



**Republic v Sagaray & 4 others (Criminal Case 61 of 2012)
[2023] KEHC 246 (KLR) (Crim) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 61 OF 2012**

**RL KORIR, J
JANUARY 25, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DWIGHT SAGARAY & 4 OTHERS ACCUSED

JUDGMENT

1. On the morning of 27th July 2012, Kenya awoke to the unprecedented killing of a foreign ambassador on her soil. The then Venezuelan ambassador to Kenya Olga Fonseca Jimenez was found murdered in her official residence in Runda Estate, Nairobi. The Embassy's then First Secretary, Dwight Asdrubal Sagaray Covault was soon arraigned before Muchemi J. on 6th August 2012 to take plea on the charge of murder.
2. On 26th November 2012, Ahmed Mujivane Omido, Alex Sifuma Wanyonyi, and Moses Kiprotich Kalya were arraigned alongside Dwight Sagaray before Ombija J. to plead to the same charges vide Information dated 9th November 2012. The four Accused persons were charged jointly in Criminal Case No. 61 of 2012 with one Mohammed Ahmed Mohammed Hassan who remained at large. They all denied the charge of murder.
3. On 2nd May 2013, Kipng'eno Kirui Chelogoi was arraigned in Court and charged for the same murder in Criminal Case No. 97 of 2012. The Prosecution made an Application on 9th May 2013 to consolidate the two cases. Kipng'eno Chelogoi was then charged alongside the other 5 Accused persons. Once again, the 5 Accused persons excluding Mohammed Ahmed Mohammed Hassan who remained at large, took plea and denied the charge of the murder of Olga Fonseca.
4. Subsequently on 25th June 2013, the Prosecution entered a Nolle Prosequi against the then 2nd Accused person, Mohammed Ahmed Mohammed Hassan. The Information was amended and the



suspects charged afresh as Dwight Asdrubal Sagaray Covault, Ahmed Mujivane Omido, Alex Sifuma Wanyonyi, Moses Kiprotich Kalya and Kipng'eno Kirui Chelogoi listed as the 1st, 2nd, 3rd, 4th and 5th Accused respectively, for the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya.

5. The particulars of the charge from the amended Information dated 21st June 2013 were that, on the night of the 26th and 27th July 2012, at the Venezuelan Embassy Residence in Runda Estate within Nairobi County, jointly murdered Olga Fonseca Jimenez. All the Accused persons pleaded not guilty to the murder. The matter proceeded to full trial.
6. The Prosecution in this case was conducted by the learned Senior Assistant Deputy Director of Public Prosecutions Mrs. Tabitha Ouya. Learned Defence Counsel Mr. Katwa Kigen, Mr. Olewe, Mr. Nyang'ayo, Mr. Wamwayi and Mrs. Omung'ala represented the 1st Accused, the 2nd, 3rd, 4th and the 5th Accused respectively.
7. The trial against the 5 Accused persons which has taken a long time was punctuated by many pre-trial issues and several interlocutory applications. The first of these were Applications by the Accused persons to be released on bond. These Applications were strongly contested by the State. In a Ruling dated 2nd May 2013, this Court admitted the Accused persons to bond on very stringent conditions.
8. In the course of the trial, the 4th Accused then disowned his Confession Statement thereby necessitating a trial within a trial. In a Ruling dated 29th July 2014, this Court held that the Confession Statement was legally and procedurally obtained and was therefore admissible in evidence.
9. Another interlocutory Application dated 28th September 2015, was made by Mr. Katwa, Counsel for the 1st Accused seeking to bar the Prosecution from adducing documentary evidence in respect of transactions authorized or conducted by the 1st Accused in his capacity as acting Ambassador, on the premise that its production offended diplomatic immunity. The Application was in respect of the 1st Accused's actions in relation of the five bank accounts held by the Embassy at the Commercial Bank of Africa during the period between 29th May and 23rd July 2012. This Application was disallowed, and the Prosecution was allowed to tender evidence limited to the correspondence and not the privileged contents of the Bank Statements.
10. The State also brought an interlocutory Application on 31st March 2016 seeking orders to allow three witnesses who were former diplomats, namely Jennifer Schell, Melissa Herenia Valor, and Miguel Angel Herera who had moved back to Venezuela to tender their evidence through video conferencing. In its Ruling, this Court rejected the Application for reasons that the State had not demonstrated any logistical support within Venezuela that would aid the virtual taking of evidence. The Court while appreciating that technology could be deployed to further the trial observed that Venezuela was at the time undergoing challenges which would make the facilitation of court proceedings difficult. The Court allowed the Prosecution time to confirm the viability of their request in view of the challenges observed in the Ruling.
11. Further delay in the proceedings was attributable to the transfer of the trial Judge who nonetheless was directed by the Honourable Chief Justice to try the matter to conclusion. The trial was further hampered by the suspension of open court hearings during the Covid-19 Pandemic. This court thus appreciates the anxiety that the delay has caused the parties.
12. The trial commenced on 13th November 2013 with the testimony of the first Prosecution witness. The Prosecution called total of 37 witnesses and produced 39 exhibits. At the close of their case, the Court found that each of the Accused persons had a case to answer in accordance with section 211 of the Criminal Procedure Code and placed them on their defence.



13. The 5 Accused persons all opted to give sworn testimonies and they did not call any witnesses.

The Prosecution's Case

14. The Prosecution case was built around a power struggle between Dwight Sagaray the 1st Accused and the incoming ambassador Olga Fonseca Jimenez which they argued provided a motive for her elimination. The gist of the Prosecution case was presented through the eyes of the Venezuelan embassy staff both at the official residence and the offices.
15. Francis Muigai Mwangi (PW1) was the Official driver of the Ambassador of Venezuela who lived at the Embassy's official Residence in Runda. He gave an account of Olga's arrival at the embassy and the names of other staff who worked and lived in the residence. It was his testimony that Dwight, 1st Accused who was the 1st Secretary took over from Ambassador Gerardo and together with his (Dwight's) friend Mohammed moved into the embassy residence.
16. PW1 testified that the new ambassador Fonseca asserted her authority leaving them confused as to who was in charge. On the material night, he testified that he saw the deceased, Jennifer and her husband Miguel taking drinks. That later that night, they heard a commotion and saw PW15, Peter Mbusi shaking. He also recognised the person standing next to Peter as Mohammed because he called him by his name Francis. That he later discovered that Fonseca had been found dead in her bedroom.
17. Kevin Lameck Akoth (PW2) was the second driver at the Venezuelan Embassy. He testified that the deceased came to replace the 1st Accused who lived at the residence with his friend Mohammed. That on the material night, alongside PW1, they took Mohammed for a meeting at Maggies pub where he was meeting somebody from the Ministry of Foreign Affairs in respect of the new Charge d'Affairs . That he learned of Fonseca's death through the television.
18. Julius Marigu (PW3) was a gardener at the Venezuelan embassy official residence since 2011. He testified that on 27th July 2012, he reported to work at 7.30 a.m. and found a Securicor Personnel in a car at the embassy residence gate. That they told him that they had been requested to replace the day guard and were unable to reach the person in charge. He testified that he entered the premises and rang the bell severally but no one answered, prompting him to go to the rear part of the house where he knocked on a glass door. There was still no response. He testified that at that point, he decided to reach out to the embassy staff in vain but finally at 9.05 a.m. got Melissa the 3rd Secretary who also tried to reach the ambassador in vain. PW3 further testified that Melissa sent Jennifer the 2nd Secretary and her husband Miguel who assisted in conducting a thorough search. They called out to the ambassador but there was no response. PW3 testified that he used a table to climb onto the balcony door which was locked with a padlock forcing him to go to the rear door where he pulled the curtain and saw Olga lying across the bed with her head facing his direction.
19. PW3 further testified that at that point, a ladder was brought to enable the others climb up to see. He described what they saw being a white rope (P.Exh34) tied to the bottom of the bed leading to the neck and a pair of large pliers with red handles (P.Exh35) next to Olga's head.
20. John Chege Kang'ethe (PW4) was a security guard at the embassy residence employed by the Securex Company. He testified that the occupants of the residence were Dwight (1st Accused) and Mohammed. That on 26th July 2012, John Ogutu and Joseph from Securex brought a list of people who were permitted to access the residence. They were Olga Fonseca (deceased), Francis Mwangi (PW1), Peter Mbusi (PW15), Zipporah Ikhola (PW9), Angelina Mwelemi (PW10), Jennifer (2nd Secretary), Miguel (Jennifer's husband) and Melissa (3rd Secretary).



21. PW4 testified that when he reported to work on 27th July 2012 at 6.20 a.m., he was informed that he would be redeployed elsewhere and replaced by Ignatius. That he went to inform the new Charge d'Affairs Olga Fonseca but received no response when he knocked on the door and pressed the bell. That they waited until 7.30 a.m. when PW3 arrived. That PW3 called the other embassy diplomats who came and thereafter PW3 climbed a table and saw the ambassador sleeping on her bed but unresponsive even when they used a swimming pool pole to touch her body. PW4 further stated that they brought a ladder, which PW3 climbed up and noticed that Olga was dead on her bed so they called the police.
22. Ignatius Kyenolwa (PW5) was employed as a field officer of Securex Company from 2012. He testified that his duties were to deploy security guards and change guards as requested by clients. He testified that on 27th July 2012 at 6.30 a.m. he reported for duty and was instructed by the Operations Manager Mr. John Ogutu to effect a change of guards at the Venezuelan embassy residence. That he proceeded with his colleague Pius Maundu and upon arrival, found PW4, the day guard at around 7.10-7.15 am. It was PW5's testimony that one of the workers went to call Olga so that he could introduce the new guard but returned after 30 minutes saying that he was unable to reach her. That after a while, two white people (a man and a lady) arrived at the embassy and called them to assist.
23. It was his further testimony that he called their office to give them back-up while the white man went to the rear of the house calling out the name of the ambassador. That the people who went up the ladder identified Olga and said that they had seen her with a wire (P.Exh34) on her neck and legs. That he subsequently called their Operations Manager who told him that he would call the Diplomatic Police. He said that he was not the one who deployed the night guards on 26th July 2012.
24. Noah Stephen Otieno (PW6) worked at Securex as a Zone Manager. He testified that his duties were to visit clients, handle complaints, kitting and giving uniforms and tools to the guards. His testimony was that on the evening of 26th July 2012, he was instructed by his boss, the Operations Manager John Ogutu to change the guards at the Venezuelan Embassy on 27th July 2012 but since he reported late, PW5 Ignatius Kyenolwa was instructed to carry out the changes.
25. PW6 Noah Otieno testified that at 9.30 a.m. PW5 had not completed the changeover of guards because they did not manage to reach Olga. That they eventually proceeded to the embassy residence with their police backup. That the residence wall was scaled and it was discovered that Olga had been strangled. That he remained at the scene until 6.00 p.m. after the body had been removed at around 4.00 p.m.
26. PW7 Jane Njeri Muchai, was an advocate practising with the firm of Mucharu and Associates who handled tenancy agreements for the Venezuelan Embassy from 2009. She testified that she was involved in meetings with Olga and the staff members where Olga asserted her authority and demanded to be recognized as the person who was in charge and not the 1st Accused. Finally, she testified that she learned of Olga's death through a phone call from Melissa and Jennifer.
27. John Ogutu (PW8) was in charge of Operations at Securex Company which provided security both at the embassy and the official ambassador's residence. He testified that on 25th July 2012, he received a phone call from the Venezuelan embassy calling him for a meeting with Olga. He stated that Olga, Melissa and Jennifer attended the meeting where Olga introduced herself as the new Charge d'Affairs. That she gave him a list of authorized persons into the embassy residence and Olga informed him that the 1st Accused and Mohammed were not allowed to access the residence.
28. PW8 testified that on the morning of 27th July 2012, he was told that the guards were unable to reach Olga. That he only came to learn about Olga's demise in the afternoon when the Diplomatic Police accessed her residence and found her strangled to death. He further testified that on the 26th July 2012, there were 2 night guards who were investigated, charged and acquitted in a separate case.



29. Zipporah Ikolo (PW9) was a housemaid at the Venezuelan Embassy residence, having worked there from 2005. She testified that on 15th July 2012, they received Olga Fonseca as a guest as they did not know her designation. She testified that there was a meeting between the domestic staff and Muthama's daughter (PW14) who informed them that Olga was the new head. She testified that on a date she couldn't recall, Olga was with a male guest when they (PW9 and Angelina PW10) retired to bed. That in the morning, they woke up and found many people in the compound. It was her testimony that security officers climbed up to the house and found Olga dead. She confirmed in her testimony that the 1st Accused and Mohammed used to live in the residence for some months.
30. Angelina Mwelemi (PW10) was a housekeeper and nanny at the residence of the ambassador of Venezuela, having worked there for 8 years. She testified that they lived at the residence with other workers; Peter the cook (PW15), Francis the driver (PW1) and Zipporah the housekeeper (PW9) while Julius the gardener (PW3) and Leonida the cleaner lived outside the residence.
31. It was her testimony that they were unaware that Olga was the ambassador, so they treated her as a guest. She also testified that the 1st Accused and Mohammed lived in the residence for about 3 months before Olga arrived on or about 15th or 16th July 2012. She further testified that they only knew about Olga's designation through Muthama's daughter (PW14) and subsequently attended a meeting to talk about their employment.
32. PW10 testified that she saw Olga and Jennifer taking drinks on the night of 26th July 2012. That they woke up the following morning at 8.30 a.m. and found police officers in the compound. They were asked to retreat to their staff quarters and later recorded statements at the police station. She testified that she later came to learn that Olga was dead.
33. Isaac Omukholea (PW11) was a watchman at Enock Katika's (Ngangi) house which was House Number 81, in Runda Estate where the 1st Accused lived. He testified that one of the occupants of the house was a Somali called Mohammed while the other was an African and that they used to drive a vehicle with CD number plates. He testified that on 26th July 2012, at around 7.00 p.m. he heard the noise of a car but was not sure which car. Later, he saw a big car like a Prado with "CD" number plates leaving the compound only to return at 4.00 a.m. It was his testimony that the occupants of the car entered the house. PW11 further stated that he had spoken with Mohammed on 26th July 2012 who was with a short dark man. PW11 stated that he checked out from work at 6.00 a.m. the following morning on 27th July 2012. That he later learned from Joseph (PW12) that an ambassador had died in Runda.
34. Joseph Mokono Chacha (PW12) was a gardener and gateman at Mr. Ngangi's House Number 81 in Runda. He testified that the compound had four houses, one which was rented to Dwight the 1st Accused who moved in on 13th July 2012 with Mohammed.
35. PW12 testified that on the morning of 26th July 2012, at around 6.00 a.m. he washed the Rav-4 and at around 8.00 a.m. Mohammed and the driver drove out and returned after 30 minutes. That the driver left with the white man and at about 10.00 a.m. Mohammed told him that he should not open the gate for anyone except for any embassy staff members.
36. It was PW12's further testimony that at 11.00 a.m. a man who said he was Mohammed's lawyer came in a white salon car and stayed in the house with Mohammed for three hours then left at about 2.00 p.m. PW12 further testified that at 4.00 p.m. Mohammed left in a taxi. On 27th July 2012, PW12 reported to work at 8.00 a.m. when the older driver (PW1) came on foot to the compound to talk to



- Mohammed. That later, the younger driver came and picked the 1st Accused using the Rav-4 and left. It was his testimony that Mohammed did not leave the compound the whole morning.
37. PW12 testified that Mohammed left in a taxi and returned at 3.00 p.m. in another car with 3 young men. That upon learning from PW12 that there were police officers and the 1st Accused in the house, Mohammed turned and sped off. It was his testimony that he later saw in the news that an ambassador had been killed in Runda.
 38. Lucy Ojwang (PW13) was a secretary and messenger at the Venezuelan Embassy since 2001. She testified that the 1st Accused introduced Olga to all the staff members as the new ambassador but that in one instance, she had heard the 1st Accused and Olga yell at each other. In her testimony she recalled that the 1st Accused received instructions to expect and settle the new ambassador and he did so by sending letters requesting the Ministry of Foreign Affairs to process Olga's documents.
 39. In her further testimony, PW13 stated that on 27th July 2012, Olga did not report to work early at 8.30 a.m. as she was accustomed to and that they later learned from Miguel in the afternoon that Olga had been strangled. PW13 testified that the 1st Accused was the signatory to the bank accounts and used to give them orders.
 40. PW14 Alice Milimi Muthama was the Managing Director of JNMH Holdings, a real estate development company and Markland Kenya Limited. She told the Court that one of their properties L.R. Number 7785/317 in Runda Grove, Runda Estate was let out to the Embassy of Venezuela as the ambassador's official residence. She told the Court that she was first introduced to the 1st Accused by Mohammed. That they had an engagement with the 1st Accused and Mohammed at her office to iron out issues relating to the renewal of the lease.
 41. In her further testimony, PW14 stated that she was informed by the 1st Accused that a new lady ambassador was coming into the country and that she should only interact with her once the 1st Accused had verified this information and introduced her officially. PW14 further testified that she learned from Olga that Mohammed and the 1st Accused had told her (Olga) that the landlord (PW14's company) had refused her entry into the residence.
 42. It was her testimony that she witnessed a squabble between Olga and the staff who were demanding to be paid their dues.
 43. PW14 stated that she believed Mohammed lived in the residence as she once saw Muslim clothes on the hanging lines and Mohammed was always there during National Days at the residence.
 44. Peter Gisiyena Busi (PW15) was a cook at the Venezuelan Embassy. He testified that the 1st Accused came to live at the residence with Mohammed. That they were informed by Francis (PW1) that a lady came to take over from the 1st Accused as acting ambassador. He testified that Melissa introduced them to Olga.
 45. PW15 testified that on 26th July 2012, Olga was with a 'mzungu' lady and her husband drinking at the garage. He testified that when he went out for a short call at 2.00 a.m., he saw strange people at the swimming pool. That they pinned him down and told him that they would shoot him if he screamed. It was his testimony that Mohammed rescued him and told him to go back to his house. It was also his further testimony that Mohammed who was wearing a long trouser and a white top asked him for his phone and made a phone call.



46. PW15 testified that when Mohammed returned his phone that night, he told him not to tell anyone that he had been at the residence that night. It was PW15's testimony that he woke up the following day at around 8.00 a.m. when PW3 informed them that Olga had not woken up.
47. Steve Allan (PW16) was an employee at the Venezuelan Embassy having worked there from 2005 as the IT Manager. He testified that sometime in July 2012, Olga came and was taken round for introduction by the 1st Accused as the Head of Mission and that the relationship between Dwight 1st Accused and Olga looked official.
48. Sheila Shishali Ongaya (PW17) was a cleaner at Venezuelan Embassy. She testified that another ambassador called Olga Fonseca came and was introduced to them by the 1st Accused but that they were confused about who was in charge thereafter. PW17 testified that on 27th July 2012, at around 11.00 a.m. she received a phone call from the embassy gate inquiring on whether someone had died at the embassy. That at the time, both Olga and Dwight 1st Accused were both not in the office and later, they got to learn from the accountant Jose and Melissa that Olga was dead.
49. PW18 was Number Chief Inspector Anne Gitahi Kanyinyi, who was attached to the Criminal Investigation Department (CID) Headquarters, Reforms section. She told the Court that she was previously stationed at Parklands CID Office under Gigiri Division where she recorded a Confession Statement of the 4th Accused (PEXH25).
50. Number xxxx Superintendent Stephen Kiptanui Kemboi (PW19) was stationed at Nairobi County Crime Scene Support Services, at the Criminal Investigation Department (CID) Headquarters. He testified that on 27th July 2012 he went to the residence of the Venezuelan Embassy in Runda, with one Mr. Mungai (PW36) and took photographs of the scene where the deceased's body was found. PW19 described the scene of crime in his testimony stating that the main door was undisturbed, but the kitchen door was disturbed and the electric wire on the perimeter fence had been cut. That there were also shoe marks inside and outside the fence. He produced the bundle of photographs (P.Exh 2[a] [1-24]).
51. Number xxxx Inspector Boniface Mule (PW20) was at the time attached to CID Headquarters Nairobi Area. That on 6th August 2012, he received information from members of the public concerning a murder suspect, one Mohammed who was believed to be in hiding at his mother's house in South C Estate. That alongside Cpl. Wambua they proceeded to that house and conducted a search. It was his testimony that they neither found Mohammed nor any relevant exhibits.
52. Dr. Joseph Maundu (PW21) was a police surgeon. He testified that on 6th November 2013, 3 murder suspects were presented by CID officers in Gigiri Police Station for a mental assessment. They were the 2nd, 3rd and 4th Accused who were all found to be mentally fit to stand trial for murder.
53. Johnstone Muthama (PW22) was a businessman dealing in mining and real estate trading as Johnstone Nthenya Muthama Holdings Limited (JNMH Ltd) which company owned property in Runda House No. 317 that was rented out to the Venezuelan Embassy as the official residence. He testified that the lease was renewed by Dwight 1st Accused on 1st July 2012 who introduced himself to him as the acting ambassador. It was PW22's testimony that a new lady ambassador (Olga) arrived in the country but was staying in a hotel at that time instead of the official residence. That together with his wife and PW14, they had a meeting with Olga where she complained about the living conditions and disrespect from the workers. He testified that Olga told him that she was fearful for her life.
54. Number xxxx P.C. Ezekiel Mwasu (PW23) was attached to CID Gigiri General Investigations. He testified that on 28th July 2012, while on duty, he was instructed by the OCS to book a post-mortem.



- That he prepared a form and booked the deceased at Lee Funeral Home for a post-mortem which he duly attended. The autopsy was conducted Dr. Johansen Oduor (PW28) and others. That samples collected from the deceased were recorded on the exhibit memo and escorted to the government chemist for analysis.
55. Number xxxx Chief Inspector Kennedy Limera (PW24) was formerly attached to the Directorate of Criminal Investigation (DCI) Office Nairobi. He testified that on 1st November 2012, Alex Sifuma 3rd Accused was brought to him to record an alibi statement. That the Alex Sifuma opted to do self-recording.
 56. Number xxxx Inspector Frida Kalekye (PW25) and Number xxxxx, Superintendent Paul Mumo (PW31) testified in respect of call data and suspected mobile communication between the Accused and Mohammed. PW25 drew a Chart Link (P.Exh 16) to simplify the interpretation of the Call data. PW31 Superintendent Paul Mumo on his part testified that the deceased's number (0733-xxxx) remained in use long after her death.
 57. Ahmed Mohammed Hassan (PW26) testified that Mohammed Ahmed Mohammed Hassan was his son. That Mohammed was admitted to Sindh Medical College in Karachi, Pakistan and stayed there from 1998 to 2011(13 years). It was his testimony that Mohammed never completed his medical degree and that he moved out from home. PW26 further testified that he last saw his son Mohammed on 28th July 2012 at around 11.00 a.m. when he came home to visit. That he learned from the TV and newspapers that an ambassador had been killed and his son was one of the suspects. He testified that he was informed by his wife that the police searched their house on 16th August 2012 and they later recorded a statement with CID. He finally stated that he had never seen Mohammed and did not know his whereabouts.
 58. PW27 Esther Wanja was an employee of CBA bank. On 28th July 2015 Mr. Katwa, Counsel for the 1st Accused made an objection that the testimony she was about to give violated the diplomatic immunity of the Venezuelan bank accounts and the actions of the 1st Accused under Article 22 of the Vienna Convention. Thus, PW27 did not give substantive testimony as she was stood down by the Court. PW35 later testified on the same subsequent to a ruling by the Court.
 59. An autopsy was conducted on the deceased by Dr. Johansen Oduor (PW28) who testified that he conducted an autopsy together with Dr. Andrew Gachie of Kenyatta National Hospital and Dr. Kizzy Shako on 28th July 2012 at Lee Funeral Home. They found the cause of death as asphyxia or lack of oxygen due to manual strangulation. PW28 also testified that they extracted samples being liver, stomach contents, kidney, blood and vaginal swabs to determine whether the deceased was under any influence of alcohol, drugs or had been raped.
 60. Julius Kipketer (PW29) was a security guard employed by KK Security Company and stationed at the Turkish Embassy, working alongside the 5th Accused, Kirui Chelogoi. He testified that in September 2012, the 5th Accused gave him a mobile phone as security for Kshs. 4,000/= loan. He stated that the phone was a black-coloured Blackberry, Curve 8520 (P.Exh19). That upon his arrest, he assisted the police trace the 5th Accused. PW29 further testified that he was arrested by plain-clothed police officers and taken to Gigiri Police Station. It was his testimony that after explaining how he got the phone, he was taken to their offices to trace the details of the 5th Accused.
 61. John Ngure (PW30) was an Advocate of the High Court of Kenya, practising under the firm of Ngure & Company Advocates. He testified that in June 2012, he was approached by one Mohammed Ahmed who requested for representation of some workers at the Venezuelan Embassy in respect of a sexual harassment case against Ambassador Gerardo. That while pushing for the filing of a case against



- Gerardo, Mohammed informed him that a lady ambassador was expected. He testified that he attended a meeting with Olga on 24th July 2012 to discuss staff issue and that later he wrote to the Ministry of Foreign Affairs on behalf of his clients seeking to have Gerardo charged for sexual harassment. That when these efforts bore no fruit, he opted to file a suit but never got an opportunity to do so because he did not receive any tangible information from the residence staff. PW30 further testified that he learned of Olga's death on 27th July 2012 when Mohammed called him and asked him to proceed to the residence because his clients the staff could be implicated. That he last saw and spoke with Mohammed on that date as his phone calls went unanswered the following day on 28th July 2012.
62. Government Analyst Joyce Wairimu Njoya (PW32) conducted toxicology examination on samples obtained from the deceased and received at the Government Chemist on 6th August 2012. They included stomach, liver and kidney as well as soda bottles and a Johnny Walker bottle. Upon analysis PW32 found no chemically toxic substances. Some 13 additional samples were examined by Government Analyst Anne Wangechi Nderitu, PW33. She found that the DNA profiles generated from the samples matched that of the deceased.
 63. Adam Ngurati Suleiman PW34 was a Civil Servant employed at the Ministry of Foreign Affairs as a protocol officer for 15 years. He testified that on 16th July 2012, they received a Note verbal from the Bolivarian Republic of Venezuela and another Note requesting for an Application form that was meant to be filled by the diplomat. It was his testimony that they received the completed form and processed immigration, work permits and diplomatic identification on 17th July 2012.
 64. PW34 testified further that on 28th July 2012, the Ministry of Foreign Affairs received a report about the murder of Olga, letters from CID in respect of the alleged murder, dated 3rd August 2012, waiving the 1st Accused's diplomatic immunity (P.Exh 28) and another dated 28th July 2012 (P.Exh 29) that acknowledged receipt of the letter cancelling the immunity of 1st Accused. It was his testimony that Mohammed was unknown to the Ministry of Foreign Affairs.
 65. Danson Wamburu Gitahi (PW35) was employed as a Retail Manager at the Commercial Bank of Africa (CBA), stationed at the Village Market branch. He testified regarding the various conflicting instructions that the Bank received from the Embassy on different dates requesting for change of bank signatories in respect of 5 accounts held by the Venezuelan Embassy. It was PW35's testimony that whenever there were conflicting instructions, the said bank account would be frozen until there was clarity from the client.
 66. Number xxxx Superintendent Peter Mungai (36) was a DCIO stationed at Gigiri and the investigating officer in this case. He testified that on 27th July 2012, at around 10.00 a.m. he received a report from the in-charge of the Diplomatic Police in Gigiri informing him that the Charge d'Affairs of Venezuela was missing. That they proceeded to the residence, searched the compound and talked to the workers who informed him that the Charge d'Affairs was drinking with Jennifer the 2nd Secretary and her husband at the veranda the previous night. That PW36 walked around the compound and noticed a disturbance on the Kei-Apple hedge near the swimming pool machine room together with mud at the swimming pool.
 67. PW36 testified that he climbed a ladder and saw the deceased lying on her bed with a wire cord around her neck, hands and legs. That at that time, one of workers stated that they had received a text in Spanish from the deceased's mobile phone at 9.00 a.m. PW36 also stated that when they entered the house, they found a trail of drying liquid on the floor from the entrance up the stairs to the first floor towards the bedroom. He saw a pair of pliers (P.Exh35) in the bedroom and observed that the kitchen door that led to the staff quarters was not locked.



68. PW36 testified that the scene of crime officers came and dusted the house for fingerprints and then he took the body to Lee Funeral Home for a post-mortem. That he collected samples for investigation contained in (P.Exh39) and questioned the workers where amongst other things, he learned that Mohammed was originally friends with the former ambassador Gerardo and that the workers believed that he was an administrator from the Ministry of Foreign Affairs because he kept the books of accounts and at times paid their salaries.
69. It was PW36's testimony that from the investigations, a lot of matters revolved around the said Mohammed and Dwight 1st Accused. That they proceeded to the 1st Accused's house to arrest Mohammed on the material day in vain. They also questioned the staff at the Embassy who revealed that there were big differences between the two (Dwight 1st Accused and the deceased).
70. It was his further testimony, that when he reviewed the Jomo Kenyatta International Airport (JKIA) Pass (P.Exh40), he noted that Mohammed was present at the VIP Lounge on 15th July 2012 at 2100hrs. That they discovered that Mohammed was neither an employee of the Ministry of Foreign Affairs nor of the Venezuelan Embassy. He stated that the immunity of the 1st Accused was waived by his country thus leading to his arrest and was subsequently being charged alongside others with the offence of murder of Olga Fonseca Jimenez.
71. PW36 testified that 5 other suspects were arrested by the DCIO office in Nairobi in relation to the murder and a warrant of arrest was issued for Mohammed Ahmed Mohammed Hassan. Upon arrest, they recorded the statements, statements of inquiry and confession statements from the suspects.
72. It was PW36's testimony that the 5th Accused was arrested because he was found in possession of the deceased's mobile phone one Blackberry serial Number xxxxx (P.Exh19) which was said to be active even after her death. That the 5th Accused claimed to have picked the phone on the roadside along Limuru Road on 27th July 2012 at around 6.00 a.m. PW36 further testified that the mobile phone could not be opened because it had a password.
73. PW36 further testified that they requested for call data from Cybercrime Unit, which was presented in the form of a Communication Link Chart (P.Exh16). That from the Logs, Alex Sifuma 3rd Accused, had contacted Mohammed 11 times on 27th July 2012 between 1313hrs and 2200hrs.
74. Number xxxx Corporal Lukas Juma (PW37) was one of the investigating officers who was stationed at DCI Gigiri. He testified that on 27th July 2012 a report was received at the Diplomatic Police Station from the 2nd and 3rd Secretaries of the Venezuelan Embassy concerning the death of Olga Fonseca. That alongside DCIO Mungai and others, they went to the residence where they found the ambassador lying on the bed with her legs tied with an electrical wire (P.Exh34).
75. PW37 testified that he interviewed embassy staff and recorded their statements including the 1st and 2nd Secretaries. That they unsuccessfully tried to trace Mohammed through his phone numbers. It was his testimony that he was the one who escorted the 1st Accused to Thika Level 5 Hospital for a mental assessment and later escorted the 2nd, 3rd and 5th Accused for a similar assessment by the Police Surgeon. It was his testimony that they were all found to be mentally fit to stand trial for murder as demonstrated by their mental assessment reports (P.Exh 42 [a], [b], [c] and [d]). That from the evidence gathered during the investigations, all the accused persons were found to have participated in the murder Olga Fonseca, in one way or another.



The Defence Case

76. At the close of the Prosecution's case, all the Accused persons were placed on their defence. The defence hearing started on 8th December 2020 with the defence of the 2nd Accused as Mr. Katwa the learned Defence Counsel for the 1st Accused was in another court and was keen to conduct the defence himself. The order of defences therefore changed as follows:- 2nd Accused-Ahmed Mujivane Omido, 3rd Accused – Alex Sifuma Wanyonyi, 1st Accused – Dwight Sagaray, 4th Accused – Moses Kiprotich Kalya and 5th Accused – Kipng'eno Kirui Chelogoi as DW1, DW2, DW3, DW4 and DW5 respectively.

Ahmed Mujivane Omido – 2nd Accused (DW1)

77. Ahmed Mujivane Omido 2nd Accused, gave sworn testimony as DW1. He stated that he was a businessman operating his family's real estate business as a manager and lived in Nairobi West. In his testimony, Ahmed Mujivane stated that he had never met nor communicated with the Venezuelan ambassador and that he only knew Mohammed as they had met at a Mosque in Nairobi West where they worshipped together and that Mohammed would be driven in a car with diplomatic number plates. Ahmed testified that he met Alex Sifuma Wanyonyi (3rd Accused) through a mutual friend called Majjid, a Ugandan motor vehicle spare parts dealer, who requested him to assist the 3rd Accused to get a job. That he met Moses Kalya (4th Accused) when he came to him with Alex (3rd Accused). That he did not know Kipng'eno Kirui Chelogoi (5th Accused) as they only met in court.
78. Ahmed testified that he believed that Mohammed was a diplomat and so he approached him on behalf of Alex (3rd Accused) to get him a job. He further testified that on 26th/27th July 2012, he was at home with his father Hassan Ali Mugongo Omido but could not call him to confirm the same because he passed away on 18th July 2019 as evidenced by the death certificate produced as DEX1. That he had never been to the ambassador's residence except during the scene visit by the Court.
79. He further testified that he was summoned by the DCIO Langata concerning the murder of the Venezuelan ambassador, where he presented himself for questioning and was then transferred to Nairobi Area. That during the questioning at Lang'ata Police Station, the DCIO requested to conduct a search of his house which was done in the presence of his father who was also interrogated. Ahmed told the Court that, prior to his arrest, he had never been charged with any offence and had fully cooperated with the police in this matter. He stated that he was unaware of the charges he was facing.
80. Ahmed Mujivane denied knowledge of any cash paid to anyone for whatever reason, that his two phones Nokia and Ideos with sim card numbers 0722-xxxx and 0722-xxxx were confiscated and no evidence was presented to show that he had received any money or made any phone calls to any the other Accused. That the said phones were never presented in Court as exhibits and never returned to him. It was his final testimony that he never participated in the murder and had no reason to. Further that Mohammed did not hire him and he had no relationship with Mohammed to even discuss such a scheme.

Alex Sifuma Wanyonyi – 3rd Accused (DW2)

81. Alex Sifuma Wanyonyi (3rd Accused) gave sworn testimony in his defence as DW2. He stated that he had a hardware business and lived along Kangundo Road. He said that he was arrested on 31st October 2012 alongside Moses Kiprotich Kalya (4th Accused) at the CBD Yala Towers, in a shop, and was informed that he was a suspect in this murder case. He said that they were beaten and driven to Nairobi Area where they were told to record a statement so that the matter could come to an end. He said that he did not know his statement would be used in court and therefore he did not want to rely on it.



82. Alex testified that he knew Ahmed Mujivane (2nd Accused) through a mutual friend Majjid, a spare parts dealer whom he had requested to assist him to get a job. He stated that he shared with his friend Moses (4th Accused) that Ahmed (2nd Accused) had informed him that a job opportunity had arisen at the Venezuelan Embassy and so Moses Kalya accompanied him to drop his CV for the clerical job that he was applying for. That later, upon his release on bail, he managed to get a job as an accounts manager for African Cotton Industries Limited from 5th December 2014 where he worked until he started a hardware business.
83. It was Alex Sifuma's testimony that Ahmed Mujivane introduced him to a man who had a car with diplomatic number plates and who claimed to work at the Venezuelan embassy and could therefore assist him get a job. That the said man (Mohammed) introduced himself as 'Ahmed' at which point they exchanged numbers for ease of communication on the job opportunity at the Embassy. Alex said that the man only called him once to accompany him to the Embassy. However, the Embassy visit never took place despite Alex's numerous follow-up phone calls to the said Ahmed (Mohammed).
84. It was his final testimony that he had never been to the Venezuelan Embassy, did not know the ambassador and that to date, he had not spoken to Ahmed (Mohammed). Further, he testified that the phone records produced in Court did not show any communication between him and the said Ahmed.

Dwight Asdrubal Sagaray Covault – 1st Accused (DW3)

85. Dwight Asdrubal Sagaray Covault (1st Accused) testified under oath as DW3. He stated that he first came to Kenya in 2010 as a 1st Secretary for the Venezuelan Embassy. That at present, he lived in Runda with Bishop Richard Kimwele and his family who stood surety for him in this case. He testified that he took over from Mr. Gerardo Alexis Carillo Silva and was later on succeeded by ambassador Olga Fonseca, the deceased in this case.
86. Dwight testified that only his diplomatic passport was cancelled and not his diplomatic status and that he was still entitled to diplomatic privileges and obligations. He stated that he was therefore precluded from giving information that would amount to treason in his country. He also contended that the cancellation of his diplomatic passport was not done procedurally.
87. Dwight stated that none of the Prosecution witnesses saw him at the ambassador's residence on the material day. That there was no forensic evidence linking him to the crime and that even the Confession statement adduced in evidence did not make a mention of him. That he was only arraigned in Court because of his association with Mohammed and that he had nothing against Olga because he introduced her to the staff and workers and asked them to assist her. That this was confirmed by the Prosecution witnesses in their testimonies.
88. On the issue of the conflicting bank instructions, Dwight admitted writing to the bank because there were procedures that were to be followed which he wanted to abide by. He cited the issue of obtaining a diplomatic Identity card and PIN for Olga which was yet to be done before she could become a bank signatory. He testified that he was the one who picked Olga from the airport because the 2nd Secretary and the Protocol Office were unwilling to do so. He stated that he opted to take Olga to the Tribe Hotel upon her arrival because he was concerned for her security as the workers at the residence had issues relating to sexual harassment claims against the former ambassador Gerardo. In addition, that there were issues with the tenancy which he needed to resolve.



89. Dwight stated that he had never met any of the other Accused before they were brought to Court and therefore could not have had any criminal enterprise with them. Further that he was not fighting Olga to be the head of the mission and thus had no reason to kill her.
90. With respect to the Embassy vehicles, Sagaray testified that the official vehicle was for use by the Head of the Mission and that he never gave Mohammed the official car but that he (Mohammed) would only ride in it if he (Sagaray) was using it. He stated that Mohammed and Jennifer the 2nd Secretary were friends and that Jennifer sold her car immediately Sagaray was arrested.
91. Regarding the material date, Sagaray testified that on the 26th July 2012 at around 4.00 or 5.00 p.m., he went to see a doctor at the Sarit Centre and left for Parklands Campus at around 7.00 p.m. At 8.00 p.m. he went back home where he slept until the following morning on 27th July 2012 when he received news that Olga had been killed. He also testified that he voluntarily informed the police of his whereabouts.
92. Dwight Sagaray stated that he knew Mohammed whom he first met at a Saudi Arabia National Day and later at the Brazilian and Egyptian National Days. That Mohammed introduced himself as a diplomat of Kenya to Pakistan but was in transition to another position. He added that Mohammed would hang around the Embassy even before he became 1st Secretary, that he (Mohammed) knew officers at the Foreign Affairs, had taken pictures with high profile people and knew Pakistani Officials and therefore it was easy to believe that he was a diplomat. Dwight further testified that though Mohammed had his own family where he lived, he would occasionally stay in his (Dwight's) house as his clothes and documents were there.
93. Lastly, Dwight testified that there were no discussions between himself and Mohammed to kill Olga and that he had nothing to do with the murder since he wasn't there on the material day.

Moses Kiprotich Kalya – 4th Accused (DW4)

94. Moses Kiprotich Kalya (4th Accused) gave his sworn testimony as DW4. He stated that he was a politician and a farmer who lived in Kasarani. That he was a former police officer for about 14 years, where he served in the General Service Unit Recce Squad and was set to join the US Marine in January 2013 but for this trial.
95. Moses Kalya testified that he was arrested on 31st October 2012 at Yala Towers on Biashara Street alongside Alex Sifuma (3rd Accused) where he had gone to purchase clothes for his son. That he was then taken to Nairobi Area where one Chief Inspector Mang'era kicked him. He stated that he was then moved to Gigiri while his friend Alex (3rd Accused) was taken to Kasarani. That his friend brought an advocate named Evans Ondieki who advised him that he should not write any statement in his absence.
96. Moses (4th Accused) referred to a Statement dated 1st November 2012 attributed to him and denied recording it in Gigiri. He stated that he only saw the Statement when it was presented in Court. That he only saw Sergeant Njeru in Gigiri who later escorted him to CID Headquarters alongside C.I. Juma to be seen by a doctor. He stated that he was later, escorted by Sergeant Njeru and PC Kirui to C.I. Anne Gitahi at Parklands Police Station but denied recording any Statement. He pointed out that his ID Number did not appear on the Statement. He also denied signing any confession statement and was unaware of its origin, that no caution had been issued and that his wife was not present during the said session.
97. Moses Kalya also stated that his mobile number was 0721-xxxxx and that the numbers 0722-xxxx and 0750-xxxxx did not belong to him. He stated that he met Alex Sifuma (3rd Accused) in town when he (Alex) was handing over his CV to a man in a car and that he did not give any details of any meeting



in Muthaiga. He denied knowing Mohammed and Olga and also that he did not know the location of the Venezuelan residence. Finally, he testified that no handwriting expert had been called by the Prosecution to confirm whether the signatures on the confession statement belonged to him.

Kirui Kipng'eno Chelogoi – 5th Accused (DW5)

98. Kirui Kipng'eno Chelogoi (5th Accused) testified under oath as DW5. He testified that before the case, he lived in Nairobi Mathare Area 3 and was first employed in September 2009 as a KK Security guard deployed to the Turkish Embassy. He said that he understood that he was arrested in connection with the murder of Olga because of the mobile phone that was found in his possession.
99. Kipng'eno Chelogoi testified that some time towards the end of July 2012, he left work between 5.00 a.m. and 6.00 a.m. That while walking along Limuru Road, he heard a phone ring, picked it and boarded a matatu (public transport) home. It was his testimony that he had hoped the owner would call but by the time he woke up at 1.00 p.m. to prepare for work, no one had called. He stated that he opened the phone and discovered that there was no SIM card inside and that what he thought was a phone call was actually an alarm. He therefore kept the phone in his house for about 2-3 months.
100. It was Chelogoi's testimony that after a while he used the phone as security for Kshs. 4,000/= which he borrowed from a friend named Julius (PW29) to enable him seek medical attention. That he was later deployed to the Norwegian Embassy around 1st November 2012 then proceeded on leave. Chelogoi testified that on 22nd November 2012 at around 11.00 a.m. he was summoned by his area chief to go to the office where he found police officers who arrested him and told that he had killed the Venezuelan ambassador and taken her phone.
101. Chelogoi stated that he did not know where the Venezuelan Embassy was until after the scene visit by the Court. He said that the Safaricom data presented before the Court did not have his mobile number which was 0715-xxxx. That he could not have used the phone as he did not know how to speak or write in Spanish. He contended that he was unable to call a witness to corroborate his story because his former employer KK Security had discarded his file and was unwilling to assist him. It was his final testimony that had he known that the phone was used in a crime, he would never have picked it. He also stated that he neither knew the ambassador nor the persons who killed her.

Issues for Determination

102. From the evidence now on Record and which I have sent out in extenso, the parties' respective submissions which I have read, the main issue for my determination in this case is whether the Prosecution proved the charge of murder against each Accused to the required legal standard. To determine this, I have isolated the following issues: -
 - i. Whether the 1st Accused enjoyed diplomatic immunity against the present proceedings.
 - ii. Whether the death of the deceased and cause thereof was proved.
 - iii. Whether the Prosecution proved motive on the part of the 1st Accused.
 - iv. Whether the Confession Statement of the 4th Accused Moses Kiprotich Kalya was properly admitted by the Court and whether it links the Accused persons to the offence.
 - v. Whether the five Accused were positively identified as the persons who caused the unlawful death of the deceased and acted with common intention.
 - vi. Whether the five Accused persons acted with malice aforethought.



Analysis

I. Whether the 1st accused dwight sagaray enjoyed diplomatic immunity against the present proceedings

Vienna Convention and Diplomatic Immunity

103. The diplomatic status of Dwight Sagaray (1st Accused) was raised as a preliminary issue and kept popping up throughout the trial. Learnerd Counsel for the 1st Accused, Mr. Katwa argued that the Court lacked jurisdiction to try him as an accused in this case as he was a diplomat and his diplomatic status had neither been waived nor lifted by his government. He contended that only Dwight's diplomatic passport was cancelled and not his diplomatic status and therefore he was still entitled to diplomatic privileges and obligations. During his defence, Dwight Sagaray told the Court that he was precluded from giving information arising from his duties as the same would amount to treason under a recent law passed in his Country. He faulted the manner in which his diplomatic passport was cancelled stating that it was unprocedural.
104. The Prosecution on the other hand argued that the diplomatic status of the 1st Accused had ceased to exist. The Prosecution called one Adam Ngurati Suleiman, PW34, who was a Protocol Officer at the Ministry of Foreign Affairs. He testified that on 28th July 2012, the Ministry received a report concerning the murder of Olga Jimenez. That subsequently, they received a letter dated 3rd August 2012 (P.Exh28), waiving the 1st Accused's diplomatic immunity and another dated 28th July 2012 (P.Exh29) that acknowledged receipt of the letter cancelling the diplomatic immunity of 1st Accused. With regard to Mohammed, PW34 testified that he was unknown to the Ministry of Foreign Affairs.
105. It is imperative at this stage to revisit the law on diplomatic immunity. According to the UN Charter (1945), Article 2 paragraph 1, the Doctrine of Immunity is premised on the principle of sovereignty of states and is imperative in the advancement of world order. The Doctrine of Jurisdictional Immunity of States connotes that each State is prevented from addressing or deciding a claim brought before its National courts against another State. In summary, immunity creates an exception to sovereign authority over the people and property within a State's territory. [See Hazel Fox, 'The Law of State Immunity', (Oxford University Press, 2002, 2nd Paperback edn. 2004)]
106. The Vienna Convention on Diplomatic Relations (1961) [(Vienna Convention)] under Article 1(e) defines a diplomatic agent as, 'the head of the mission or a member of the diplomatic staff of the mission'.
107. The Convention further provides the following guidelines that are pertinent to this present case on the issue of immunity and its waiver or termination.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - a. -
 - b. -
 - c. -
2. A diplomatic agent is not obliged to give evidence as a witness.



3. -
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.
2. Waiver must always be express.
3. -
4. -

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. –

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Article 43

The function of a diplomatic agent comes to an end, inter alia:

- a. On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
- b. On notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.

108. In Kenya, the Vienna Convention is ratified and domesticated by The *Privileges and Immunities Act*, Cap 179 Laws of Kenya. In particular, section 4 provides:

Application of Convention



1. Subject to section 15, the Articles set out in the First Schedule to this Act (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in Kenya and shall for that purpose be construed in accordance with the following provisions of this section.
2. For the purposes of Article 32 a waiver by the head of the mission of a State or a person for the time being performing his functions shall be deemed to be a waiver by that State.
3. Articles 35, 36 and 40 shall be construed as granting any immunity or privilege which they require to be granted.
4. The references in Articles 37 and 38 to the extent to which immunities and privileges are admitted by the receiving state and to additional immunities and privileges that may be granted by the receiving state shall be construed as referring respectively to the extent to which any immunities or privileges are specified by the Minister by order and to any additional immunities and privileges that may be so specified.
5. In its application to the immunity granted by paragraphs (2), (3) and (4) of Article 37 of the First Schedule the expression “permanently resident” in Article 38 of that Schedule shall be deemed to extend to an individual other than one who is resident in Kenya solely for the purpose of performing the duties of his office for a mission.

109. The above provisions were articulated by the Court of Appeal of Kenya in *Unicom Limited vs. Ghana High Commission* [2016] eKLR) where the learned judges stated thus:-

“16. That is not to say that the doctrine of sovereign and diplomatic immunity does not apply to Kenya. It does. Section 4 of The *Privileges and Immunities Act*, Chapter 179 of the Laws of Kenya on which the lower court relied gives the force of law in Kenya to certain Articles of the Vienna Convention on Diplomatic Relations signed in 1961 and the Vienna Convention on Consular Relations signed in 1963. Under those conventions, immunities and privileges are accorded to diplomatic missions or consular posts and to persons connected with such missions or posts.”

110. From the above legal provisions, it is evident that a person is clothed with diplomatic status upon introduction by his sending State to the receiving State, at which point, the receiving State grants the person diplomatic immunity by issuing them with a diplomatic identity card. Notably, diplomatic immunity extends to acts that were committed by a person while he or she was conducting themselves in their official capacity, even after they cease to hold diplomatic status and as such, no action can arise against them in that respect. This is founded on the classic diplomatic immunity theory discussed in the case of *Fernandez vs. Fernandez* 545 A. 2d 1036, 1044 (Conn.1988) where diplomatic immunity meant that the diplomat was symbolically on the soil of the land that sent him wherever he went and thus was extraterritorially immune.
111. Diplomatic status therefore subsists during the period of assignment and is only lifted or becomes non-existent under the following circumstances:



- i. When the sending state declares them (the diplomat) persona non grata or when their functions are thus terminated. This is provided for under Article 9 (1) of the Convention which states thus:-
 1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
 - ii. When the period of the assignment expires or comes to an end. (Article 39[2]).
 - iii. When it is waived by the sending State in accordance with Article 32 of the Convention.
 - iv. When the diplomat conducts himself and commits acts that are outside his official duties and functions as stated by Article 38 (1).
 - v. When the receiving State refuses to recognize them as a member of the mission thus not granting them diplomatic immunity. (Article 9 [2])
112. I have considered existing jurisprudence on diplomatic immunity. In earlier decisions, the position was that diplomatic immunity was all encompassing and a diplomat who enjoyed diplomatic immunity could not under any circumstances be prosecuted or sued regardless of the conduct in question. This position is illustrated in the case of *Brzak vs. United Nations* 597 F.3d. 107, 109-10 (2d Cir. 2010) where the Plaintiff brought a sexual assault claim against the then High Commissioner for the United Nations High Commission for Refugees. The court held that:-
- “...That American courts must dismiss a suit against anyone who is entitled to immunity under..... the (Vienna Convention).”
113. It was the reasoning of the court that when determining whether a defendant was immune, the court must do so without giving weight to the underlying conduct that actually occurred, whether it was wrongful or not.
114. In the case of *Tachiona vs. United States*, 386 F.3d 205 (2d Cir. 2004), it was held that diplomatic agents were still cloaked with immunity even though the actions which related to the claim occurred before the diplomatic appointment.
115. In the case of *Gonzalez Paredes Vivila vs. Vila* 479 F.Supp. 2d 187, 195 (D.D.C. 2007), the American courts distinguished between the application of the doctrine of immunity in civil and criminal disputes. An action was brought against Argentinian Diplomats for the violation of wage laws, breach of contract and unjust enrichment. Despite empathizing with Gonzalez and those in her similar position who were left without recourse, the court held that the diplomats were immune under Article 31 of the Vienna Convention.
116. The practise has since evolved from these decisions as illustrated in the case of *Swarna vs. Al-Awadi* 622 F.3d at 140. Swarna who was an Indian national was employed as a leave-in domestic worker in the home of Al-Awadi who was a Third Secretary to the Permanent Mission of the State of Kuwait to the United Nations. She alleged that she was stripped off her passport, was overworked, underpaid, abused, assaulted and repeatedly raped for 4 years. The Court held that even though Al-Awadi was



undisputedly a diplomat, Article 39 (2) of the Vienna Convention did not immunize acts incidental to the function as a member of a diplomatic mission and that his actions towards Swarna were not included in his official acts as a diplomat. Therefore, the Vienna Convention did not bar Swarna's claims.

117. The above case laws posit that where matters are of a criminal nature involving diplomats and occurring in the course of their governmental or official capacities, they are clothed with diplomatic immunity and no action can arise against them. However, where the said criminal acts occur during their private engagements and not in their official diplomatic capacities when conducting official duties, they may be prosecuted because those acts are not protected by diplomatic immunity. Similarly, in civil and administrative actions, diplomats are protected by diplomatic immunity save for instances such as those outlined under Article 31 (1) (a)- (c). Hence the test is the capacity in which they act.
118. It follows then and as demonstrated by the jurisprudence above, that the Doctrine of Diplomatic Immunity is not an open cheque for those enjoying this privilege because absolute sovereign immunity does not exist. The extent to which such immunity is applicable is a question of fact.
119. The Application of restrictive immunity was buttressed in the Kenyan Court of Appeal decision in *Ministry of Defence of the Government of the United Kingdom vs. Joel Ndegwa* (1983) eKLR where it was held thus:-

“...it is apparent that there is no absolute sovereign immunity. It is restrictive. The test is whether the foreign sovereign or government was acting in a governmental or private capacity, then the doctrine will apply otherwise it will not afford protection to a private transaction. The nature of the act is therefore, important...”

120. In another case, *BAH vs. Libyan Embassy* 2006 (1 BLR 22 [IC]), Botswana (Labour) court was asked to determine whether employment and labour suits could be brought against an embassy which was said to be diplomatically immune. It was held:-

“...the doctrine of absolute immunity that was previously applicable in international law is no more. Days passed when absolute immunity reigned supreme, a sovereign state was immuned irrespective of the nature of the activities which gave rise to the suit against the foreign sovereign state. The notion of sovereign immunity can safely be regarded as dead and buried, it is offensive to modern thinking and has now given way to restrictive immunity....”

121. Similarly, in the case of *Rahimtoolah vs. Nizam of Hyderabad & Another* (1958) AC 379, Denning MR stated as follows:-

“It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it and his independence is better ensured by accepting the decisions of the court of acknowledged impartiality than by arbitrarily rejecting jurisdiction....”

122. In the United States Supreme Court, the learned Bench in the case of *Saudi Arabia vs. Nelson*, (507 US 349-Supreme Court 1993), held thus:-

“..... under the restrictive, as to the ‘absolute’ theory of foreign sovereign immunity, a state is immuned from the jurisdiction of foreign courts as to its sovereign of public acts in (jure imperii), but not as to those that are private or commercial in nature (jure gestionis)....”



123. Guided by the jurisprudence above, I now review the relevant evidence in the present case to determine whether Dwight Sagaray (1st Accused) was immune from the present proceedings. The Investigating Officer, Rtd. Supt. Peter Mungai (PW36) in his examination-in-chief produced a letter dated 28th July 2012 from the Ministry of Foreign Affairs addressed to the Police Commissioner (P.Exh 41) which stated that the 1st Accused no longer enjoyed diplomatic immunity with effect from 27th July 2012. The said letter was accompanied by another letter (Note Verbal) from the Ministry of the Popular Power For Foreign Relations of Venezuela referenced I.DD.3-No. 181 which notified the Ministry of Foreign Affairs of the cancellation of diplomatic passport numbers xxxx/2005 and xxxx/2010 assigned to the Minister Counsellor Gerardo Alexis Carrillo Silva and First Secretary Dwight Sagaray (1st Accused) respectively. The annexed letter from Venezuela further stated that the two had ceased from acting in their official capacities.
124. Counsel submitted on behalf of 1st Accused that he was a diplomat and that he enjoyed diplomatic immunity. That the fact that Dwight's passport was recalled back to Venezuela did not amount to revocation of his diplomatic status and that he could not be subjected to any trial before his diplomatic status had been formally waived. He further submitted that Kenya had ratified the Vienna Convention on Diplomatic Relations 1961 and Vienna Convention on Consular Relations 1963. That the Embassy of Venezuela in Nairobi served both as the diplomatic and consular office and that in the circumstances, the Vienna Convention on Diplomatic Relations '1961 applied. It was Counsel's further submission that the evidence that Dwight's Passport had been recalled or cancelled did not lift his diplomatic immunity.
125. From the above, it is clear that there was express communication between the two Ministries to the effect that the 1st Accused no longer held an official diplomatic capacity and had been relieved off his duties as First Secretary by his sending home country, Venezuela. It follows then and in accordance with Article 43 (a) of the Vienna Convention, that his function had ceased and he could no longer be a diplomat so he could no longer enjoy diplomatic powers and privileges including immunity. His immunity was therefore not waived but ceased to exist the moment his official duties and position were terminated by his government. As the case law I have painstakingly reviewed has shown, diplomatic immunity was no longer a bar to prosecution where a diplomat engaged in criminal acts outside their official duties.
126. It is therefore the finding of this Court that Dwight Sagaray (1st Accused) was properly arraigned before the court to face trial alongside his co-accused as he no longer enjoyed diplomatic immunity.

II. Whether the death of the deceased and the cause thereof was proved.

127. The offence of murder is provided for under section 203 of the Penal Code as follows:-

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

128. Lord Kenyon C.J. in *Fowler vs. Padget* (1798) 7 T.T. at, 514 stated that, “To constitute a crime, there must, as a rule, be both a guilty mind and a criminal act.”



Similarly, Odgers in 'The Common Law of England', (2nd Edn. Smith and Maxwell Ltd, 1920) p.106 stated as follows:-

“Every common law crime consists of two elements: first, the voluntary commission of an act which is declared by the law to be criminal; second, the existence in the offender of a state of mind which is declared by law to be consistent with criminality.”

The intent and the act must concur to constitute the crime.

129. Simply put, the offence of murder is comprised of actus reus (the act itself) and mens rea (the criminal mind or intention). The actus reus in this case is the unlawful taking of another's life. Mens rea on the other hand denotes malice aforethought which is a condition of the mind in which one unlawfully and voluntarily does a serious bodily injury to another. [see State vs. Wetter, 11 Idaho 433, 83 Pac. 341, 346 (1905)].

130. In Halsbury's Laws of England, 'Criminal Law', (Volume 25 (2020) at paras 1–552 and Volume 26 (2020), paras 553–1014), the elements of murder are outlined at paragraph 129, as follows:-

“To establish a case of murder, the prosecution must prove:

- i. That the unlawful death of the victim was caused by an act or omission of the defendant.
- ii. That the defendant did that act or omitted to act with malice aforethought, express or implied.”

131. In the case of Johnson Njue Peter vs. Republic (2015) eKLR, the Court of Appeal of Kenya listed the three elements that must be proven to sustain a charge of murder as follows:-

- i. The death of the deceased and the cause of that death.
- ii. That the accused committed the unlawful act which caused the death of the deceased.
- iii. That the accused had the malice aforethought.

(see also the Nigerian case of Ogunleye Tobi vs. the State, LER [2019] SC. 714/2017).

132. For the offence of murder to be proven, like any criminal offence, the onerous task of proof falls on the Prosecution. This burden of proof by the Prosecution was aptly explained by Fidelis Nwadialo, 'Modern Nigerian Law of Evidence', University of Lagos Press, Lagos (1999) 379 as follows:-

“The term burden of proof is used in two different senses. In the first sense, it means the burden of obligation to establish a case. This is the obligation which lies on a party to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitute his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact or issue. This evidence, in some cases must be sufficient to prove the fact or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called evidential burden. This is the sense in which the expression is more generally used.”



133. The burden of proof lies squarely on the Prosecution. In the celebrated case of Woolmington vs. DPP (1935) AC 462, 25 Cr App Rep 72, HL, Viscount Sankey L.C held thus:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

134. The law also provides for situations where there are multiple accused persons and where such persons may be deemed to have played different roles in the commission of the offence as in the present case.

135. Section 20 of the Penal Code Cap 63 explains a principal actor, an aider and abettor as follows: -

“1. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

- a. Every person who actually does the act or makes the omission which constitutes the offence;
- b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- c. Every person who aides or abets another person in committing the offence;;
- d. Any person who cancels or procures any other person to commit the offence.

and in the last mentioned case, he may be charged either with committing the offence or with counselling or procuring its commission.

2. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
3. Any person who procures another to do or omit to do an act of such a nature, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or made the omission, and he may be charged with doing the act or making the omission.”

136. In determining culpability where there are multiple accused, the court must inquire whether there was common intention in the execution of the offence as provided for under Section 21 of the Penal Code of Kenya.

137. Having stated the law and the principles, I now move to consider whether or not the ingredients of the offence were proven to the required legal standard.



Context of the Case

138. The Embassy of Venezuela in Kenya was located at Gigiri while the official residence was located in Runda Estate, House No. 317 on LR No 7785/317. From the evidence on Record, the Embassy had had 4 different people as heads of the mission since 2008. They were Jackline Mendoza (2008), Gerardo Carillo Silva (2009), Dwight Sagaray – 1st Accused (in acting capacity from June 2012) and Olga Fonseca – the deceased (from July 2012 till her death). The Embassy had other diplomatic staff namely Jennifer Schell, Melissa Herenia Calor Mendez (2nd and 3rd Secretaries respectively) and Jose Reyes the Embassy administrator/accountant. At the Embassy were other local staff members, amongst them, a secretary (PW13), drivers (PW1 & PW2), IT Officer (PW16), cleaner (PW17) and gardeners.
139. The Embassy residence had domestic staff who resided in the servants quarters. They were 1 driver (PW1 Francis Mwangi as the official driver), two housekeepers (PW9 Zipporah Ikhola & PW10 Angelina Mwelemi) and a cook (PW15 Peter Mbusi). There was also a gardener (PW3 Julius Marigu) and guards from Securex Company who did not reside at the residence. The Embassy residence was leased, and the lessor was a real-estate company (JNMH Holdings Ltd) owned by one Alice Muthama (PW14) and Johnstone Muthama (PW22).
140. A vivid description of the Embassy residence was given by PW8 John Ogutu, the head of operations at Securex, in his Report dated 30th July 2012 (P.Exh7). The Embassy residence comprised of a main house and the 3-roomed staff quarters which was detached from the main house. The only point of entry into the compound was one - the main gate which was about 50 metres from the main house. The main house could be accessed from the front main door and the rear door which led to the kitchen. Both doors comprised of wooden and metallic doors. There were three bedrooms upstairs: one for the ambassador, another which was used by the former ambassador's daughter and a third room. There was also a shed at the rear side of the compound with a swimming pool. The compound was surrounded by a Kei-Apple fence with an electric barbed-wire chain link which was said to be faulty or poorly maintained. The live fence (Kei-Apple) was easily penetrable because it was not dense (thick) and the electric fence had also been neglected. There were two dogs within the compound. According to the evidence of PW8, the KK Securex company provided security services which entailed two guards on night duty and one on day duty. One of the guards was expected to be at the gate at all times while the other patrolled the compound. There were no CCTV cameras. There was also an alarm system which had once triggered itself indicating that it was faulty. The response time for the Security Company was averagely 5-7 minutes.
141. The Court acceded to the request by Counsel for the 2nd, 3rd and 4th Accused to undertake a scene visit. In justifying the scene visit, Defence Counsel stated that they wanted the Court to appreciate the lay out of the Embassy residence and particularly the distances mentioned by the witnesses in their testimony. They also wished to cross-examine the investigating officer at the scene. The Prosecution, while not objecting to the scene visit, notified the Court that the tenancy of the residence had changed and owing to passage of time, the layout may also have changed.
142. The scene visit was made on 5/12/2018 when the Investigating Officer No. xxxx Supt. Peter Mungai who had been stood down resumed his testimony. The Court observed that the Embassy residence had a main gate and a sentry box at the front. The main house faced the gate while the swimming pool was positioned at the rear. PW36 pointed out that, the fence, which by the time of scene visit partly had a perimeter fence, previously had a barbed wire and Kei-Apple live fence. He pointed out the place where he had noticed that the fence had been cut and where in his view, the murderers may have escaped through. The Court also noted that the servants' quarters was about 20 metres away from the main house and the doors were at the rear part. PW36 showed the Court the veranda where the



deceased, Jennifer and Miguel were said to have been drinking on the fateful evening as well as the stairs leading to the deceased's bedroom where he had noted a trail of some liquid. Though the house was undergoing renovation, it was the observation of the Investigating officer that the basic structure and layout was still the same.

143. The Court observed that the rear part of the house and the swimming pool were not visible from the sentry box at the gate. The Court also observed that what the cross-examination of PW36 yielded was a confirmation of what the witnesses had said in respect of the layout of the Embassy residence.
144. The above is the description of the Embassy residence where the ambassador met her death.

The Death of the deceased and the cause thereof

145. The Venezuelan ambassador Olga Fonseca arrived in Kenya on 15th July 2012 as stated by PW1, Francis Mwangi who picked her from the airport and as confirmed by the 1st Accused Dwight Sagaray in his defence. The Embassy residence staff PW9 Zipporah Ikhola, PW10 Angelina Mwelemi and PW15 Peter Gisienya Busi retired on the evening of 26th July 2012 at around 9.00/10.00 p.m. leaving Olga in the company of Jennifer and her husband Miguel, seated at the veranda having drinks. She was found dead in her bedroom on the morning of 27th July 2012. The Residence gardener Julius Marigu (PW3) told the Court that he reported for duty at about 7.30 a.m. and rang the bell. When he got no response, he went to the rear of the house and upon peeping from the balcony, saw the ambassador lying on the bed. The discovery of the body of the ambassador led to frantic activity as police were called in.
146. PW19 Stephen K. Kemboi the CID Forensics Officer testified that he found the deceased's body lying on her bed with the neck and legs tied with an electronic cable. He stated that there were skid marks that indicated that something had been pulled from the corridor to the bedroom. It was his testimony that while the main door was undisturbed, the kitchen door was actually disturbed and that the locking piece of the metallic kitchen door was twisted. That the wooden door was unlocked but had no key.
147. In his further testimony, PW19 testified that the electric wire on the perimeter fence had been cut and that there were shoe marks inside the compound and outside the fence. He processed the scene and took photographs which he produced as P.Exh 2(a) (1-24).
148. PW36 Supt. Peter Mungai the investigating officer testified that he found a trail of dry liquid on the floor from the entrance up the stairs to the first floor towards the bedroom. He testified that he also saw the deceased lying on her bed with a wire cord around her neck, hands and legs.
149. The autopsy on the deceased was conducted by Dr. Johansen Oduor (PW28), the government pathologist. He testified that he observed multiple bruises on the left cheek and the left side of the neck; protrusion of the tongue and dried lower lip; bilateral subconjunctival haemorrhage; peripheral cyanosis (bluish discolouration of hands, fingertips and toes); bruise and wound on the left shin; multiple subcutaneous haematomas; and haematomas on the thyroid and thyroid cartilage.
150. Dr. Oduor concluded that the cause of death was asphyxia (lack of oxygen due to manual strangulation). It was his further finding that the ligature (cord) tied on the neck was applied after death which meant that the deceased had been strangled by hand and then the cord tied afterwards. He produced the Post-mortem report dated 28th July 2012 (P. Exh18). It was the evidence of PW28 that the body of the deceased did not have any defence marks and they wanted to find out why there was no resistance by the deceased when she was being attacked. They therefore extracted samples including stomach, liver, kidney and blood for toxicology examination and further analysis. The said samples were recorded in P.Exh25 and P.Exh39 produced by PW32 the government chemist and PW36 the Investigating Officer respectively.



151. The Prosecution then presented forensic evidence in an attempt to unravel the murder. The US National Institute of Standards and Technology defines Forensic Science as, “Forensic science is the use of scientific methods or expertise to investigate crimes or examine evidence that might be presented in a court of law. It includes DNA, ballistics, fingerprint analysis, trace evidence, and digital analysis”.

Black Law’s Dictionary, 8th edition also defines forensic evidence as:-

“Evidence used in court; especially evidence arrived at by scientific or technical means, such as ballistic or medical evidence.”

152. The forensic evidence presented in this case by the Prosecution were the toxicology reports (P.Exh 25A and P.Exh26) and the DNA Analysis (P.Exh26A) which were drawn from the various samples collected from the scene of crime and extracted from the body of the deceased. PW32 Joyce Wairimu Njoya, an Assistant Government Chemist who worked at the Government Chemist Division in the Toxicology Laboratory testified that on 6th August 2012, they received samples from Number xxxx Joseph Kiragu and Number xxxx Ezekiel Busembo. The said samples were stomach, liver, kidney and blood labelled Olga Fonseca.

153. The Government Chemist also received additional items for examination which were a 2-litre plastic bottle of coca cola containing 550ml of caramel-black liquid, 1-litre Johnny Walker Black Label containing 700ml light brown liquid, 2 empty polythene bags labelled brown mozzarella brown cheese, Halian glasses and 500ml Keringet mineral water bottle containing a brown liquid that were to be examined for any toxic material that may have contributed to the death of the deceased.

154. Upon examination, PW32 made the following findings:

- i. That the liquid in the coca-cola bottle was soda
- ii. That the liquid in the Johnny Walker bottle contained ethanol of 40% concentration volume to volume.
- iii. That the liquid in the Keringet water bottle was characteristic of coca cola drink,
- iv. That the blood of the deceased contained ethanol at concentration of 40/100 equivalent to two tots of Whiskey.

155. It was her testimony that the additional exhibits listed above did not contain any chemically toxic substances. She prepared and produced a Report dated 1st October 2012 (PEXH-25A) together with the exhibit memo form from the Gigiri Police station Reference Number CR.162/33/2012 (P.Exh 25).

156. The Post-mortem Report (P.Exh 18) and the Government Analyst Report (P.Exh 25A) were both expert reports and were received as such by the Court. PW32’s finding that there were no toxic elements in the samples ruled out poisoning as a possible cause of death.

157. From the above evidence, it is clear that Olga Fonseca died on the night of 26th/27th July 2012 and the cause of death was manual strangulation. It is my finding therefore, that the Prosecution proved both the death and the cause thereof to the required legal standard. The death was evidently unlawful. I also hasten to add that the fact of death and the cause thereof were not contested at all in the proceedings.

III. Whether the prosecution proved motive on the part of the 1st accused.

158. The Prosecution presented circumstantial evidence to show that there was motive to eliminate ambassador Olga Fonseca. They argued that a power struggle existed between the 1st Accused Dwight



Sagaray, who briefly held an acting capacity as the ambassador, and Olga Fonseca the new ambassador. It was their case that the power struggle precipitated a desire to eliminate her.

159. Circumstantial Evidence entails that evidence which is deduced or inferred from a set of facts. It is openly distinct from direct evidence in that, whereas direct evidence draws from credible testimonies which result in creating some sort of belief, circumstantial evidence on the other hand entails a process of inference and deduction. This was the principle outlined in William Willis, 'An Essay on the Principles of Circumstantial Evidence', (Attorney at Law, London 1838), 171 Philadelphia, T. & J.W. Johnson, 1853) where it was stated thus: -

“Every other possible supposition by which the facts may be explained consistently with the hypothesis of innocence must be rigorously examined and successively eliminated; and only when no other supposition will reasonably account for all the conditions of the case, can the conclusion of guilt be legitimately adopted.”

160. Circumstantial Evidence will be construed as sufficient where it enables the court to make reasonable inferences about the ultimate facts in issue; it must be more than mere conjecture, speculation or guess. The court must closely scrutinize the circumstantial evidence at hand and conduct an assessment of probabilities of guilt. (see Supreme Court of United States in Galloway vs. United States 319 U.S. 372 [1943]).
161. In the present case, the identifying evidence of the Prosecution was circumstantial as there was no eyewitness and the forensic evidence already discussed did not provide any linkage between the death of the deceased and the Accused. In the case of Ahamad Abolfathi Mohammed and Another vs. Republic (2018) eKLR, the Court of Appeal held: -

“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, C.J. 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.’”

162. In R vs. Kipkering Arap Koske & Another (1949) 16 EACA 135, it was held that: -

“In order to justify circumstantial evidence, the inference of guilt, and 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.”

163. The Prosecution sought to demonstrate that Dwight (1st Accused) resented the arrival of the new ambassador Olga Fonseca and that upon her arrival and assumption of office, a power struggle ensued between them. The Prosecution postulated that Dwight Sagaray and Mohammed the suspect at large, had established themselves at the control of the Embassy and that the arrival of a new ambassador threatened the status quo. It was their case that the power struggle escalated to complete resentment and ill will leading to an orchestrated plan to eliminate her.



164. To this end, the Prosecution presented an array of witnesses to show the power struggle both at the Embassy offices and the Embassy residence over Embassy resources including staff, motor vehicles and bank accounts. I have set out in the succeeding paragraphs the relevant evidence.
165. PW1 Francis Mwangi, the Embassy driver stated that on 15th July 2012, he drove Dwight Sagaray (1st Accused) to the airport to pick up a visitor using the official car at around 7.00 p.m. whom he later learned was the new ambassador (Charge d’Affairs) called Fonseca. He was instructed by Dwight Sagaray to take her to Tribe Hotel at the Village Market. It was his testimony that Mohammed appeared shortly after Fonseca had gotten into the car and later left. That when they reached the said hotel, Fonseca insisted that she wanted to be taken to the official ambassador’s residence contrary to the instructions of Dwight Sagaray. That she refused to alight from the car forcing him to call Dwight who came and talked privately with her after which she agreed to alight the car and stay at the hotel. PW1 Mwangi then drove Dwight back to the Embassy residence at around 10.00 p.m. where he lived with Mohammed. PW1 told the Court that Dwight (1st Accused) and Mohammed left the residence either on 16th or 17th July 2012 after the arrival of Olga.
166. Mwangi further testified that on 16th July 2012, Fonseca called him to the office and asserted her authority by stating that she was the boss since it seemed to her that the staff did not recognize her. PW1 also stated that they (staff) were confused as to who was in charge. That in a subsequent meeting with Fonseca, they demanded to be paid but she said that there was no money because the cheque books were still in the name of Dwight the 1st Accused.
167. PW2 Kevin Lameck Akoth also testified that the 1st Accused lived in the ambassador’s official residence with Mohammed who was not an employee of the embassy but whom they knew as a nephew to Yusuf Haji, then a prominent Government official. Zipporah Khavukwi (PW9) the housemaid, Angela Mwelemi the nanny (PW10), and Peter Mbusi, the cook (PW15) all told the Court that the 1st Accused and Mohammed lived in the Embassy residence. Alice Muthama, the landlady (PW14) told the Court that Mohammed presented himself as an official of the Embassy and lived at the Embassy residence.
168. PW2 also testified that there was open acrimony between Fonseca and the 1st Accused in regard to the ongoings of the Embassy and residence operations. That sometime in July 2012, he saw a letter addressed to the staff stating that Dwight (1st Accused) had been replaced by Fonseca. That he also witnessed an altercation between Dwight and Fonseca where Fonseca confiscated the official embassy car keys.
169. Angela Mwelemi (PW10) who was domestic staff testified that they were unaware that Olga was the ambassador, so they treated her as a guest. She testified that they only knew about Olga’s designation through PW14 Alice Muthama the landlady and subsequently attended a meeting to talk about their employment. This was corroborated by the evidence of PW9 Zipporah the housekeeper and PW15 Mbusi the cook.
170. PW17, Sheila Ongaya the cleaner testified that Olga was introduced to them by Dwight (1st Accused) and that during a meeting on 15th July 2012, in the absence of Dwight, Olga told them that she was the new ambassador, and she would work with them going forward, causing confusion amongst the staff on who was actually in charge. That a subsequent meeting was held on 24th July 2012, still in the absence of Dwight, where Olga reiterated her position and authority. In the same light, PW8 John Ogutu the Securex Head of Operations testified that Fonseca gave him a list of authorized persons into the Embassy residence in which Dwight (1st Accused) and Mohammed were barred from accessing the residence.



171. The Prosecution called PW35 Danson Gitahi, a retail Manager at Commercial Bank of Africa who testified that on 29th May 2012, they received instructions through a letter referenced EBK-A-1/A82 dated 29th May 2012 (PEX-31), informing them of the ambassador's departure and Dwight (1st Accused) being appointed as the new bank signatory in his capacity as the acting Charge d'Affairs. He also testified that the bank received another letter referenced EBK-A-1/337 and dated 23rd July 2012, (PEX-32), requesting the bank to change signatories from Dwight (1st Accused) to Olga (the deceased) in respect of 5 Embassy Accounts. A subsequent letter dated 24th July 2012 and referenced EBK-A-1/18/B (PEX-33) was issued instructing the bank to retain Dwight the 1st Accused as a signatory to the 5 accounts pending translation of Olga's signature registration. This third letter was signed by Dwight the 1st Accused.
172. It was PW35's further testimony that whenever there were conflicting instructions, the said bank accounts would be frozen until there was clarity from the client and that in this case, he was not aware of any transactions that may have taken place in the period between the two conflicting correspondences.
173. In his defence, Dwight Sagaray stated that the issues of acrimony and hostility that he allegedly created between the residence employees and the deceased were not true because he was the one who picked the deceased from the airport when the 2nd Secretary and the Protocol Office were unwilling to do so. That he opted to take the deceased to the Tribe Hotel upon her arrival because he was concerned for her security as the workers at the residence had issues relating to sexual harassment claims against the former ambassador Gerardo. In addition, he stated in his defence that there were issues with the tenancy lease which he needed to resolve first before letting the deceased move in. Dwight admitted to writing conflicting bank instructions letters, but stated in his defence that there were procedures to be followed in changing bank signatories which he wanted to abide by. He stated that he was still in the process of applying for a diplomatic Identity card and PIN for the deceased which would be required before Olga could become a bank signatory.
174. The Prosecution submitted that they had demonstrated beyond reasonable doubt that the 1st Accused resisted the taking over of the Embassy by the deceased by inciting the staff that she was going to sack them. That the 1st Accused introduced Mohammed to the staff and allowed him to live in the ambassadorial residence. That he also gave him access to the Embassy's facilities and allowed him to exercise administrative duties over staff.
175. The Prosecution also submitted that Dwight Sagaray the 1st Accused had tried to paint a picture that he followed protocol and made the deceased's life comfortable but that this did not displace their case that there was a consistent air of animosity between the two which was aggravated by the constant presence of Mohammed.
176. It was the Prosecution's further submission that Dwight had refused to hand over to the new ambassador access to the Embassy Accounts as shown by the correspondence adduced in evidence.
177. The Prosecution also submitted that the 1st Accused did not deny his close association with Mohammed. That the excuse that he gave about Mohammed conducting himself as a diplomat from the Pakistan Embassy did not displace their case that Mohammed was not an official of the Venezuelan Embassy. It was their further submission that Dwight entertained Mohammed both at the Embassy residence and offices.
178. Counsel for the 1st Accused made extensive submissions on behalf of the 1st Accused seeking to rebut the Prosecution's submissions. He submitted that the 1st Accused had no motive to kill the deceased. That he personally went to pick up the deceased from the airport on 15th July 2012 when she arrived in



- Kenya and that was corroborated by PW1, PW2 and PW36. Counsel further submitted that he applied within 2 days of the deceased's arrival in the country for her diplomatic recognition and diplomatic identity card; within 5 days of her arrival applied for her to take over as bank signatory for all the 5 accounts that belonged to the Embassy; and that he introduced the deceased to the employees of the Embassy.
179. Counsel further submitted that in the face of all these, it was unreasonable to infer malice and discomfort on his part (the 1st Accused) by the deceased's takeover as the head and in charge of the Embassy. He dismissed the claim against the 1st Accused as wild speculation, unfounded, unsupported and unreasonable.
 180. Counsel also disputed the existence of a work-place argument as motive for committing murder, stating that even if there was an argument, (which was not proved), a workplace argument did not constitute a basis to infer malice sufficient to result in murder as workplace disputes were normal.
 181. It was Counsel's submission that PW16 confirmed that Dwight's relationship with the deceased was official and that he had even asked the employees to withdraw their sexual harassment case against ambassador Gerardo. He relied on *Parvin Singh Dhalay vs. Republic (1997) eKLR*.
 182. I have closely examined the evidence with respect to the alleged motive. Motive refers to the reason why a person chooses to engage in criminal conduct. I will analyze the Prosecution's evidence with respect to motive in the succeeding paragraphs.
 183. It became apparent, and as submitted by the Prosecution, that the arrival of ambassador Olga Fonseca was not only resented by Mohammed and Dwight, but also by the staff who had already been incited against her on the allegation that she was going to sack them if they did not withdraw the sexual harassment claims against former ambassador Gerardo.
 184. A look at the evidence of PW1 Mwangi and PW2 Kevin Lameck (the drivers) confirms this position. They testified that Mohammed had told them that he was meeting with an official from Foreign Affairs who would assist in expelling Olga from the country since she had not been formally accredited as an ambassador. That Mohammed informed them he would use his influence to stop Olga from coming, but eventually Olga arrived in the Country on 15th July 2012.
 185. From the evidence of PW1 it is also clear that Dwight Sagaray had not prepared for the arrival of the new ambassador. Dwight stated in his defence, that he wanted to shield Olga from the hostility of staff who had an outstanding issue of sexual harassment against Gerardo, the outgoing ambassador. He also said that he wanted to repair the Embassy residence before Olga could move in. However, PW36 who visited the scene on 27th July 2012 did not find any renovation or repairs going on.
 186. It is my view that if he had a genuine reason not to take her from the airport to the official residence, he would have explained to her instead of directing the driver to drop her at the Tribe Hotel. It became clear from the evidence of PW2 Kevin Lameck that Dwight Sagaray demonstrated not to have been ready to have the ambassador occupy the official residence because he lived there with his friend Mohammed, the suspect at large.
 187. This position is fortified by the evidence of PW13 Lucy Ojwang' the Embassy secretary, who testified that she recalled that Dwight had received instructions to expect and settle the new ambassador. This could only mean that Olga's arrival was not a surprise to Dwight and that he had already been instructed long before her arrival to prepare for her and settle her down. The fact that Dwight had neither moved out of the residence nor renovated it by the time Olga arrived in Kenya, despite having been given prior notice of her arrival, was a clear demonstration that he was not ready to receive her.



188. PW22 Johnstone Muthama also testified that Dwight had lied to Fonseca that the landlord was not willing to renew the lease. In light of this, the issue of the lease could have been a tactic employed by Dwight and Mohammed in a bid to delay their evacuation from the official Embassy residence to give way for the occupation of the new ambassador.
189. In a demonstration of authority, Olga's arrival led to her replacing the 1st Accused at the residence and further banning Mohammed and Dwight from accessing the residence, widening the rift between herself and Dwight.
190. The ensuing power struggles were then evidenced by the withdrawal of the official Embassy vehicles by Olga. PW1 testified that Olga directed him to park Car No. 1 at the Embassy residence and she took custody of the car keys. PW2 also witnessed an altercation between Dwight and Olga concerning the official Embassy car and stated that he was also fired by Olga for not being at work despite having been given official leave by Dwight to attend to a personal issue upcountry. PW2 stated that he was thereafter employed by Dwight to drive him in his official car.
191. The employees at the Embassy office also testified that they were confused as to who was in charge as demonstrated by the evidence of PW13 Lucy Ojwang', the Secretary, PW16 Steve Allan, the IT Manager and PW17 Sheila Shishali Ongaya, the cleaner. Lucy Ojwang' (PW13) testified that in one instance, she had heard Dwight the 1st Accused and Olga yell at each other after which Olga left and came back with new cheque books from the bank. PW16 further testified that they did not witness any formal handover process and that in certain instances, Dwight was absent in the staff meetings. PW16 Steve Allan the IT Manager stated that when Olga took over, Dwight moved from the ambassador's office to another office and that sometimes he would hear raised voices when they were talking.
192. PW7 Jane Njeri Muchai the advocate who handled leases on behalf of the Embassy testified that Olga reached out to her concerning issues with her staff members and requested for a meeting where she asserted her authority over the staff. She further testified that a subsequent meeting was held on 24th July 2012 between the deceased, the Embassy staff and their lawyer John Ngure (PW30) who questioned Olga's authority by stating that she had not been accredited as an ambassador. That in the said meeting, Olga produced her authority letter in response and Melissa the 3rd Secretary made a phone call to the Ministry of Foreign Affairs where it was confirmed that Olga had the authority. She also said that according to Olga, the staff only acknowledged Dwight as the one in charge and that Olga intimated that she was suspicious of Dwight the 1st Accused as he had refused to hand over the accounts and had been illegally living in the ambassador's residence.
193. PW22 Johnstone Muthama further testified during their meeting with Olga, she complained about the living conditions amongst other things such as disrespect from the workers and that she expressed fear that her life was in danger. It was his testimony that he advised her to report the matter to the Diplomatic Police at Gigiri. In addition, PW14 Alice Muthama the landlord testified that she witnessed a squabble between Olga and the staff who were demanding to be paid their dues.
194. The evidence of PW30 John Ngure advocate was also significant. He testified that Mohammed had introduced himself to him as an employee of the Venezuelan Embassy and instructed him to represent the Embassy staff who had complaints of sexual harassment against the outgoing ambassador Gerardo. He stated that he never got an opportunity to question Emmanuel Wafula, Francis Mwangi and Peter Mbusi (the complainants) on the allegations of sexual harassment because Mohammed spoke on their behalf. It was his testimony that Mohammed pushed for a case to be filed in court and paid him a total of Kshs. 75,000/= in legal fees. PW30 also testified that Mohammed notified him of a meeting between the staff and Olga on 24th July 2012 which he attended but the issue of sexual harassment



- was not addressed. That he only got to know that Mohammed was a fraud after the death of Olga on 28th July 2012 when his pictures were circulated on the media that he was amongst the suspects of the murder of Olga.
195. I have found the evidence of the Embassy staff with respect to the power strife between Dwight Sagaray and the new ambassador credible. This is because the staff merely narrated what they saw, observed and experienced. They had no interest in siding with either so as to influence their testimonies and observations. I find the respective testimonies above clearly corroborative. The evidence demonstrates that there was outright conflict between Olga and Dwight with respect to the control of the staff and Embassy vehicles. The evidence of PW7, PW14 and PW22 demonstrates that the Embassy issues had spilled outside the Embassy.
 196. I have considered the conflicting instructions from Dwight and ambassador Olga on the change of bank signatories as evidenced by PW35's testimony which clearly demonstrates power struggle in the Embassy. PW2 testified and PW35 confirmed that the deceased wrote a letter to Commercial Bank of Africa, Gigiri Branch dated 23rd July 2012 (P.Exh32) informing them that she was the official account signatory but the bank received a countermanding letter (P.Exh33). from Dwight Sagaray the following day stating that he was still the signatory.
 197. In his defence, the 1st Accused stated that he was still in the process of applying for the diplomatic passport and PIN for Olga before she could become a signatory to the bank accounts. However, from the evidence of PW34 Adam Suleiman, he stated that they had already received a Note Verbal - Notification of Arrival dated 16th July 2012 (P.Exh 6) from the Bolivarian Republic of Venezuela informing the Ministry of Foreign Affairs in Kenya of Olga's arrival. He also testified that they processed and issued Olga with a Diplomatic Identification and Work Permit (P.Exh27) on 17th July 2012. This means that by the time of issuing the letter instructing the bank to change the authorized signatories (P.Ex32), Olga was already in possession of her official documents including her work permit and diplomatic identification.
 198. The fact that Olga Fonseca had already received her diplomatic accreditation and identification is corroborated by the evidence of PW35 Danson Gitahi. PW35 testified that the instructions they received from the Embassy on 23rd July 2012 through the letter referenced EBK-A-1/337 (PEX-32) requesting the bank for a change of signatories from Dwight to Olga in respect of 5 Embassy Accounts was accompanied by 5 documents. These were a letter from the Ministry of Foreign Affairs dated 16th July 2012 introducing Olga as the new Charge d'Affairs, a copy of Olga's diplomatic card, a copy of Olga's diplomatic passport, her signature card and a non-official translation forwarded to the bank introducing Olga as the new Charge d'Affairs.
 199. It is the above evidence that leads this Court to conclude that Dwight's assertions that he was in the process of applying for Olga's official documents before they could change the bank signatories are untruthful.
 200. The evidence above demonstrates that Olga already had the requisite documents and therefore there was no reason for Dwight Sagaray to issue a countermanding letter to the bank. His action was obstructive, not facilitative. The evidence proves that he was neither ready nor willing to relinquish his position and that he actively tried to block Olga Fonseca from taking control of the Embassy's bank accounts.
 201. This Court therefore finds that the Prosecution's evidence has adequately demonstrated the glaring conflict between Dwight Sagaray and Olga Fonseca. Further, I find that this led to power struggles



which when examined closely, provide the motive on the part of Dwight (1st Accused) and Mohammed his friend to eliminate her.

202. With respect to Mohammed, the suspect at large, the evidence demonstrated that Dwight the 1st Accused gave Mohammed unlimited access to the Embassy's facilities and in particular the official motor vehicles and that Mr. Mohammed would attend official meetings, pay the staff by issuing cheques and grant them leave days from work as testified by PW15 the cook Peter Mbusi. PW14 Alice Muthama the landlady also testified that they had an engagement with the 1st Accused and Mohammed at her office to iron out issues relating to the renewal of the lease and that it was Mohammed who delivered a rental cheque after the meeting. Further, there was the evidence of PW30 Ngure Mbugua advocate as already outlined in his evidence that he had been instructed by Mohammed to represent the domestic staff of the Embassy on the claim against ambassador Gerardo.
203. From the Prosecution witnesses, Mohammed was also considered an influential person because he was spotted severally with senior high-ranking government officials and was believed to be a diplomat from Pakistan. PW22 Johnstone Muthama confirmed this when he stated that during a meeting with Dwight to renegotiate the lease, he was accompanied by a Somali-looking man who PW22 had recognized from a previous engagement. That at that meeting, Mohammed confirmed to PW22 that he was no longer with the UN but was working for the Venezuelan Embassy.
204. This Court is not convinced that Dwight was an innocent bystander as Mohammed overrun the Embassy which he (1st Accused) was responsible for between the time of the departure of ambassador Gerardo sometime in May 2012 and the arrival of Olga Fonseca on 15th July 2012. It has been shown through the evidence of the Embassy staff that they were close and when he (Dwight Sagaray) moved into the ambassador's residence, he invited Mohammed along where they continued to run the Embassy affairs together. Both the 1st Accused and Mohammed were stakeholders in the control of the Embassy and it was in their interest to stop Olga from taking over.
205. It is the finding of this Court, therefore, that the Prosecution has proved that the 1st Accused had the motive to orchestrate the death of the deceased.

IV. Whether the confession statement of the 4th accused moses kiprotich kalya was properly admitted by the court and whether it makes material admissions of the offence.

206. The Prosecution presented evidence of a Confession statement by Moses Kiprotich Kalya (4th Accused). Number xxxx Chief Inspector Anne Gitahi Kanyinyi (PW18) attached to the Criminal Investigation Department (CID) Headquarters, Reforms section testified that she recorded a Confession statement of Moses Kiprotich Kalya on 1st November, 2012 at Parklands CID Offices.
207. The *Evidence Act* Cap 80 defines confessions under section 25 as follows:-

“Confession defined

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

208. In the case of Sango Mohamed Sango & Another vs. Republic (2015) eKLR, the Court of Appeal interpreted section 25 of the *Evidence Act* as follows:

“Broad as section 25 appears to be, a confession must still be sufficiently clear that the accused person admits all the elements of the offence charged. As the former Court of Appeal for



Eastern Africa stated in *Rex vs. Kituyan s/o Swandetti* (1941) 8 EACA 56, a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.”

209. The production of the Confession statement was vehemently opposed by Counsel for the 1st, 3rd and 4th Accused who urged the Court to conduct a trial within a trial in order to determine the admissibility of the said statement. Their objection was upheld by the Court which necessitated the holding of a trial within a trial. This is because once a Confession statement is repudiated, the burden shifts to the Prosecution to prove that the statement was made voluntarily without duress or coercion. In the Sango case (*supra*), the court held thus:-

“..... the trial court must be convinced first about the voluntary nature of the confession and secondly that the confession has a ring of truth.”

210. The trial within a trial was held on various dates from 4th March 2015 in which the Prosecution called 4 witnesses: PW1, Number xxxx Superintendent Peter Mungai, PW2 Number xxxx, Cpl. Venanzas Njeru, PW3 Number xxxx Chief Inspector Anne Gitahi and PW4 No. xxxx Cpl. Lukas Juma. These witnesses testified regarding the roles they played in or leading to the recording of the statement.

211. PW18 C.I. Anne Gitahi testified as PW3 in the trial within trial. She stated that at about 1244hrs, a suspect was brought by the then DCIO Gigiri, Inspector Mungai (PW36) and Corporal Njeru who gave her a charge sheet and issued instructions to record a Confession statement from the suspect. It was her testimony that the suspect appeared normal and without any complaints. That the suspect nominated his wife, one Agnes Gichemba Ogeto, of National Identity Card Number xxxx to represent him as the third party. That the session began at 1249hrs with an introduction from herself (PW18), reading of the charges to the suspect and issuance of a caution which was then signed by both herself (PW18) and Moses Kalya (4th Accused).

212. Put on his defence in the trial within trial, the 4th Accused exercised his constitutional right to silence. In its reasoned Ruling dated 29th July 2014, the Court in considering the evidence tendered by the Prosecution, was guided by the Evidence (Out of Court Confessions) Rules, 2009 which provide the Guidelines to be followed while recording confession statements from suspects or accused persons. In particular, the Court considered the rights of an accused as listed in the Rules.

213. A trial court is however required to judiciously consider all evidence before rendering a judgement. In the case of *Kinyori s/o Kariditu vs. Regina* (1956) EA 480, the Court of Appeal of Eastern Africa held that:

“The broad principle underlying that procedure is that the accused is entitled to present, not merely to judge but also to assessors, the whole of his case relating to the alleged extrajudicial statement; for the judge’s ruling that it is admissible in evidence is not the end of the matter; it still remains for both judge and assessors individually (or, where there is a jury, for the jurors) to assess the value or weight of any admission or confession thereby disclosed and also the accused is still at liberty to try and persuade them that he has good reason to retract or the repudiate the statement concerned or any part of it.” (Emphasis mine).

214. In the case of *Kanini Muli vs. Republic* [2014] eKLR, the Court of Appeal underscored that the accused was still entitled to call evidence to show that the confession which has been ruled admissible cannot be acted on.



215. In his sworn defence at the close of the Prosecution case, Moses Kalya (4th Accused) stated that he was a politician and a farmer who lived in Kasarani. That he was a former police officer having served for about 14 years, in the General Service Unit Recce Squad and was to join the US Marine in January 2013. He testified that he was arrested on 31st October 2012 at Yala Towers on Biashara Street alongside Alex Sifuma (3rd Accused) where he had gone to purchase clothes for his son. That he was then taken to Nairobi Area where one Chief Inspector Mang'era kicked him. He further stated that he was then moved to Gigiri while his friend Alex (3rd Accused) was taken to Kasarani. That his friend brought an advocate by the name Evans Ondieki who advised him that he should not write any statement in his absence.
216. Moses stated that he was escorted by Sergeant Njeru and PC Kirui to C.I. Anne Gitahi at Parklands Police Station but denied recording the Confession statement dated 1st November 2012 in Gigiri. He said that he was unaware of the origin of the statement and that he first saw it when it was presented in Court. He further stated that his ID Number did not appear on the statement, that no caution had been issued and that his wife was not present during the said session. Moses also stated that no handwriting expert had been called by the Prosecution to confirm whether the signatures on the Confession statement belonged to him.
217. Evidently, Moses Kalya (4th Accused) repudiated the Confession statement by stating that he neither recorded, drafted nor signed it. He further alleged that he was beaten and that the statement was not procedurally recorded, if at all.
218. Dwight Sagaray (1st Accused) stated in his defence that the Confession statement adduced in evidence did not make a mention of him. The 2nd, 3rd and 5th Accused (Ahmed Mujivane, Alex Sifuma and Chelogoi Kipng'eno respectively) did not state anything in respect of the Confession statement in their respective defences.
219. This Court is not obligated to revisit the trial within trial proceedings and the Ruling. I have however, in considering this Judgment, revisited the trial within trial proceedings and once more tested the evidence of PW18 against the Law and the Rules. I have found general compliance. In particular, Moses Kalya's wife one Agnes Gichemba Ogeto was present as a 3rd party as required by Rule 4 (3); the caution was administered and recording time was indicated, as required by Rule 5. Certification was done as required by Rules 9 and 10 and the Recording Officer testified as required by Rule 14. Further, the Recording Officer was a Prosecution witness as required by the Rules. I observe from the trial Record that Mr. Wamwayi, Counsel for the 4th Accused had indicated that they would appeal the Ruling. There is however no indication that such an appeal was pursued.
220. There is no evidence adduced by the 4th Accused in his defence that casts doubt on the propriety of the recording and admission of the statement into evidence before this Court. From this, I am strongly convinced that the Confession statement was made voluntarily, and that Moses Kalya only repudiated it as an afterthought. As such, I am still satisfied that the said statement was admissible and was properly admitted into evidence. I am guided by the Court of Appeal case of Paul Nakwale Ekai vs. Republic (1981) eKLR which held thus: -

“ Again, a substantially truthful confession may contain mistakes....in an appropriate case, a trial judge may rely on such a confession notwithstanding the mistakes it contains....”



221. The only issue then would be the weight to be given to the 4th Accused's Confession since it was repudiated. In this respect, the Court of Appeal in the case of Thiong'o vs. Republic (2004) 1E.A., 333 gave guidance in holding that:-

“There is no rule of law that a court cannot act on a retracted and/or repudiated confession unless it is corroborated in material particulars. What exists is the rule of prudence that such a court should be cautious to act on such a confession unless it is corroborated in material particulars (Tuwamoi vs. Uganda [1967] E.A. 83 [adopted]) in the current case, the retracted confession was amply corroborated.”

222. With the above legal principles in mind, I now delve into the contents of the Confession statement. This is what Moses Kiprotich Kalya (4th Accused) stated in his Confession statement dated 1/11/2012. He introduced himself as an ex-police officer having retired in September 2011 after 14 years of service. That he met Alex Sifuma (3rd Accused) in July 2012 and became friends. One day Alex called and requested him to accompany him to Muthaiga to check on some business. He joined him in town and they (Alex and Moses) proceeded to Muthaiga. They alighted at Total Petrol Station and went to the parking where Alex Sifuma, 2nd Accused told him (Moses, 4th Accused) to enter a Toyota DX car. Alex (3rd Accused) then entered a Toyota RAV-4 Silver in colour with a red diplomatic number plate. Alex Sifuma remained in the car for about 20 minutes then came out with a man whom he introduced to Moses as 'Ahmed', a police officer stationed at Lang'ata Police Station. The said Ahmed (2nd Accused) dropped them back in town at Moi Avenue. Moses Kalya stated that no business was discussed in his presence but after alighting, he (Moses) asked Alex Sifuma (2nd Accused) what was discussed in the RAV-4 and Alex Sifuma told him that he was with the Venezuelan ambassador who told him that there was a tug of war at the Embassy between him (the ambassador) and the newly posted lady. Alex Sifuma further told Moses that the discussion in the Rav-4 was how to eliminate the lady and they were planning to kill her. That he (Moses) asked Alex Sifuma if that was the business they had gone for and Alex Sifuma responded that, “It is good to listen to them”.

223. Moses Kalya went on to state in his Confession statement that Alex Sifuma told him that the Venezuelan administrator Mohammed had promised to get their wives jobs. Alex Sifuma invited him (Moses) to accompany him to Gigiri two days after a conversation about possible jobs for their wives. They (Moses and Alex) went to Java at 9.00 am and waited till 12.00 noon and were joined by a gentleman whom he later learnt was Mohammed, the Venezuelan Embassy administrator who had promised their wives jobs. Mohammed had a conversation with Alex Sifuma in which he complained that the newly posted lady was a nuisance and had changed staff and that “she would know who they are.” They then left.

224. Moses Kalya further stated that the following day Alex Sifuma called him (Moses Kalya) and they again proceeded to Gigiri Java where Mohammed joined them at 7.30 p.m. being driven in the same RAV-4 he had before. That the driver left and the three of them Moses Kalya (4th Accused), Alex Sifuma (3rd Accused) and Mohammed “ate supper which was bought by Mohammed”. That at that meeting, Mohammed told them that he had given Ahmed Kshs. 468,000/= to eliminate the lady ambassador but was apprehensive as to whether Ahmed would do the job. That shortly Mohammed got a call and he left asking them to wait for him. That Mohammed kept leaving and re-joining them and at about 12.30 a.m. he came back having changed his clothes and was wearing a jacket, t-shirt, jeans and sports shoes. That when Mohammed left, he (Moses Kalya) followed him and saw him giving money to 3 men who were standing by the RAV-4 then the 3 men left and Mohammed rejoined them briefly before leaving again in a hurry. That at about 3.30a.m., he (Moses) told Alex Sifuma to forget about eliminating the lady. They left Gigiri at 4.05 a.m. and boarded a matatu to town, then to Kasarani where



- they parted ways and he went to his house. He slept till 11.00 a.m and proceeded to town where they met with Alex at Giggos the following day. That while there, he saw on Citizen TV that the Venezuelan ambassador had been murdered. Moses Kalya stated that he then told Alex that it must be Mohammed and his people. They parted ways and the following day he was arrested along Biashara Street. (End of statement).
225. It was the Prosecution's submission that the Confession statement of the 4th Accused implicated him, the 2nd Accused, 3rd Accused, and Mohammed. That there were several meetings to which Mohammed was using a Rav-4 Motor Vehicle with red diplomatic plates and those meetings were to orchestrate and execute the elimination of the deceased. That in those meetings, Mohammed was introduced to Moses Kalya (4th Accused) by Alex Sifuma (3rd Accused) and that Mohammed used the same Rav-4. That in the process of those meetings, Mohammed brought along Ahmed Mujivane (2nd Accused) whom he paid Kshs. 468,000/= for the task of eliminating the Venezuelan ambassador.
226. In relation to the Accused's respective defences, the Prosecution urged the Court to reject the 2nd Accused's defence that he was not involved in the murder as he was part and parcel of the team that plotted and executed the murder of the deceased. The Prosecution further submitted that there was no explanation as to why the 3rd Accused would hang around until the late hours of the night where the subject of discussion was the elimination of the deceased if he was not part and parcel of the plan and execution.
227. It was also the Prosecution's submission that the 4th Accused's Confession Statement provided details about the meetings with Mohammed, 2nd and 3rd Accused with the clear agenda of eliminating the deceased. That Moses Kalya mentioned a meeting of the four [Mohammed, Ahmed (2nd Accused), Alex (3rd Accused) and Moses (4th Accused)] at Java Gigiri until late at night where money was paid to the 2nd Accused. That he also referred to Mohammed using a Rav-4 with red diplomatic plates on various occasions.
228. The Prosecution further submitted that an inference of guilt was made with reference to the 2nd, 3rd and 4th Accused based on common intention and motive as none of them made an effort to thwart the plans either by reporting the activities before or after the murder. They relied on the cases of Republic vs. Teresia Mueni Kilonzo & Another (2017) eKLR, Choge vs. Republic (1985) KLR 1 and Section 21 of the Penal Code.
229. The Prosecution further submitted that the Confession statement confirmed that Mohammed left Ahmed, Alex and Moses (2nd, 3rd and 4th Accused respectively) at Java and came back at 12.30 a.m. where he had changed into a jacket, t-shirt, jeans and sports shoes while he was previously dressed in a suit. That was confirmation that he was dressed for the final execution of the plan to murder the deceased. It was the Prosecution's further submission that PW1 Francis Mwangi the driver and PW15 Peter Gisiyena Mbusi the cook had seen Mohammed at the scene on the material night dressed as described above.
230. They submitted that it was unthinkable that the four would spend time up to midnight only for Mohammed to seek other hit men to assist him in the heinous act. That since the evidence on record indicated that the deceased was killed around 2 a.m., the Court could only infer that the 2nd, 3rd and 4th Accused persons were in the company of Mohammed when the murder was executed.
231. Learned Counsel for Dwight Sagaray (1st Accused) Mr. Katwa submitted that his client was not alleged to have made any Confession. He stated that even where a Confession had been made, the court was obligated to consider and decide if there was other evidence that supported the allegation. He relied on



- the cases of *Kanini Muli vs. Republic* (2014) eKLR and *Republic vs. Thomas Mokaya Akara* (2017) eKLR to support this submission.
232. Learned Counsel for Ahmed Mujivane (2nd Accused), Mr Olewe submitted that the Confession by Moses Kalya (4th Accused) mentioned a person by the name Ahmed. That there was a warrant of arrest in respect of Mohammed Ahmed Mohammed Hassan who was never arrested. He further submitted that PW36 Supt. Peter Mungai the investigating officer was unable to inform the Court which Ahmed was referred to in the Confession.
 233. Counsel also submitted that his client was not the Ahmed from Langata as described in the Confession as he lived in Nairobi West with his parents. That a search was conducted at his client's house and CCTV cameras were carted away and not availed to this Court to controvert his statement. It was his submission that the Prosecution withheld evidence that did not favour them.
 234. Counsel further submitted that a confession on its own was not a reliable tool for conviction. That a confession must be corroborated by evidence tendered in court. He submitted that no such evidence was produced and thus the Confession statement was of no value to the Court.
 235. Learned Counsel for Alex Sifuma (3rd Accused), Mr. Nyang'ayo submitted that his client was charged with the offence solely on the disputed and uncorroborated Confession by the 4th Accused. That the said Confession was repudiated and uncorroborated by other evidence and that such a repudiated Confession ought to be treated with caution. That even if the Prosecution was to rely on the allegations in the Confession, the same would not be admissible under the *Evidence Act* as they amounted to hearsay. He relied on *Republic vs. Thomas Okinyi Kibiba* (1979) eKLR.
 236. Learned Counsel for Moses Kalya (4th Accused), Mr. Wamwayi submitted that his client repudiated his Confession statement and that the Prosecution was unable to explain the gaps in the statement. That his client's signature did not appear on the certificate to indicate that the Statement was made voluntarily. It was his further submission that the statement did not amount to a confession as it did not show that Moses Kalya had a premeditated intention to kill the deceased. He relied on *Ogero Omurwa vs. Republic Cr. Appeal No. 14 of 1979*.
 237. A confession must substantially admit the elements of the offence charged. It must either admit in terms the offence or at any rate, substantially all the facts which constitute the offence. (See *Rex vs. Kituyan s/o Wandetti* (1941) 8 EACA 56, cited in the Sango case, [supra]).
 238. In the Confession, Moses Kiprotich Kalya, (4th Accused) introduces himself, the 2nd Accused Ahmed Mujivane Omido and the 3rd Accused Alex Sifuma Wanyonyi as persons who were either acquaintances or known to each other prior to the date of the offence. He states that he met Alex Sifuma in July 2012 and they became friends. That in one instance, he accompanied Alex to Muthaiga to go and transact a business which he alleged not to have known what it was about, and it was on that day that he met and was introduced as Rotich to the 2nd Accused Ahmed Mujivane at Total Muthaiga. Moses Kalya (4th Accused) also stated in his confession statement that Mohammed was introduced to him as the Venezuelan Embassy Administrator by Alex Sifuma (3rd Accused), when they met at Java Gigiri. According to him, Alex Sifuma had told him that Mohammed would help their wives to get jobs.
 239. From this part of the Confession, it is clear to the Court that the 2nd, 3rd and 4th Accused were either acquaintances or friends. Specifically, Moses (4th Accused) stated that, "I met Alex Sifuma in July 2012 and we became friends", and it was Alex Sifuma who introduced him to Ahmed Mujivane (2nd Accused). The 2nd Accused denied in his defence that he was not the Ahmed referred to in the Confession. He said that the Ahmed referred to could be the Mohammed Ahmed who is the suspect at large.



240. I have considered that argument. I find it not convincing for the reason that Moses Kalya was consistent in his statement when he talked about Mohammed. He referred to him as Mohammed and described him as 'the Embassy administrator'. There is therefore a clear distinction both in the Confession and even in the defence testimonies of the Accused. The Ahmed referred to in the Confession is none other than the 2nd Accused, Ahmed Mujivane Omido.
241. The fact that the 2nd, 3rd, and 4th Accused were known to each other is admitted by them in their own defences. Ahmed (2nd Accused) stated in his defence that he met Alex (3rd Accused) through a mutual friend called Majjid a spare parts seller who requested him to assist (3rd Accused) to get a job. He stated that he met (4th Accused) through Alex (3rd Accused). In his defence Ahmed Mujivane also stated that he met Mohammed at a Mosque in Nairobi West where they worshipped together and he would often see Mohammed driven in a car with diplomatic number plates. In his defence, Alex (3rd Accused) corroborated Ahmed's narrative of how they met and stated further that he shared about the possibility of a job opportunity at the Venezuelan Embassy with his friend Moses. Moses (4th Accused) stated that Alex was his friend and that they had been arrested together on 31st October 2012 when they had gone to town to buy clothes for his son.
242. I find it proven from my analysis of the admission in the Confession and the defences of the 2nd, 3rd and 4th Accused that they were known to each other and to Mohammed, the suspect at large. It is however, not an offence to be acquainted or to be friends. All that the proven fact of acquaintance does, is to show that the 2nd, 3rd and 4th Accused were not strangers. This fact makes the Confession believable that the 4th Accused was talking about people he knew.
243. The Confession statement shows that there were discussions on the elimination of Olga. According to Moses Kalya (4th Accused), there were subsequent meetings between Mohammed, Ahmed (2nd Accused), Alex (3rd Accused) and himself where they discussed about the Embassy issues and how the new lady ambassador had become a nuisance to everyone and therefore had to be eliminated. Two weeks later at a meeting in Java Gigiri, Moses (4th Accused) stated in his Confession statement that Mohammed revealed to them (Alex and himself) that he had given Kshs. 468,000/= to Ahmed Mujivane (2nd Accused) but was apprehensive as to whether he (Ahmed) would actually do the job of eliminating the ambassador.
244. Ahmed Mujivane (2nd Accused), Alex Sifuma (3rd Accused) and Moses Kalya (4th Accused) all admitted during the defence case that they had had several meetings on various dates with the said Mohammed. That the first meeting was between Ahmed (2nd Accused) and Alex (3rd Accused) in town at Garden Square where Ahmed (2nd Accused) was with other Arab-speaking men. Alex (3rd Accused) and Moses (4th Accused) also stated that they went to meet with someone at Jamia Mosque to drop Alex's CV to a man who was in a Toyota Prado with red-plates (diplomatic registration).
245. There was another meeting between Ahmed (2nd Accused), Alex (3rd Accused) and Mohammed at Total Muthaiga. Moses (4th Accused) had accompanied Alex (3rd Accused) to the said meeting but was not present during the discussions as he was made to wait in another car separate from the silver-coloured Rav-4 where the discussion took place. He however got to know of the content of the discussions when they were later dropped in town by Ahmed (2nd Accused).
246. The subsequent meetings were held at Java Gigiri on the material day and later at Maggie's Pub on the material night. Moses (4th Accused) stated in his Confession statement that on the material night at Java Gigiri, Mohammed left with his driver but returned later at around 12.30 a.m. and found them at a pub called Maggi's at Kenol Petrol Station. That Mohammed had now changed his clothes into a



jacket, a t-shirt, jeans and sports shoes. This was corroborated by the evidence of PW1 Francis Mwangi who stated in his testimony that he recognized Mohammed on the night of the murder dressed in jeans and no coat.

247. From the Confession statement also, Moses (4th Accused) stated that on the material night, Mohammed left them at the pub, went to the parking lot and gave some three men money and the four of them (Mohammed and the 3 men) left towards the UN route. He also stated that he and Alex (3rd Accused) remained at the pub until 3.30 a.m. waiting for Mohammed to return, when he told Alex to forget about eliminating Olga. According to Moses (4th Accused), Alex tried to reach Mohammed on phone in vain, prompting them to leave for home at 4.00 a.m. He finally stated that he woke up the following morning at 11.00 a.m., went to town and received a call from Alex to watch the news from where he learned about the death of the ambassador adding that, at that point, he knew that Mohammed and his people were responsible.
248. From the above, it is my finding that the Confession makes material admissions of the meetings between Ahmed (2nd Accused), Alex Sifuma (3rd Accused), Moses Kalya (4th Accused) and Mohammed whose purpose was to plan the murder of Olga Fonseca. The numerous meetings were evidence of the plot to kill Olga following the discussions in the Toyota Rav-4 at Total Muthaiga and were actual preparation for the commission of the offence.
249. I have also already found that Mohammed the suspect at large referred to in the Confession was keen to stop the deceased from taking over the Embassy. His identification in the Confession as the person who revealed the murder plot to the 3rd and 4th Accused therefore gives the Confession a ring of truth. It is my deduction that the 2nd, 3rd and 4th Accused were fully aware of the plot to kill the ambassador. This is so because according to the Confession statement, Moses told Alex, “forget about eliminating Olga”. The conduct of the 3rd and 4th Accused makes the Confession believable. He also stated that the 2nd Accused was present at Java Gigiri on the material night. Further, from the Confession, Moses stated that they went home in the wee hours of the morning and the following day, they were keen to monitor the news of the death of ambassador Olga. It is my finding that their interest only demonstrates that they were active participants in the said unlawful death.
250. It is my further finding that the Confession statement made by Moses Kiprotich Kalya (4th Accused) was a clear admission of his participation and involvement alongside the 2nd, and 3rd Accused in the planning and execution of the murder of ambassador Olga Fonseca thereby demonstrating a common intention amongst them with Mohammed, the suspect at large playing a leading role.

The Alibi Statement of the 3rd Accused

251. As already stated in the principles, a retracted confession statement must be supported and corroborated by other evidence. In this case, the Confession statement of the 4th Accused admitting to the knowledge and participation in the plotting of the killing of the deceased by the 2nd, 3rd and 4th Accused was corroborated in material respects by the Alibi statement of the 3rd Accused Alex Sifuma Wanyonyi produced by the Prosecution as P.Exh 16.
252. Alibi is defined in the Black’s Law Dictionary 10th Edn. as, “A defence based on the physical impossibility of a defendant’s guilt by placing the defendant in the location other than the scene of the crime at the relevant time.”



253. In the South African case of *R. vs. Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA held:-
- “If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.”
254. There are multiple principles to consider in an alibi defence. Firstly, it must be raised at the earliest opportunity to enable the Prosecution test it. (See *Republic vs. Sukha Singh s/o Wazir Singh & Others* [1939] 6 EACA 145). Secondly, it must be corroborated by other witnesses (see the decision of the Court of Appeal at Kisumu in *Erick Otieno Meda vs. Republic*, Criminal Appeal 55 of 2015 (2019) eKLR). Thirdly, there is no burden of proof on the accused to prove his alibi. (see the South African court in the case of *S. vs. Malefo en Andere* 1998 (1) SACR 127 (W) at 158 [a – e]).
255. It follows then that, once an alibi is pleaded, the burden of proof falls on the Prosecution to rebut the said defence. This was aptly stated by the Kenyan Court of Appeal in the case of *Victor Mwendwa Mulinge vs. R.* [2014] eKLR where the court rendered itself on the burden of proof thus:-
- “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....”
256. Similarly in *Kiarie vs. Republic* [1984] KLR, the same Court of Appeal stated:-
- “An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.....”
257. In this case however, Alex Sifuma Wanyonyi (3rd Accused) said in his defence that he did not wish to rely on his alibi statement as part of his defence. The above principles were therefore not applicable as the Alibi was not exculpatory.
258. Number xxxx Chief Inspector Kennedy Limera (PW24) who was formerly attached to the Directorate of Criminal Investigation (DCI) Office Nairobi testified that on 1st November 2012, Alex Sifuma Wanyonyi (3rd Accused) was brought to him for purposes of recording an alibi statement which he (Alex Sifuma) opted to self-record. That during the interview, the Alex stated that he had met a friend called Ahmed from Lang'ata (2nd Accused) at Garden Square Restaurant at 4.00 p.m. That the said Ahmed was in the company of three other Arab-speaking people unknown to him. That they parted after their meeting ended at Garden Square.
259. C.I. Limera further testified that in his statement, the 3rd Accused Alex Sifuma stated that they again met with the 2nd Accused (Ahmed Mujivane) 2 days later at the same restaurant before proceeding to Total Petrol Station with two other friends namely Moses Kalya (4th Accused) and one Evans. That Ahmed (2nd Accused) informed him of a job offer which he (Alex Sifuma) declined. He further testified that from the Alibi statement, Ahmed (2nd Accused) reached out to Alex Sifuma (3rd Accused) two days later, where he (Alex) inquired whether Ahmed (2nd Accused) could get him a job at the Venezuelan Embassy. A subsequent meeting was held at Java in Gigiri between Ahmed (2nd Accused), Alex (3rd Accused) and Moses (4th Accused) where they parted ways at 3.00 a.m. on the material day. C.I. Limera stated that the 3rd Accused refused to reveal the job that his friend Ahmed had called him for. It was PW24's testimony that Alex indicated in his statement that he never saw Suleiman and Ahmed (2nd Accused) again until he was arrested and brought to record his statement.



260. With respect to the Alibi statement, the Prosecution submitted that it was unthinkable that Alex Sifuma and Moses Kalya would spend time with Mohammed and Ahmed (2nd Accused) until midnight only for Mohammed to seek other hitmen to assist him commit the crime. It was their further submission that since the evidence on Record indicated that the deceased was killed around 2 a.m., the Court could only infer that the 2nd, 3rd and 4th Accused persons were in the company of Mohammed when the murder plot was executed.
261. A closer look at the Alibi statement shows that Alex Sifuma (3rd Accused) narrated the planning meetings as follows: the first one at Garden Square restaurant between Ahmed (2nd Accused) and other Arab-speaking people who were unknown to the 3rd Accused; a second one at Total Petrol Station in Muthaiga, this time incorporating Moses Kalya (4th Accused) and one Evans; and a subsequent one at Java Gigiri involving him (Alex 3rd Accused), Ahmed (2nd Accused) and Moses (4th Accused). These meetings are materially the same as the ones stated by the 4th Accused in the Confession. The attendees were more or less the same and the venues were also the same.
262. It is my further finding that the Alibi statement of the 3rd Accused makes material admissions on the meetings and effectively corroborates the admissions in the Confession in respect of the 4th Accused, thus lending credence to both the Confession and the Alibi statements, with the latter becoming inculpatory and not exculpatory. It is also my finding that the aim of the planning meetings was to kill the ambassador.
263. The 4th and 3rd Accused persons asserted from the Confession and Alibi statements that they were left out of the plan by the said Mohammed when they remained behind at the pub forcing them to depart for their homes at 4.00 a.m. via public transport. It is also their assertion that the said Mohammed left with other people. The 3rd Accused stated that Ahmed, the 2nd Accused, was also present but left with Mohammed.
264. Further, Alex Sifuma (3rd Accused) admitted in his Alibi statement that on the material night, they (2nd, 3rd and 4th Accused) were earlier with Mohammed and Ahmed at Java Gigiri but that Mohammed and Ahmed left them behind with a promise to return. That later when Java closed, they (Alex and Moses) moved to another restaurant and waited for the two to return in vain until at around 3.00 a.m. when they decided to take a matatu home.
265. From my wholistic consideration of the evidence, the assertions made by the 3rd and 4th Accused that they were left behind are unconvincing and improbable. I have already found that they were involved in the planning meetings. I agree with the submission of the Prosecution that they could not have been involved in the planning, only for Mohammed to take other hit men to the Embassy Residence at the last minute.
266. It is the finding of this Court that even if the 3rd and 4th Accused persons were left out of the actual execution on the material night between 12.00 midnight and 4.00 a.m. as they stated, they were still culpable because they participated in the various meetings held to plot the murder. It is my further finding that they remained aware of the plot and failed to disassociate themselves, prevent or report the planned murder. The plot which concerned murder was clearly a criminal enterprise.

V. Whether the five accused were positively identified as the persons who caused the unlawful death of the deceased and acted with a common intention.

267. The Prosecution presented further forensic evidence in a bid to establish a connection between the Accused and the death of Olga. PW33 Anne Wangechi Nderitu the Government Analyst working at the Government Chemist department testified that on 3rd August 2012, she received samples from No.



- xxxx Cpl. Joseph Kiragu of CID Gigiri Police station at the Government laboratory with the request to determine the presence of semen, spermatozoa, blood stains and hair. PW33 forensically examined a total of 13 samples and found that the DNA profiles from the fingernails (item 12) matched the DNA profile from item 10 which was the blood sample of the deceased and that the pant yielded a partial profile. PW33 testified that the items received for examination were recorded on the Exhibit Memo (P.Exh 25) and thereafter labelled, packed and stored away. She produced a report dated 15th January 2016 (P.Exh 26) which included a DNA Analysis (P.Exh 26A). It was her finding that the DNA profiles on the items only matched that of the deceased.
268. For the Defence, only Dwight Sagaray, the 1st Accused testified in rebuttal that there was no forensic evidence linking him to the crime. Counsel for the 1st Accused submitted that the forensic evidence of DNA, fingerprint, blood and shoe print did not provide any nexus between his client and the deceased. That there was no blood matching between him and the deceased and that the shoe print found by PW36 did not belong to him. He cited the case of *David Wanjala Matuba vs. Republic* (2019) eKLR in support of this position.
269. From my consideration of the evidence adduced by PW33, the samples tested at the Government Chemist, did not reveal anything substantive that linked the Accused to the crime in question. In fact, PW33 merely confirmed that the samples matched the DNA of the deceased. Of particular interest was her testimony that they had requested for blood samples from the Accused to enable to them compare but they were not availed. Further, it was her admission that the samples had not been well preserved and therefore they did not generate good DNA analysis.
270. From the above, it is my finding that the Forensic evidence obtained from the said samples was not only wanting but is entirely inefficacious and inutile in respect of linking the Accused to the death of the deceased. This forensic evidence yielded no results whatsoever and failed to advance the case of the Prosecution against the Accused persons.
271. The Prosecution also produced evidence from call logs compiled from data obtained from various telecommunication service providers to link the Accused to the murder of Olga Fonseca. A Communication Link Chart (P.Exh16) was prepared by PW25, Inspector Frida Kalekye and produced in evidence by PW36 Supt. Mungai the investigating officer, to demonstrate whether the Accused persons could be linked to the murder.
272. During the trial, a push and pull arose between the Prosecution and the Defence as to whether the call data was properly produced in court. On 28th March 2018, Mrs. Ouya told the Court that she wished to call two more witnesses being liaison officers from Safaricom and Airtel mobile service providers. She noted that the Communication Link Chart was marked in evidence by PW25 Inspector Kalekye and that it was necessary to call the liaison officers who generated the call data that was used to prepare it. Mr. Katwa Counsel for the 1st Accused, Mr. Olewe for the 2nd and 4th Accused, Mr. Kiarie for the 3rd Accused and Mrs. Omung'ala for the 5th Accused all opposed the Application for adjournment to call the witnesses. They stated that the call data had already been produced by PW25 as P.Exh16. The Court noted that both the Prosecution and the Defence had taken the position that the same had been produced and was properly on Record.
273. I have thoroughly perused the Record and noted that the Link Chart was only marked for identification by Inspector Kalekye (PW25) and the call logs were never produced as stated by Defence Counsel. Subsequently, PW36 the investigating officer produced the Communication Link Chart as P.Exh16 while PW31, Supt. Paul Mumo produced P.Exh 26 (b) which was the call data from Airtel service provider. No liaison service providers were called to produce the call logs data. This Court has



therefore, re-examined the evidence on the call data and the communication chart in order to determine their admissibility under the Evidence Act.

274. The Evidence Act, Cap 80 provides for admissibility of electronic evidence such as Call Logs & Communication Charts. Section 106B of the Evidence Act provides as follows:-

“106B. Admissibility of electronic records

1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
2. The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - c.
 - d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
3.
4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - a. identifying the electronic record containing the statement and describing the manner in which it was produced;
 - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
 - d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),



shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

275. While discussing the application of the above section, the Court of Appeal in *County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board and 6 Others* (2015) eKLR observed that:-

“Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document ‘if the conditions mentioned in this section are satisfied in relation to the information and computer.’

In our view, this is a mandatory requirement which was enacted for good reason. The Court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in subsection 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.”

276. With regard to the requisite contents of a certificate, the court in the above case went on state as follows:-

“The *Evidence Act* does not provide the format the certificate required under subsection 106B (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.”

277. The Supreme Court of India in the case of *Anvar P.V. vs. P.K. Basheer & Others*, Civil Appeal No. 4226 2012 stated thus:-

“Most importantly, such a certificate must accompany the electronic record like computer printout, compact disk (CD), video compact disk (VCD), pen-drive etc pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision etc, without such safeguards, the whole trial based on proof or electronic records can lead to travesty of injustice.”

278. I am persuaded by the case of *Donald Atemia Sipendi vs. Republic* (2019) eKLR where Mativo J. (as he then was) held that:-

“As stated above, the Safaricom data records were produced by a police officer. He is not the maker of the document nor does he work for Safaricom. He could not give evidence on how the records were generated, stored or printed or vouch on the accuracy. In short, he was not competent to produce the same. The said evidence was not properly received. The learned magistrate erred in law by allowing the said records to be produced by a person who was not competent to produce them.”

279. In this case, PW25 Number xxxx Inspector Frida Kalekye testified that on 30th July 2012, she received a request from Supt. Mungai (PW36) for Safaricom data in respect of IMEI Numbers and the call data between 15th July 2012 and 29th July 2012 for 9 mobile numbers as follows: 0721-xxxx, 0721-xxxx, 0724-xxxx, 0727-xxxx, 0723-xxxx, 0712-xxxx, 0727-xxxx, 0722-xxxx and 0708-xxxx. It was PW25’s testimony that the data demonstrated the numbers, times of calling and duration of calls.



280. Further, Inspector Frida Kalekye testified that on 22nd August 2012, Supt. Mungai (PW36) requested for subscriber details of 9 mobile numbers as follows: 0721-xxxx, 0721-xxxx, 0721-xxxx, 0716-xxxx, 0720-xxxx, 07222-xxxx, 0725-xxxx, 0723-xxxx and 0727-xxxx. That on 16th November 2012, she was instructed to obtain the call data in respect of IMEI Number xxxxx from YU Company for the period 3rd October 2012 to 16th November 2012. This data was then handed over to the investigating officer, Supt. Mungai.
281. W25 also testified that they analysed the most frequently called numbers from Mohammed's mobile number 0733-xxxx and prepared an illustrating chart. That on 30th July 2012, she again requested for the same data in respect of mobile numbers 0738-xxxx, 0736-xxxx and 0733-xxxx. She then prepared a chart (P.Exh16) to simplify the information for the investigating officer.
282. PW31, Supt. Paul Mumo testified that his predecessor Godfrey Mangesa had received a letter dated 20th July 2012 Reference Number 165/40/2012 (P.Exh26a) to collect information on three numbers being 0738-xxxx, 0736-xxxx and 0733-xxxx. He further testified that the number 0733-xxxx belonged to the deceased who had been killed on 27th July 2012 and that this number remained active post her death as it was used to contact number 0722-xxxx within Rosslyn Estate area on 31st July 2012 at 1611hrs. PW31 further stated that the deceased's number sent an SMS to 0701-xxxx and later made an international call to number xxxxxx for about 8 minutes.
283. PW31 also testified that on 27th July 2012, at 2144hrs, there was an SMS from two numbers 0722-xxxx and 0723-xxxx to the deceased's phone, that on 28th July 2012 at 0726hrs, another SMS was sent to 0737-xxxx within the city centre. That finally on 28th July 2012, another line was inserted in the mobile phone IMEI Number xxxxxxx.
284. From the above-referenced legal provisions, electronic data material is inadmissible in evidence unless it meets the criteria stipulated in section 106B of the *Evidence Act*. Supt. Mungai, the Investigating Officer (PW36) produced a Communication Link Chart marked as P.EXH16 whose data was derived from call logs received from Airtel Mobile Service Provider. The said call logs were however not accompanied by the requisite certificate neither were they produced by their maker. PW36 was the investigating officer and not the liaison officer from Airtel (the maker of the said data). As such, he was incompetent to produce the same into evidence making the said evidence inadmissible before this Court. It is the finding of this Court therefore, that the call data, not having been produced procedurally, cannot be admitted into evidence.
285. The failure of the Prosecution to properly adduce the call data and proper forensic evidence was however not fatal to the Prosecution's case. As I have already found, the 1st Accused had the motive to eliminate the deceased. I have also made a finding that the 2nd, 3rd and 4th Accused participated in the preparation and planning of the plot to kill the deceased.
286. The next issue therefore, is whether the 5 Accused acted with common intention in the planning and executing the plan to kill the deceased.
287. Section 21 of the Penal Code of Kenya defines common intention as follows:-
- “ 21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”



288. I get further guidance from the case of Republic vs. Tabulayenka s/o Kirya (1943) EACA, 5 where the Court of Appeal of East Africa held thus:-
- “Common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”
289. In Dickson Mwangi Munene & Another vs. Republic, 314/2011 (2014) eKLR, the court in interpreting the above law held:-
- “..... Where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object, by unlawful means and so act or express themselves as to reveal such intention, it implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence.....”
290. In the Australian case of Johns (1980) 54 ALJR, 166 at 169, the court held that an accessory before the fact who is a participant in a common design is responsible for the possible, as distinct from the probable, consequences of execution of the common purpose.
291. In this case, the Prosecution presented evidence to demonstrate that the Accused had a common enterprise in planning and carrying out the murder of Olga. They demonstrated this through the evidence contained in the Alibi statement of Alex Sifuma (3rd Accused) and in the Confession statement of Moses Kalya (4th Accused) which were recorded by PW24 C.I. Limeria and PW18 C.I. Anne Gitahi respectively. In both statements, Moses and Alex stated that they had attended meetings with Ahmed Mujivane (2nd Accused) and Mohammed the suspect at large at Total Muthaiga, Maggi’s Pub and Java Gigiri on diverse dates. It turned out that the purpose of the said meetings was to discuss ways in which the new lady ambassador who had caused a disruption and become a nuisance at the Embassy would be eliminated.
292. PW1 Mwangi and PW2 Kevin, the Embassy drivers testified to the fact that they drove and dropped Mohammed to attend a meeting on the night of 26th July 2012. They stated that Mohammed told them the meeting was with a certain officer from Foreign Affairs to discuss Olga’s presence in the country. PW1 Mwangi stated that they (he and PW2 Kevin) took Mohammed to a pub called Maggi’s at Kenol Petrol Station where they dropped him off and were given Kshs. 2,000/= to take a taxi home. This evidence was corroborated by that of PW2. It also materially corroborates the Confession (P.Exh 25) and Alibi statements (P.Exh 15) on the fact of the meeting held by the 2nd, 3rd, 4th Accused and Mohammed the suspect at large on the night of the murder of Olga.
293. The Prosecution submitted that Dwight was an accessory before the fact for three reasons. Firstly, that Mohammed was not an official of the Embassy but a fraud and whose actions were perpetuated by the 1st Accused in facilitating him, thereby abetting and aiding the offence. Secondly, that the “officials” that Mohammed intended to meet and the “official business” that Mohammed intended to undertake were not embassy business, rather was the planning and the execution of the plot to kill the deceased with the active involvement of the 2nd, 3rd and 4th Accused as implicated in the Confession and Alibi statements. Thirdly, that the 1st Accused did not inquire or object to any move that Mohammed made which suggested that he knew what was going on prior to or even after the murder.
294. Counsel for the 1st Accused Mr. Katwa submitted that the Prosecution did not allege that he was part of any joint criminal enterprise and that he was not mentioned by any of the Accused or witnesses as having been in any collusion. Further, that he was not aware of any plans to kill the deceased. He



- relied on *R. vs. Mohamed D. Kokane & 7 others* (2014) eKLR and *Evodi Ngarkoni Mtei vs. Republic* (2018) eKLR.
295. Counsel submitted that the Prosecution's case showed that other than Dwight, there were other people who equally had the opportunity to kill the deceased and such people were not exonerated by the Prosecution so as to leave the evidence pointing unerringly towards the guilt of Dwight. That no one saw Dwight at the scene, that there was no nexus between him and the deceased shown using the blood samples and finger prints, that there was no direct or circumstantial evidence placing him at the scene and that the shoe print lifted at the scene by PW19 did not belong to him. That the evidence only raised wild suspicion which could not found a basis for conviction. He cited *Neema Mwandoro Ndurya vs. Republic* (2008) eKLR.
296. It was Counsel's submission that the Prosecution's evidence was highly circumstantial as none of their 36 witnesses placed Dwight at the scene of crime on the material day but rather that PW1 and PW15 identified Mohammed Ahmed Mohammed Hassan at the scene of crime yet he was not presented before this Court for prosecution. He submitted that the circumstantial evidence did not link Dwight to the crime.
297. It was Counsel's further submission that there was no direct evidence linking the 1st Accused with the motor vehicle referred to in the confessions and by the Prosecution witnesses. That the Rav 4 Registration Number xxxx 7K, silver in colour belonged to Jennifer Johanna Schell, the 2nd Secretary of the Venezuelan Embassy. That his (Dwight's) car was a white Toyota Rav 4, Registration Number xxxx 5K.
298. Counsel submitted that the 1st Accused's alibi defence which he gave right after he was arrested was not rebutted by the Prosecution but was instead corroborated by PW1 and PW2 who stated Dwight had gone to see a doctor at Westlands Sarit Centre, then went for his Masters Class at Parklands Campus and was thereafter dropped off at his Runda home at around 7 p.m. It was his submission that Dwight spent the night at home and only received a call from PW9 the next morning informing him that the police were at the Embassy and upon reaching the Embassy he found the police and the deceased. He relied on *Victor Mwendwa Mulinge vs. Republic* (2014) eKLR, *Wangombe vs. Republic* (1980) KLR 149 and *Wycliffe Shakwila Mungo vs. Republic* (2018) eKLR.
299. It was Counsel's further submission that the KK guards manning the Embassy on the material night could be responsible for the murder or could otherwise account for the murder of the deceased. That the other possible parties to be involved could have been the person she had sex with on the material night and Mr. Ahmed Mohammed Hassan who was seen at the Residence on the material night by PW1 and PW15.
300. Finally, Counsel submitted that according to PW9 and PW10, Jennifer Schell and her husband Miguel Herera were with the deceased and that the doctrine of "last seen" placed a statutory burden upon them to explain how the deceased died. He relied on Sections 111 (1) and 119 of the *Evidence Act*, Republic vs. EKK (2018) eKLR and Republic vs. Francis Mbogo Wambugu (2018) eKLR.
301. Mr. Olewe, Counsel for Ahmed Mujivane (2nd Accused) submitted that his statement corroborated that of his late father who had died before he could testify on his behalf and that he would rely on his alibi notice that was tendered before Court.
302. Counsel submitted on behalf of the 2nd Accused that there was no evidence of identification as no identification parade had been conducted and the Prosecution witnesses failed to identify him and the role he played in the murder. He relied on *Regina vs. Turnbull* (1976) 3 WLR 445 and *Jali Kazungu Gona vs. Republic* (2017) eKLR.



303. It was Counsel's submission that his mobile phone was confiscated by the police with a view of finding incriminating evidence against Ahmed Mujivane but P.Exh 16 being the Link Chart had no record of the 2nd Accused's phone number. He submitted that Ahmed met Mohammed Ahmed Mohammed Hassan only once at a mosque in South C where he requested him to assist Alex Sifuma get an employment opportunity. That Mohammed was driving a Toyota Prado with diplomatic registration. He submitted that Ahmed did not exchange telephone numbers with Mohammed and it was not true as alleged by the Prosecution that there were numerous meetings between him, Mohammed and his co-Accused.
304. It was Counsel's further submission that Alex Sifuma informed the Court that he had never met Ahmed and that Moses Kalya (4th Accused) stated that he had only met him once. He submitted that it was obvious that Ahmed was not present in the alleged meeting of 26th/27th July 2012.
305. Counsel submitted that a high-profile murder of this nature required people who had known each other for a long time or who had worked together to undertake such a venture. That it was impossible for Ahmed to undertake such a venture as he was not well known to the other Accused persons.
306. It was Counsel's submission that the Prosecution did not provide any evidence of him being paid Kshs. 468,000/= by Mohammed. That the 3rd Accused did not even mention the money in his Alibi statement. The 2nd Accused further stated that the Prosecution failed to produce any direct or circumstantial evidence linking him to the offence and that he ought to be acquitted.
307. Counsel for the 3rd Accused Mr. Nyang'ayo submitted that none of the Prosecution's witnesses pointed towards Alex Sifuma's (3rd Accused) culpability in the murder of the deceased. That his alleged communication with Mr. Mohammed Ahmed Mohammed was conjecture since PW36 did not testify as to the contents of the alleged communication.
308. Counsel also submitted that Alex and Moses Kalya (4th Accused) were arrested together and that they were assaulted during their arrest and before the recording of their statements. It his submission that the deceased died as a result of strangulation and none of the Prosecution's witnesses placed Alex Sifuma at the scene. That the Prosecution failed to produce key witnesses and evidence which would have provided insight as to who actually killed the deceased.
309. Mr. Wamwayi, Counsel for the 4th Accused submitted that Mohammed Ahmed Mohammed Hassan was the main suspect of the murder and was identified at the scene by PW15. It was the Counsel's submission that there was no direct evidence that placed him at the scene of crime. That Confession relied on by the Prosecution the 4th Accused had disapproved of the plan to kill the deceased.
310. Counsel for the 4th Accused submitted that there was no common intention to kill the deceased and that he did not act in concert with anybody in killing the deceased. He relied on the case of Republic vs. Cheya (1973) EA.
311. It was Counsel's submission that the only reason Moses Kalya was arrested was because he was a friend of Alex Sifuma (3rd Accused). That without cogent evidence of the 4th Accused having malice aforethought and having participated in the murder of the deceased, the Prosecution had failed to prove its case against him beyond reasonable doubt and that he ought to be acquitted.
312. Mrs. Omung'ala Counsel for the 5th Accused submitted that out of the 37 witnesses for the Prosecution, only PW29 and PW37 mentioned his client Kipng'eno Kirui. That he had nothing to do with the murder and that at the time of his arrest, he was at home enjoying his leave from work. She further submitted that the Investigating Officer contradicted himself when he stated that the 5th



- Accused had been arrested with the deceased's phone. That the Investigating Officer stated that the same phone had been used to pass text messages in Spanish, a language that the 5th Accused did not understand.
313. It was Counsel's submission that the Investigating officer never made a statement against the 5th Accused and that the case against him was an afterthought. That at one point, the Prosecution had contemplated dropping its case against him. She relied on *Republic vs. Michael Rotich & 2 others* (2016) eKLR and *Seenoi Ene Parsimei Esho Sisina & 8 others vs. Attorney General* (2013) eKLR.
314. I have considered the Accused's defences and their submissions alongside the Prosecution's case. The 2nd, 3rd and 4th Accused admitted that they were involved with Mohammed but only for purposes of assisting Alex (3rd Accused) to get a job. However, the Confession statement of Moses Kalya (4th Accused) already admitted into evidence and discussed above, revealed that the essence of those meetings was to plot to kill Olga Fonseca. I have also already found earlier in this judgment that there was congruence between the Confession statement of Moses Kalya (4th Accused) and the Alibi statement of Alex Sifuma (3rd Accused).
315. The admissions are similar in the two statements. From the Alibi statement, Ahmed Mujivane (2nd Accused), Alex Sifuma (3rd Accused) and Moses Kalya (4th Accused) went for a meeting at Total Muthaiga where Ahmed Mujivane alighted the car they had come in and proceeded to a silver-coloured Toyota Rav-4. That after a while Ahmed Mujivane beckoned Alex Sifuma to join the meeting in the car, meeting 2 other people other than the 2nd Accused, where he got to learn about the squabbles at the Embassy.
316. From the 4th Accused's Confession Statement, Alex Sifuma told him (Moses Kalya) that during the same meeting referred to in the Alibi statement, he (Alex) had met with the Venezuelan ambassador in the said car. That there was a tug of war in the Embassy with the incoming lady ambassador and that they were discussing ways in which they would eliminate her.
317. Additionally, in the 4th Accused's Confession Statement, he stated that at a subsequent meeting in Java Gigiri, Alex (3rd Accused) introduced him to a man who was dressed in a suit and had come in the same silver-coloured Toyota Rav-4 that he had seen at Total Muthaiga. That the man's name was Mohammed and he was the Venezuelan Embassy Administrator.
318. Moses Kalya (4th Accused) stated in his confession statement that, ".....Ahmed drove us to town and Alex and I alighted at Moi Avenue near Barclays Bank. There is no business that we actually talked about. After alighting, I asked Alex what business was going on in the Rav 4 and he told me that he was with the Venezuelan ambassador and that there was a tug of war between the ambassador and the newly posted lady. So he told me that they were discussing on how to eliminate the lady. I asked Alex how they were going to eliminate her and he said that men are planning to kill her....."
319. Moses Kalya (4th Accused) stated that he could not see the occupants in the Toyota Rav-4 owing to its heavy tint. He was also not part of the discussions in the said car because he was left waiting with Evans in the other car. However, he stated in his Confession that he learned of the occupants of the said car from Alex who told him that there were two other people aside from Ahmed Mujivane and that one of the people in the car was the Venezuelan Ambassador. That Alex also told him that their plan was to kill Olga.
320. This portion of the Confession statement by Moses is hearsay. This is because he was not in the Rav-4 at Total Muthaiga and could not see any of its occupants. Further, he did not personally participate in the meeting and therefore could not verify what was discussed. He merely reported what Alex told him.



321. However, there was other evidence that demonstrated that there were subsequent meetings which lend credence to the admissions of the 4th Accused in respect of the meeting to plan the murder of Olga. As already outlined, there was a meeting at Java Gigiri between Mohammed, Alex and Moses where Mohammed told Alex and Moses that he had paid Ahmed to eliminate Olga but was apprehensive as to whether he would deliver on the job. A further meeting was held between Mohammed, Ahmed, Alex and Moses at the same eatery and later at Maggi's Pub where both Alex and Moses stated in their statements that they were left behind at around midnight by Mohammed and Ahmed.
322. From my analysis of the evidence in respect of the said meetings, it is clear that there is no cogent evidence placing Dwight in those meetings. However, and as already demonstrated in this judgement, though Dwight may not have been present at the said meetings in which the planning took place, his close association with Mohammed who was present at the meetings and who carried their common intention to frustrate and remove ambassador Olga, establishes the link between him and the executors of the common intention. I find that 1st Accused was an accessory before the fact.
323. Turning to Ahmed Mujivane (2nd Accused), Alex Sifuma (3rd Accused) and Moses Kalya (4th Accused) placed him at the meeting in Java Gigiri through their Alibi and Confession Statements respectively. Both statements revealed that he was present on the material night and it is alleged that he left Java Gigiri with Mohammed at midnight leaving Alex and Moses behind who waited for them till 4.00 a.m.
324. In his defence, Ahmed merely stated that he was at home with his father who is since deceased and that he was not aware of any plot to kill Olga. He also denied having any relationship with Mohammed to even discuss such schemes.
325. I dismiss the 2nd Accused's defence and consider it be untrue. Firstly because, from the defence of Moses (4th Accused), he stated that he accompanied his friend Alex (3rd Accused) to Jamia Mosque where they met Ahmed (2nd Accused) to hand over the CV to another man in a car. Secondly, from the alibi statement recorded by Alex Sifuma (3rd Accused), he stated that Ahmed (2nd Accused) met with him Alex (3rd Accused) on several occasions at Garden Square Restaurant to help him get a job. That during one of the said meetings in Nairobi CBD, Ahmed was in the company of other Arab-speaking men. The Prosecution evidence demonstrates that it was Ahmed who invited Alex (3rd Accused) to Total Muthaiga. This was corroborated by Moses Kalya (4th Accused) who stated that he accompanied Alex Sifuma alongside another friend called Evans to that meeting at Total Muthaiga. Moses Kalya also stated that on that day before the meeting at Total, he was introduced to Ahmed (2nd Accused) as 'Rotich' and they were then offered a job which they declined but still opted to accompany him (Ahmed) to Total Muthaiga. That Ahmed went to the tinted Silver-coloured Toyota Rav 4 to talk to a friend.
326. From the above, it is evident that Ahmed (2nd Accused) was the one who invited Alex and Moses (3rd and 4th Accused respectively) to the meeting at Total Muthaiga and connected them with the said Mohammed. The evidence also shows that Ahmed was well known to Mohammed. It follows then that he knew about the plot to kill Olga which was the main discussion in the meetings. The Confession and Alibi statements demonstrate that Ahmed was involved in the planning and preparation. He cannot therefore distance himself from the crime of the murder of Olga Fonseca. I find him a key player in the plot to kill Olga because he not only actively participated, but he was the link between Mohammed and the 3rd Accused and 4th Accused.
327. In considering the defence of the 3rd and 4th Accused persons, I am not persuaded that their involvement in the said meetings was only for purposes of getting their wives jobs at the Embassy.



328. The 3rd Accused claimed that the only engagements he had with Ahmed (2nd Accused) and Mohammed were in relation to getting a clerical job at the embassy. He stated in his defence that he merely went to Jamia Mosque to drop his CV with Mohammed and that it was Ahmed who had connected him to Mohammed. When questioned about the job offer made by Ahmed, the 3rd Accused refused to reveal to Inspector Limer (PW24) what job it was. Furthermore, the 3rd Accused did not mention dropping any CV for a clerical job at the embassy in his alibi statement, as he alleged in his defence. This is undoubtedly an afterthought.
329. The 4th Accused in his defence on the other hand said that he accompanied his friend the 3rd Accused to look for a job. He denied seeing the 3rd Accused after the transaction at Jamia Mosque until they were later arrested. From his own Confession statement, Moses Kalya (4th Accused) said that after the meeting at Total Muthaiga, they (he and Alex) were dropped in town by Ahmed (2nd Accused). That he (Moses) learned from Alex about the discussion in the tinted Silver-coloured Toyota Rav-4 at Total Muthaiga, which according to Alex was to eliminate Olga. At a subsequent meeting at Java, Moses himself met with Mohammed, Ahmed (2nd Accused), and Alex (3rd Accused) where they held further discussions on how to execute the plot. Thus, the 4th Accused became a part of the plans when he became aware of this plot and continued to participate in subsequent meetings. His testimony that he merely accompanied his friend Alex to look for a job contradicted the contents of his confession statement and Alex's Alibi statement because it became apparent that they attended subsequent meetings together at Java in Gigiri and Maggi's Pub at Kenol Petrol Station including the one that took place on the material day, which meetings related to the elimination of Olga.
330. Further, Moses Kalya stated in his Confession that they (Moses and Alex) were left behind on the material night and had to wait until 4 a.m. at which point he told his friend Alex to forget about eliminating Olga. This evidence shows that Moses knew of and together with Alex were ready to take up the job that Mohammed had been planning for. By waiting for Mohammed and Ahmed to return till the wee hours of the morning, Alex and Moses demonstrated that they were willing to participate in the execution of what they had been planning for days in their numerous meetings had they not been left behind as they allege. Their defences are not only incoherent but amount to mere denials.
331. As already stated earlier on in this judgment, this Court finds it unlikely that the 3rd and 4th Accused who had actively participated in the planning would be left out at the last minute. Their assertions that they were left out of the plan at the last minute were farfetched. Even if the 3rd and 4th Accused were not placed at the scene at the time of the murder, it is the finding of this Court that they were together with Mohammed and Ahmed at Java that night.
332. Consequently, this Court finds the circumstantial evidence against the 1st, 2nd, 3rd and 4th Accused overwhelming and cogent. The circumstantial evidence in totality leaves no doubt that Mohammed the suspect at large, acted with the knowledge and tacit support of the 1st Accused and with the assistance of the 2nd, 3rd and 4th Accused in planning and executing the murder of the deceased. To this end, I am persuaded by the case of Republic vs. Nicholas Ngugi Bangwa (2015) eKLR.

“Regarding circumstantial evidence the leading case is Republic vs. Kipkering Arap Koskei & Another 16 EACA 135, where the court held:

‘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’.



In order to test whether the circumstantial evidence adduced by the prosecution merits the legal threshold it must meet the principles set out in the case of *Abanga Alias Onyango vs. Republic* CR.A No.32 of 1990(UR) where the learned Judges of the Court of Appeal stated thus: -

‘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.’”

333. Turning to the Prosecution’s evidence with respect to the scene of crime on the material night, it was the evidence of PW1 that he and PW2 left Mohammed at Maggi’s Pub on the night in question. This was consistent with the evidence adduced by Alex (3rd Accused) and Moses (4th Accused) that they were in the company of Ahmed (2nd Accused) and Mohammed till late at night. Further, PW1 and PW15 testified that they heard a commotion at the ambassador’s residence on the material night and that they both saw and recognized Mohammed who was at the scene dressed down from his usual suits and casually into a t-shirt and jeans. This evidence again corroborates the Confession statement of the 4th Accused Moses Kalya where he said that Mohammed returned to Java wearing jeans and a t-shirt. It gives the Confession a ring of truth.
334. As for the 5th Accused at this point in my analysis of the evidence, there is no evidence from the Prosecution to indicate that he was part of the meetings or participated in the plot to kill.
335. From the totality of the evidence on Record, it was clear that Dwight Sagaray and Mohammed the suspect at large held the motive to eliminate Olga and that Mohammed and 2nd, 3rd and 4th Accused met on several occasions to plan and execute the murder of the deceased.
336. Following the reasoning in the case of *Tabuyalenka* (supra), the common intention in this case is evident from the presence of the Accused in the various meetings, their knowledge of the plot to kill, failure to disassociate themselves with the planning and their omission to notify the relevant authorities of the plot. They took part in the planning and were therefore culpable alongside the 1st Accused who had the motive to eliminate Olga. I therefore find a common intention between the 1st, 2nd, 3rd and 4th Accused aided by Mohammed the suspect at large to kill the deceased.
337. However, I have found no evidence that proves common intention on the part of the 5th Accused.
338. This Court is keenly aware that it should not enter a conviction on the basis of circumstantial evidence, unless it satisfies itself that there were no other co-existing circumstances that would destroy the inference of guilt on the part of the Accused.
339. In this regard, Mr. Katwa, Counsel for the 1st Accused submitted that there were other people who may have been responsible for the murder of Olga Fonseca and that in particular, Jennifer Schell and her husband Miguel ought to have been called to account because they were the people who were last seen with the deceased on the night of her murder. He also submitted that there were the night guards from Securex Company who ought to have been called to account for the death because they were on duty on the material night. Further he submitted and that the motor vehicle referred to in the Confession statement of Moses Kalya was a silver-coloured Toyota Rav-4 while his client’s car was a white-coloured Rav-4. That the said silver coloured car belonged to Jennifer Schell, the 2nd Secretary.



340. In considering these submissions by the Defence Counsel, this Court finds guidance from the Court of Appeal case of *Abanga alias Onyango vs. Republic* Criminal Appeal CR. APP. No 32 of 1990, where it was held that:-

“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 and erringly pointing towards the guilt of the accused;
- iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

341. I have revisited the evidence and the proceedings to satisfy myself that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

342. From the Prosecution evidence, all the domestic staff (PW1, PW9, PW10 and PW15) testified that ambassador Olga was drinking with other diplomat friends that night. They named Jennifer Schell and her husband Miguel as the people she was drinking with. However, it was the testimony of PW15 that later that night, he witnessed three strange men and Mohammed at around 2.00 a.m. at the residence compound. This was corroborated by PW1 who testified that on the material night, he also saw Mohammed at the residence when he came out of his room to check up on PW15. In fact, Mohammed identified himself to PW1 when he said, “It’s me Francis, go back, go sleep.” It was also the Prosecution’s evidence that the men who PW15 saw threatened to kill him if he screamed. This evidence demonstrates that, the men who were in the compound with Mohammed had come with ill-motive and further that the deceased must have been murdered either in the late hours of 26th July 2012 or in the wee hours of 27th July 2012.

343. Further to this, the evidence points to the fact that Mohammed was in the compound with strangers that night after the other guests (Jennifer and her husband Miguel) had left and staff were asleep, yet he was unauthorized to access it. This evidence points unerringly to the fact that Mohammed must have been present at the compound alongside others to carry out the final execution of the plot to kill Olga. There is no evidence from the 36 Prosecution witnesses demonstrating any motive on the part of the three diplomats and further, no evidence demonstrated that they could have been responsible for the death of the deceased as submitted by Defence Counsel.

344. During this trial, there was demonstrated effort by the Prosecution Counsel to call as witnesses Jennifer Schell, Miguel Herera and Melissa Herenia who were Venezuelan diplomats working at the Embassy at the time and who by the time of the trial, had already returned to Venezuela. Despite numerous efforts to serve them summons through diplomatic channels, the Prosecution was unable to call them as witnesses. The option of video conferencing was also explored by the Prosecution Counsel. However, the Court observed that the same would be marred by logistical challenges that would have compromised the integrity of the trial. The Court required the Prosecution to resolve the said logistical challenges before allowing evidence through video-conferencing. It is the view of the Court that the effort which the Prosecution made shows that they had every intention to call the three witnesses.



345. Similarly, there was no evidence linking the night guards from Securex to the murder of the deceased. Further, there was no evidence to demonstrate that they had any motive to eliminate the deceased. From the evidence on Record, they would only be guilty of negligence and omission in not preventing the entry of the intruders into the Embassy residence.
346. In the premise, having considered all the evidence and circumstances of this case, I am satisfied that the Prosecution evidence pointed unerringly towards the 1st, 2nd, 3rd and 4th Accused as the persons who unlawfully killed the deceased.
347. The Prosecution case against the 5th Accused Kipng'eno Kirui Chelogoi was built on the doctrine of recent possession. They presented evidence that demonstrated that Chelogoi the 5th Accused was in possession of the deceased's mobile phone which he had passed on to his colleague Julius Kipketer (PW29).
348. As earlier stated, PW29 Julius Kipketer was a security guard employed by KK Security Company and stationed at the Turkish Embassy, working alongside Kipng'eno Kirui Chelogoi the 5th Accused. He testified that sometime in September 2012, the 5th Accused gave him a mobile phone as security for KShs. 4,000/= loan as he needed money for treatment. He testified that the phone was a black-coloured Blackberry, Curve 8520 (P.Exh19).
349. PW29 went on to testify that his two brothers used the phone on 20th November 2012, and that the following day on 21st November 2012, he went to work with the phone and was arrested by plain-clothed police officers. Thereafter he was taken to Gigiri Police Station where his brothers had also been arrested. It was his testimony that after explaining how he got the phone, his brothers were released while he was taken to the police station for further interrogation to trace Chelogoi the 5th Accused.
350. In the article, Regina V. Graham 'The Doctrine of Recent possession and the Rule against Hearsay Evidence,' (1973) 15 Crim LQ 195, it was stated:-
- “Under the doctrine of recent possession, an inference of guilty knowledge may be drawn against the accused in the absence of a reasonable explanation from him of how he came by the (stolen) goods in his possession.”
351. In Tremear's Annotated Criminal Code, 6th Edn. at page 440, the Editor stated as follows:-
- “The doctrine is sometimes stated by saying that if a person is found in possession of recently stolen property, the onus is upon him to explain his possession and to show that he came by it honestly. While this is not inaccurate in the sense that the accused may be convicted solely upon evidence of possession, if he gives no explanation of that possession, it is nevertheless misleading in that it tends to give a false impression as to the burden of proof in such cases. It is definitely incorrect to say that the onus is on the accused to 'satisfy the jury' that he came by the property honestly.”
352. There exists rich jurisprudence on the principles applicable in the case of recent possession. In the case of Paul Mwita Robi vs. Republic (2010) eKLR, the Court of Appeal explained thus:-
- “Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden”.



Similarly, in the persuasive case of *Kelvin Nyongesa & 2 Others vs. Republic* (2016) eKLR the High of Kenya court held that:

“Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard”.

353. The leading case on the doctrine above is *R. vs. Schama & Abramovitch* (1914), 11 Cr. App. R.45, at p49, where Lord Reading pronounced himself thus:-

“... when the Prosecution has proved the possession by the prisoner and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true,.... The prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner’s guilt. That onus never changes, it always rests on the prosecution.”

See also ‘Evidence by Cross’ (3rd Edn. 1967) at pp. 37-8.

354. In essence, when an accused person has been found in possession of goods which form the subject matter of a criminal inquiry, a prima facie case becomes established against them and therefore the court gives them a chance to explain their side of the story to avoid the risk of being found guilty.

355. In the case of *Ungaro vs. the King* (1911), 6 Cr. App. R.225, Lord Estey J. dealt with the doctrine of recent possession as follows:-

“..... They mean no more than, that the evidence of recent possession unexplained raises a prima facie case against the accused upon which if the accused does not adduce further evidence by way of explanation, the jury may not, not must, find the accused guilty.”

356. The inference of guilt therefore is permissive and not mandatory. In the Canadian Supreme Court case of *Republic vs. Kowkyk* (1988)2 SCR 59 it stated: -

“.....upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto..... In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

357. In the present case, Kipng’eno Chelogoi the 5th Accused was charged jointly with the others for being in possession of the deceased’s phone which he subsequently handed over to another person (PW29). The Prosecution adduced evidence through PW29 Julius Kipketer who testified that he was arrested in possession of a phone he received from his colleague, Chelogoi the 5th Accused. He further testified that the said phone was security for Kshs. 4,000/= which he had lent the 5th Accused. It was his testimony that he was booked as a murder suspect at Central Police station then taken to Nairobi Area where his work identity badge number xxxx and his other mobile phone, Blackberry Bold 9780 (P.Exh20) were confiscated. The said phone, a Blackberry 80520, was produced in Court by PW36 as P.Exh 19.



358. In his defence, Chelogoi the 5th Accused stated that while in employment as a KK security guard deployed at the Turkish Embassy, he came upon the said phone on the morning of 27th July 2012 at around 5.00-6.00 a.m. after his night shift duty. He said that it was his hope that the owner of the phone would call the phone but in the course of the day, he discovered that the phone had no SIM Card. He decided to keep the phone for about 2-3 months. He corroborated PW29's testimony regarding the phone being security for the amount he borrowed.
359. From the above, it is clear to this Court that the fact of possession was proved by the Prosecution. Indeed, this fact was not contested but admitted by Chelogoi the 5th Accused in his defence.
360. During the trial, all the other Accused persons testified that they did not know Chelogoi the 5th Accused person. Furthermore, none of the Prosecution witnesses knew him, save for PW29 who was his former colleague. It was his (Chelogoi -5th Accused) testimony that he neither knew where the Venezuelan Embassy was nor the residence and that he did not participate in the murder of the said ambassador.
361. The Prosecution submitted that Chelogoi the 5th Accused person was found with the deceased's phone. That he failed to indicate the date and the month he allegedly picked up the phone. The Prosecution further submitted that PW29 (the 5th Accused's workmate) was arrested with the phone after inserting a SIM card. That Chelogoi the 5th Accused contradicted himself when he stated that there was no SIM card.
362. It was the Prosecution's submission that PW29 confirmed that the twin-sim black blackberry phone had no SIM card and that he inserted his. That this contradicted Chelogoi the 5th Accused's defence that he picked up the phone when it was ringing by the roadside. It was the Prosecution's further submission that it was the 5th Accused who removed the SIM card. They relied on *Wanjohi & 2 others vs. Republic KLR (415)*.
363. Defence Counsel Mrs Omung'ala submitted on behalf of the 5th Accused person that out of the 37 witnesses for the Prosecution, only two mentioned him, i.e. PW29 and Cpl Lukas Juma (PW37). He submitted that the 5th Accused had nothing to do with the murder and that at the time of his arrest, he was at home enjoying his leave from work. He further submitted that the Investigating Officer contradicted himself when he stated that the 5th Accused had been arrested with the deceased's phone. That the Investigating Officer stated that the same phone had been used to pass text messages in Spanish, a language that the 5th Accused did not understand.
364. It is my finding, after a careful analysis of the evidence as indicated above, that a prima facie case had been established against Kipng'eno Chelogoi the 5th Accused for being in possession of the said phone (P.Exh) 19. However, upon his explanation, the Prosecution failed to discharge its burden of proof to the required legal standard against the 5th Accused. The fact that the 5th Accused was found with the phone created suspicion that he was a participant in the murder of the deceased ambassador and picked the phone from the murder scene. However, there was no further corroborating evidence to place him at the scene or to link him to the crime.
365. Indeed, in the South African Court of Appeal case of *Rex vs. Difford (1937) SA*, it was stated thus:-
- “It is equally clear that no onus rests on the accused to convince the court on the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable



possibility of his explanation being true, then he is entitled to his acquittal.” (Emphasis added).

366. The explanation offered by the 5th Accused as to how he came upon the deceased’s phone, though not completely convincing, was sufficient to cast doubt on the Prosecution case against him. In law, he had no burden to prove his innocence. It is therefore my finding that the Prosecution did not prove the case against the 5th Accused person beyond reasonable doubt.

VI. Whether the 5 accused persons acted with malice aforethought.

367. Section 206 of the Penal Code of Kenya sets out the circumstances which constitute malice aforethought. It states thus:-

“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.”

368. According to William Livesey Burdick, ‘The Law of Crimes’, (M. Bender & Company, 1946), malice aforethought can be evidenced by bad feelings towards someone but does not necessarily mean personal hatred or revenge against the person killed. In the case of *Commonwealth vs. Webster*, 5 Cush [Mas] 295 [1850]), malice aforethought denotes purpose and design in contradistinction to accident and mischance.

369. Malice aforethought was also well defined by Bayley J. in *Bromage & Another vs. Prosser*, 107 Eng. Rep. 1051, 1055 (K.B. 1825) as:-

“Malice in common acceptance means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.”

Lindley L.J. in *Stuart vs. Bell* stated:-

“Malice, in fact, is not confined to personal spit or ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or every wrong feeling in a man’s mind.”



370. Section 206 of the Penal Code outlines instances where malice aforethought may be inferred. In the classic case of *Tubere s/o Ochen vs. Republic E.A. (1945) 12 EACA 63*, the Court of Appeal of Eastern Africa stated as follows:-

“The duty of the court in determining whether malice aforethought has been established is to consider the nature of the weapon used, the manner in which it is used, the part of the body injured, the conduct of the accused before, during and after the attack.”

(See also *Sawe vs. Republic [2003] KLR 364*).

371. Lord Hailsham L.C. in *Hyam (1975) AC 55, 79* held that the defendant is guilty of murder if he possesses the following intention: where he knows that there is a serious risk that death or grievous bodily harm will ensue from his acts and commits these acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts.

372. In *The Forum*, ‘Recent Revolutions in Criminal Law – Presumption of Malice’, (No. VI, April 1875) the author in explaining how to infer malice stated:-

“The public authorities, therefore, to recapitulate, must take the initiative, whenever an alleged crime is reported in inquiries on the following topics:

1. Character and relations of the parties implicated.
2. Motives which may have led either of such parties to the commission of the crime.
3. Subsequent conduct of other of such parties e.g. escapes or evasions of justice
4. Attempts by any parties to fabricate or destroy evidence.
5. Prior attempts or antecedent preparations by any parties.

373. In this case, I have already found that the 1st, 2nd, 3rd and 4th Accused acted in concert to plan and execute the death of the deceased. In other words, they had a common intention as already established. The issue now is whether they acted with malice aforethought.

374. From my analysis of the evidence, the circumstantial evidence has shown that the 1st Accused had a motive to stop the deceased from taking over the Embassy. His actions right from the time she landed to the time of her demise demonstrated ill will. He incited staff against her, vacated the residence grudgingly and continued to entertain his friend Mohamed in the affairs of the Embassy. Together with Mohamed, they hatched a plan to frustrate her.

375. I infer malice from the fact that the 1st Accused must have known of the plot to kill the deceased but did nothing about it. It is my conclusion that the planning meetings in which the 2nd, 3rd and 4th accused participated in under the tutelage of Mohamed had the 1st Accused’s tact and support. The evidence did not directly place him at the meetings or the scene on the material night. However he failed to stop the evil scheme and instead allowed omissions that would expose the ambassador to danger. Mohammed the suspect at large only executed the common intention that he shared with the 1st Accused.

376. From the totality of the evidence, it is my finding that the 1st Accused had the necessary malice aforethought as demonstrated by the planning and execution through the hand of Mohammed the suspect at large.



377. For the 2nd, 3rd and 4th Accused, the evidence has demonstrated that they participated in meetings to discuss the elimination of the ambassador. These meetings which have been evaluated at length were held at various places including Garden Square, Total Muthaiga and Gigiri Java. The 2nd, 3rd and 4th Accused were placed at Gigiri on the night of the murder in the company of Mohammed. From analysis, there was no evidence directly placing them inside the Embassy residence at the time of the murder. There was however direct evidence showing that Mohammed was present in the compound when the ambassador was killed. Since I have already found that the 2nd, 3rd and 4th Accused had common intention in the planning and preparation leading to the killing, it is my finding also that the hand which killed the ambassador executed the common plan. It follows that, the 2nd, 3rd and 4th Accused acted with malice aforethought as their common intention matured into the execution of the deceased.
378. PW3 described the scene when he first saw the deceased's body lying on her bed. His evidence was further corroborated by No. xxxx Supt. Stephen Kemboi (PW19) and Supt. Mungai (PW36) who all stated that a telephone wire cord (P.EX34) had been tied around her neck. The pathologist Dr. Oduor (PW28) in the Post-mortem Report (PEXH18), confirmed that the deceased had been killed by manual strangulation then the ligature tied afterwards. There can be no other conclusion than that, whoever strangled the deceased had malice aforethought. The person who strangled her was executing the malicious intent of the 1st, 2nd, 3rd and 4th Accused.
379. The aftermath of the deceased's demise was characterized by a deceitful expedition where Mohammed tried to lure the Embassy drivers (PW1 and PW2) to illegally remove the official car from the residence on the pretext that the lady ambassador had left the country the previous night. He is also said to have been in possession of the car keys for the official cars yet these had earlier on been handed over to the deceased.
380. It is my view from the above facts that the Accused had the necessary malice aforethought and had an intention to kill the deceased. The manner in which the deceased was killed and the subsequent ploy to make it look like she had committed suicide all connote malice aforethought. It is also clear that they acted alongside Mohammed, the suspect at large.
381. It is also my finding that the 2nd, 3rd and 4th Accused, based on their numerous engagements to plan for the elimination of Olga, leads to the inference that they possessed the necessary malice aforethought. This is because, they were aware of the plot to kill and knew that their actions would lead to the death of the ambassador. If indeed, they had no intention to commit the murder, they would have and from the onset, walked away from the planning and completely disassociated themselves with the plan.
382. It is my firm finding therefore, that this case squarely falls within the provisions of Section 206 of the Penal Code.
383. Turning to the 5th Accused, as already stated, there is no evidence demonstrating any motive or malice from him and nothing links him to the murder of the deceased save for the deceased's mobile phone which was in his possession and as I have already found, was adequately explained.
384. This judgment would not be complete without considering the glaring omission of the State to present one Mohammed Ahmed Mohammed Hassan to face trial alongside the 5 Accused in this case. His name loomed large throughout the proceedings. The Embassy staff, notably the drivers, PW1 and PW2 told the Court that prior to the arrival of Olga Fonseca the deceased ambassador, he (Mohammed Ahmed Mohammed Hassan) had unlimited access to the Embassy vehicles and was driven around as he wished. PW1 and PW2 testified that Mohammed moved into the Embassy residence during the tenure of ambassador Gerardo and also lived there when Dwight Sagaray (1st Accused) took over.



385. The Prosecution submitted that the said Mohammed was a fraud as demonstrated by the evidence of PW34 who told the Court that Mohammed was unknown in the Ministry of Foreign Affairs. It became clear that Mohammed Ahmed Hassan Mohammed wielded a lot of power and authority at the Venezuelan Embassy and residence that he would at times pay the domestic workers at the residence their dues or grant them permission from work. They knew him as the boss of the Embassy. He also held himself out to PW14, PW22 and PW30 as an administrator at the Embassy.
386. From the evidence on Record, it has also been clearly established that there was a laissez-faire attitude from Dwight Sagaray in the manner in which he allowed Mohammed Ahmed Mohammed Hassan to run the affairs of the Embassy and unlimited access to the Embassy residence, vehicles and staff.
387. In his defence, Dwight told the Court that he knew or thought that Mohammed was an official of the Kenyan Government. That he met with Mohammed at the celebrations of the Brazilian and Egyptian National Days where he (Mohammed) introduced himself as a diplomat of Kenya to Pakistan. Dwight produced a bundle of photographs (D. Exh 24) which included one which showed the image of Mohammed in the company of persons he identified as former senior Government officials including Mr. Yusuf Haji, a former minister for Defence and Najib Balala, a former minister for Tourism. Dwight Sagaray told the Court that, that was the reason he believed that Mohammed was a government official.
388. This Court believes that Mohammed Ahmed Mohammed Hassan, the suspect at large, was either a fraud as submitted by the Prosecution or a well-connected individual. This is because no ordinary person would, without authority, find their way into a Foreign State's Embassy to overrun it. Although the photographs produced by Dwight were not authenticated to prove that the person pointed out by him was Mohammed or to confirm the circumstances under which they were taken, the testimonies of the various witnesses paint him as a person of influence thereby lending credibility to Dwight's assertion that Mohammed was either an influential person or was connected to influential persons.
389. A look at the testimony of No. xxxx Inspector Boniface Mulee (PW20) who was dispatched to arrest Mohammed was quite telling. PW20 casually told the Court that he visited the home of Mohammed's parents and found a young man whom he thought was Mohammed's brother. He made no effort to confirm whether or not the individual was Mohammed. The fact that Mohammed has not been arrested years later shows that there was lacklustre or no effort at all on the part of the investigators to find and arrest him to face the charge of murder. To date, the warrants of arrest against Mohammed Ahmed Mohammed Hassan remain unexecuted. Justice demands that the said suspect at large be traced, arrested and charged. To this end, this Court directs the Deputy Registrar of the Court to certify this judgment to the Director of Public Prosecutions for action.
390. In the final analysis, I am satisfied that the Prosecution has proved the charge of murder against the 1st, 2nd, 3rd and 4th Accused beyond reasonable doubt. I find that Dwight Asdrubal Sagaray Couvault (1st Accused), Ahmed Mujivane Omido (2nd Accused), Alex Sifuma Wanyonyi (3rd Accused) and Moses Kiprotich Kalya (4th Accused) guilty of the offence of murder contrary to section 203 of the Penal Code. Each of them is convicted accordingly.
391. I find that the Prosecution has not proved the charge of murder against Kipng'eno Kirui Chelogoi, (5th Accused) to the required legal standard. I grant him the benefit of doubt. He is thus acquitted under section 215 of the Criminal Procedure Code.
392. As I conclude this judgment, I wish to express my gratitude to the learned Prosecution Counsel and the learned Defence Counsel for their industry and dedication to the cause of justice. I also thank all the parties including the Accused for their patience during the pendency of this trial.



JUDGEMENT DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY, 2023.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of 1st, 2nd, 3rd, 4th and 5th Accused, Mrs. Ouya and Ms. Gichohi for the State, Ms. Waweru h/b for Mr. Katwa for the 1st Accused, Ms. Kinyua h/b for Mr. Olewe for the 2nd Accused, Ms. Waweru h/b for Mr. Okatch for the 3rd Accused for the 3rd Accused, Mr. Wamwayi for the 4th Accused, Mrs. Omung'ala for the 5th Accused, and Gitonga (Court Assistant).

