



REPUBLIC OF KENYA



**Republic v Mbaya (Criminal Case 45 of 2015)
[2023] KEHC 1361 (KLR) (23 February 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 45 OF 2015
EM MURIITHI, J
FEBRUARY 23, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNETH MUTHOMI MBAYA ACCUSED

JUDGMENT

Introduction

1. The accused Kenneth Muthomi Mbaya is charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The Particulars of the Offence are that he

“on the night of the March 14, 2015 at Kianjogu village, Buuri Kingori sublocation in Imenti central District within Meru County murdered Susan Kathambi Magaju.”

The accused denied the charge and the case proceeded to trial with the Prosecution calling 7 witnesses and the accused when put on his defence leading sworn evidence without calling a witness.

The Prosecution’s case

2. The Prosecution’s case is that the accused who lived together with the deceased as boyfriend and girlfriend was on the evening of 14/3/2015 at 7.00pm seen leaving the deceased’s home with the deceased and they were later seen at a Church Crusade meeting at about 9.00pm later in the night. The deceased was not seen for the next three days and upon a search on 17/3/2015 her dead body was found on her bed half naked with injuries on her face and blood oozing from her private parts. Upon post-mortem a machete was recovered from her genital tract and the cause of death was established to be multiple gut wounds due to forced machete penetration into he vagina. The accused was no where to be seen and was arrested three months later in June 2015. Upon search at the deceased’s house, the accused’s clothing being a jacket and a trouser and personal items in nature of a medical card and



receipt in the accused's name and a prescription note with the name of the accused were recovered and produced before the court as exhibits. On circumstantial evidence and the last seen with doctrine the Prosecution seeks the conviction of the accused for the offence of murder contrary to section 203 as read with 204 of the *Penal Code*.

The Defence

3. The Defence case is based on an alibi that the accused parted with the deceased who was his girlfriend on the evening of her alleged killing on 14/3/2015 and he proceeded on the 15/3/2015 to visit a friend in Nairobi where he stayed for the three days during the discovery of her dead body on the 17/3/2015 at 3.00pm. Upon return, on advice of his friends that he should stay away as the family of the deceased suspected him to be involved in the killing, the accused had gone away from the area for three months until June 2015 when he was arrested upon a visit to the deceased family home on the invitation of the deceased's brother himself allegedly deceased.

Issues for Determination

Proof of the charge of murder

4. The ingredients of the offence of murder contrary to section 203 as read with 204 of the *Penal Code* are settled and maybe paraphrased as follows-
 - i. Proof of death and cause of death;
 - ii. Proof that the accused's unlawful act causing the death; and
 - iii. Proof of malice aforethought on the part of the accused.

See for example *Antony Ndegwa Ngari v R* [2014] eKLR] where the Court of Appeal at Nyeri held, approving *Nyambura & others v Republic* [2001] KLR 355), that –

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a) the death of the deceased and the cause of that death;
 - (b) that the accused committed the unlawful act which caused the death of the deceased and
 - (c) that the Accused had the malice aforethought.”
5. It is accepted by both the Prosecution and the Defence herein that the case before the court is based on circumstantial evidence, the point of departure being only whether there is sufficient circumstantial evidence to prove the above elements of the murder charge.
 6. The question the court must determine therefore is whether on the evidence presented by the prosecution before the court, and in light of the defence by the accused, the elements of the offence of murder are proved beyond reasonable doubt so as to support a conviction of the accused, or there is a reasonable doubt the benefit of which should be given to the accused. The court is mindful of its duty as counselled in *Okethi Olale & others v R* [1965] EA 555 to consider and weigh the evidence presented by the prosecution and the defence as a whole in determining whether the charge is proved.



The Evidence

7. The full record of the testimony of the prosecution witnesses is set out below:

8. PW1 Magaju M'Ituma testified that,

“I reside in Uku, Kianjogu village Imenti South. I rear livestock at home. On 17.3.2015 at 3.00 pm, Mutwiri did wrongs. I saw Mutwiri cause a disturbance trying to kill a lady called Grace Kathambi my eldest daughter. I reported her to sub-area. I could not handle the situation. Grace Kathambi is deceased. On this day I had gone to Kathambi's house to find out whether everything was okay as there is nearby my house. When I got there, I found the disturbance by Mutwiri. I found out the door had been broken into the inside of the house. I did not enter the house as it belonged to my child and respect for her could not allow. I went to call sub-area manager for Kianjogu one Gitonga. After the sub-area came he investigated what happened and he later went to report to the police. When he went to report to the police with one Mbaabu, I was left behind at home. They went to report to the police. The sub-area went to report to the police because of the breaking into the house of Kathambi. At the time, Kathambi was not at the home. I cannot tell where Kathambi was at the time.”

9. On cross examination, he stated that,

“I did not record a statement with the police.”

10. PW2 Janet Kanyiri testified that,

“On 14.3.2015 at 7.00 pm in the evening, I saw Kathambi leaving her house with one Kenneth Muthomi. I saw them as I was at home. I was outside the house. From my house to Susan's house, it is 20 metres. At the time, it was just getting dark but I could see clearly. Kathambi was my sister-in-law as I am married to Kathambi's brother Samson Muriungi. Kenneth Muthomi used to live with Kathambi. They had lived together for over (1) year. They lived as husband and wife. I did not see the two again until 17.3.2015 when the house was opened and we found Kathambi's body lying on the bed. It was Susan's father, Charles Magaju who opened the house. Susan's body was on the bed. She was dead. She lay on her back with her top blouse lifted up to the neck. We called the neighbours. I am the one who called the neighbours. The area manager called Stephen Gitonga also came. He is the area manager of Ukuu, Kianjogu. The area manager called the police who came and took the body and took it to mortuary. Kenneth Muthomi is the accused (pointing). I am the one who removed the beddings which had blood all over. I buried them on the following day on 18.3.2015. I recorded my statement at Kariene police station.”

11. On cross examination, she stated that,

“On 14.3.2015, I saw Kathambi and the accused leaving. There is no one else who saw her. At our home there (3) houses, one belonging to Kathambi, the other to my father-in-law and the last mine. There are about (7) people living on the home of Magaju. On that date, he was alone in the home. No other person saw Muthomi and Susan leaving. They were at home. On 14.3.2015 Susan wore a white top, trouser grey and grey pullover. Muthomi wore a brown jacket. I can't recall the rest of his clothing. I did not see them thereafter. Between 14th – 17th, I didn't see Muthomi anywhere. It is 20 metres from my house to Susan's house. From my father's house to Susan's house it is 15 metres. It is not far. On 14/16 March, 2015,



I did not witness any quarrel at the home. Susan was looked from 14.3 – the evening (“why did you not go to check on her? “I did not go because the house was locked as usual. We did not know whether she was inside or not. We wanted to find out whether she was in and that is when we went to her check. The key to house was outside the house. It was my father in-law Charles Magaju who opened the door, who opened. When we opened, the body was not smelling. The body was on the bed lying on the back. I did not see any injuries on the body. I also did not see any weapon. I do not say that it was the accused who killed Susan. I did not record that I took the bloody beddings and buried them. It is in the statement.”

12. PW3 Samson Muriungi Magaju testified that,

“...I know the accused as Muthomi. I know him because of the relationship with my sister Susan Kathambi. My sister is dead in 2015. My sister had a relationship for over (1) year with the accused. On 14.3.2015 we were at home and we agreed with my sister Susan Kathambi at 9.00p.m. In the night we meet at a crusade. I went to the market at a religious crusade at Uku market. When I went to the crusade, I saw my sister and the accused. I then went home. On 15.3.2015, I did not see my sister but her house was closed. I did not see my sister until 17.3.2015. The house is about 20 metres from my house. I had thought my sister had gone on safari but she never used to go for more than one day. I did not see her for the 3 days 15, 16 and 17 March 2015. On 17.3.2015 at about 3.00p.m. In the afternoon I received a call from neighbours that my sister had been locked in the house and she had been killed. I ran home and I found it was true, I went upto my sister’s house. I went to Susan’s house, I found people at the home. People were crying. I looked into the house from outside. The door was open. I saw my sister’s body half naked lying on the bed facing up. Outside my sister’s house were many people. I recorded a statement at Kariene police station.”

13. On cross examination, he stated that,

“My sister Kathambi had been married before – about 10 years before she met the accused. She had been divorced. It had been about 10 years. My sister had (2) children. The children lived with her mother Kathambi. From Kathambi’s house to my house is about 20 metres. Our father’s house is about 20 metres from my sister’s house and they are our children. I saw the accused and my sister at the crusade. I stated that accused and Kathambi were drunk. I saw them drinking at the crusade. I left them at the crusade. I did not see them coming home. I do not know where they went after the crusade. My sister was discovered on 17.3.2015. Between 14-17 March I went for my casual labours. At my home in our compound there is mzee at home. There is no one who heard any commotion at the home between 14-17. On 15.3.2015, it was on a Sunday. I was at home and I did not see anything. I also did not smell any foul air of decomposing body. On 17.3.2015 it was mzee our father Magaju who opened the door. He was with my wife when we did not see her. Our father said that we should open the door as he knew where the key for the door. It was my father who knew where the key for Kathambi’s door was kept. On that date 14.3.2015 accused wore a brown jacket. I cannot recall the other clothing. The deceased wore a white blouse and a red skirt. On 17.3.2015 when I looked into the house, the deceased wore a white blouse and nothing else on. It was the same white blouse that she wore on the 14.3.2015. Before the incident, the accused and deceased lived well but they could have occasional disagreements. On 14.3.2015, they were happy and celebrating. I have said that the accused .. my sister. I may state they were together. I did not know who killed my sister.”



14. PW4 Stephen Gitonga testified that,

“...I am also area manager, Kianjogu. On 17.3.2015 at about 1.30 p.m. I was with a mzee called Magaju who came to my house. The mzee is Charles Magaju. He came to my home and told me that he had gone to her daughter’s house and found that she was dead. I told him to come with me so that we go to see. We went back with him to the house of Kathambi. At the house I saw the body. The body had clothes removed to the neck. The body was on the bed. I looked into house through the door. I told mzee Magaju to come with me so that we report the matter to the police. We went with mzeee Magaju and his son Muriungi. From there they got police officers who went and conducted investigations at the house and took the body to the mortuary. On 26.3.2015 at general hospital I went to witness the postmortem examination. I do identified the body as belonging to Kathambi. The accused is Muthomi. I know him and even his home from when he was a young man when he started having a relationship with Kathambi. I used to see them walking together in the village. On 17.3.2015 and when I went to see the body of deceased, I did not see the accused anywhere.”

15. On cross examination, he stated that,

“Mzee Magaju came to my home on 17.3.2015. We went to the scene on the same day. At the scene, the door was opened by mzee Magaju when I asked him to open so that I see. The door was opened by key. It was not broken. [witness referred to statement] Magaju broke the door? Magaju opened the door. It was not broken. I saw her private parts. There was no blood on the bed. When I saw the body we were three of us, magaju and his son Muriungi. The deceased wore a white piece of dressing around the neck. I know the accused for about (2) years before the incident. I am the area manager. I had not heard of any dispute between them. I saw them as a happy couple for the period that I knew them. I was among the few people at the scene. The body was not producing any smell. Around the scene there are other houses about 20 metres and could hear what happened at one of the houses.”

16. PW5 No 67654 Cpl (Rtd) Tarcisio Kagunda testified that,

“I was working at Kariene police station performing general duties. It was in 2015. On 17.3.2015 at 3.58 p.m. I was in the office where a report of sudden death was made at the station. I was the duty officer of the day. The report was made by the father of the deceased one Magaju. We went to the scene. I was with PC Abdi and the OCS. We went to the scene aboard the station motor vehicle. We went to Kambao village of Ikoo location, Uruku location. At the scene, we found that the deceased lying on her bed facing upwards half naked and oozing blood on her private parts. She also had visible bruises on the mouth and the head. The scenes of crime officers came and took photographs. I have pictures of the scene. The photographs are (6) marked MFI 1 (a) – (f). They are showing the injuries on the deceased. They also show the single room house and the environment of the house. We collected some of the items we found necessary. We collected a jacket and a blouse. A jacket white in colour and a grey trouser. I recovered them in the house of the deceased. I produce the jacket as P Exh 2 and the grey trouser as P Exh 3. I do recovered a medical note on the accused from the accused. Card ION of Kathambi Muthomi No 1251607969 dated 12.3.2015 P Exh No 4, Receipt from Ken Muthomi Mbaya Kshs. 1,050/= being payment of group construction dated 26.2.2015 produced as P Exh No. 5. The other is a medical note prescription in the name of Kenneth Muthomi Mbaya dated 12.3.2015 produced as P Exh No 6. We went to the police station. After photographing the scene, I took the deceased to Meru PGH mortuary. Thereafter, I conducted a postmortem on 26.3.2015 at



Meru Level (5) hospital together with some of the relatives of the deceased. The postmortem was done by Dr Kagari. When doing the postmortem a panga was recovered from the deceased's private parts. I took it as an exhibit believing it to be the murder weapon. I have the panga before the court. Panga was removed during postmortem. It was very traumatizing to witness the panga being removed. Panga with a handle produced as P exhibit No 7.”

17. On cross examination, he stated that,

“I am the investigating officer. I recorded a statement. I recorded it on 5.6.2015. The statement indicates date of arrest as 6.6.2015 at around 7.00a.m. I received a call the accused was last seen not the deceased on 14.3.2015. He was seen together with the deceased as they were going to the trading centre. It was Samson Muriungi who saw the deceased and the accused going to the centre. They were at a crusade at Ukuu market and the witness PW3 Samson Muriungi and he saw the deceased and the accused at the crusade until 9.00p.m. The witness Muriungi said he left them there. According to my investigation there was another person who saw the deceased. It is Janet Kanyiri PW2 who said she saw the deceased and accused going towards the market at around 7.00 p.m. I witnessed the scene. There are three houses. One for Janet Kanyiri, one for her father and another for the deceased. The distance between deceased's house to her father's house is not far. It is about 30-40 metres. PW2's house to Susan's house are also about 30-40 metres. I did a sketch map. I have a sketch map. I have it here with me. (witness shows to counsel). Between the 14 – 17 March 2015 no one saw the two after the PW3 saw them at the centre. On 14.3.2015, there is no record of the clothing that the accused wore. Between 14 – 17 March 2015 no one heard a quarrel or screams at the compound. According to my investigations, the deceased and accused were living together in the same house. I do not have a record of any quarrel or fighting. The deceased went missing according to the father's statement from 14.3.2015 up to 17.3.2015. It is not possible to tell when deceased went missing. The house was locked. It is after she was not seen for some time that the deceased's father opened to find out why. They used a key which was outside the house, on top of the door. It is not true that any other person could have opened. The accused disappeared until 5.6.2015, yet the accused was living with the deceased. The only other person who knew about the key is the father and other close relatives. I confirm that no witnesses saw Muthomi kill the deceased. At the scene, I saw injuries private parts oozing blood, head had visible bruises and the mouth also. At the scene I did not a murder weapon but during postmortem the panga was retrieved by the doctor. When we went to the scene, the body had smell. It was moderate smell. Somebody outside the house could not smell it. It was after we entered that we experienced the smell. The items recovered in the deceased's house were inside the trouser. The trouser was hanging on a line in the house. Panga produced in court. Any DNA testing. We did not manage to take it for DNA testing at Nairobi. There was blood on the beddings. The beddings were not taken for DNA testing. We charged the accused because we recovered items of his in the house among other reasons. Accused and deceased lived as husband and wife in the same house. The accused has lived about (1) year together. Motive – After all those happening bearing in mind that accused was a close friend of the deceased, accused was nowhere to be found, even at the time of burial. He escaped. There is no record of drunkenness on 14.3.2015. The accused was arrested at the home of the deceased. I see it that he had escaped as we were looking for him and he could not be seen.”



18. PW6 No 56791 Cpl James Muriithi under CCIO Meru County and CSI office, testified that,

“I am appointed by AG under Section 78 of *Evidence Act* by gazette notice 4562 of 7.7.2003. I worked with John Munywa Isaac. I know his handwriting. I can confirm that this report is the one on report dated 16.5.2016. According to the report. On 17.7.2015 at 18.00 hours my colleague arrived at Kianjogu village, Ukuu location, Kauvao sub-location where we met Chief Inspector Francis Wafula who was at the homestead of the deceased namely Susan Kathambi. According to his report, he noted that in a timber cube of 7 x 10 feet the body of the deceased Susan Kathambi was lying on its back and it was naked. He also noted that there was a blood from her private parts. He took the following pictures:

- 1) Photograph No (1) showing the general view of the homestead.
- 2) Photograph No (2) is a close up view showing Chief Inspector Francis Wafula standing in front of the cube in question.
- 3) Photograph No. (3) showing the body of the deceased lying on the bed.
- 4) Photograph No. (4) showing the same body in close-up view.
- 5) Photograph No. (5) showing the main injury on the private parts
- 6) Close-up view showing the facial view and the injuries on the mouth.

I wish to produce the photographs (MFI 1 (a) – (f).

Court:

1. Photographs are produced as exhibit Nos 1 (a) – 1 (f).
2. Certificate of 16.5.2016 as P Exh No. 8.”

19. On cross examination, he stated that,

“I was appointed as Scenes of Crime Officer on 7.7.2003. I started in Meru. John Munyi retired in 2017. He retired at Meru. I was in Meru. I never worked with him at the same station. Photograph No. 1 - A view of the homestead. There is a structure behind. Report visible injuries are on the private parts and on the mouth.”

20. PW7 Dr. Maria Mwangi, Assistant Director of medical services Meru County, stationed at Meru County hospital testified that,

“I have MCLB from Kampala International University 2012. I have postmortem prepared by Dr. Kabathi. I worked with Dr. Kabathi for (2) years. I know his handwriting and I recognize his signature on the postmortem dated 26.3.2015. I wish to testify on his behalf. Postmortem of 26.3.2015 on Susan Kathambi. Confirmed to be deceased on 25.3.2015. Postmortem conducted on 26.3.2015 at Meru Level (5). Deceased African female 51 years old of good nutritional status. Body was well preserved.

External – Metallic object visible in the perineum. On examination it was found to be a machete 53 cm in length and was retrieved from the deceased’s genital tract. There were lacerations to loarations regional tract and her gut was seen evisarating from the lacerations in the perineal area and the rectum had been perforated.



Death certificate serial No. 547177. Post mortem report signed by Dr Kibathi and authenticated by the hospital stamp. I produce the same as exhibit.

Court – Postmortem report dated 26.3.2015 is marked No 9.”

21. On cross examination, he stated that,

“The deceased was found in the night of 25.3.2015 but the time of death was unknown. The report stated that the body was found at Kianjogu on 17.3.2015. From the report we can ascertain the date of death. Normally a body decomposing depends on temperature, moisture of the area. It is possible decomposition can start after (20) days. There is smell when body starts to decompose. Apart from the injuries in the genital area, externally, there were no other injuries visible. Type of clothing deceased wore is not indicated in the report. At the time of postmortem examination the deceased had no clothes.”

22. When put on his defence the accused gave sworn evidence as DW1 and stated as follows:

“I hail from Meru County, Meru Vental, Kithiruni East location, Keru sub-location Ngunjiru village. I know why I am before the court. Murder of Susan Kathambi. I know Susan Kathambi since January, 2011. It was in April that we became friends. All that while we lived as boyfriend and girlfriend. We were living together. Susan Kathambi is deceased. On 14.3.2015 we had been together the whole day as usual. At 6.00p.m in the evening we went for a crusade. The crusade was at Uku market. The crusade ended at 8.00p.m. Crusade is an open air preaching by church ministers. We left crusade at about 8.30 p.m. We left the market about 8.40 p.m. We were going to my home together with other people who were coming from the crusade. The deceased’s home is about 200 – 250 metres from the market. As we got to her home, she entered her house as she knew I was due to travel on safari the next day. She bid me goodbye and those were her last words. As we left the crusade, we there were other people we were walking along with. After wishing the safe journey, I proceeded on my way upto my home. I went to bed. On the following day I took a boda boda on 6.00a.m and went to Ngubu (Nkubu)market and took a matatu to Nairobi. I had gone to look for a friend of mine, martin Muriithi and I had spoken with him over (3) months past and he had invited me to go to Nairobi. I went to Nairobi and did not get him. I stayed for (3) days. I stayed there on 15, 16 and 17th April, 2015. On 15.4.2015 I resided in lodging near ... Pangani, Nairobi on three days 15, 16 and 17 April, 2015. As my money was running out, I decided to come back to Meru. I took a vehicle at Tea room Nairobi on 18.4.2015 at about 9.00a.m. I came and alighted at Nkubu, Kariene. Immediately upon alighting, I was called by one of the boda boda operator and he said that Susan had been discovered dead and that it was suspected that I was the killer and the family were looking for me and they were upset with me as they thought it was me who had killed her. They advised me not to go home and go back where I had come from. They advised me as they are my friends. I went back to Nairobi and stayed at a place called Mwiki. I stayed there for (3) months from March to June, 2015. I decided that I come back on 4.6.2015. When I came back I went direct to a place called Kariene. I went to a hotel and while there I found a brother to the deceased Mputhia who is also deceaed. He told me that as a family they had investigated the matter and found that it was not me. He told me to visit their place the following day. I was supposed to go and talk to his brothers. I stayed with him and close relatives on the day that I was told there was no problem. On 5.6.2015, the following day, I went to their home. We were at deceased’s brother called Samson Muriungi and we were taking tea together with the late Mputhia. It happened that people started coming to the home and making a crowd. I



told them that the groups of people may be upto no good. Somebody called the police and the police came and arrested me. I do not know who called the police. I could not have gone to the deceased's home. I only went because Mputhia had said we should go and talk about the matter. I have no problem with the family of the deceased. The exhibits produced before the court are mine. They were recovered from Susan Kathambi's house. I used to live with Kathambi most of the time. She was providing me with everything. There were even other items of mine in the house. Prosecution's case. The witnesses never said they saw me killing Kathambi. The brother even said they knew it was not me. We lived with Kathambi for (4) years. I do not know why he said I wanted to kill her. I think it was the incidence that I was going for a safari when the matter happened. The key to the Kathambi's house, I had a copy of the key in the house."

23. On cross examination, he stated that,

"14.3.2015, I agree I was with the deceased. I was not the last person to be seen at the crusade but I was not alone. When I dropped her at her place, I never went in. I did not live at her house presently. Many people saw me part with the deceased, Kiambi ...even other several people who saw me proceed after leaving Kathambi. Kathambi had given me o key to her house. She also had her set of keys. I had my key to the house. The deceased's key was said to have been outside the house. I came from to see Martin.

Question - You had not spoken with Martin for (3) months? How did you go to a person with whom you had not spoken with? I had gone to see whether he could show me home to get a job in Nairobi. I came after (3) days. The people told me not to go near Kathambi's home as they suspected me. Why did you not go to the police station if you were not running away? I could not go to the police. I was not told that police were looking for me. I was told that the family were looking for me in relation to her murder. I could not go to the police station. I thought some of my friends and who were advising me to go away may have been with the family. I remember one boda boda operator called Ken. I may call him as a witness. It was the deceased's brother who invited me to go to their home. I have also a person who used to sell merchandise. The person who used to sell at the Bar can confirm our discussion with Mputhia."

24. On re-examination, he stated that,

"From the main gate at Kathambis place there was a house belonging to Mbaabu. The other one belonged to John about (70) metres away. From John's house to their father's house is about 20 metres. From her father's house to Kathambi's house is 5 – 10 metres, while using water with a basin you could know it was her father's house. There were grandchildren in the home. John is the only one who did not have grandchildren. The people could hear if there was any struggling or fighting at the compound, I was not there."

25. Counsel then agreed to put in written submissions on the evidence.

The Submissions

26. By Written Submissions dated July 8, 2022, the Defence Counsel submitted that

"the prosecution has entirely relied on hearsay evidence, circumstantial evidence and ... the evidence of the prosecution witnesses is marred by contradiction and hence not water tight as it ought to be hence it cannot warrant a conviction against the accused. The Prosecution



witnesses all relied on circumstantial evidence in proving their case.” Citing the case law of *Abanga Alias Onyango v R Cr. App NO. 32 of 1990*, *Sawe v. R* [2003] KLR 364; and *Ahamad Abofathi Mpohamed and Anor v R* [2018] eKLR on circumstantial evidence, Counsel for the Accused submitted that –

“The only circumstantial evidence tending to link the accused to the crime was that of the investigating officer who testified that he collected some clothes and medical cards belong to the accused person. It is not in contention that the accused person used to live as boyfriend and girlfriend and once in a while the accused person would visit the deceased person’s home. ... there is nothing strange in finding the clothes and other items belonging to the accused at the homestead of the deceased’s as it was publicly known that they were in a relationship.”

27. The Defence further submitted that the element of malice aforethought as defined in section 206 of the *Penal Code* that

“it is the evidence of the witness that on March 14, 2015, the accused person and the deceased had no quarrels and were in a happy mood. Further witnesses testified that the deceased and the accused had been living happily without any disagreements. The prosecution failed to establish the motive of the killing as none of eh witnesses proved so.”

28. Of course, the motive is in terms of section 9 of the Penal Code irrelevant to the proof of the offence, but as held in *Choge v Republic* [1985] KLR 1 motive may be accepted as offering corroboration of the evidence of the prosecution, by circumstantial evidence, when taken with other circumstances.

29. The Defence adverted to the doctrine of last seen with which holds that in the absence of a satisfactory explanation, the court is justified in drawing an inference that the accused who was last seen with the deceased killed the deceased, and pointed out that

“at the end of the crusade all the witnesses left for home. The accused and the deceased also left but the accused never went to the deceased’s home that night. None of the witnesses saw the accused enter the homestead of the deceased and PW1 who was the father of the late.”

The cited two Nigerian cases of *Moses Jua v The State* [2007] LPELR-CA/IL/42/2006 and *Stephen Haruna v The Attorney General of the Federation* [2010] 1 iLAW/CA/A/86/C2009 and an Indian case of *Rajeshkhanna Reddy & another v State of Andra Pradesh*, JT 2006 (4) SC 16 on the principle of “last seen with” and submitted that –

“The Prosecution witnesses do not show the duration of time between when he accused left the crusade and when he left the deceased persons home. Further, the deceased’s body was found some days later in her house. There was no evidence from the witnesses to when the deceased could have been murdered. It is possible that the murder could have been committed not necessarily on that night or any other thereafter and by somebody else other than the accused.”

Submissions by the Prosecution

30. By Written Submissions dated 27/7/2022 the Prosecution urged that it had established the offence of murder in all its elements against the accused based on circumstantial evidence presented before the court, and also by virtue of application of the last seen with doctrine to the facts of the case. As regards



circumstantial evidence Counsel urged the authority of *Omar Mzungu Chimera v R* Criminal Appeal No. 56 of 1998 quoted in *R v Evans Karari Mwangi* [2021] eKLR on the three elements thereof that –

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

- (i) The circumstances from which an inference of guilty is to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly 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 no one else.”

31. It was submitted that “from the evidence on record the prosecution while presenting its case did satisfy the three tests as required for circumstantial evidence. PW2, PW3, PW4 and PW5 did all testify before the court that the deceased and the accused person were lovers and further that they had been staying together for quite some time. PW2 did testify that her home and that of the deceased were only 20 metres apart from each other and that on the 14th day of March, 2015 she did see the accused person leave with the deceased. PW3 does also corroborate PW2’s testimony in that he did also see the accused person with the deceased at the crusade and left them together at 9.00pm. The accused person was also nowhere to be seen after the evening of the crusade, he ran away and was arrested only three months later after his escape. Therefore, all the above mentioned factors do point towards the guilt of the accused person and they also further form a complete chain there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

32. On the principle of last seen alive with, it was submitted relying on *R v DWK* [2020] eKLR and cases cited therein that –

“It is without a doubt that it is the accused who must have been the last person ‘to be seen’ with the deceased. He is the one to give an explanation on how the deceased must have met her death. Unless he exonerates himself from the death, he will be culpable. In this present case PW2 did last see the deceased with the accused person. PW3 does corroborate the testimony of PW2 when he stated that he did see the accused with the deceased on the evening of the 14th day of March 2015 while at a crusade and when he left they were still together. Additionally, while PW5 was conducting his investigations he did find personal effects which belonged to the accused person at the deceased person’s house. These personal items belonging to the accused person were produced as exhibits which were a white jacket Pexb 2, grey trousers Pexb 3, National AIDS/STD control programme patient card bearing the accused’s name Pexb 4, a receipt of Ksh.1000/- bearing the accused person’s name Pexb 5 and a medical prescription note with the name of the accused person as Pexb6.”

33. The Prosecution urged that malice aforethought was to be inferred in terms of section 206(a) and (b) of the Penal Code by “actions of the accused person. The Postmortem clearly does show that the deceased was injured grievously and also further that the person who injured her did in fact have the intention of murdering her [as the] injuries suffered by the deceased were gruesome and severe and she would not at all have survived even if she had been found earlier due to the nature and state of the injuries.”



The duty of the Court on application of the law on the facts

34. Both the Prosecution and the Defence, consequently, urged the Court to consider the principles for the application of the circumstantial evidence and the “last seen with the deceased” theory to opposite outcomes based on their respective perspectives.

Determination

The Law

35. This Court has had occasion in Meru HCCRC No.2 of 2016 *R v Edward Gauntai alias Mbonke* of 28/2/2022 to consider the application of circumstantial evidence with a last seen with link as follows:

“Circumstantial Evidence

12. The Prosecutions’ case is a clear case of “last seen with the deceased” based on circumstantial evidence of the accused having been seen with the deceased and of recovery of items alleged to belong to the deceased from the accused. It is trite that for an inference of guilt to be drawn from circumstantial evidence as a basis of a conviction:

“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.” See *R v Kipkering Arap Koskei & Anor*. [1949] 16 EACA 135.

Mere suspicion is not sufficient. See *Sawe v R* [2003] KLR 364.

13. The burden of proving facts which justify the drawing of the inference of guilt based on circumstantial evidence is always on the prosecution which must establish its case beyond reasonable doubt. See *Wambua & 3 Others v R* [2008] KLR 142 [C.A].
14. Applying the test of circumstantial evidence in *Ndurya v R* [2008] KLR 135, the Court of Appeal citing *R. v Kipkering Arap Koskei & Anor* [1949] 16 EACA 135; *R v. Taylor Weaver and Donovan* [1928] 21 Cr. App. R 20; *Teper v R* [1952] AC 489 and *Sawe v R* [2003] KLR 364, held as recorded in the head-note, that:-

“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person’s guilt from circumstantial evidence to be sure that there were no other co-existing circumstances which would weaken the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant.”



15. Based on the foregoing, authorities, I understand the determination of a criminal case based on circumstantial evidence to involve a three-phased inquiry by the court, as follows:-
- i. Proof of the facts upon which the inference of guilt is sought to be established by the prosecution;
 - ii. Narrow and intensive examination of these facts to ensure that the facts are not fabricated to cast suspicion on accused; and
 - iii. Confirmation that the facts are incompatible with the innocence of the accused and incapable of any other reasonable explanation than that of the guilt of the accused; and that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.”
37. I respectfully note and agree with the analysis by Kasango, J. in *R v Evans Karari Mwangi* [2021] eKLR cited by the Counsel for the DPP, which sets out the position, culminating with *Omar Mzungu Chimera v R*, as to the factors to be considered in a case based on circumstantial evidence, in similar terms.
38. The principle of circumstantial evidence, as well as its last seen with doctrine, does not take away the cardinal principle of criminal law that the legal burden of proof lies with the Prosecution to prove the charge to the standard of beyond reasonable doubt and never shifts to the defence. See *Wambua & 3 others v R* [2008] KLR 142 [C.A]. See also the Nigerian case of *Moses Jua v The State*, *supra*, quoted with approval by Lesiit, J. (as she then was) in *R v ECK* cited in *R. v DWK* [2020] eKLR, saying:
- “Regarding the doctrine of the last seen with the deceased, I will quote from the Nigerian Case of *Moses Jua vs. The State* (2007) PELR – CA/11 42/2006. The Court while considering the last seen with doctrine held:
- “Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.””
39. This Court respectfully considers the doctrine of “last seen with” the deceased, is not a standalone principle but rather a part of the web of circumstantial evidence in which an accused is entangled which supports an inference of his involvement in the murder absent a satisfactory explanation exonerating him in much the same way as the doctrine of recent possession in theft cases.
40. The conjunction of the circumstantial evidence with the last seen with doctrine is acknowledged in the passage of the Nigerian case cited by the Defence Counsel *Stephen Haruna v AG*, *supra*, held:
- “The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such



circumstances. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

41. Moreover, the interrelation with circumstantial evidence is emphasized by the requirement for applicability of the “last seen with”, of corroboration, which must involve circumstantial evidence because the very need to use last seen with principle indicates lack of direct evidence, is shown in *Ramreddy Rajesh Khanna Reddy* case, *supra*, as follows:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the court should look for some corroboration.”

42. I respectfully note the decision of Riechi, J. in the case cited by the Counsel for the DPP of *R. v DWK* [2020] eKLR which fingered the connection of the doctrine to circumstantial evidence as follows:

“The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide an explanation as to what happened.”

43. The Court must, therefore, consider the whole circumstantial evidence including the fact of the accused having been the last person seen with the deceased against the defence and determine whether, in the language of Kipkeri Arap Koskei, the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Analysis of Evidence

Death and cause thereof

44. The Prosecution witnesses PW1, PW2, PW3, PW4, PW5 and PW6 are witnesses to the death of deceased whose body was found on bed in her house on 17/3/2015 and picture exhibits Pexb 1 (a) – (f) were produced by PW6. PW7 gave medical evidence as to the cause of death by multiple cuts to the guts the result of machete penetration through the vaginal tract.

Accused’s act causing death

45. PW2 saw the accused and the deceased leave home in the evening of 14/3/2015; PW3 saw the deceased and the accused at the crusade at the shopping centre and left them there when he left at 9.00pm. Circumstantial evidence of recovery of his personal clothing and personal items placing him at the deceased’s homestead together with the fact that the two were last seen together raises a presumption that the accused knows what become of the deceased. As the last person seen by the witnesses with the deceased he is required to offer a satisfactory explanation to rebut this presumption that he is the killer.

Accused’s explanation in response to last seen with the deceased theory

46. In his defence the accused said he had parted with the deceased and went to his home as he was travelling to Nairobi the following day. No explanation why he had to sleep away from the deceased’s house on this particular night yet they had been living together previously.
47. Alibi defence not raised in cross-examination or notice thereof given to the Prosecution. The defence by the accused is one of alibi that he was not at the place of the offence at the date and time of the



offence. See *Wang'ombe v Republic* [1980] KLR 149, [1976-80] KLR 1683; *Karanja v Republic* [1983] KLR 501 and *Kiarie v Republic* [1984] KLR 739. It was held in *Karanja v Rep* [1983] KLR 501 that:

“In a proper case, a trial court may in testing a defence of alibi and in weighing it with all the proper evidence to see if the accused’s guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

48. In *Raphael v Republic* [1973] EA 473, it was held that late disclosure of an alibi may go to the weight of the evidence and the court is entitled to consider the defence of alibi as a mere afterthought. The alibi defence in this case was clearly an afterthought.

Malice aforethought

49. While motive may support malice aforethought, it is not necessary to show motive to prove malice. See section 9 (3) of the *Penal Code*. Malice aforethought is a term of art which is defined at section 206 (a) and (b) of the Penal Code as follows:

“206. 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;”

50. From the severity of the act of thrusting a machete into a person’s vaginal tract, which caused the killing of the deceased herein, the intention to kill or at least cause grievous harm and knowledge that the act of pushing a panga into the deceased which caused death by cutting up her guts will probably cause death or grievous harm to her is manifest, and the case falls squarely within the provisions of section 206 (a) and (b) of the Penal Code. What else could have been the intention, or even motivation, of such an act if not to kill or cause grievous harm?

Verdict

51. The deceased’s brother PW3 left the accused and the deceased at the Crusade at 9.00pm on 14/3/2015. She was discovered three days later on 17/3/2015 at 3.00pm when her father PW1 having not seen her for three days enlisted the help of his daughter in law (PW2) who is also wife of PW3 in searching for her and the two after opening the deceased’s house found her dead body on her bed half naked.
52. There was no witness that the accused and the deceased went home together but this does not remove him from the web of last seen together because he is the one who was last seen with the deceased at the crusade on the evidence of the prosecution witnesses, and the evidence was that the two lived together as boyfriend and girl-friend, which the accused says accounts for the recovery of his clothes and personal items from the deceased’s house. According to the authorities, as the last person seen with the deceased and in view of the circumstantial evidence of his being a live-in boyfriend and recovery of



his clothing and personal items in the deceased's house, the accused is required to offer an explanation to rebut the presumption that he is the killer.

53. His explanation by way of a late alibi defence and unnatural and callous reaction to the grave situation of the killing of his lover is not satisfactory rebuttal of the presumption that he is the killer.
54. Looking for corroboration on the circumstantial evidence of the accused having been the last to be seen with the deceased, even without factoring the discovery of his clothes from the deceased's house, the court finds that in all human probability standard of circumstantial evidence, the accused was the killer because-
 1. While he lived with deceased in her house as her boyfriend a fact he admits in his defence, he disappears from home on the very night of 14/3/2015 that she is killed and is only arrested three months later in June 2015.
 2. He is not concerned to find out what happened to his lover who he left on 14/3/2015 until arrest in June 2015.
 3. On learning of her killing and being advised by friends that he is suspect, the accused allegedly heeded their advice to run away and hide instead of seeking to clear his name if he were innocent.
 4. His reaction of running and away to hide is not the normal expected reaction of a lover whose girlfriend has been killed in unclear circumstances in his absence. He does not mourn his loss at all and he does not seek to know how his beloved died!
 5. Weighing the prosecution evidence against the alibi defence, the accused does not indicate where the deceased spent the night of 14/3/2015 before he was to travel on the 15/3/2015 to meet his friend in Nairobi. The alibi defence is not helpful as it does not cover the night of the murder the 14/3/2015.
55. The alibi defence was never put to the Prosecution and or the Prosecution witnesses to enable the Prosecution to investigate the alibi and, if necessary, call rebuttal evidence. It is clearly an afterthought conjured up to respond to the testimony of the Prosecution witnesses.

Conclusion

56. On the basis of the circumstantial evidence presented herein and on the basis of unanswered presumption arising from the last seen with doctrine, the court finds that the Prosecution has proved beyond reasonable doubt that the accused killed his lover the deceased on her bed at her house by penetrating her vaginal tract with a machete thereby causing multiple gut cuts that caused her death. The accused then ran away and hid until he came back three months later when he thought that matters had cooled down and was arrested for the offence. The accused was the last person with the deceased and no satisfactory explanation dislodging the presumption that he is the one who killed her was offered by the late alibi defence, which in any event did not rule out his involvement on the 14/3/2015 before leaving for Nairobi on 15/3/2015 as alleged. The circumstantial evidence pointing to the accused is inconsistent with his innocence, for no reasonable explanation is given for running away on learning, as alleged by the accused, of the killing of his girlfriend and staying away for three months without bothering to establish how his beloved had died, and to pursue justice for her.
57. The killing of the deceased by the accused is an injustice that the law must correct.



Orders

58. Accordingly, for the reasons set out above, the Court finds that the Prosecution has proved the murder charge against the accused beyond reasonable doubt and consequently convicts the accused for the offence of murder contrary to section 203 as read with 204 of the *Penal Code*.

59. The Accused shall be detained awaiting mitigation in sentencing proceedings to be held on a date to be fixed in consultation with the Counsel for the Prosecution and the Defence.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF FEBRUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Ngugi, Advocate for the Accused.

Ms. Nandwa, Prosecution Counsel for the DPP.

