Republic v Kagua & another (Criminal Case 20 of 2015)
[2024] KEHC 15332 (KLR) (28 November 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 20 OF 2015

HM NYAGA, J

NOVEMBER 28, 2024

BETWEEN

REPUBLIC ..... COMPLAINANT

AND

MARGARET WAMAITHA KAGUA ..... 1ST ACCUSED

STEPHEN RUGUMI WAMBUI ..... 2ND ACCUSED

JUDGMENT

1. The Accused persons were charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 27th March, 2015 at Ruiru Village, Solai Division in Rongai Sub County within Nakuru County, jointly with others not before court they murdered Simon Nyoike.

2. On 9th April, 2015, the 1st Accused pleaded not guilty whereas the 2nd accused did not take plea as he was found to be mentally unfit to do so. Subsequently, the court set a hearing date of the 1st accused person's case and directed the 2nd accused to be admitted to Mathare Hospital for treatment.

3. On 11th February, 2016, the counsel for the accused persons told court that the 2nd accused was found fit to stand trial as confirmed by the psychiatrist's report dated 10th February, 2016. The charge was then read to both accused persons, to which they pleaded not guilty. Thereafter the trial commenced. The prosecution's case is summarised as follows.

4. PW1 was Jane Wanjiru Mwaura, the mother of the deceased who was aged 10 years. She testified that she knew both accused persons as her neighbours. She recalled that on 27th March,2015 at around noon, she was with the deceased. Shortly thereafter she left home to buy fruits from a neighbour. Upon returning at 1.00 pm, she did not find the deceased. She searched for him all over but could not find him. She then went to the home of the 2nd Accused but nobody was there. She later returned and

found the second accused and upon enquiring about the deceased's whereabouts, he told her they were together earlier. Worried, she alerted her relatives who helped her search for the deceased to no avail. Later, she came to learn of the fate of her son, who was discovered on the following day, dead in a banana plantation. She did not know who killed him. She stated the shedid not have any problem with the family of the 2nd Accused.

5. PW2 was Paul Kimani Nyoike, an uncle to the deceased. It was his testimony that on 27th March,2015 at around 2.00 pm, the deceased's mother (PW1) went to his house and told him that she was searching for the deceased. He helped her to search for the deceased until 10.00pm. on the following day, they went to the 2nd accused's home and he told them that he had seen the deceased a day prior with an unknown man. He said as they continued to search, he received a call from his wife and was informed that the deceased's body had been found. He went to the scene and saw the deceased's body, in a maize plantation belonging to the 1st accused. He observed that there was a stone next to the body and deceased's legs had been tied with a duster. He also saw a wound on the left side of the head. He said both accused were present at the scene. He affirmed that his family and accused person's family were very close friends. He did not know how the deceased met his death.

6. PW3 was Cyrus Thiongo Chege, a teacher at Solai Primary School. She stated that she knew the deceased who was a pupil at Ruiru Primary School, and that the 1st Accused as a teacher at the said school. That the 2nd accused was her grandson. She recalled that on 27th March,2015 at around 6.00 pm his son told him that his wife had requested that he should go to the home of the 1st Accused person. He went there and found his wife. At around 8.00 p.m. the 1st accused arrived. Shortly thereafter, Paul Kimaru and PW1 arrived and said that their son had been missing from 11.00 am. They all searched for the deceased and at 10.00 pm they abandoned the search and parted ways. That on the next day, he learnt that the deceased's body had been found near the home of the 1st Accused . They went to the scene and saw the deceased's body which was lying in a banana plantation, 5 meters from the home of the 1st accused. He did not know who killed him.

7. PW4 was Grace Wangechi, a neighbour to the accused persons. She said on 27th March,2015 at around 7.00 pm she went to the home of the 1st Accused but she was not around. She waited until 8.00 pm then she phoned her husband to go pick her as it was dark. She said PW1 came there and told them that she had been searching for her son since morning. They helped her search for him, to no avail, then they went home and slept. That on the following day, the 1st accused called saying that the deceased had been found near her home. She later went to the scene and saw the deceased's body. She observed that it had a wound on the head. She did not know how he met his death.

8. PW5 was Agnes Wangui, a sister of the deceased. She told court that on 27th March,2015 at around 6.30 pm when she arrived home from school, she found that the deceased had locked the house and left with the key. That the 2nd accused went to their home and told her he could look for the deceased and take him home, and he left but never returned. Later, she learnt that the deceased's body was found next to the 1st accused home. She did not know who killed him.

9. PW5 was Elizabeth Waithera Oyengo, a Government Analyst. She said on 31st March, 2015 she received the following from PC George Kageni of Solai Police Station;Blood sample in a bottle indicated as of the deceased herein.A male swap in a container indicated as of the deceased.A stone wrapped in a Khaki Paper marked as B1A swab marked as B 2.

10. The witness further stated that on 10th April,2015, she received the following additional items from PC Dominic Kiwela, also of Solai Police Station;Blood sample in a bottle indicated as of the 1st Accused

person herein marked as C1.Blood sample in a bottle indicated as of the 2nd Accused person marked as C2.

11. The witness that stated that upon analysis, the stone marked as B1 was found to be lightly stained with human blood while the swab marked as B2 was stained with human blood. That upon further analysis of the above items, she found that:The DNA profile generated from the blood stains on the Stone (B1) and Swab (B2) both matched the DNA profile generated from blood sample (A1) and the nail clippings(A2) both indicated as of the deceased .

12. She produced the DNA report as an exhibit.

13. PW6 was PC George Mathenge. He recalled that on 28th March,2015 upon receiving the report of the incident herein, he proceeded to the scene in company of Inspector Ochieng and Corporal Koech. Upon arrival, they found the body of the deceased lying in a banana trench which was about 7 feet from the 1st Accused's house. They removed the body of the deceased from the scene and took the accused persons to the police station.

14. The witness further stated that later, they received a call from a member of public, who alerted them that there was a shoe at the pit latrine in the compound. They returned to the scene and retrieved the shoe. They searched the scene further and inside the store of the main house they recovered a greenish, blue bicycle. He added that earlier on, he had noticed the wet parts on the deceased's knee which resembled the colour of the bicycle. The bicycle was retained as an exhibit.

15. The witness further the told court that the scene was revisited by the police and dry blood spots were seen on the wall in the table room of the main house. That other blood stains were found at the door near the kitchen. He said this led them to believe that the body had been dragged out of the house. He drew a sketch plan of the scene and marked a stone which was recovered near the body. He added that the stone had some blood and hair on it.

16. The witness further stated that when he observed the deceased's body, it had dried blood on the face and a deep cut on the right ear. He also said that a pullover was next to the deceased's body, which lay about 7 feet from the house and that the latrine in which the shoe was recovered was within the compound and about 20 feet from the house. That the deceased's parents identified the shoe as belonging to the deceased. He added that only the two accused persons lived in the compound. He produced the bicycle, stone, recovered shoe, pull over, sketch plan, stool and bench as exhibits. He did not know the motive of the murder.

17. In cross examination, he stated that he saw traces of blood on the ear of the deceased, a stab wound and a big wet wound on the right ear. He recovered a stone between the house and the banana tree, which had some blood and hair on it. It was his further testimony that the bicycle had wet paint but no blood. That he saw a stain of wet paint on the knees of the deceased which matched the colour of the bicycle. He said he never made an inventory of the items he collected. He stated that he saw blood on the floor of the house, and that photographs were taken. It was his further testimony that the two accused persons were arrested because blood stains were found in the main room.

18. PW9 was Dr. George Biketi a Medical Superintendent at Provincial General Hospital. He produced the Post Mortem Report prepared by Dr.Titus Ngulungu on 30th March,2015. He said according to the report, the body was in decorate posture and pale. That the scalp was smeared with blood and there was a 25 x 19 laceration above the right ear, the left supra orbital region had a tear measuring about 15 x 15 cms, the lower limbs were intact but had abrasions caused by friction with a rough surface. Also left side of the chest had some paint. The respiratory system was intact but the lungs had collapsed. The head had a skull fracture at the right temporal bone and at the external entry to the ear. The nervous

system-brain showed extensive bruising. He said Dr. Ngulungu concluded that the cause of death was severe head injury attended by extensive brain laceration, skull fractures with scalp laceration due to enormous head trauma by a hard object. He produced the post mortem report as an exhibit.

19. In cross examination, he stated that the examination showed that head injury was due to enormous head trauma. That excessive force was deployed and that fractured the skull. That the injury was estimated to be three days old. He confirmed that the DNA sample never changes despite the age of the corpse.

20. PW10 was P.C Omutelema Japheth, the investigating officer. It was his testimony that on 28th March, 2015 at around 4.00 p.m while at the station, he received the accused persons herein, who had been arrested by Corporal Koech and Mathenge and he placed them in the cells. He also took possession of a bicycle and a stone which was blood stained and had hair. He stated that on 30th March,2015 he visited the scene with the accused persons herein. On arrival, he ordered the 1st accused to open the house. He noted blood stains on the floor and on the walls. He said outside there was a banana trash and water tank. On a closer look, he noted blood stains covered in soil. He testified that there was a pit latrine in the compound and he retrieved a shoe that was positively identified by PW1. He added that he also recovered a stool and a bench which had multiple breakage. He produced the same as Exhibits. He further told court that he called the crime scene personnel who processed the scene and he went back to the station. He was unable to establish the motive of the killing.

21. On cross examination, he stated that he had no interest in the matter. He said he did not prepare an inventory for the items recovered and that he did not take the stool and bench for forensic examination.

22. At the close of the prosecution case, the court found that there was sufficient evidence to warrant the accused offer their defence.

23. In her defence, the 1st accused (DW1) stated that she is a teacher and that on 27th March, 2015 she was teaching at Ruiru Primary School. In the evening, she went to church with her colleagues up to 6.00pm then went home. She said she did her house chores and went to get milk from her neighbour. On coming back, she found Grace Wangeci Thiongo, Stephen Thiongo and the deceased's aunt and uncle. They told her that they were looking for the deceased. That she told them she had not seen him. She said they stayed in her house until 10.30 p.m.

24. It was her testimony that on the following day, she called the 2nd accused and Ian Nderitu who are her grandchildren to have breakfast, and they reported that there was a foul smell near the fence and they thought it was normal. She said after a while Ian led her to the fence where she saw the deceased's body. She said the body was 2-3 meters from the house. She then called the deceased's aunt and apprised her of what she had seen. She also called the chief who in turn called the police and they came to the scene and collected the body.

25. It was her further testimony that one police officer advised her to go back home for her safety. That later at around 1.00pm, the police from Solai Police Station went to her house and took her and the 2nd accused to the police station and they were placed in the cell. That on the following day, they were taken to DCI –Subukia where her blood sample was taken and later she was charged with the present offence.

26. On cross examination, she stated that on 28th March,2015 she left the 2nd accused at home alone. She said that the 2nd accused had been sent home from school after being accused of sodomizing another child. She stated that when she left home she did not check if there was anything broken in the house. She did not see any disturbance in the house and there were no broken furniture. She further stated that the tank near where the body was found was next to the trench where the dirty water would flow. That on that day she had gone to the tank and she did not smell anything and when the children told

her about the stench, she presumed it was from the dirty water. She further testified that the children told her about the foul smell after they had gone to wash their hands. She stated the prior night, the deceased's aunt came looking for the deceased and she told her she had not seen the deceased. She said the 2nd accused was there but he did not say anything.

27. DW2, was the second accused. While tendering his evidence the court observed that he was visibly mentally unwell and was unable to comprehend the proceedings. Vide this court's ruling delivered on 25th January, 2024 he was admitted to Nakuru Provincial Hospital, Mental Health Unit to continue receiving treatment.

28. DW3 was Teresia Nyawira. She said on 27th March,2015 while going to church at around 4.00 pm she passed by the school to pick the first accused and together, they went to church up to 6.00 pm.

29. In cross examination, she stated that she couldn't tell what happened after 6.00pm.

30. At the close of the defence case, only the 1st accused person filed her submissions.

31. Citing the provisions of Article 50(2)(a) of *the Constitution*, Section 107(1) of the *Evidence Act* and the case of Miller v Minister of Pensions (1947) 2 ALL ER 372, 373 on what constitutes the burden of proof beyond reasonable doubt, the 1st Accused person's Counsel submitted that the burden of proof rests solely on the prosecution throughout the trial save where there are admissions by the accused person.

32. The counsel argued that pursuant to Section 203 of the Penal code, the prosecution has a duty to prove that the deceased died as a result of the unlawful omission or commission of the 1st Accused. Secondly, that in killing the deceased the 1st accused's acts were actuated by either express or implied malice aforethought. Thirdly, that it was incumbent upon the prosecution to place the accused at the scene of the murder.

33. The Advocate further submitted that in the instant matter, there is no evidence at all that connects the 1st accused to the killing of the deceased apart from the deceased being found at the banana plantation within her homestead.

34. Counsel also submitted that in fact PW1, 2, 3, 4 and 5 stated that they did not know how the deceased met his death. He posited that PW6' s evidence did not link the accused person herein to the death of the deceased.

35. The advocate also submitted that PW7 and PW9, in their investigations, did not link the 1st accused person herein to the death of the deceased and their evidence that they retrieved the deceased's shoe from the pit latrine within the 1st accused homestead was uncorroborated by PW1 whom they claimed positively identified the same. The counsel contended that there was variance of the evidence by the prosecution witnesses.

36. The advocate posited that the alleged blood stains which were recovered from the house of the accused was immaterial as there was no evidence in terms of photographs produced herein.

37. The Counsel argued that the prosecution evidence merely raised suspicion and such evidence is not adequate to establish the guilt of the 1st accused person.

38. In buttressing their submissions, the counsel referred this court to the case of Joan Chebichii Sawe v Republic [2003] eKLR and urged it to acquit the 1st accused under Section 306 of the Criminal Procedure Code.

Analysis & Determination

39. It is basic law that in criminal cases, the standard of proof is beyond reasonable doubt. This point was stressed in Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR where the learned Judge expressed himself as hereunder:

> " To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

40. On the same issue, Lord Denning in Miller vs. Ministry of Pensions, (supra) had this to say: -

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

41. I have considered the evidence presented before the court both by the prosecution and the defence.

42. Section 203 of the Penal Code provides that:

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

43. The Court of Appeal in Anthony Ndegwa Ngari vs Republic [2014] eKLR held:

> " For the offence of murder, 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."

44. In the instant case, therefore, the questions that the court must answer is whether the prosecution proved:

    a. That there was the death of the deceased and the cause of the said death.

    b. That the death was caused by unlawful acts or omission

    c. That the accused committed the unlawful act which caused the death of the deceased

    d. That the accused had malice afore thought.

45. I will now proceed to answer the above questions sequentially. In the process, I will also look at the defence adduced and the submissions by Counsel for the 1st accused person.

46. The death of the deceased is not in dispute. All the prosecution witnesses and the 1st Accused testified to this fact.

47. PW8, who produced the Post Mortem examination, stated that the pathologist formed an opinion that the cause of the deceased's death was as a result of severe head injury attended by extensive brain laceration, skull fractures with scalp lacerations due to enormous head trauma by a hard object.

48. Was the death of the deceased caused by an unlawful act or omission? The case of Republic vs Guzambizi S/o Wesonga 1948 15EACA 65 articulates the principle that death is excusable by law in circumstances of reasonable defence to self, property, as a result of accident or misadventure or in protection of life or property of a third party.

49. In the instant case, there is substantial evidence in support of proof of the fact that indeed the deceased met his death through an unlawful act. The cause of death as stated above confirms that the fatal injuries were clearly not self-inflicted and couldn't have been self-inflicted. This was a vicious assault on the deceased.

50. The next question to be answered is whether the prosecution has proved beyond reasonable doubt that it was the accused persons herein who committed the unlawful act which caused the death of the deceased

51. From the evidence on record, it is clear there is no direct evidence of the prosecution witnesses pointing to the accused. The prosecution sought to rely on circumstantial evidence.

52. In order to prove a case relying solely or majorly on circumstantial evidence, the parameters are well known. In the celebrated case of Kipkering Arap Koske And Another vs Republic (1949) E. A. C. A. 135 PAGE 136, the Court of Appeal stated as follows;

> "As said in Wills on 'Circumstantial Evidence' 6th Edition P. 341 in order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused."

53. In the case of R v Hillier {2007} 233 A.L.R 63, Shepherd v R {1991} LRC CRM 332 it was held that:

> "The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is

proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

54. Further in *Philip Muiruri vs Republic Criminal Appeal No 76 of 2012*, the learned judge referred to the South African case of Ricky Ganda V The State (2012) Zafshc 59,Free State High Court, Bloemfontein, which stated as follows;

> " .....the proper approach is to weigh up all of the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

55. The above authorities do not need any further elaboration as to what entails circumstantial evidence. The duty of the court is to establish if such evidence herein is sufficient to convict the accused.

56. In the instant case, it is not in dispute that the deceased's body was found within the 1st Accused's homestead. The 1st Accused confirmed that she lived there with the 2nd accused who is her grandson.

57. PW6 told court that the deceased's shoe was recovered from the 1st Accused pit latrine. He also stated that inside the store of the main house, a bicycle was recovered and the wet paint on it resembled that which was noted on the deceased's knee. He said there was dry blood on the wall and at the door near the kitchen. He said the stone which was recovered near the deceased's body had blood and hair on it.

58. PW10 corroborated this testimony as he stated that there were blood stains on the floor and walls in the 1st Accused's house, and that a shoe belonging to the deceased was retrieved from the pit latrine. Additionally, he stated that there were blood stains covered in soil outside where the banana trash was. He confirmed the stool and bench recovered had multiple breakages.

59. PW5, the government analyst, confirmed that the DNA profile generated from the blood stains on the stone and swab matched the DNA profile generated from the blood sample of the deceased herein. The first accused did not deny the presence of the blood that was found inside her house, on the floor and the wall.

60. It is thus not in doubt that the deceased met his untimely death within the house belonging to the 1st accused and where she lived with the 2nd accused. The evidence points to the conclusion that only someone with access to the compound, the house and latrine could have committed the offence.

61. The evidence on record points to the accused persons as the only ones who could have had such access.

62. For reasons that were recorded on the court record, the 2nd accused did not get to testify, owing to his mental status during the course of the trial. He was placed on his defence but was unable to adduce evidence in his defence. I will revisit this issue shortly.

63. In her her defence the 1st accused raised a defence of alibi. She stated that on the material day she was at school, as usual and only returned to her house in the evening. She further stated that she had left her grandson, the 2nd accused, at home that day as he had been sent away from school over allegations of indiscipline.

64. The offence was apparently, committed on a day that the 1st accused was supposed to be in school. Although the offence was committed in her homestead, that does not make her guilty of it, given that

there was someone else who was at home that day. In my view there was need for the prosecution to have raised evidence to rebut the defence of alibi by the 1st accused.

65. It is well established law that when an accused person pleads an alibi, the burden of proving the falsity, if at all, of the defence of alibi lies with the prosecution. In the case of Victor Mwendwa Mulinge vs. R [2014] eKLR the Court of Appeal while addressing alibi defence stated:

> ' It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs. R [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.'

66. Still on the issue of alibi, the Court of Appeal in the case of Wang'ombe v Republic [1980] KLR 149 held as follows:

> " ..... In Ssentale v Uganda [1968] EA 365, 368 (Sir Udo Udoma CJ) .... said that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout the prosecution. We agree, we have ourselves said so on more than one occasion..... The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible".

67. It may be argued that the 1st accused did not raise her defence of alibi earlier. In R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

68. The 1st accused in this case raised her defence of alibi years after the offence was committed. Is it an afterthought? In Festo Androa ASenua v. Uganda, Cr. App. No. 1 of 1998 the Court made the following:

> " We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

69. The previous position in law was as set out in the R. v. Sukha Singh s/o Wazir Singh & Others(supra). However, Articles 49 and 50 of *the Constitution* have provided safeguards against an arrested or accused person from giving any information that may incriminate him or her. They provide that;

> 49. Rights of arrested persons
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> (1) An arrested person has the right—
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> (a) to be informed promptly, in language that the person understands, of—
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> (i) the reason for the arrest;
>
> (ii) the right to remain silent; and
>
> (iii) the consequences of not remaining silent;
>
> (b) to remain silent;
>
> (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
>
> 50. Fair hearing
>
> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (a) to be presumed innocent until the contrary is proved;
>
> (b) to be informed of the charge, with sufficient detail to answer it;
>
> (i) to remain silent, and not to testify during the proceedings;
>
> (k) to adduce and challenge evidence;
>
> (l) to refuse to give self-incriminating evidence;

70. It is thus clear that an accused has no onus to say anything during his/her arrest or trial and even when the accused raises a defence of alibi as late as the time of his/her defence, it is upon the prosecution to rebut that evidence. This is clearly the law as set out under section 309 of the Criminal Procedure Code (CPC) which states that;

> '309. Evidence in reply
>
> If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.
>
> 310. Prosecutor's reply
>
> If the accused person, or any one of several accused persons, adduces any evidence, the advocate for the prosecution shall, subject to the provisions of section 161, be entitled to reply.'

71. In as much as the deceased was actually killed in her home, she has provided an alibi that was not rebutted by the prosecution.

72. I am thus of the view that the evidence as against the 1st accused fails to meet the threshold of proof beyond reasonable doubt.

73. I will now deal with the case against the 2nd accused.

74. The 2nd accused was at first found to be unfit to plead, but later, he was found fit and the case proceeded up to the time he was placed on his defence. Subsequently, he relapsed into a mental state that was found to make him unfit to stand trial.

75. I had already dealt with the issue of the 2nd accused in my ruling that was delivered on 25th January 2024. I ordered that the said accused be placed in hospital for treatment.

76. At this particular stage of the proceedings, the court has to make a determination as to his culpability for his actions and the manner in which he will be treated. First, I will deal with the first issue, the 2nd accused's culpability.

77. There is ample evidence that the 1st accused lived with the 2nd accused. Apart from the 1st accused only one other person had unrestricted access to the house where blood was found, store where the bicycle was found and the latrine where the deceased's shoe was found.

78. Although the general compound may have been accessible to other people other than the accused persons, in the absence of the 1st accused only one other person could have had such unhindered access. That other person was the 2nd accused. It was confirmed that indeed that on the material day at the time the deceased went missing, the 2nd accused was not in school. It is also in evidence that the 2nd accused interacted with some of the witnesses on that material day, during the day, as they were searching for the deceased.

79. I am of the view that although there is no direct evidence to incriminate him, there is sufficient circumstantial evidence that placed him at the scene of the crime, his home, at the material time. The circumstantial evidence irresistibly points to the 2nd accused, to the exclusion of any other person, including his own grandmother, the 1st accused, as having had a role to play in the deceased's death.

80. Having found that that the 2nd accused had a role to play in the act that led to the demise of the deceased then it is upon the court to establish if there was malice aforethought.

81. Section 206 of the Penal Code provides the definition of malice aforethought and it reads 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;'

82. Thus, the ingredient of malice aforethought can be express or implied. It can be deemed to have been established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.

83. There are numerous authorities that have dealt with the manifestation of malice aforethought on a charge under Section 203 of the Penal Code. For instance, in Rex v Tubere s/o Ochen {1945} 1Z EACA 63, Eastern Court of Appeal observed:

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

84. In addition, in the case of Hyam v DPP {1974} A.C. the Court held inter alia that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

85. The death of the deceased was as a result of an illegal act. The injuries sustained by the deceased that caused his death suggested that it was the intention of the person who committed the act to cause the death of or to cause him grievous harm or, that the person knew that the injury to the deceased would probably cause his death or grievous harm. The injuries as described by the pathologist point to a vicious act of violence against the victim. This, in my view, proved that the 2nd accused's action was actuated by malice aforethought.

86. Thus, under the circumstances, I find that malice aforethought can be inferred under section 206 of the Penal Code.

87. After evaluating the evidence in totality as against the 2nd accused, I am of the opinion that the same is sufficient to justify a conviction against the 2nd accused, that he was culpable for the death of the deceased.

88. Consequently, I direct that the 2nd accused be availed in court for further orders under section 167 of the Criminal Procedure Code, as read with the authorities that I had referred to in my earlier ruling delivered on 25th January 2024.

89. As for the first accused, I am prepared to give her the benefit of the doubt and acquit her on the offence of murder. She is set at liberty unless lawfully held.

90. Orders accordingly.

H. M. NYAGA,

JUDGE.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF NOVEMBER, 2024.

JUDGE.