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| Case Number: | Criminal Case 4 of 2017 |
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| Case Class: | Criminal |
| Court: | High Court at Nyahururu |
| Case Action: | Judgment |
| Judge: | Roseline Pauline Vunoro Wendoh |
| Citation: | Republic v Samuel Maina Wanjiku [2019] eKLR |
| Advocates: | Ms. Rugut for the State Mr. Njogu for Accused |
| Case Summary: | - |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Nyandarua |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Accused acquitted under Section 322 of the Criminal Procedure Code |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL CASE NO.4 OF 2017

REPUBLIC.....PROSECUTOR

V E R S U S

SAMUEL MAINA WANJIKU.....ACCUSED

J U D G M E N T

Samuel Maina Wanjiku, the accused was charged with the offence of *murder contrary to section 203 as read with Section 204 of the Penal Code*.

The particulars of the charge are that on 2/12/2016 at Nguba Village, Tumaini Location Nyandarua Central Sub-County, murdered Peter Kinuthia Wahogo. The accused denied the offence. The prosecution called a total of 14 witnesses in support of their case.

PW1 Veronica Wangeci Kinuthia is a daughter to the deceased. She was a girlfriend to the accused. She recalled that her father was murdered on 2/12/2016 and on 24/12/2016, her mother received a call that the deceased's clothes had been found at Mama Njamba Forest. She went with her uncle to the forest. PW1 identified the black and white robes, scarf, prayer books, a suitcase, all produced P.Ex.1 – 5 which belonged to the deceased. That about 20 metres from where the deceased's suitcase was, they found the accused's belongings, a black jumper, jacket, blue jeans, yellow/black striped shirt, truck suit, a Bob Marley bag. She identified the black jumper that she had earlier given to accused. P.Ex.No.6 – 10. On finding the deceased's clothes PW1 called accused to inform him that deceased belongings had been recovered and he said he was on his way there but never arrived.

PW1 further said that the accused took part in the deceased's funeral arrangements but after the clothes were found, PW1 did not see him again. PW1 confirmed that accused used to visit her at her home when the deceased was still alive and he had never disagreed with the deceased. PW1 did not know how the father met his death.

PW2 Eunice Wamuyu Ileri a resident of Tumaini stated that on 24/12/2016 after church, she visited her son and passed by Mama Njamba Forest and when on the road, saw children running and they informed her that while looking for firewood, they had seen somebody up a tree; that under the tree were 2 bags; PW2 called Veronica Wairimu PW3 to join her; that PW3 came there with Gitari, he entered the forest and came to inform them that he had seen the pastor's clothing. PW1 screamed and people came to the scene. They went to the scene and found the lay readers (deceased) clothes – P.Ex.No.1 – 5. PW2 did not see the accused at the scene, she knew accused well.

Veronica Wairimu Njogu (PW3) recalled 24/12/2016, that PW2 called to inform her that children had seen a person and 2 bags of Mama Njamba Forest. She proceeded to Mama Njamba Forest where PW2 was and she saw the bags. She said she saw accused who wore a white T-shirt who had a bag written on Bob Marley and he ran off and she started to scream. She called her husband, deceased's brother, to tell people to surround the forest. PW3 also identified the things found in the forest as belonging to the deceased. In cross-examination, she said that when she saw the accused, she was alone as others had gone with the children and that she even called his name but he ran off. PW3, also told the court that she knew that the deceased did not approve of the relationship between PW1 and the accused.

PW4 Julius Njeru Wahogo is an elder brother of the deceased. He recalled 2/12/2016 about 8.00 p.m. when his wife informed him of noises at the deceased's home. He proceeded to the deceased's home which is nearby, found people gathered and the police. He found the body of the deceased on the corridor of his house next to his bedroom in a pool of blood. He saw fingerprints on the sofa set and a metal weapon covered in blood and a fork Jembe; that the main door to the house was broken and bloody shoe prints

leading outside. He later identified the body to the Doctor for purposes of postmortem. He saw the deceased's face completely smashed; PW4 also said that deceased did not approve of the relationship between accused and PW1 and he told police about it but they never recorded it in his statement. PW4 said that on 24/12/2019 they started to look for accused, received information that he boarded a Nuclear Van to Nairobi. PW4 did not know who killed the deceased.

PW5 Joel Ndungu Wanjiru, a son in law to the deceased passed by the deceased's home on 2/12/2016 to vaccinate his animals. He saw the deceased and he left for church. PW5 later left for another village and at 6.00 p.m., he received a call and was informed of a problem at the deceased's home. He proceeded there and found the deceased had been murdered and had a deep cut on the face, which was totally disfigured and there was a lot of blood at the scene. He identified the items found at the scene. They found that the doors had been broken from outside. On 24/12/2016 he was called to proceed to Mama Njamba Forest where he found over 200 people looking for the deceased's clothes. He saw the clothes that were produced in court. He heard PW1 call the accused on phone who promised to come where they were but he did not show up. They found the Bob Marley bag and its contents on the other side of the forest and identified the yellow T-shirt and blue track suit as belonging to the accused as he had seen him with them. PW5 said that thereafter accused stopped, responding to his and PW1's calls. PW5 also said that deceased did not approve of accused and PW1's relationship.

PW6, Joyce Wanjiru Kinuthia, a daughter to the deceased was called by a neighbor on 2/12/2016 and told to hurry to their home which she did, found a crowd. She entered the house and found the father's dead body. She saw the fork Jembe at the scene.

On 24/12/2016, she was called and informed that the deceased's clothes had been found at Mama Njamba Forest. She proceeded there and saw the deceased's belongings. She also saw the items with Bob Marley bag that were said to belong to the accused and she had seen him with the bag and the grey/black jumper and yellow T-shirt; that people went in search of accused but information was received that he boarded a matatu. She denied seeing accused on 24/12/2016.

PW7 Margaret Wairimu Kinuthia is the wife of the deceased. She told the court that on 2/12/2016, the deceased left for a meeting while that PW5 was treating their animals but he later left. She left the home at 2.30 p.m. and returned about 5.00 p.m., found the outer door open and so was second door. On entering, she saw a Fork Jembe and deceased lay dead on the corridor with injuries on the head. She raised alarm. She said she had locked up when she left. She lost consciousness and came to while in hospital. She later discovered that a suitcase with deceased's work clothing were missing.

Peter Gitonga Gakunju (PW8) recalled that on 2/12/2016, about 2.30 p.m. he was resting at his home when accused went there carrying an empty manila sack, white in colour with red stripes which looked like the manila bag found at Mama Njamba Forest. On 24/12/2014 when at work on a construction site with his brother John Irungu and Kamau wa Mama Jane and Muriithi Kirimi, they heard screams from the bush and ran there. They found children who said they found a person with some clothes and people were gathered. He went near the tree and found the deceased's clothing, bible, suitcase and he saw a sack. They also found a bag – Bob Marley nearby. He did not know whose clothes were in the bag but Joel and Maina Wa Kiliso said belonged to accused.

PW9, SN, a boy aged 10 was in Mama Njamba Forest on 24/12/2016 with other boys, K, F, H looking for firewood when they saw clothes under a tree and someone up a tree. He only had a vest but no clothes on the lower part of the body. PW9 did not know the person and they ran away and meant one Mama Sheila and informed her what they had seen and they went to see. She screamed and more people came. He also saw the bag with Rasta a bit far from the suitcase.

On 26/12/2016, he identified the accused as the person he saw on the tree. He had never seen the person before. He said that he did not wait for the person who was up the tree to come down as he ran off.

PW9 admitted that Joel, a vet, a relative of the deceased, showed him a picture of the accused on a phone before he went to the identifying parade and he went to look for the person whose picture he had seen in the phone.

PW10 Haron Kimiri Maina was with PW9 at Mama Njamba Forest. He said they found 2 bags under a tree and a person was up a tree and he wore a yellow T-shirt. PW10 had never seen the person before. They ran away and informed Mama Sheila and Baba Maina and on going back to the scene, the smaller bag was missing. On 26/12/2016, he identified the person he had seen in the tree on a parade.

PW11 Ip. Samuel Kombo officer in charge of Kichunga Police Station conducted an identification parade. He paraded 8 people and

asked accused to choose the position he wanted. The first witness did not identify the accused; that Haron Kimiri (PW10) identified accused by touching him and so did Steven Njoroge (PW9).

PW12, PC Patrick Akwiri of DCI Nyandarua was informed of a murder at Ngumba Village, he proceeded there and found Administration Police and people gathered. They found the deceased's body on the corridor floor of his house with a deep injury to the forehead, his pockets were turned inside out, Fork Jembe near the body and bedroom had been ransacked. Blood stains were on sofa and blood stained metal. Scenes of crime photographed the scene. Both the kitchen and main house were broken into. He witnessed the postmortem after relatives identified the body. On 24/12/2016, he was informed of the finding of the deceased's suitcase in the forest and went there, found a crowd and a bag under a tree and the deceased's daughter identified the suitcase and contents as belonging to the deceased, stolen during the attack. About 50 metres away they found another bag with clothes which PW1 identified as belonging to accused. They searched for accused but did not find him till he was spotted at Mawingo Location and arrested and charged for this offence. A parade was conducted and accused was identified by one witness.

The postmortem was conducted on the body of the deceased by Dr. Patrick Kariuki (PW.13) at J.M. Kariuki Hospital. He found that there was a crush injury to the face exposing the brain tissue, severe crush to the skull and fracture of yganatid and orbital and exposed brain tissue; crush injury to C1 and 2 (behind the neck). He formed the opinion that cause of death was severe injury to the head leading to massive internal haemorrhage leading to death.

PW14 APC Eliud Ng'ang'a of Milangine District Hospital recalled 25/12/2016 when somebody reported to him that he had spotted a suspect of murder in a homestead. Together with other officers, they went to the homestead, found the suspect with an elderly lady in a house and arrested him. He was collected by officers from Tumaini and that one had a photograph of him.

PW.15 Sgt.Koskei Joel a scenes of crime officer who visited the scene of crime on 2/12/2016 took ten (10) photographs of the scene which he produced in evidence.

Accused was called upon to enter his defence. He gave his evidence on oath and called one other witness.

The accused denied killing the deceased. He admitted knowing the deceased, since his childhood and used to visit his home because Veronica Wangeci (PW1) was his girlfriend since 2015; that the deceased had never told him that he did not approve of their relationship nor had the wife (PW6) told her of the same.

He learnt of the deceased's death the evening of 2/12/2016; that on that day, he left home about 10.30 a.m. and went to Peter's Video Shop upto 7.00 p.m. watching videos; that he was in the shop with Peter, his employee and about 20 other people; he paid to enter the shop and at 7.00 p.m. while leaving, his friend Chege asked if he knew of the deceased's death. He went to the deceased's home about 7.30 p.m.; found many mourners the body was removed and he left at midnight. He visited the home on 3/12/2016, helped with work, that is, drawing water, cutting wood. He visited the home till 8/12/2016 when the burial took place. He visited even after the burial till 23/12/2016. He was at the deceased's home on 23/12/2016 and denied seeing Peter Gitonga nor passing near his home at 2.00 p.m. He said that when at Peter's home, the fence is so thick that one cannot see a person passing on the road. He denied having the manila bag with the red stripes found with deceased's belongings. He denied being at Mama Njamba forest or meeting PW2, 9 & 10.

He denied ever having seen the deceased's items that were produced in court as exhibits. He also denied that the clothes that were found in a bag in the forest were his; that PW1 never called him on 24/12/2016; that on 25/12/2016 he went to Wiyumiririe to celebrate Christmas, on invitation by a close friend of his, but on 25/12/2016 at 2.00 p.m. the police arrived and arrested him. He was put in a Land- Rover, taken to Tumaini with the siren on, people gathered including Joel, PW5, who took a picture of him; that PW5 & PW6 Julius Njogu entered the vehicle and he was taken to Ol Kalou Police Station; that on 26/12/2016, the parade was conducted and the boys were called and asked if they identified anybody and that the 2nd and 3rd touched him but he denied ever meeting them. He denied having any reason to kill the deceased. He denied that his relationship with the deceased and his wife was bad and that they always welcomed him in their home.

DW2 Simon Kimani Theuri was a resident at Tumaini on 2/12/2016. He worked at Tumaini Video, employed by Peter where videos were shown. DW2 said that the accused went to the shop, paid Kshs.40/= to watch 4 videos and left at 7.00 p.m.; that before accused left, Chege went to greet him, went where accused was, talked to him and he left. He denied that they used to issue receipts and that accused was a regular customer there.

After the close of the defence case, Mr. Njogu submitted that the prosecution failed to prove both *mens rea* and malice aforethought; that there was no evidence that the deceased did not approve of PW1 and accused's relationship; PW6, PW1's mother adduced evidence disapproving of the relationship; that only PW4 & PW5 alluded to the deceased being unhappy with accused but they did not record it in their statements and hence that evidence was an afterthought.

Counsel further submitted that there is no evidence that accused had malice aforethought, Counsel sought guidance on the decision of *Zachariah Mwangi Thuo v Republic Cr.A.159/2014 (Nyeri)* where the Court of Appeal Emphasized the need to prove malice aforethought.

Counsel also submitted that though the murder weapons were found at the scene, none was taken for forensic testing to confirm who handled them. Counsel urged that the circumstantial evidence relied upon is of the weakest character that it cannot be a basis for a conviction. Counsel also relied on the elaborate submissions made at the stage of no case to answer.

Ms. Rugut on her part submitted that malice aforethought was proved in that the accused and deceased's property were found in the forest; that the accused fled the area once the said items were recovered; that PW4 & PW5 had information from the deceased that he did not approve of accused and PW1's relationship.

That the evidence is circumstantial but points at accused as the culprit; that the accused was seen in the tree in the forest and did not explain how he came by the deceased's clothes. Counsel urged the court to return a verdict of guilty.

I have duly considered the evidence on record; the submissions by both counsel. The accused faces a charge of murder under Section 203 of the Penal Code which provides as follows:

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

The onus rests on the prosecution to prove the ingredients of the offence of murder under Section 203 Penal Code beyond reasonable doubt. The ingredients are:

- (1) That the accused caused the death of the deceased;***
- (2) That the accused caused the death of the deceased through an unlawful act or omission (also known as actus reus);***
- (3) That the accused possessed malice aforethought (intention mens rea).***

The death of the deceased is not in doubt. Witnesses, PW1, 3, 4, 5, 6, 7 all went to the scene and saw that the deceased was dead and the body lay in the corridor of his house. PW4, a brother to the deceased, identified the deceased's body to the Doctor, PW13 before he conducted the postmortem. PW4, PW5 confirmed that the deceased had injuries to the face which were confirmed by PW13; that there was a crush injury to the face and skull exposing brain tissues. The probable weapons used in the assault were found at the scene; a fork jembe and a piece of metal.

The Doctor opined that the cause of death was severe injury to the head leading to internal haemorrhage. No doubt these circumstances go to show that somebody inflicted those injuries on the deceased. The next question is who inflicted those injuries.

Nobody witnessed the attack on the deceased. This case therefore turns entirely on circumstantial evidence. For the court to found a conviction on circumstantial evidence, the events leading to the death must form a chain so closely knit together without any breaking or interruption. Circumstantial evidence has also been held to be the best evidence to prove an offence as was expressed in the case of *Ndunya v Republic, 2008 KLR 135* where the Court of Appeal stated:

“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in

this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.”

The Court of Appeal in *Abang’a alias Anyango v Republic Cr.A.32/1990* set out the three tests that circumstantial evidence has to pass. The same were anchored in *Sawe v Republic (2003) KLR 366*. The court said as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

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

(ii) These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) The circumstances taken cumulatively should form a complete 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.”

This court has to carefully analyze all the evidence tendered before this court and determine whether it satisfies the above stated principles.

There is no doubt that the accused was a boyfriend of PW1, the deceased’s daughter. The prosecution seems to advance a theory that the deceased never approved of the relationship between accused and PW1. PW1 denied knowing that the deceased did not approve of their relationship.

Incidentally, PW7, the deceased’s wife denied knowing of any enemy that the deceased had. She never mentioned of any frosty relationship between accused and the deceased. Incidentally, PW6, PW1’s sister did not mention being aware of the deceased disapproving of the accused and PW1’s relationship. However, PW3, 4 and 5 all said that the deceased had told them that he did not approve of accused and PW1’s relationship. They did not give the reason why the deceased was uncomfortable with the relationship.

When put to task, it turned out that the witnesses never told the police in their statement, about this uneasy relationship. They all seem to have remembered that part of evidence in court. If there had been uneasiness between accused and the deceased, PW1, 6 and 7 would have been the first people to know about it. There is also no evidence to the effect that accused knew that the deceased did not approve of his relationship with PW1 so that accused would plan to eliminate the deceased. I doubt that such a situation existed.

The evidence on record is that the accused was at the deceased’s home from the day the deceased was found murdered, during the funeral preparations and even the burial date but that the accused disappeared after the deceased’s clothes were found in Mama Njaba forest on 24/12/2016.

PW2, was one of the first to arrive at Mama Njaba forest after the children informed her of seeing somebody up a tree with 2 bags under the tree. She denied having seen the accused near the tree nor did she find him up the tree.

It is PW2 who called PW3 to come to the scene. PW3 said that on going to the scene where the deceased’s suitcase was found, she saw the accused near there, carrying the Bob Marley bag. When pressed in cross-examination, PW3 said that she saw accused when she was alone. When her statement to the police was put to her, it emerged that she had told the police officer that she saw the accused up on the tree, called him by name and he alighted. She however changed her story in court. If she had seen accused up the tree, then PW2 would have seen him too. PW3 did not impress the court as a truthful witness. I doubt that she saw accused in Mama Njaba forest where the deceased’s suitcase was found or at all. In any case, PW9 & 10 who called the ladies to the scene said that by the time they took people back to the tree, in the forest, the man who had been up the tree was not there and the smaller bag had been moved a distance away.

PW11 conducted an identification parade at Ol Kalou Police Station where PW9 & 10 purportedly identified the accused.

The Court of Appeal in the case of *Samuel Kilonzo Musau v Republic (2014) eKLR* discussed the purpose of an identification parade. The court said:

“The purpose of an identification parade, as explained in Kinyanjui & 2 others v Republic (1989) KLR 60, is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of the event to remove possible latter confusion:

It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”

The Police Force standing orders under the National Police Service Act 2011 provide the procedures for the conduct of identification parade. The said procedures were restated in Republic v Mwanga s/o Manaa (1936) EACA 29 and Ssentale v Ugandan (1968) EALR 365.

The Rules include the following:

- i) An accused should always be informed he may have his advocate or friend when a parade takes place;*
- ii) None of the witnesses are allowed to see the accused before the parade;*
- iii) The witnesses should be shown the parade separately and should not discuss the parade amongst themselves;*
- iv) There must be at least eight persons as far as possible of similar age, height, general appearance and class of life:*
 - a) The accused may stand at any position; or*
 - b) Exclude every person who has no business there*
- v) Careful notes be recorded after each witnesses leave and if identification had been made or not;*
- vi) Witnesses may ask accused to walk, speak, see him with a hat or not, if so, then all parade members must do likewise;*
- vii) The witnesses must touch the person identified.*
- viii) Accused to be asked if he is satisfied with the parade at its termination;*
- ix) There should be no influence of witnesses. They should be told that the culprit may or may not be on the parade;*
- x) The Investigating Officer of the case should not be in-charge of the parade as that heightens suspicion of unfair conduct of the parade.*

PW9 told the court that he saw the accused up a tree. He had never seen him before that day nor did he know him. He said that on seeing him up the tree, he ran away. No evidence was led as to how long PW9 observed the person who was up the tree.

The first irregularity I note in the conduct of the parade is that the accused was never informed that he could have his advocate or relative or friend attend the parade.

Secondly, PW9 was told to choose from the 5 people on the parade. PW9 was not informed that the suspect may be on the parade or not.

The said parade was totally rendered useless when PW9 said that PW5, Joel showed him a photograph of the suspect before he went

on the parade. Since PW9 had been shown the suspect, the parade was rendered a nullity.

The accused in his defence told the court that PW5 had taken a picture of him after his arrest when he was taken to Tumaini and was in a police car where people gathered. PW9 just confirmed the fact that indeed PW5 had taken a photo of accused with a phone.

As regards PW10's evidence on identification, he said that he saw the accused in a tree, wearing a yellow T-shirt. He had never seen the accused before. He did not describe the person he saw to anybody though he said he saw accused's face when he was still up the tree. He also said that when they saw the person, they ran. It is unclear how long PW10 observed the person who was up the tree before he ran.

Although PW10 denied having been shown the accused or his picture before the parade, given that PW9 had been shown a photograph by PW5, one wonders whether PW10 was not shown too.

I have, above considered the irregularities in the conduct of the parade. The parade did not meet the threshold under the Police Standing Orders and hence of no evidential value.

In his defence, the accused gave an alibi that he spent the whole of 2/12/2016 at Peter's video shop. He called the attendant there as a witness. The prosecution never attempted to dislodge this alibi.

No doubt the deceased's belongings were found in Mama Njaba forest. There is also another bag that was allegedly found about 50 metres from the deceased's items. PW1 identified a jumper that she had allegedly given to the accused.

PW5 purported to identify a yellow T-shirt and blue truck suit as belonging to the accused, while PW6 purported to have seen accused with the Bob Marley bag when he went for funeral arrangements, the blue trousers and grey/black jumper. It is interesting that PW1 who was accused's girlfriend was only able to identify the Bob Marley bag which she had allegedly seen accused with during the funeral service and that she gave him the black jumper. Accused denied that those items were his. Although PW9 and 10 claimed to have seen the bag next to the deceased's suitcase, the Bob Marley bag was found some metres away from the scene estimated at 50 metres. The bags had not been opened at the time they were found. The children just saw them, if indeed they were together under the tree. It cannot be said for certain that the bags were together. If indeed the clothes in the Bob Marley bag were the accused's then there is suspicion as what his clothes were doing in the forest near those of the deceased. There is however no evidence to prove that it is the accused who took them to the forest and therefore came into contact with the deceased's property and hence the murderer. It just raises suspicion.

There were items found in the deceased's house which were suspected to have been used in the murder, that is, fork jembe and a metal rod. Finger prints were also seen in the deceased's house. No forensic evidence was conducted on those items which in my view was a failure on the investigation because that may have shed light on who handled the said items.

PW8 told the court that on 23/12/2016 he saw the accused with manila bag which had red stripes like the one found at the tree where deceased's belongings were found. Accused denied seeing PW8 on that day or that he ever had a bag of that nature. Again, PW8's allegation is mere suspicion. Even if accused had the manila bag, there are so many of that kind but there is no evidence to show that it is the same one found at the suitcase.

Accused took part in funeral arrangements and visited the deceased's home from 2/12/2016 to 23/12/2016. Up to that day, his conduct does not raise any suspicion. It was alleged that he disappeared on 24/12/2016 after the deceased's clothes were found in the forest. The witnesses told the court that it was established that accused boarded a Nuclear Matatu and was issued with a receipt. That evidence of a receipt was not tendered to the court. The accused explained that he had been invited for a Christmas celebration and that is where he was found. It is possible. However one wonders why he had not told his girlfriend, PW1 about it. If indeed accused disappeared after being told the deceased's clothes were found, then it is also suspicious why he would do that.

From the foregoing, I find that there is indeed some suspicion against accused especially as relates to the finding of clothes linked to him in the forest near where deceased's clothes were found and his conduct from 24/12/2016. But this is mere suspicion. Courts have held over the years that suspicion alone, however strong, cannot found a conviction.

The prosecution always has the onus to prove that it is accused who killed the deceased which onus has not been discharged. The

circumstantial evidence on record is so weak that it does not point unerringly to the accused as the culprit, to the exclusion of all other persons.

For the above reasons, I find that the prosecution case has not met the required threshold of beyond reasonable doubt. The accused is given the benefit of doubt and is hereby acquitted of the charge under Section 322 of the Criminal Procedure Code.

Dated, Signed and Delivered at NYAHURURU this 17th day of December, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – Prosecution Counsel

Mr. Njogu for accused

Soi – Court Assistant

Accused - present



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