



**Republic v Mwangangi (Criminal Case 22 of 2019)
[2024] KEHC 14982 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 22 OF 2019
LM NJUGUNA, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

KAVIVYA MWANGANGI ACCUSED

JUDGMENT

1. The accused was charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. Particulars of the charge are that on the night of 08th and 9th October 2019 at Mashamba River in Makima Location of Mbeere South, sub-county within Embu County, the accused, jointly with another, murdered Michael Kyengo Maingi.
2. The accused took a plea of not guilty and the same was duly entered. The case proceeded to trial and the prosecution called sixteen (16) witnesses and then rested its case.
3. PW1, was Wayua Maingi, the deceased’s mother who testified that on 02nd October 2019, the deceased had gone home since he was on leave and he stayed until 08th October when he left at around 4PM to go on an errand with his car that was a dark colour. That the deceased did not call to say if he had arrived safely and so she tried to call him the following day. The deceased’s phone went unanswered severally and eventually, someone answered it calling her ‘mum’ but it didn’t sound like the deceased. That the person she spoke with on the appellant’s phone said that he would return after 2 weeks as he had been sent on official duty. She noticed that it was not her son answering the phone and she became suspicious.
4. She stated that the deceased’s friend, one Mwaka, was also trying to reach him and when he asked her about the deceased’s whereabouts, she said she did not know. They called Father Mutunga who was the deceased’s colleague and he advised them to report the matter at the police station, which they did. That the deceased’s brother Boniface Mutiso arrived home and stayed with her until 15th October 2019 when



- the police called saying that the deceased's body and his car had been found. She was not present when the body was removed from the dry river bed. She stated that she was taken to Montezuma Funeral home to identify the body of the deceased and DNA samples were collected from her tongue. That when the deceased left home, he was okay and he did not have any problem.
5. On cross-examination, she stated that when the deceased left, he said that he was going to see his friend in Mwea but he did not return home that day. That the person who spoke to her using the deceased's phone said that he had a cold but she knew it was not her son. That she spoke to the strange person on 10th October and the matter was reported to police the following day on a Friday but the body of the deceased was found the following Tuesday in a river in Mwea. That all along she had been trying to reach the deceased but his phone was off. She did not know what the deceased was doing in Mwea but he was found dead with his body in a nylon paper bag.
 6. PW2 was Gabriel Wambua Kimeu, a mason who stated that he was with the deceased on 08th October 2019 who had given him some work to fence his compound when he told him that he was going to Mwea. That the deceased told him to hurry so that he could give him a lift and they left at around 5:30 p.m. in his car which was dark blue in colour. That he dropped him off at Kaewa market and proceeded but he had been on phone with someone whom he told that he would arrive at 8:30PM.
 7. That 2 days later, PW1 called him to ask where he had parted ways with the deceased and he went to Kivaa Parish and told the priest-in-charge about PW1's apprehension. Later on, he learned that the deceased had died. On cross-examination, he stated that he knew the deceased through the church. That when the deceased gave him a lift, he spoke to someone on the phone telling them that he would arrive as about 8:30 p.m. He was in the deceased's motor vehicle for about 1 hour.
 8. PW3 was Haroun Mulwa Mulumba who stated that Michael Muthini (who was convicted on his own guilty plea) borrowed a spade from him at around 8PM on 08th October 2019 to go an excavate sand but he never returned it. That the following day, Michael Muthini told him to collect the spade from his home and he did. He stated that it was not unusual for Michael Muthini to borrow his spade to excavate sand at night since sand excavation is done at night to avoid the authorities. On cross-examination, he stated that he heard that Michael had been jailed in relation to the death of the deceased herein.
 9. PW4 was Boniface Mutiso King'oo, the deceased's step-brother who stated that on 06th October, 2019, he spent the day with the deceased before he returned to school in Thika. That on 09th October, 2019, PW1 called to ask him if he had spoken to the deceased but he said he had also been unable to reach him. On 11th October 2019, he reported the matter at Thika Police Station and then he went home and took the OB to Malaa Police station where the police had traced the deceased's number to Mombasa.
 10. The DCI were investigating the incident and he was advised to await a call from DCI headquarters. He stated that he was called to go and identify the deceased's motor vehicle registration number KCQ 665S that is blackish in colour and the deceased's phone. He noted that the motor vehicle had been painted white and he recorded a statement before returning home. The DCI officers called him and asked him to meet them at Mashamba river the following day, where the body of the deceased was exhumed from the dry riverbed and it was in a white sack tied with a rope. He testified that the sack was opened so that the body could be identified and samples were taken because the body had decomposed.
 11. That the body was moved to Montezuma funeral home in Machakos and samples from the deceased and PW1 were taken to the government chemist for analysis. That the samples matched and the body of the deceased was released to them for burial. That the deceased appeared to have been slaughtered with a sharp object. On cross-examination, he stated that he was last with the deceased on 06th October 2019 but they communicated afterwards about some construction he was doing at home. That when



he went home, him and PW1 went to Malaa police station and investigations were ongoing. That the deceased's motor vehicle was traced at Munarani in Mombasa and the police arrested a young man called Michael who was driving it.

12. PW5 was Dr. Dorothy Njeru who conducted postmortem on the body of the deceased. She testified that the body was significantly decomposed, all the skin had fallen off and it had an offensive smell. That the hands were tied together at the wrist and the legs were tied together at the ankles with braided sisal ropes and the 2 ropes were joined at the back of the body with a manilla rope. Beneath the ropes, there was bruising of the skin on the hands and legs and there was a wound on the front part of the neck running from right to left and measuring 26cm.
13. The neck wound was inflicted by a sharp object and it went through all the layers up to the bone, injuring the trachea, windpipe and esophagus. The 3rd and 4th bones of the neck had been fractured and the internal organs had all decomposed. Samples were collected for further examination. She produced the postmortem report as evidence and stated that she was part of the team that recovered the body at the riverbed. On cross-examination, she stated that the body was remarkably decomposed and the samples collected were sent for further molecular studies including DNA analysis.
14. PW6 was P.C. Eric Lemiso Nasha who stated that he was in the company of his colleagues when they received a missing person's report of the deceased. That they were mandated and they undertook investigations into the matter. The deceased's motor vehicle was traced through road cameras as it was being driven towards Mombasa. They started tracking the motor vehicle and at around midnight, the motor vehicle was being driven back to Nairobi at a high speed.
15. The driver was ordered to stop but he defied the order. They were forced to deflate the right rear tyre of the motor vehicle and that is when the driver stopped and attempted to run away but he was arrested. On carrying out a search in the vehicle, they found personal belongings in the car and the things were entered into an inventory. The motor vehicle and the suspect were escorted to DCI headquarters. He testified that they interrogated the suspect who told them that the owner of that motor vehicle is the missing person who was buried in a dry riverbed in Mwea.
16. The suspect also disclosed that there were other suspects involved in the crime and the police arrested them as well. That they went to Mashamba river in Mwea, being led by the suspect, and he identified the grave and the soil around the area looked disturbed. The scene was secured and processed and the body was exhumed the following day in the presence of a pathologist. On cross-examination, he stated that the suspect they arrested with the deceased's motor vehicle is the one who identified the grave and upon searching his home, they found a knife inside a pit latrine and they also recovered a spade. That the accused person was not there when they visited the suspect's home.
17. PW7 was CPL Henry Kiboma who stated that he accompanied the CCIO Embu to the crime scene where he took photographs of the scene. He produced the photographs, the report and certificate of photographic evidence.
18. PW8 was CI Nancy Ekakoro of DCI headquarters who stated that she accompanied Inspector Wanjohi to Machakos for postmortem of an exhumed body. She documented the process and took 79 photographs of the various steps taken during the postmortem exercise. The photographs together with a report were produced as evidence.
19. PW9 was Benson Musyoki Kiseli who testified that in August 2019, he was working at an agrovet when the accused person purchased a gunny bag for Kshs.200/=. That he remembered that purchase after he heard about the death of the deceased from the news. That the gunny bag is one which has a plastic



- lining on the inside and it was white in colour with the writings 'agroset sack'. That the accused was a regular customer who sometimes took items on credit.
20. On cross-examination, he stated that they had sold many similar sacks to different customers and they came in different colours. That the white sack sold to the accused was the last one of its kind to be sold from the agrovet. He could not remember if he gave the accused a receipt when he bought the gunny bag. That he particularly remembered the accused because he spent quite sometime explaining to him the kind of gunny bag he wanted and he bought the last piece from the agrovet.
 21. PW10 was CI Philip Bii of DCI headquarters who stated that an investigator from DCI told him that a murder suspect wanted to confess but the officer could not record the confession because he was of a junior rank. That he went to where the accused was and he asked the suspect if he was ready to record his confession and the accused agreed and he informed him of his rights to have a representative around who either could be a family member, an advocate or a friend but the suspect said that he was comfortable being alone. That he enquired whether the suspect had any medical complaints from the time he was arrested until then but the suspect stated that he did not have any.
 22. He also asked him whether he was coerced into confessing but the suspect stated that the same was voluntary. He stated that the suspect narrated how he settled in the town of Gategi and thereafter became a cook at a hotel when he met Michael Muthini who was seemingly rich. That after several interactions with the said Michael Muthini, he told him of a cult and he (accused) desired to join the alleged cult that people believed made Michael rich. It was his evidence that the said Michael told him that he must adhere to some requirements before he could join to the said cult. Michael Muthini informed him that he must pay a subscription amount of Kshs.30,000/= and he therefore started paying the same albeit by instalments.
 23. That Michael Muthini informed him that he had a guest and he was instructed to buy a 90 Kg sack and a polythene bag. On 08th October 2019, Michael told him that the guest was coming to Gategi town and that he knew that it was time to make the sacrifice that was to be offered. It was his further evidence that Kavivya (the accused herein) went to Michael Muthini's residence but did not enter the house as he was told to wait at the entrance. That the guest was later brought wearing only an underwear with his hands tied with a nylon rope. The guest was forced into the boot of a motor vehicle and they drove to an unfamiliar place where they crossed a bridge. While there, the guest was made to come out of the vehicle and Michael Muthini demanded from him his pin number and which he used to transfer Kshs.1,500/= to the accused's line.
 24. That they later walked to a river where he tied the legs and the hands of the guest together under the instructions of Michael Muthini; and having complied with the said directions, Michael further instructed the accused to slit the throat of the guest using a machete. That they thereafter placed the body of the guest in a polythene bag and buried it on a river bed. He further stated that he informed the suspect of the implications of his confession and he proceeded to make a certificate of the confession and thereafter, read the same to the suspect who appended his thumb print on the confessional statement.
 25. The accused challenged production of the confessional statement and the court conducted a trial within a trial. The state called 3 witnesses and the accused defended himself. The court, through a ruling delivered on 27th June 2023 found that the confessional statement was recorded in compliance with the laid down procedures. The same was found to be admissible as evidence and it was thus produced as such.
 26. PW11, Lawrence Nderi of Mathari National Teaching and Referral Hospital produced a mental assessment report authored by Dr. Owiti who found that the accused did not have any mental disorder.



27. PW12 was Margaret Wahu Maina of government chemist Nairobi who testified on behalf of Dr. Joseph Kagunda Kimani. She produced a report authored by the said doctor stating that their office received samples from the body of the deceased being nail clippings, cartilage and several blood swabs on cotton wool placed in envelopes. He was required to examine the items and determine the genetic relationship from the DNA profiles generated from them. Since everyone inherits half of their DNA from the biological parents, the findings of the analysis were that the donor of the DNA profile generated from the nail clippings is the son of PW1.
28. PW13 was CPL Pascal Bwana who stated that he was informed that a suspect in a missing person's report which had escalated to murder had volunteered to show them where the body of the deceased was buried. That they went to the site which was at a dry riverbed and a crowd had gathered. That they were accompanied by a pathologist and the scene had been well secured. They had obtained an exhumation order and the body of the deceased was exhumed as the team documented the process. The body was in a gunny bag that was tied with a manila rope and when it was opened, the body of the deceased was decomposed and the neck had been slit.
29. The hands and legs were tied at the back. Samples were collected and the body was taken to Machakos Montezuma mortuary. He stated that they also attended the postmortem and another set of samples were collected and taken to government chemist for analysis. PW1 was also taken to the government chemist where some DNA samples were collected for analysis. He stated that the deceased's accounts had money transferred from them and they investigated the recipients of the funds and the communication between the deceased and the recipients of the funds. That Safaricom records were obtained to verify the transactions and the accused's number is one of the recipients of the money.
30. That the investigators played different roles and came up with a combined file which was forwarded to the DPP. On cross-examination, he stated that the accused herein was not there when Michael Muthini identified the grave. That some tools were recovered that were suspected to have been used in the crime but they were not tested for forensics. That the accused took the police where the deceased had been slaughtered.
31. PW14 was Dr. Muendo Muthini who stated that he conducted a toxicology on the samples from the body of the deceased. He produced a report that showed that the deceased's body had 2 types of chemicals; One was hydantoin which is a type of bacteria and the other was a metabolite called hydroxyphenyion. He stated that the 2 drugs causes a state of confusion and can lead to a coma. On cross-examination, he stated that he did not have a look at the body of the deceased but he concluded that the cause of death was the concentration of the drugs although no blood samples were available. That the chemicals in excess can cause death. That he couldn't make a conclusive analysis because he did not have a blood sample.
32. PW15 was CPL Jonathan Limo, Safaricom law enforcement liaison officer and data analyst who stated that he received a court order summoning data record for the deceased. That he extracted call data showing which numbers he had communicated with prior to his death and duration of the calls, among other details. He also extracted M-pesa records showing transactions between the deceased and the accused at the time of the incident. He produced the data records and the court orders that were used as evidence together with the corresponding certificate.
33. PW16 was CI Raphael Wanjohi of DCI Headquarters who stated that he was assigned to investigate the case which was about a catholic priest who had been found buried in a shallow grave and the body was to be exhumed. That they proceeded to the scene in the company of his 2 colleagues and they found other senior officers already there together with Dr. Njeru. That the body was exhumed and the gunny bag it was in was opened to enable identification. The gunny bag had a plastic lining on the



- inside and the body was decomposing and the limbs had been restrained with ropes from back and the deceased's throat was slit open. The body was covered with underwear and there was also a short-sleeved shirt found.
34. He stated that they measured the width of the river which was 680ft and there were trees along its banks and there were no houses nearby. He produced the sketch plan of the scene as evidence. It was his testimony that the body of the deceased was taken to Montezuma mortuary in Machakos and the following day, he was accompanied by PW8 and PW13 and they attended postmortem conducted by PW4 at the said mortuary. That he went with his colleague CPL Venta to Michael Muthini's home in Gateri where they conducted a search and the accused's copy of national ID was found. They recovered some other things which belonged to Michael Muthini. The investigations team was alerted about some items that were allegedly found in the deceased's car but when PW13 went to the place he was told, he did not recover anything.
 35. He testified that the deceased's motor vehicle had been parked in the yard at Nairobi Area and he documented some of the things that were inside the car, some of which were the deceased's work-related items. There was also a bank deposit slip for Michael Muthini at Kilifi branch and Kshs.50,150/= in cash, 2 phones, 3 simcards, a Rolex wrist watch, a bunch of keys with 4 keys and 2 new ones. It was his evidence that he visited the deceased's mother in Tala and interviewed her and PW2 who was given a lift by the deceased on the day he disappeared. That the investigations disclosed that he reached Gategi market at around 9PM and he went to Michael Muthini's rental house at the shopping center. That after the postmortem, PW1 was escorted to the government chemist where her DNA samples were taken and used to identify the body of the deceased.
 36. He stated that they wrote to Safaricom to provide some data required to assist in investigations and it was provided and analyzed to link the accused person and Michael Muthini to the death of the deceased. That the data revealed that the accused's phone was switched off after the deceased went missing. They found this to be suspicious and so they visited the accused's home with officers from special crimes unit. After verifying his identity through a national ID, they searched his house and recovered some of his personal items including phones, bank cards, simcards and medical information cards and medication, which items were recorded in an inventory that was signed by the accused. He testified that the accused was arrested and arraigned before a Milimani court where he told the court that he wanted to confess.
 37. The confession was recorded by PW10 and the confessionary statement was produced as evidence. He stated that from further examination of the mobile data, he established that there were several transactions between the accused and Michael Muthini showing that they know each other. That the accused told them that the deceased's motor vehicle was dark blue although he couldn't tell the number plate since it was at night. The colour of the motor vehicle was ascertained through NTSA records and through investigations, they learned that the car was repainted in Kilifi. The accused confessed that the deceased's throat was slit and PW4 confirmed that it was the cause of death according to the postmortem.
 38. It was his testimony that when the body was exhumed, he was suspicious of why there were no signs of a struggle yet the deceased seemed to be a well-built man. That he ordered for a toxicology analysis of samples from the deceased's body and it revealed that the deceased ate food that was laced with certain chemicals as was documented by PW14 in his report. That this report explained why the deceased did not fight back since he was intoxicated and he surrendered his bank and Mpesa PINs. He stated that the accused had an exercise book where he wrote the Mpesa transactions between himself and Michael Muthini. That he conducted his investigations while following the accused's statement and he concluded that the accused was present on the night when the deceased was murdered. That between



- 8th-11th October 2019 the deceased's accounts had lost over Kshs.700,000/= which could have been the motive for killing him. From his investigations, he gathered that Michael Muthini was interested in the deceased's property and he paid the accused herein to execute the act. The accused was motivated to kill the deceased for money. He produced 24 exhibits as evidence.
39. On cross-examination, he stated that the accused was arrested because his phone received Kshs.1,500/= from the deceased's phone and he communicated frequently with Michael Muthini on the night of the incident. That the accused confessed to having left his shirt at the shallow grave where the deceased was buried after executing him and the shirt was recovered as evidence. That when Michael Muthini was arrested, the accused was not with him. That no murder weapon was recovered from the house of the accused but other items found at this house linked him to the offence. That the deceased's motor vehicle was repainted on the instructions of Michael Muthini in Kilifi.
40. That the accused person was not present when Michael Muthini identified the shallow grave to the police but he was involved in committing the offence since he said that he is the one who slit the deceased's neck and blood splashed on his shirt, which was buried with the deceased. The accused confessed that he belonged to a cult and he was introduced by Michael Muthini. He stated that phone records show that the accused was at the Mashamba river at the time of the incident and it was about 10 KM from his home. That the medicines found in the appellant's house were not subjected to analysis but they were not the ones found in the deceased's body. That the accused's phone was switched off after the incident and it was turned back 10 days after.
41. He stated that from investigations, he learned that the deceased had visited Michael Muthini for masturbation since they had a sexual relationship but the accused was not part of that relationship. That there was a phone call that lasted 108 seconds between the deceased and the accused on 05th October 2019 and by this time, the deceased was still alive. That the other piece of evidence connecting the accused to the death of the deceased is the transaction of Kshs.1,500/= sent from the deceased to the accused. That the deceased's KCB account was connected to his Mpesa account and it had about Kshs.2million of which Michael Muthini took Kshs.700,000/=. That both accused persons stood to gain from the death of the deceased but Michael Muthini gained more. He stated that the accused was involved in the death of the deceased since he is the one who slit his throat at Mashamba river.
42. 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.
43. DW1 was the accused person who denied killing the deceased or having anything to do with his death. He stated that Michael Muthini who was his customer borrowed his phone and he did not know what he did with it. That he was arrested and asked if he knew Michael Muthini and he said yes but he denied being involved in killing the deceased. That Michael Muthini had borrowed Kshs.1,500/= from him and he repaid it through another person's phone which he learned was the deceased's. That he kept the money for 4 days before he spoke to Michael who told him that he had repaid the debt he owed. He stated that police officers went to his house on the night of 23rd October 2019 and took him to Nairobi but he did not alight from the police vehicle and he was taken back to Gategi to a river and asked where the body was buried, they took him back to Nairobi then to Kerugoya after which he was charged in Embu. On cross-examination, he stated that on the night of the incident, he received money from the deceased's phone. It was put to him that he switched his phone off after he received the money and that he was seen buying a gunny bag that the deceased was buried in. He denied giving a voluntary confessionary statement to the police and stated that they forced him to sign it.
44. The defense closed its case and the prosecution filed its submissions.



45. 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. That the testimonies of the prosecution witnesses have proven the offence. That the body of the deceased was too decomposed such that it was only identifiable through DNA evidence. That the postmortem report showed that the deceased had a slit throat which caused his death. Reliance was placed on the cases of Republic v. Stephern Sila Wambua (2017) eKLR and Republic v. Richard Itweka Wahiti (2020) eKLR. It argued that circumstantial evidence is enough to place the accused at the crime scene. Regarding the accused person's confession, the prosecution submitted that confessions must be corroborated but the court can still convict the accused person based on a confession if it believes the confession is true. It relied on the cases of Fanuel Hesiwas Modakaa v Republic (2000) KECA 425 (KLR) and Benjamin Ndambu Suku v Republic (2003) KECA 72 (KLR) where the court cited the cases of Bakari Omari And John Martha Komora v. Republic [1983] 1 KAR 349 and Tuwamoi v. Uganda (1967) E.A. at P.84. It argued that the accused bore malice aforethought at the time of committing the offence and it urged the court to convict the accused of murder. It relied on the case of Morris Aluoch v Republic (1997) eKLR.
46. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
47. 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 and the prosecution has the burden of proving 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.”
48. 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.”
49. The accused person herein was charged alongside Michael Muthini who pleaded guilty to the charge and he was convicted on his own guilty plea. He was sentenced to 30 years imprisonment. There was another accused person named Solomon Mutava, against whom the prosecution entered a nolle prosequi and converted him into a prosecution witness.
50. The first element is death and cause of death. PW5 produced the postmortem report which indicated that the cause of death was sharp force trauma to the neck. She observed that there was a deep wound on the neck extending to the cervical spine with 2 parallel incisions to the body of C3/C4 about 1.8cm each and involving the trachea oesophagus, thyroid cartilage and other anterior neck structures. This is sufficient proof of the cause of death.



51. Next is to establish that the accused inflicted these fatal injuries upon the deceased. PW10 testified that when the accused was arraigned before a Nairobi court, he told the court that he wished to make a confession. The court directed that the accused be facilitated to record his statement. PW10 who possessed the necessary rank, recorded a confessionary statement by the accused. Even though the accused challenged production of this statement into evidence, the court conducted a trial within a trial and allowed the statement to be produced into evidence.
52. According to this confessionary statement, the accused said that he knew Michael Muthini in early 2019 as a member of a cult called illuminati. That he became interested in the cult which promised riches fast, and he was recruited into it by the said Michael Muthini on condition that he paid installments of Kshs.2,666/= or Kshs.3,666/= and he documented the payments in a book which was produced as evidence. That in August 2019, Michael Muthini told him that they needed to make a sacrifice because someone had failed to comply with the demands of the cult and he sent him to buy a sack and ropes.
53. In September, Michael Muthini told him that a guest was coming but did not give him further details. In October, Michael Muthini called him through a different phone to inform him that the guest had arrived. At around 9.00 p.m, Michael went to his house where he stayed until 9.30 p.m. when he left and brought a motor vehicle whose registration number he did not see. That Michael drove the motor vehicle up to the door and then he removed a man from his house, the man only wearing underwear and his hands being tied in front. He put the man in the boot and then they drove to a river.
54. He stated that at around midnight, Michael stopped the car and asked the man in the boot of the car for his PIN numbers for MPesa and he transferred Kshs.1,500/= to him (accused). That Micheal then re-entered the vehicle and drove to the river, stopping the car at the bridge. They led the man in the boot towards the river and as they went, the man begged them not to kill him and he would give them what they wanted. Michael then asked him for his bank account PIN numbers and he gave him access to the accounts and Michael transferred money from them. That Michael instructed him to tie the man's legs and hands from behind and tightened the remaining rope.
55. Afterwards, Michael told him to cut the man's throat with a panga as a blood sacrifice which he did, and blood oozed out spilling on his yellow shirt. They put the man in a sack together and they then dug a shallow grave and buried him. That afterwards, Michael rubbed the panga in the sand to remove blood stains and then put the panga and spade in the car and they drove to Gategi where they arrived at 2.00 a.m. That he returned to his work but he felt guilty for killing the man and after a few days, Michael was arrested and he was arrested a few days later at his home.
56. In his defense, the accused stated that he did not give the confessionary statement voluntarily and that he was forced to sign it. This averment arises too late in the day after the court had found the confession to have passed the test under sections 25 and 26 of the *Evidence Act*. The contents of the confession point towards the accused's involvement in killing the deceased upon compulsion by Michael Muthini who was already convicted for the same offence. The accused said that it is him who slit the deceased's throat and the deceased's blood stained his yellow shirt, which he put in the grave where they buried the deceased.
57. The court, in considering a confessionary statement as evidence, must satisfy itself that the accused was telling the truth. In the case of *Tuwamoi v. Uganda* [1967] E.A. at P.84 the court stated:

“There is no rule of law or practice requiring corroboration of retracted statement of confession before it can be acted upon but it is dangerous to act upon it in the absence



of corroboration in material particulars, or unless the court after full consideration of the circumstances is satisfied of its truth”.

58. There are several reasons why this court believes that the contents of the confession speak the truth. To do so, this court will delve into circumstantial evidence since there are no eye witnesses to this incident. In the case of *Chiragu & another v Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) the Court 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.””

59. First, this confession was recorded on 25th October 2019 while the photographs of the crime scene were taken on 16th October 2019. Photograph number 7 shows the yellow shirt described by the accused as having been put in the same grave where the remains of the deceased were buried. Secondly, there are call data records placing the accused at the burial site of the deceased on the night of the incident. In fact, Mpesa records show that the accused received money from the deceased’s phone number and in the confession, the accused says that Michael indeed sent the money from the deceased’s phone after coercing him to give him his PIN. The accused himself stated that he is the one who slit the deceased’s throat that night.
60. In my view, proving the accused’s presence at the scene is a matter largely dependent on the accused’s admissible confessionary statement and circumstantial evidence. In considering both, the court is persuaded that he was at the scene and he inflicted the fatal injuries to the deceased. Furthermore, the description of the injuries as given by PW5 is corroborated by the statement of the accused in the confessionary statement. Even though the accused, in his defense, denied his involvement in killing the deceased, there is evidence beyond reasonable doubt that he was involved in the act.



61. The final element to prove is malice aforethought which goes to show that the accused intended to murder the deceased person. 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.”

62. 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.....”

63. In this case, the accused murdered the deceased by slitting his throat. The prosecution witnesses who saw the body of the deceased noted the gruesome nature of the neck injury. I have painfully looked at the photographs of the incident and do take note of the amount of impunity that went into killing and disposing of the body of the deceased. Even though no murder weapon was found, the cause of death speaks for itself. The accused inflicted those injuries on the deceased knowing full well that he would succumb. Further, the manner in which the deceased’s body was tied and forced into a gunny bag explains clear intention to murder him in cold blood. The accused bought a specific type of gunny bag from PW3 knowing full well what he was going to use it for; to bury the remains of the deceased after killing him. This murder was premeditated; thus, the accused is found to have had malice aforethought.



64. As I conclude, I must say that the murder of the deceased was conducted in such a painful and cruel manner, which the family and the community of the deceased may grapple with for a long time. There is no justification in law or otherwise for anyone to lose their life in this manner.
65. 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 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.
66. It is so ordered.

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

L. NJUGUNA

JUDGE

