ***Erick Otieno Meda v Republic [2019] KEHC 4959 (KLR)*** observed as follows in considering alibi defence;

> ***(a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.***
> ***(b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.***
> ***(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.***
> ***(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014) (emphasis added)***

73. In this case, there is compelling evidence that the Accused, the deceased and others were at the bar at the material time. There is evidence that the Accused quarrelled the deceased over his (Accused's) beer. PW1 and PW6 affirm this fact. According to PW1, the quarreled was a heated one. (he states the Accused was "Kali"). It is worthy of note that

the Accused persisted in the quarrel even after the bar was closed. PW1 had to spirit the deceased to safety through a back door only to find the Accused on the road and still insisting that the deceased had to pay his beer. This forced PW1 to offer to pay for the beer the next day leaving the Accused with the deceased.

74. It is a fundamental principle of criminal law that an Accused person has no obligation to prove his innocence. The burden of proof lies entirely on the prosecution and never shifts. In our laws, that presumption of innocence is ring fenced under Article 50(2)(a) of the Constitution.

75. The evidence by the Accused is that there was no quarrel at all at the bar that night. That he was invited for a drink by one Zakabi and he just went home at 9.30pm only to be confronted the next morning, beaten by a crowd and questioned about one Maina whom he did not know.

76. I have applied my mind to, and weighed this evidence. In light of evidence on record, the account of events at the bar by the Accused cannot possibly be true.

PW1 and PW6 are independent witnesses who had nothing to gain from the outcome of these proceedings. They had no reason to create a story about an altercation at the bar involving the Accused and the deceased. They witnessed the same first hand.

77. I have no difficulty in arriving at a finding that the Accused was not entirely candid about the events at the bar on the material night. But that is as far as I can go for am alive to the presumption of innocence the Accused enjoys and the burden was not on him to prove his innocence but for the state to prove his guilt beyond reasonable doubt.

78. The pertinent question then becomes whether the circumstantial evidence herein and the application of the doctrine of last seen meets the threshold of prove of the charge against the Accused to the required degree. In a nutshell, that evidence is that the Accused was left with the deceased after they had quarrelled in a bar. He was found burnt about an hour after. The time of the act must have been a lot less as PW1 found him already burnt. The period

between when the deceased was last seen with the deceased and the time the deceased was found murdered was short.

79. Further, the Accused had an already demonstrated ill will against the deceased for pouring his beer. As indicated above, PW1 stated the quarrel was a heated one. That the Accused persisted in the quarrel even after the bar was closed. PW1 had to spirit the deceased to safety through a back door only to find the Accused on the road and still insisting that the deceased had to pay his beer. This forced PW1 to offer to pay for the beer the next day leaving the Accused with the deceased. An established grudge existed between the Accused and the deceased.

80. In these circumstances the deceased having been found burnt soon thereafter, the prosecution has in my considered view established the parameters set in law in **Abanga Alias Onyango vs. Rep** (supra) in that the circumstances from which an inference of guilt is sought to be drawn has been cogently and firmly established and those circumstances are of a definite tendency unerringly pointing

towards the guilt of the Accused. Further, the circumstances taken cumulatively, all the way from the quarrel in the bar to the extension of the dispute outside the bar, the fact that the Accused was left with the deceased **(See *Moses Jua vs. The State,* supra)** and the finding of the deceased burnt shortly thereafter form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

81. Has malice aforethought been proved? The manner of the execution of harm on the deceased through burning by use of an accelerant is a clear indicator that the Accused knew that his action would cause death or grievous harm to the victim.

82. The court of appeal in ***Daniel Muthee – v- R, CA No. 218 of 2005 (UR)***, while considering what constitutes malice aforethought observed as follows:

> ***"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous***

harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."

83. On the whole, am satisfied that the prosecution has proved its case to the required degree. I find the Accused guilty as charged and convict him accordingly.

Dated signed and delivered virtually this 6th day of November 2025.

A.K. NDUNG'U

JUDGE