



**Republic v Njeru (Criminal Case 13 of 2018)
[2024] KEHC 10466 (KLR) (27 August 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 13 OF 2018
LM NJUGUNA, J
AUGUST 27, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

EDWIN MWENDA NJERU ACCUSED

JUDGMENT

1. The accused faces 2 counts of Murder contrary to section 203 as read together with section 204 of the Penal Code. Particulars of the 1st count are that on 10th June 2017, at Njarange village Ishiara location in Mbeere North sub-county within Embu County, the accused murdered Pauline Kagendo. Particulars of the 2nd count are that on 10th June 2017, at Njarange village Ishiara location in Mbeere North sub-county within Embu County, the accused murdered Johnstone Muriithi. The accused took a plea of not guilty and the same was duly entered. The case proceeded to trial and the prosecution called eleven (11) witnesses.
2. PW1, Diana Mukami, the accused's sister stated that the deceased persons were not known to her. She stated that on the day of the incident, the accused asked for some gunny bags from Njoki, their househelp and he said that he was going to cut sugarcane in their nearby farm. That Njoki gave him the gunny bags and then Njoki told her that she noticed that the accused person looked disturbed but he told her that he was in a fight with another young man. That she herself was in the house and did not go close to the accused to observe his mood that day. That she was standing outside the house with Njoki when they heard continuous banging sounds from the bushy shamba which was about 100 meters away and the sounds continued for about 10 minutes. During the banging sounds, she stated that she saw the accused lifting a stick in a motion of hitting something on the ground severally.
3. That after about 20 minutes, the accused returned and then lit a fire outside the cowshed using some leaves he had collected. That the smoke from the fire reeked of burning meat. That at this time, she was washing clothes outside the house with Njoki when Njoki went to the latrine and when she returned,



she told her that she had seen a human leg sticking out of the waste. She stated that afterwards, the accused told her that he had a girl who has his child near Njarangi and that he was going to visit them. That she later returned to school and when she was on half-term break, she met and befriended one James Kinyua who asked her if she knew his sister Pauline (deceased) who had disappeared from home. That James told her that the deceased had disappeared on 10th June 2017, the day when the accused had told her that he was going to see his girlfriend and the same day when Njoki had said she saw a human leg sticking out of the toilet.

4. She stated that she had differed with the accused in 2018 over some money she needed from him and he threatened to break her neck. As a result of this threat, she ran away from home. That after the human leg was seen in the latrine, there was an unusually bad smell coming from the said latrine. Upon cross-examination, she stated that the latrine was not very deep and that it had light inside such that one could see if something was thrown inside. That they continued using the latrine after the incident. She stated that she saw the accused hitting something and when he noticed that she was watching him, he ordered her to go into the house. That when he lit the fire, it burned for about 15 minutes and she did not see what was burning. That she was unruly in school and because of this, she had a strained relationship with her parents and the accused who also refused to give her money. That Njoki said that she saw bloodstains on the accused's clothes and he seemed disturbed. She stated that she did not go to the latrine to see the human leg that was sticking out but she noticed that the hole of the latrine had been demolished/extended on the day of the incident.
5. PW2 was Patrick Njeru, the accused's father, who stated that on 15th April 2018, PW1 ran away from home and she was later brought back home by the principal of her school on 22nd April 2018. That she looked anxious and told him that she suspected that the accused had done something bad to his girlfriend. That the accused was on duty in Migori County and he was called to return home on 28th April 2018. That later, while he was at Kiambere hiding, he received a call from his daughter informing him that his wife, the accused's wife and a worker had been arrested and so he returned home. On cross-examination, he stated that he was not at home when the police dug out human remains from the pit latrine in his home. That the latrine had been used since the time of the incident and they did not suspect anything wrong.
6. PW3 was Tabitha Njoki Ngungi who was the house help for PW2 and his family for a very short time. She stated that the accused went home with a thorn in his arm and when he asked her to remove it, she was unable. That he asked for a knife which he used to remove the thorn from his arm. That the accused was wearing a vest that had blood stains. That the accused then asked for a gunny bag but when she gave him, he said that it was small and he entered the house and took a bigger one. That he also took a panga and an axe handle and he said that he was going to harvest sugarcane from the farm. She told PW1 that she had seen fresh blood stains on the accused's vest. That before he left, he locked her and PW1 in the house and then she heard a woman's voice screaming and crying and the accused said in ki-Mbeere language; 'go and tell your relatives that they will not take me anywhere'.
7. That the accused returned home at around 2PM and opened the door for them and ordered them to go about their work but he did not bring back any sugarcane. That she went to cook and PW1 went to wash clothes then he warned them never to speak of what he had done or he would shoot them with a gun. She stated that she found the behavior of the accused and his stern warnings to be very strange. That the accused gathered dry leaves and rubbish and demanded for a matchbox which he used to light a fire and then he asked her if she had seen anything happening and she said she did not see anything. That after sometime of the fire burning, the accused started picking things and taking them to the latrine.



8. She noted that the smoke from the fire lit by the accused smelt like burning meat but she did not go to find out what had been burning. She stated that she later left the employment and returned to her mother's home and in 2018 she heard on radio that the accused had been arrested. Upon cross-examination, she stated that PW1 is the one who picked her from her home and took her to Kiambere police Station to record her statement. That when she was recording her statement is when she learned that the deceased were a mother and her baby. That she heard of the arrest of the accused person in 2017 and she recorded her statement in 2018.
9. PW4 was James Kinyua Mugo who stated that the deceased Pauline Kagendo was his sister and the other deceased was his nephew. He stated that his deceased sister was the accused's girlfriend and in 2016, she dropped out of school when she fell pregnant by the accused. That after she delivered the baby, the accused did not marry her but he used to visit them at their home. That the baby Johnson got sick and the deceased's mother demanded that the accused should bear the medical costs. That he was not at home when his mother made this demand but as soon as he learned of this, he went home but Pauline was not there, she was not reachable on her phone and she did not return home that day. That later on, he met PW1 and she became his girlfriend and while they were talking she denied knowing his sister but she told him about the incident on that material day.
10. He testified that PW1 told him that on the day of the incident, she heard cries of a baby from the shamba and she saw her brother carrying a panga. That PW1 told her that the accused had warned her against revealing the incident to anyone but she told him and asked him not to tell anyone else. That later on, the accused asked him if he knew the whereabouts of the deceased persons but he lied to him that he heard she got married. He stated that he informed his parents of the things PW1 had told him and they reported the matter to the police where they recorded their statements. That they went to the scene with the police and exhumed the remains of the deceased together with the clothes they were wearing on the day of the incident.
11. On cross-examination, he said that he lied to the accused because he feared for his life considering that he was a GSU Officer. That he was present when the remains of his nephew were removed from the latrine and he could identify the child's clothes since he knew them from seeing him wearing them at home. That the remains were sent to the government chemist for analysis and that he does not know who killed the deceased.
12. On re-examination, he stated that his sister and her child disappeared in 2016. That the bones that were removed from the latrine were those of a child, given their small size. That the pit latrine was in the home where the accused was living at the time. That the police also found remains of partly burned clothes behind that house. That PW1 told her that when the accused learned about her relationship with him, he started beating her. He stated that the accused sent him a message through a number that was not his, telling him 'tutaona hiyo case nani atashinda' meaning 'we shall see who will win that case'. That the disappearance of the deceased persons was reported after one month.
13. PW5, Annorata Karimi Nyaga is the mother of Pauline (deceased) and grandmother of Johnson (deceased). She stated that her daughter and the accused were in a relationship and she knew this when she saw the accused's photograph on her daughter's bed and when she asked her, she confirmed it. That she learned that her daughter was pregnant and she confronted the accused about it. The accused paid maternity fees of Kshs.3,000/= and promised to take care of the child after she threatened to report him to the police. It was her testimony that on the day of the incident, the accused called Pauline (deceased) and told her to take the child to the hospital and the child was dressed in a blue short, white t-shirt, a green lesa and a red baby shawl. That at around 3PM on the same day, the accused called her and told



her that henceforth, she should never ask him about the whereabouts of Pauline (deceased) since she had gone away with another man who is allegedly richer than him.

14. That her daughter could not be reached on her phone and when she asked the accused twice, he told her never to call him again about the deceased. She stated that she called her other children but none of them knew the deceased's whereabouts. That when she reported the matter to the police, they summoned the accused but he told them to dismiss her, which they did. That she learned of the death of her daughter through PW4 who got the details from PW1 and she reported the matter to DCIO who began investigations and arrested the accused. That she was present when the latrine was pulled down and the remains exhumed. She saw some small bones of the neck and arm and a diaper that the baby was wearing. She identified the accused person as the one in the dock.
15. Upon cross-examination, she stated that she did not know why the accused told her never to call him again and why he told the police to dismiss her the first time when she reported. That the story of PW4 as narrated by PW1 was confirmed when the police recovered the remains of the deceased from the latrine. That the clothes she saw the child wearing and the leso and shawl were recovered and the remains were sent for DNA analysis. She was embittered by the manner in which her daughter and grandson died. She stated that when the exhumation was taking place, neither the accused nor his parents were present but his grandparents and other relatives were there. That the pit latrine was still being used by the family since the bodies of the deceased were dumped in it.
16. That the accused did not show her the man who had allegedly taken Pauline with him and he did not tell her which private hospital he had sent her to with the sick child. That she gave the police officers the accused person's phone number which she had because the accused had sent her money for maternity expenses. She stated that she reported the disappearance of her daughter in July 2017 but she was not given any document because the police chased her away after talking to the accused. That 3 people ended up being arrested in connection with the murders but they were not charged; the mother of the accused, his wife and a domestic worker. That the 2nd time she reported the matter she was in the company of her husband and her son and they were given an OB Number. That the accused person surrendered himself at Siakago Police Station. That part of the things recovered from the pit latrine was a notebook bearing Pauline's name.
17. PW6 was Mburia Alexander Mbae, an analyst from the government chemist. He intended to produce a copy of the report authored by Eunice Wamuyu Njogu who had since retired. The accused person objected to the production of the report on the basis that the witness was not competent and so he was stood down. Through a ruling delivered on 27th November 2023, this court allowed the objection but granted the prosecution an opportunity to have the report produced by a competent expert witness.
18. PW7 was C.I. Nancy Ekapolo of DCI headquarters Nairobi. She stated that her office received a request from DCIO Mbeere to assist in documenting a suspected murder crime scene. That she went to the scene in the company of her colleagues and Dr. Kalsi, a pathologist and they identified 4 sites at the scene to be processed. That out of the 4 sites, 2 of them became the sites of interest; one being the pit latrine and the other was loose soil behind the house where there were some ashes. She stated that they took 62 photographs which were produced as evidence. On cross-examination, she stated that she was not informed the date of the crime or how old the ashes were. That the soil surrounding the pit latrine was not fresh but it was disturbed. She couldn't identify the colors of the clothes that were retrieved from the latrine neither could she determine the size of the hole of the latrine. She stated that she did not see any fresh bones and that some of the bones were charred.



19. PW8 was Dr. Sheila Shavulimu of Embu Level 5 Hospital who produced a mental assessment report authored by Dr. Joseph Thuo who conducted a mental assessment on the accused person. The accused person was found to have no mental illness.
20. PW9 was Dr. Donna Nyamunga, a dentist and registered medical practitioner produced postmortem reports authored by Dr. Amritpal Kalsi who no longer works for the government. She stated that she worked with her for 10 years in forensic odontology and is familiar with her handwriting and signature. She stated that the first body was unknown and the autopsy was carried out at City Mortuary on 17th May 2018. That the age was determined at 1 year and the race and nutrition were unknown. The remains consisted of complete, incomplete and fractured bones from various parts of the body. There were no findings on any other organs of the body since there were no soft tissues to examine. She concluded that the cause of death was undetermined but the human remains belonged to an infant below or above 1 year old. The bones had been exposed to a burning process. Samples were collected for DNA analysis and verification of sex, identity and reassociation.
21. The second body is also unknown and an autopsy was conducted on the same day as the first. It was an incomplete set of human remains having undergone wet skeletonization (no soft tissue and it was wet) which from analysis of the mandible, tended to be female. Physique showed that it was a young adult. The remains consisted of complete and incomplete bones some which had been exposed to burning. There was no soft tissue to enable examination of the internal organs. There were 11 teeth on the mandible present. The cause of death was unascertained but the human remains had been exposed to burning and the age of the victim was between 16-23 years old. Samples were collected for DNA analysis. On cross examination, she stated that there are other animals with similar set of bones but the remains (first body) herein belonged to a human infant owing to the shape of the bones and the adaptability displayed. That the teeth found on the mandible of the second body are specific to humans and cannot be found in other animals.
22. PW10 was Catherine Sella Murambi, a designated analyst at the government chemist. She testified on behalf of Eunice Wamuyu who retired. She stated that she worked with Eunice and is familiar with her signature and handwriting. She stated that her office received a request to examine samples forwarded by C.I. Richard Mathenge. The samples included soil samples, ashes and clothing material from the site of cremation. That the analysis was done using the ultra violet technique and x-ray to find that the chemical characteristics was the same in the samples meaning that they came from the same source. No flammable substance was found on the samples.
23. PW11 was P.C. Jeremiah Langat, the investigating officer in the case, having taken over from P.C. Owino who was transferred. He stated that the DCI Mbeere office received information that PW5 had made a report that her daughter had been missing and was suspected to have died alongside her son while they were going to the hospital. That before leaving home, the deceased told PW5 that she was also going to meet her ex-lover, the accused who was the father of her son. That PW5 had gathered the information she reported from her son PW4, who was PW1's boyfriend.
24. He narrated the facts as stated by PW5 and stated that he visited the scene with his colleagues and obtained court orders for exhumation of the remains of the deceased under the supervision of a pathologist. That some bones were recovered and PW5 identified the clothes her grandson was wearing on the day he disappeared. On cross-examination, he stated that he simply stated what the former investigating officer had captured. That he could not tell whether the bones were of human origin but samples were collected for further analysis and the remains were taken for autopsy.
25. At the close of the prosecution's case, the court found that the accused person had a case to answer and he was placed on his defense.



26. DW1 was the accused person who stated that on the material day, he asked PW1 for a sack to use for carrying cow fodder but she did not know where it was and he took it by himself. That he went and cut fodder for the cows then returned and fed them. He stated that he did not lock PW1 and PW3 in the house and that there is some distance between the main house and the cowshed where he was burning trash with a store in between so that one cannot see the other end. That on the said day, he was at home with PW1 and PW3 and his father had asked him to talk to PW1 after she got a baby while in school. That his sister, PW1 was dating the deceased's brother while he himself was dating the deceased who was his fiancé. He denied any knowledge of the exhibits recovered from the pit latrine. That he took himself to the police station because his wife, mother and an employee of his parents had been arrested. That he talked to the DCI officers and they also treated him as a suspect in the murder case.
27. He denied involvement in the murders. On cross-examination, he stated that the deceased was his girlfriend until he joined the GSU in 2015 and that the child was not his. That on the week when the incident occurred, he was off duty and that he last saw the deceased on 09th June 2017. That when he returned to work, PW5 called to inform him that the deceased was missing and he told her that he did not know her whereabouts. That PW5 told him that Pauline had said that she was going to meet him on 10/6/2017 but he did not follow up on the information. He stated that he does not know if the 2 deceased are still alive to date and that he was not present when human remains were recovered from the latrine.
28. DW2 was Hellen Wangari Njeru, the accused's mother, who stated that on 24th April 2018 she was at home with her children and employee when police officers went to their home and arrested them. That the accused brought himself to the police station since the police were looking for him. She stated that the cowshed cannot be seen directly from the main house. That she was not present when the pit latrine was exhumed and human remains removed, if at all. That the Accused and PW1 had a strained relationship because PW1 got a baby while in school and she was unruly to the point where the accused beat her up sometimes. She stated that she did not know whether the accused had a child with the deceased. On cross-examination, she stated that at the time of the alleged incident, she was not at home but PW1 was at home and she was better placed to testify on what could have happened on that day. That the accused was allowed to discipline PW1 because he is the one who enrolled her back to school after she got a baby.
29. The defense closed its case and the parties filed their written submissions.
30. The prosecution submitted relying on the case of Anthony Ndegwa Ngari v. Republic (2014) eKLR and the provisions of section 203 of the Penal Code. It was its case that the testimony of PW9 leads the court to consider proof of death by way of circumstantial evidence even though the cause of death couldn't be directly ascertained. Reliance was placed on the cases of Republic v. Michael Gatutu (2002) eKLR and Kimweri v. Republic (1968) EA 452. Further reliance was placed on Article 26 of [the Constitution](#) and the cases of Republic v. Stephen Sila Wambua (2017) eKLR, Guzambizi Wesonga v. Republic (1948) 15 EACA 63, Abanga alias Onyango v. Republic CRA No. 32 of 1990 (UR) and Kipkeri Arap Koske & Another (1949) EACA 135 and it argued that the court should follow circumstantial evidence which points towards the accused as the assailant.
31. It also urged the court to apply the doctrine of 'last seen' as applied in the cases of R. v. F.O.O. (2021) eKLR where the court cited the Nigerian case of Stephen Haruna v. The Attorney General of the Federation (2010) 1 iLAW/CA/A/86/C/2009. It submitted that it had discharged the burden of proof to the required standard per section 111 of the [Evidence Act](#) and urged that the court disregards the evidence given by the accused since it did not meet the requirement of section 119 of the [Evidence Act](#). It was its submission that the prosecution had proved malice aforethought as provided for under



section 206 of the Penal Code and it further relied on the case of Joseph Kimani Njau v. Republic (2014) eKLR.

32. The accused person submitted contending that the pieces of clothing that were referred to as evidence could not have been an accurate description since the prosecution stated that they had been partly burned. It was his case that when clothes burn their colour changes. He argued that the evidence should be disregarded since they were not physically produced in court. That the testimonies of PW4, PW5 and PW9 on the clothes and the deceased child are contradictory.
33. He urged the court to cautiously apply circumstantial evidence since the evidence presented before the court does not form a strong chain as was stated in the case of Abanga alias Onyango v. Republic CRA No. 32 of 1990 (UR). That the testimony of PW5 does not prove that the accused met with the deceased on that day and also PW1 and PW2 could not prove with certainty that the accused burned something that day because there was no direct line of sight from where they were to where he allegedly was.
34. That DW1 testified that when his children would remove their teeth they would throw them in the toilet and also that remains from leftover meals of meat were thrown in the pit latrine. That the DNA report identifying the deceased persons was never produced in court. He argued that the court cannot rely on unidentified bones and assume that the bones belonged to the 2 deceased persons. Moreover, that there was no direct evidence to prove that the bones were of human origin hence the prosecution failed to prove their case against him to the required standard. That the relationship between the accused and the deceased should not be taken as malice aforethought and that PW1 had a bad relationship with the accused. He relied on the cases of P.O.N. v. Republic (2019) eKLR and Republic v. W.O.O. (2020) eKLR where the court held that suspicion is not sufficient to sustain a conviction.
35. The victims' family filed submissions in which they submitted in similar terms as the prosecution. They urged the court to follow circumstantial evidence to find the accused person guilty. That at the very least, the accused person should be held as the last person seen with the deceased before their death and his defense does not provide any explanation as to why he should not be held accountable. They relied on the case of Republic v. E.K.K. (2018) eKLR and urged that the accused had the chance to explain the circumstances that would remove him from the whole scenario but he failed to do so. That PW1 did not frame the accused for the offence, despite their strained relationship. Further reliance was placed on the case of Philip Nzaka Watu v. Republic (2016) eKLR. They urged the court to find the accused person guilty and convict him accordingly since he has robbed them of their loved ones.
36. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
37. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The accused person herein faces the charge of murder contrary to section 203 as read together with 204 of the Penal Code. It is upon the prosecution to prove beyond reasonable doubt, that the accused murdered the deceased. Section 203 of the Penal Code provides:

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



38. In the case of *Republic v W.O.O.* [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, as guided by the Court of Appeal in the case of *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, as follows:

“For the offence of murder to be proved, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

39. The first element is death and cause of death. PW9 produced the postmortem reports for both victims, one being the skeletonized remains of a human infant whose cause of death was undetermined. However, the pathologist noted that the remains were of a human infant slightly above or below 1 year of age and the bones had been exposed to a burning process. The other being skeletonized human remains and the cause of death was unascertained. However, the pathologist noted that the remains were of a young adult human between the age of 16-23 years and the bones were exposed to a burning process. On both postmortem reports, the pathologist indicated that samples of the bones were collected for cross checking with family reference samples at government chemist laboratory to verify the sex and identity. From this testimony, there is indeed death of the deceased persons even though the cause was undetermined in both cases but the pathologist opined that they were exposed to a burning process.

40. The second element to be proved is that the accused person is responsible for the deaths of the deceased. PW1 stated that she was in the house with PW3 when the accused borrowed a sack and left with it to the farm. That PW3 told her the accused looked disturbed and he said that he had fought with another man. That she heard loud continuous banging from the shamba and it went on for about 10 minutes. That after about 20 minutes, the accused returned to the home and lit a fire which he used to burn something that smelt like meat. That PW3 went to the pit latrine and told her that she had seen a leg sticking out of the waste in the latrine. That the accused then told her that he was going to see his girlfriend who had his child.

41. She stated that later on, she started dating PW4, the deceased’s brother and she told him about the incident since he had told her about his sister’s disappearance. It is PW4 who blew the whistle and his mother took the matter up with the police. PW1 also stated that she did not see exactly what was burning because she did not have a direct line of sight to the place of the fire but she said that it smelt like burning meat. She said that the hole in the latrine looked like it had been demolished so as to extend it on the same day. PW2 was informed of the incident by PW1. PW3 is a key witness because she interacted with the accused person on that day. She narrated that the accused asked for a big sack and he claimed that he was going to harvest sugarcane. That his vest was bloodstained and as he headed out to the shamba, he took a panga and an axe handle.

42. She stated that the accused locked them inside the house and they heard an exchange of words between a woman and the accused. That the accused returned home and borrowed a matchbox which he used to light a fire with the leaves he had gathered. She also stated that whatever was burning smelt like meat. After sometime, she saw the accused picking things from the fireplace and taking them to the pit latrine. She stated that the days following the accused’s actions, the pit latrine had an unusually bad smell.

43. PW4 testified that he gathered the details of the incident from PW1 who was his girlfriend at the time and he told his parents about PW1’s suspicion. He stated that the accused asked him about his sister’s whereabouts and if he had heard anything but he lied to him that she got married elsewhere. PW5 who is the mother of the deceased went to the police and reported the incident, triggering investigations



by the DCI. PW11 stated that they obtained an order for exhumation of the remains and the same was done under the supervision of a pathologist. The remains were removed from the pit latrine at the home of the accused's parents.

44. From these testimonies, there is no direct evidence linking the accused to the murder. However, there is plenty of circumstantial evidence available that can be examined by the court. In considering circumstantial evidence, the court warns itself of the factors to proceed cautiously in that direction. The court has pronounced itself on this in the case of *Chiragu & another v Republic (Criminal Appeal 104 of 2018)* [2021] KECA 342 (KLR) where it stated:

“Thus, there was no direct evidence linking the appellants to the death of the deceased. The prosecution case on this aspect therefore hinged on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence: “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) in which this court held 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) those circumstances should be of a definite tendency unerringly pointing towards 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.”

45. In the case of *Sawe v. Republic* (2003) KLR 364, the Court of Appeal amplified on the above thus:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

46. PW5 stated that the last thing her deceased daughter told her was that she was going to see the accused who is the father of her child, as she takes the child to hospital. She stated that the accused had paid for the deceased's maternity expenses and she called him severally when her daughter went missing. DW1, the accused, stated that he knew that deceased who was his fiancé but he did not sire any children with



him. Back to PW1. She stated that she heard continuous banging from the shamba and she saw the accused seemingly hitting something that was on the ground. She also stated that she heard the sound of a child crying. PW3 stated that she heard the voice of a woman exchanging words with the accused when he had left with a sack, a panga and an axe handle. PW1 and PW3 stated that they smelt meat when the accused had lit a fire and began burning something. PW2 saw him ferrying things from the site of the fire to the pit latrine.

47. DW1 stated that he was off duty and at home. On that day, he stated that he went to look for fodder for the cows and when he returned, he fed the cows and that he burned some chaff in the compound. He denied anyone could see the cowshed area from the main house because there was a structure between the 2 places. He denied being involved in the murders. DW2 stated that they generally threw food remains in the latrine and when children extracted teeth, they would throw them there as well. That it is not true that the exhumed remains belonged to the deceased persons since they were never properly identified.
48. Through this circumstantial evidence, there is a strong chain of evidence placing the accused and the deceased person at the scene of the crime at the same time. It is also necessary to point out that despite the fact that the identities of the deceased persons were not verified through DNA evidence, circumstantial evidence fills in that gap since Pauline (deceased) had a relationship with the accused and according to PW5 Johnson (deceased) was born as a result of the said relationship. In fact, the evidence shows that the accused knew the deceased very well since PW4 stated that he had been visiting them at their home.
49. Moreover, the expert evidence adduced by PW9 ascertained that the remains were of a young female adult of between ages 16-23 years and an infant aged slightly above or below the age of 1 year. The remains were exposed to fire from the same source, according to PW10, the forensic analyst. These pieces of evidence merge to adequately prove that the descriptions of the deceased persons according to PW4 and PW5 is properly corroborated through expert evidence even in terms of their ages. I find the testimony of the defense to be insufficient to displace the circumstantial evidence available in that regard.
50. The accused person, in his submissions, challenged the evidence produced as exhibit 66 and stated that the clothes could not be identified since their colour should have been distorted over time and that they had been partly burned. This is an argument that should have been fronted to the witnesses through cross-examination of the prosecution witnesses. However, I have perused the photographic evidence adduced and from the photographs marked as number 23 and 51, the clothes that were recovered are seen to have identifiable distinct colours matching the description of the clothes that the deceased persons had as they were leaving home.
51. The final element to prove is malice aforethought which goes to show that the accused intended to murder the deceased persons. Malice aforethought is defined and well explained under section 206 of the Penal Code as follows:

“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.”

52. Further, the court in *Republic v Njeru & 3 others (Criminal Case 2 of 2019)* [2023] KEHC 19141 (KLR) stated as follows:

“The Court of Appeal in *Bonaya Tutu Ipu & Another Vs Republic* [2015] eKLR stated as follows on the prove of malice aforethought; -“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit Vs Uganda*, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue: It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

53. In this case, the cause of death was unascertained for both victims. However, the pathologist categorically noted that the remains were exposed to a burning process. She noted that some of the bones were whole, others were incomplete and fractured or broken and there was no soft tissue to examine. While it may remain unknown how the accused person caused the deaths of the deceased, a lot can be deduced from the manner in which he burned the remains and then disposed them of by throwing them into a pit latrine, given the circumstantial evidence available. In my view, the actions of interring the bodies of the victims in that manner, speaks to the intention by the accused person to kill and completely destroy his victims such that they would not be discovered. I think that the murders were well calculated and executed willingly by the accused person.

54. The actions of the accused person can only be described as inhumanely gruesome and it is unfortunate that the family of the victims will live forever remembering the pain of their loved-ones’ deaths.

55. In the end, having carefully considered the evidence before the court and the relevant laws, it is my finding that the prosecution has proved the offence of murder against the accused person on both counts, beyond reasonable doubt. The accused is therefore found guilty of the offence of murder contrary to section 203 of the Penal Code and is hereby convicted accordingly.

56. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA

JUDGE

..... for the State



..... for the Accused Person

