



**Republic v Kalunge (Criminal Case 77 of 2014)
[2023] KEHC 1111 (KLR) (Crim) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 77 OF 2014
J WAKIAGA, J
FEBRUARY 20, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

RAPHAEL MUOKI KALUNGE ACCUSED

JUDGMENT

Introduction

1. The deceased Mary Waruguru Maina, was a loving daughter of her father. At the time of her death she was working at the family firm together with the Accused person, who had earlier resigned from his job as a police officer, in what the father in law considered to be a very wise decision in helping the duo solve what was turning out to be a major marital problem in their life.
2. She studied at the University of Nairobi and at the time of her death was a Post Graduate Student at the said University whereas the Accused was a Graduate of the Kiganjo Police training school. From the evidence of DW2 the brother of the Accused was corroborated by PW21 the Investigating Officer, they had known each other as kids and later as teenagers in the year 2003 and started a relationship and therefore when they met in the city after each went his way, nothing was more easy than for them to hit it off leading to a child coming into the picture and what the father of the deceased would later on call not a marriage, while the family of the Accused recognised it as marriage for all intended and purposed. Of interest to the Court is the fact that the mother of the Accused and the deceased seems to have been friends, going by their attempt to salvage what had remained of the relationship.
3. Like any marriage in this sinful world, theirs had its own share of troubles, which they tried to solve in the best way they knew. Perhaps if help came in earlier in the form of marriage counselling by professionals, this judgement would not have been necessary, but as they say the rest is history for. On



the night of the 6th of July and the morning of 7th July (saba saba), the lifeless body of the deceased was found sitting on the passenger's side of a motor vehicle assigned to her by the firm and this Court is now called upon to exercise its judicial mind to decide whether the Accused caused her death, having been charged with the offence or whether the deceased was a victim of road traffic accident.

4. On the 28th day of August 2018, the Accused appeared before Mbogholi J. as he then was when the Court was informed that the second Accused an interesting actor in this case was absent and warrants for his arrest issued. On 4th September 2014, the Accused appeared before Muchemi J. when in the absence of the alleged second Accused, the Accused pleaded not guilty to the charges and hearing dates set for 11th and 12th day of May 2015.
5. On the same day of plea and which will be of great interest for the purposes of this judgement, the Accused filed in the Children's Court at Nairobi under certificate of urgency custody proceedings in Children Case No 1048 of 2014 Rachael Muoki Kalungu v Josheph Maina & another seeking to review the orders that the Court had made on an application dated 8th day of August 2014 in which he had sought for the custody of the minor children and to restrain the Defendants from removing them from the jurisdiction of the Court .
6. On the same day the prosecution made an application for the said minor children to be placed under witness protection before Muchemi J, and by a Ruling thereon dated 5th September 2014. The Court stated that the issue of the custody was before the Children Court which was the right Court but directed the Accused to desist from making any contact with the witnesses until they testify.
7. On the 21st October 2014, the Accused appeared before Mutuku J. on an application for bail, which application was heard before Kimaru J. as he then was who by a Ruling thereon dated 11th December 2014 declined to admit the same to bond and therefore for record purposes it must be noted that the Accused has been in remand custody throughout the period of his trail, a period of almost nine (9) years, which is highly regretted and which this Court will explain in herein under.
8. On the 22nd day of January 2015, the Applicant filed an application for discovery in which he sought several items listed therein and by a Ruling thereon dated 4th day of March 2015 the Court allowed the application and ordered that the named items save for the motor vehicle inspection report be availed to the Accused person not later than 14th April 2015 and hearing dates fixed for 12th May 2015 when the prosecution sought for adjournment which was opposed by the defence. The Judge directed that the then Prosecuting Counsel Miss Mwaniki to personally appear before her and when she did not, the Court stated that it was owed an explanation by the prosecutor.
9. On the 14th day May 2015, the prosecution sought that the Court recuse herself from handling the matter by an oral application, which application was supported by Mr. Karigi watching brief for the family on the grounds that the Court was not impartial, which application the Court dismissed by a Ruling dated 26th May 2015 and by an application dated 28th day of September 2015 the Accused sought for an order directed towards Safaricom Ltd to be supplied with call data records in respect to the mobile number of the deceased which application was allowed by a Ruling dated 24th November 2015, upon which the Prosecution indicated that they intended to move to the Court of Appeal against all the Rulings made by the trial Court leading the Court to refer the file back to the then Presiding Judge for re-allocation and that is how the file found its way to my docket .



PROCEEDINGS

PROSECUTION CASE.

10. It must be stated for record purposes that at that time there was no love lost between the prosecution, the family of the deceased and the trial Court, which factors were unknown to this court when transferred to the Division and the file placed before me for hearing on the 14th December 2015 and from the said date to the close of the defence case the Court recorded the evidence of twenty two (22) prosecution witnesses and seven(7) defence witnesses during which period of time the Court was transferred three times and this explains why it has taken this long to conclude the matter.
11. PW8 PC MARTIN SIMIYU reported on duty on the 7th July 2014 along Mombasa Road near General Motors to control traffic when he was informed by members of the public of an accident that had occurred after the railway crossing. He proceeded to the scene and found motor vehicle registration number KBT 445 Y and was joined by two armed Police Officers who assisted him control the onlookers and was able to see the driver's window was rolled down and the engine was running with the gear on, the drive mode and the heater on. He then switched off the engine and checked on the condition of the deceased who appeared dead, though there was some warmth on the body caused by the heater. He therefore called the Base Commandant of Embakasi to send accident stand by personnel.
12. He then tried to check out what might have happened before the accident by looking for any skid marks or braking marks and from his observation, he confirmed that it was not a road traffic accident but a stage-managed scene of murder as the driver was not found at the scene and the impact could not have caused the death.
13. In cross examination, he stated that he did not witness the motor vehicle veer off the road and was only told that it was found off the road. He reported on duty at 6.00 am and had a motor bike having come from industrial area and that he as the first officer at the scene having been told by some unknown man that the car had rolled down hill and had found it at the perimeter wall and that he found the driver's window rolled down and that the passenger seat was reclined to almost sleeping position with the deceased lying on her back. It was his evidence that there was mark on her face as if she had vomited and that the impact could not have caused the death since the airbags were intact. He noticed that her neck was not stable. He was told that the driver was not at the scene by the reportees. He left Chief Inspector Mutuku at the scene, having formed an opinion that it was not an accident.
14. Pw9 Chief Inspector Jennipher Mutuku stated that she was raised by PW7, who informed her on the accident, she proceeded to the scene and noticed that the motor vehicle had a small dent on the bonnet and that the body of the deceased had marks on the neck with foam coming from the mouth. She then formed an opinion that it was not an accident, based on the fact that the airbags were intact, there were no physical injuries on the body that could have been caused by the impact. There were no braking marks and that the engine had been found running. She then informed the OCPD Embakasi since the accident looked suspicious, so he came with the Scene of Crime Personnel to whom she handed over the scene.
15. In cross examination, she stated that all the witnesses said that they had found the motor vehicle in that state without a driver. She concluded that the deceased did not die at the scene as the neck would have been stable and the victim did not have safety belt on.
16. Pw12 Inspector Silvester Ndwiga, a scene of crime officer visited the scene on the 7th next to Imara Daima Railway Station which he documented by taking photographs of the deceased body, the motor vehicle and the general scene. He stated that the clothes found in the motor vehicle were clean without



- any blood stains and that he opened the bag in which they were and put them on the seat before taking the photographs. He noted that there was no element of the driver attempting to control the motor vehicle, leading him to rule out accident.
17. In cross examination, he stated that it was not possible to lift out finger prints from the interior of the motor vehicle since the air-condition had been on and therefore the inside was hotter than the outside and that the deceased did not have the seat belt on when he arrived, he then informed PC Indeche to take charge of the scene.
 18. Pw13 Pc Edward Indeche, visited the scene where they found a motor vehicle that had slightly hit the wall and inside was a dead body on the passenger's seat. The scene of crime officer gave him a note book that was inside the motor vehicle with some phone numbers and called the second number which went to a Mwaniki, who confirmed that the deceased was his boss. He then personally drove the motor vehicle from the scene to the police station. He was told by Mwaniki that he was informing the family but should take the body to Chiromo, where post mortem was carried.
 19. In cross examination, he stated that the scene was handed over to them by the DTO since they had ruled out traffic accident based on the state of the body and the slight dent on the car and that the deceased must have been murdered elsewhere and the body put in the motor vehicle and pushed down the slope, as no body reported the accident. He stated that they did not take the motor vehicle for inspection since it was not an accident. He later on went to the deceased house, where he found the Accused and his family members and he interviewed the house help. There were already Officers from Mlolongo Police Station whom she had called when the relatives of the deceased arrived at the scene.
 20. Pw3 Joseph Maina Kimani testified on oath that the deceased was his daughter and that in the year 2006 she introduced him to the Accused as a boyfriend, with who she was staying. The Accused introduced himself as a Police Driver with the Kenya Police Force. In the course of their stay, he realised that they were having financial difficulties, so he decided to employ both of them in his company, with the deceased being in charge of Administration and Finance, while the Accused was in charge of Purchasing and transport. At that time, they were living at Ridge Ways and had their first child.
 21. In the year 2010 when the deceased joined the company on full time basis, the Accused started to come to work late and was drunk most of the time and also misusing company assets and money and started beating the deceased even in the presence of the family members, so they took him for rehabilitation upto 2014, when he was given back his job, but went back to his habits after eight months and was suspended from duty in the month of February. It was his evidence that the deceased told him that the Accused was resentful of her and that the same confirmed that their problems started when she joined the company.
 22. He testified that on the 25th May 2014 the Accused sent to him a message stating that he was likely to loss his family and that on the 28th June 2014, when they were celebrating the graduation of their son, the Accused beat up the deceased and left her at the party. They then decided as a family that it would be in their best interest if the deceased left her matrimonial home, which she was planning to do in the month of July, the family having identified a house for her which was under repairs. That when she discussed with the Accused about her moving out, he threatened to kill her and the children.
 23. On the 7th July 2014, he received the information on the death of the deceased from one of his employees, who had been called by the police. He contacted the Accused on phone but he did not answer, so he proceeded to Chiromo where the post mortem was conducted by PW1 and Dr Mutuma for the family, who confirmed that the cause of death was strangulation and abdominal injuries caused by a blunt object. The Accused later joined them at Chiromo and since he was worried about the children, he proceeded to their home and picked them up, passing through the police station where he



- inspected the motor vehicle and that the Accused went underground during the funeral arrangements and only reappeared on the day of the burial.
24. He stated that he knew Joseph Mutuku Kalovi who was working with him, having been brought by the Accused and that last time he saw him was on the 4th of July 2014 and that his oldest grandchild told him that the Accused had taken them out on a motor cycle and left them at Food Palace only to come for them very late. The Accused then filed a case at the Children's Court at a time when he was still mourning the deceased.
 25. In cross examination he confirmed that the deceased used to drink but had stopped as at the time of her death. He denied that she had been admitted in hospital for depression and that whereas the Pathologists had indicated the cause of death to be strangulation, the Accused in his Court papers indicated that she had died out of fatal road traffic accident. He stated that the Accused and the deceased had lived for eight years before he was formally introduced, at the time when they were expecting their first child. He stated that on 20th July 2014 applied for the birth certificates for the children and did not indicate the Accused as the father since they were not married. The Accused was then charged in Court.
 26. It was his further evidence that the Accused met with the deceased while she was a student at the University of Nairobi and that the Accused constantly used to beat her and that there was a time he strangled her in the processes leaving marks on her neck before taking her to the hospital, which information he only gave to the police upon her death.
 27. Pw5 Joyce Wanjiru Njoroge, the mother of the deceased stated that she came to know the Accused in the year 2006, when he came to introduce himself to her in the company of his father and mother whom she had known before, so they gave their consent. Shortly thereafter, the deceased called her and informed her that the Accused wanted to beat her since she had stopped him from going to stay with his parents at Baba Dogo and that she spoke to him and told him that if he could not stay with them, he should take them to her in Ngong and they agreed to give it a trial. It was at that time when they decided to ask the Accused to join the company as they thought that his salary was not enough sustain to him and the family.
 28. The deceased then got a job with Barclays Bank before moving to Kenya Commercial Bank up to 2010, when she joined the family company and took over the purchasing duties from the Accused and they started to have fights and at one time he beat her up, and she went with the mother of the Accused and a friend to try and reconcile them, but soon thereafter the Accused once again beat and strangled her which she confirmed from the visible marks on her neck. She reached out to the Accused and told him not to use his hands on the deceased. He stopped but continued thereafter forcing the deceased to move out leaving the children with the Accused for two months. The deceased told her that when she went to see the children, the Accused attempted to knock her down with the motor vehicle.
 29. They then reconciled and moved back together but the Accused started to drink again which affected his work, leading to his interdiction. She stated that the Accused would beat up the deceased even when they were together with them, as he did not want her to talk to anybody. At the time of her death the deceased had told her that she wanted to move out and stay alone with her children and they proposed that she moves into one of their houses in Karen which was under renovation but she said that it was urgent and could not wait for that and on 6th when she called to go check on the progress of the moving out and the child who was sick, she did not answer. She later called her at 3.00 pm and told her that she had fought with the Accused who said he would kill her on that day, and when she got out of the bed room, she found the Accused and the children missing from the house.



30. She then told her that she was going to look for them and promised to call her if she found them, which she didn't and when she called her at 3.30 pm, her phone was off until the following day when she was reported dead in her car along Mombasa road. When she identified the body at the mortuary, she noted that she had marks similar to those she had when the Accused had strangled her previously and took her to the hospital and that the Accused just came and looked at the body and left within a minute without looking at her in the eye.
31. In cross examination, she confirmed having spoken to deceased at 2.00pm when she told her of the quarrel with the Accused and the threat he issued to kill her. She confirmed that on the 28th of June 2014 at Carnivore, she saw the Accused beat up the deceased before they were separated. She stated that as per the traditions, the Accused and the deceased were not married though they were living together and that their marital issues started in the year 2008, and that she did not know that the deceased was having affairs outside her marriage and that they took the children after the deceased was found dead because they were worried about their welfare.
32. Pw7 Joseph Nganga, was the driver assigned to the deceased. On the 7th July 2014, he received a call from Mwaniki at about 9.00 am inquiring whether he had spoken to her and told him that he had not but was waiting for her call. He then received a call from PW3 who told him that something bad had happened to her. He was then instructed to go check if the Accused was at home, which he did and found the house help who told him that he was around. He called him and put him through to Mr Momanyi who told him to take a taxi and go to Chiromo, and as they were going to look for a taxi, the Accused told him that he had been told by the police from Embakasi that the deceased had an accident on Mombasa road and the body taken to Chiromo.
33. It was his evidence that in the month of June 2014, he had carried the Accused and the deceased on their way home, when they started to fight with the Accused accusing the deceased of getting to the house late and sometimes sleeping outside and that having been suspended by her father from his job, he was not going to suffer alone and that he moved onto her in an attempt to strangle her forcing him to stop the motor vehicle and reconciling them. He had at one time heard the deceased tell her mother that the Accused had beaten her the previous night and that she wanted to move out and live alone.
34. In cross examination, he said that Mr. Momanyi asked him to go to the house of the Accused and look for him because he had calling him and not responding. He confirmed that the deceased used to work on Saturdays when she would pay wages and that the Accused would pick her up from the gym most of the times.
35. Pw1 Doctor Dorothy Njeru, the Government Pathologist stated that she examined the body of the deceased who had external bruises on the right hip, abrasions on the right elbow, front of the neck towards the right side, on the chin, contusions on the face and the upper lips, both legs and the upper chest wall and a healing scar on the lower chest. Internally there was bleeding on the chest wall, collar bone. There were multiple injuries and bleeding spots on the head with swelling of the brain. There were multiple contusions on the neck muscles with a fracture of the spine on the lower neck bone. As a result of her examination, she formed an opinion that the cause of death was strangulation with internal abdominal blunt force injurie.
36. In cross examination she stated that she could not establish the period of death as the body had been refrigerated and that there was bleeding between the ear and the temporal region of the head and that it was not possible for the injuries to be caused by a seat belt and the pattern of the injuries on the face could not be caused by a collusion with the steering wheel, as there was no focal point of impact. She stated that her opinion was based on the injuries on the neck and ruled out the seat belt as the object used. She was of the opinion that the fracture on the neck was caused by strangulation.



37. Pw2 Dr. Joseph Maundu confirmed that the Accused was fit to stand trial.
38. Pw4 Bilah Kendeli Vindolwa was the house help living with the two, having been employed in May 2014. She stated that they used to live in a maisonette with the master bed room being on the ground floor where the deceased used to sleep while the Accused had his room on the upper floor, and would sometimes sleep in the deceased room.
39. She stated that on the 6th which was a Sunday, she took the last born child, with whom she used to share a room to the deceased at about 8.00am before leaving for church. The deceased car was then parked in the compound. She returned back from church at 6.00 pm and found the Accused and the children and when he asked the Accused where the deceased was, he told her that he did not know and neither did he know whom she had left the children with. When she asked Aron, (PW20) the whereabouts of his mother, he told her that she had gone to work. It was her evidence that it was not the norm for the deceased to leave the children alone and neither had she seen them being left with the Accused.
40. The Accused then left the house to go buy meat, which was strange to her since it was the deceased who used to buy things for the house. She served dinner at 7.00 pm which the Accused ate while watching TV at the sitting room, where he was joined by the Landlord at 7.30 pm. The Accused then received a call which he answered outside the house after which he went upstairs and changed into shoes and jacket before leaving the house, instructing her to lock the doors with the keys only so that when they return, they would not disturb her. She then asked the Accused for her set of keys which were missing and he told her that might be the deceased had taken them. At 9.00 pm she called the deceased on her cell phone but she did not answer, so she proceeded to bed and slept up to 12.00 a.m. when she woke up to give the baby milk.
41. She went back to bed up to 3.00 am when she heard someone opening the door and heard the Accused checking on the bed room doors before his phone rung, which he answered in Kikamba before he proceeded to the deceased room. In the morning, she woke up at 5.00am to prepare the children for school which she did. The Accused then received another call which he answered from outside the house and when he came back, he asked her whether the deceased had called her on phone, he then proceeded to the deceased room before going back to his room, changed and left the house at 10.00 am. Later on, at 3.00pm some ladies came to the house in two motor vehicles and told her to prepare the children. When she called the Accused, his phone was off, she then called the Agent who had recruited her, who called the police who came to the house at 6.00pm when they were just about to leave the house and that is when the people identified themselves and told her that the deceased had been found dead.
42. It was at that time when she saw the Accused standing outside the house with his mother and father whom she knew. It was her evidence that during the two months she had worked for the deceased, the Accused never used to go to work since he was on interdiction and would just stay in the house watching movies and drinking alcohol save for when he would leave the house 7.00 pm and come back with the deceased who had told her that from work, she usually proceeds to the gym. She confirmed that the couple used to quarrel and that there was a time the deceased told her that she did not see them staying together as the Accused used to follow her at work and when they get back home he would beat her and that she was planning to leave in July.
43. It was her evidence that on the 5th of July the Accused and the deceased came back to the house together and that on the 6th when she took the child to the deceased, they were together with the Accused in her room.



44. In cross examination, she stated that they had two sets of keys, one which she shared with the deceased and one was with the Accused which he used to carry in his pocket, while the one they shared was always put at the water dispenser and that the set of keys were later on found in the motor vehicle which the deceased was driving. She stated that the deceased would always inform her if and when she was not going to come back to the house. She confirmed that when she came from off on Sunday, she found the Accused in the house and that he did not have any injuries.
45. Pw6 Damacrine Kwamboka Nyambeki, stated that in the year 2014, she was a waitress at Food Palace Restaurant in Mlolongo and had worked there for one and half years, where the Accused was a regular customer. On the 6th day of July, she was approached by the Accused accompanied by another gentleman at 2.00 pm for a favour to boil for him milk for his youngest child who could not eat roasted meat, which she did and asked her to look over the babies for him since he did not know the time he would be back. The children were three in number, she then took the milk to the girl who was with them and that the girl had rashes and was crying with the lady straggling to keep her quiet. She kept watching the kids until 5.00 pm when the Accused returned back alone and gave her a tip of Kshs.200. She stated that she knew the wife of the Accused who was also a regular customer but did not see her on that day.
46. In cross examination, she stated that she did not serve the Accused nor the children on that day, she only help boil the milk and watched over them from her work station. The police later on went to her with a photograph of the Accused which she recognised but could not identify the other man who was with him.
47. Pw10 Boniface Wachira was a boda boda operator next to the place where the Accused lived. He identified the deceased motor vehicle and stated that in May 2014, while at the stage the deceased asked him to assist in taking her tyres to be repaired and that the Accused was with her and thereafter he would see them pass by the stage. He confirmed having seen the motor vehicle on the 6th at 3.00 pm at Connection Bar and the deceased told him that she was waiting for the Accused whom he saw coming towards the vehicle and left them together and that was the last time he saw her.
48. In cross examination he said that the police had a photograph of the deceased which they wanted him to identify and to confirm whether he had carried her children on the 6th but told them that he had seen her outside Connection Bar with the Accused coming from behind the car towards her before getting into the motor vehicle.
49. Pw11 Valeria Ayoti Lukoye was the deceased's hair dresser at Olives Executive Salon since 2012 and knew her as Mama Briana. They become good friends and the last time she saw her was on 28th June 2014, when she mentioned to her that she wanted to move houses as her relationship with her husband who she had met was not good. She then talked to her on the 5th of July on phone, when she told her that she would be taking the youngest child to the hospital the following day since she was not feeling well, she later on text her at night between 11 and 12 requesting for financial assistance but she did not respond. She then called her on the 6th but she didn't answer. She later met PW7 (Nganga) who informed her of the death. She confirmed that the Accused used to drop her and the children at the salon and that she had mentioned to her that she wanted to move out of her home.
50. In cross examination, she stated that she got a missed call from the deceased and called her back and that they used to have lunch or coffee from time to time and that in one of those meetings she told her that she was having issues in her marriage and wanted to move out and that she later received a call from someone who asked her why she had recorded the statement with the police.



51. Pw14 Esther Akinyi Odhiambo stated that she was at the time working at Friend's Bar and that on the 6th of July 2014, the Accused, who was a regular customer, came to the bar at 7.00 pm and asked for beer for himself and a gentleman he was with, he then settled his bill for that day and for the 5th which he had incurred on himself and the same gentle man and they then left together. The Accused then returned the following day the 7th and said that he wanted to talk to her and asked her what she had told the police and he told her that she had told the police that he had left with his cousin Mutuku, who he was with on the 5th and 6th, whose name she had not known. He then told her that if the policed went back to her she should not agree to talk to them.
52. When she asked him what was the problem in her talking to the police, he told her that his wife had been killed and put in a motor vehicle and that the police were disturbing him on it and that she should not talk to them. She stated that her boss had earlier told her that he was an uncle to the Accused. On 13th the Investigating Office visited her and asked whether she had seen the Accused and informed him that she had seen him on the 11th and warned her not to talk to them anymore.
53. The following day the Accused returned annoyed and asked her why she was still talking to the police and told her to forget about the deceased whom he called a prostitute and that it was good for her to be dead and that if she wanted to continue working and living in peace, she should not communicate with the police and from that date her boss would constantly ask if she had communicated with the police anytime she was on phone. He then asked her to leave the matter of the Accused alone if she wanted to continue working, which warning was again given to her by a gentleman who was working in the kitchen called Mbinda and in the month of August she was given off duty without pay and told to wait to be called back which was not done. She was later on called by Mbinda who issued a warning to her, which information she gave to Mwaura, she then decided to travel out of Nairobi.
54. In cross examination, she stated that the Accused went to the club the following day at 6.00 am and that Mutuku had on the two days come to the club before him. On the 5th he was at the club after lunch time and that on the 6th he had come at 7.00 pm and that she reported the threats to the police who later looked for her to testify.
55. Pw15 David Peter Mwangi Muchekeu stated that he was working with the ICEA LION and through that the deceased became his client by buying an Anticipated Endorsement Assurance Saving and Investment Package with additional benefits of life cover, with an accidental death benefit tax relief, saving and investment. He stated that he had met her on the 4th July at Westlands when she came to pick her policy statements and receipts for premium payment at 6.30 pm when she was driving alone in her motor vehicle and later on communicated with her on the 5th July 2014 via text message which was the night of the quarter final of the World Cup between Netherlands and Costa Rica as the deceased was a great fun of football and she had put a bet on Netherlands. It was his evidence that the relationship between them was purely business and he had met her husband, the Accused with her twice. On the 6th he did not leave his house since his girlfriend was visiting.
56. Since her monthly premiums were due on the 10th, he called her but her phone was off and on the 8th when he went to town, one of her friends called Shiro, informed him that she had been found dead along Mombasa road and she gave him the number of the mother of the deceased whom he called and confirmed the death. He had in the year 2012 received a text telling him not to communicate with Mary and when he showed her the number, she confirmed that it was the Accused number and that her marriage life was difficult as a result of which she had separated with the Accused but they later reconciled. It was his evidence that the Accused was the only beneficiary on her policy cover and that he did not know whether the Accused knew that he was the sole beneficiary.



57. In cross examination, he confirmed having met her in the year 2011 and that since she was paying monthly premiums, he had to call her every month and that he met her several times in various hotels and that on the 5th she sent him a text on which team to bet on and she later texted him before the game began and that she was going to watch the game with some of her friends. Since she had told him that she had placed a bet at Kshs.10,000 and her team had won, he requested for Kshs.2000 from the bet. bHe denied having a sexual affair with her.
58. Pw16 Corp. Nicholas Ole Sena a cyber-investigator was requested to extract messages from an iPhone dated 25th May 2014 which was a threatening message from the Accused to the father of the deceased where he stated that he was afraid he may lose his family unless things change.
59. Pw17 Stephen Omondi Sindi stated that he was working with the deceased and the Accused who was doing purchasers with him and that Joseph Mutuku Kalove was the turn boy. He last saw him on the 4th of July. He stated that the Accused was suspended on the ground of misappropriation of the company money and alcoholism. He later came to learn that the Accused and Kalovi were cousins and very close. The last time he saw the deceased was on the 4th when they were doing verification of purchases.
60. In cross examination, he stated that Mutuku was not expected on duty on the 5th since there was no loading to be done. He saw the Accused at the burial in Ngong and that he attempted to call the deceased on Monday but could not get through which was very unusual.
61. Pw18 Daniel Amisi received a request on the 8th July 2014 from DCI Embakasi on the call data on the cell phone numbers 072301...94 and 070809...95 and on 17th on 070726..26 and that 072301...4 was registered in the name of the deceased and that it was at Mlolongo area on 6th July 2014 when initiated a call to number 073846..53 and spoke for 59 seconds, 0708099... was registered in the name of Joseph Kavovi and that there were communication between it an078346..53 between 2nd 3rd 4th 5th and 7th July and that he was in the same location with the deceased. He further stated that on the 6th the deceased made three calls.
62. In cross examination, he confirmed that the deceased was at Mlolongo, where Joseph Kalovi was too. On the 5th and 6th and that 0721915916 was in communication with the deceased.
63. Pw19 Vincent Mabuu from Airtel produced data on 0738468853 but was unable to get the details.
64. PW20 AKM a minor who was found intelligent enough to testify on oath and a child of the deceased and the Accused stated that on the 6th of July, he was at home with his father and mother at 10.00 am when he saw the duo quarrelling and the Accused pushed her causing her to fall down, she then went into her room and locked herself in. The Accused then told them to dress up as he was taking them skiing, which they did and when he asked him whether he could say goodbye to his mother, the Accused refused. They left in a rash and walked to the road during which time the Accused called someone on phone and then a motor bike came for them.
65. They passed the skiing place and went to Food Palace, where he ordered food and drinks for them, they were joined by a lady he did not know and a friend of the Accused whom he had seen before but whose name he did not know. The Accused then left with his friend, leaving them under the care of the lady and when he later returned in the evening, he gave the lady some money and they left for home in a taxi. They did not find the deceased at home and when he asked the whereabouts of his mother, the Accused told him that she had gone to work, he also gave this information to the House Helper when she came from her off duty.



66. A friend of the Accused joined them as they were taking super and watched news at 7.00am with him, after which they left together and did not return as at 9.00 pm when he went to bed. The next morning, he went to school, leaving the Accused at the living room watching TV, and the deceased missing from her bed room. When he returned from school, at about 4.00 p.m., he found very many people at home.
67. In cross examination, he confirmed that among those he found at home were his grandparents who later on took him to the police station to record his statement, having told him that his Dad had killed his Mum.
68. Pw21 Ss James Mwenje Mwaura stated that on the 7th at about 7.30 am, he was instructed to visit a suspected murder scene at Imara Daima Railway Crossing and he requested for a scene of Crime Officer to accompany him. At 9.00 am at the station parking, he saw the deceased motor vehicle driven by PC INDECHE, surrounded by members of the public and police officers, so he decided to go and have a look at it. On arrival, he saw a lady seated at the co-driver's seat and on checking the motor vehicle, he noted that it had a small dent on the bonnet and the mudguard and since the door was opened, he saw an empty bottle of Jamison on the left side of the lady. Her body was later transferred to a police motor vehicle.
69. He was later on told by Corp Simba that the body was of unknown lady and since there were documents in the car they decided to use them to establish her identity, having noticed that the body had bruises on the face and neck. Later that day some police officers at the station started a rumour that the deceased was a drunkard who was unfaithful to her husband and used to neglect her children for days without caring. At 16.00 hours PC KYALO called him and told him that the husband of the deceased and his parents were at the police station looking for the Investigating Officer, so he directed them to the Crime Office. He then told him that the case had been transferred to the CID, so he told him to advise them to come back the following day and see the DCIO.
70. On 8th, the Deputy DCIO Mr. KAMULA, instructed him to find out who was handling the matter, and he instructed PC Indeché to hand over the file to him. PC KYALO once again went to him and told him that the husband of the deceased was a former police officer and his friend and that the lady had disturbed him and was known in their cycles as unfaithful to him, which information he wanted to give to him, so he asked whether he was willing to record a statement which he confirmed. He was later handed over statements, call data, the motor vehicle and post-mortem report by PC INDECHE.
71. He revisited the scene and from the road to the wall where the vehicle had stopped was thirty meters slopping to sixty degrees and since the ground was wet, he could not see any breaking marks, the tyre marks went zigzag before it hit the wall, he formed an opinion that the motor vehicle had no driver at the time it was going down and must have been pushed down the slope.
72. He then called PC SIMIYU the first Respondent, who told him that he found the engine running. He recorded the statement from PW4 the house Maid who had worked with couple for two months who confirmed to him that on the 6th when she came back from off duty she did not find deceased at home but found the Accused who later on left the house with an uncle and did not come back until 3.00am. She confirmed to him that at that time the Accused was not working and was not sleeping in the same bed room with the deceased. She also found it odd that the Accused told her to lock the door, since she is the one who used to open for them.
73. She gave him the deceased's cell phone numbers and said that the Accused had several numbers. He then called the Accused from his Airtel number and he told him that he had been within the police station but had left so he would come the following day. From the call data records of the deceased and the Accused, he isolated five numbers, 0721 745.... Belonging to the mother who had spoken to



her at 13.09 hours and the deceased called her back at 14.08 on the 6th which she confirmed. Second number 0738468... of the Accused whom she called at 14.00, third number 0726902... belonging to Valera Lukoye who texted her at 12.23 hours having spoken on 5th at 19.57 hours which number was located at Mlolongo near the police. The fourth number 0724839... belonging to Peter Muchekeo who had exchanged text with the deceased on the 6th between 0.121 hours up to 0.58 hours and the sixth 0723606... belonging to Melvin Nganga who had also text the deceased between 15.48 hours and 01.28 hours.

74. From the Accused number, they found that he had communicated with Joseph Mutuku Kalove from 12.27 hours to 09.12 hours on the 6th to the 7th and that the Accused had called him ten times and he had called him four times and that his number was located within Mlolongo while Melvin's number was located at Voi and Muchekeo's at Ruaka. The Accused who had agreed to record his statement, did not show up and when he called him he did not answer, only for him to call through an Advocate, Mr Ongoya who later on brought him to the station where he confirmed having sent PC Kyalo and that he knew that he had spoken to his in-laws, who must have told him a lot of lies, that is why he had instructed an Advocate.
75. The Accused then told him that he had met the deceased when they were young in the year 2004 and later met again while she was in school and started dating and that they had a good life until, 2011, when the deceased started coming home late and occasionally drunk and that he was told that she died in a road accident along Mombasa road and asked him to account for his movement as required by police procedures from 2nd to 7th of July to which he responded that he had taken the deceased out on both the 3rd up to 4.00 am when they went back home and on the 5th when he left her in town and she came back home alone. On the 6th she said she was going to the salon in town and since she wanted to use the family car, he decided to take his children to the skating place in Mlolongo on a boda boda where they were until lunch time, when he took them to Food Palace up to 17.00 hours before returning home.
76. That he did not find the deceased at home and later on went to Friends Pub where he bought beer and cigarette and settled his previous bills and that when he tried to call the deceased her phone was off and that on the 7th he was called by a certain police woman who gave him the information on the death and that he suspected Peter Muchekeo (PW15) who was dating his wife since 2011 and that he had noted that she had a new guy called Melvin Nganga who had been texting the deceased at night and that PW15 might have come to know about that leading to a confrontation with the deceased and strangled her and when he asked him who would be hurt most if the wife had three men, he did not answer but his Advocate said the husband.
77. The Accused had with him the cell phone number of PW15 and his photo which he gave to him and when he compared the Accused statement and the house help, he noted some gaps and when he checked the same, he noted that on the 6th while at Syokimau he had received a call from Mutuku at 19.28 hours and also called the same at 20.07 while Mutuku was at Mastermind in Mlolongo and later called him while the Accused was at Mlolongo at 20.16 hours which confirmed the evidence of the house girl and the following day when he visited his house, he found him with Mutuku who told him that now all the women were gone and that the Accused was more friendly to them and the house now belonged to men and when the Accused took them through the house they found that there were clothes scattered everywhere on the floor and he said that the night before, the deceased left in a hurry, he left with the Accused phones and went to the skiing place where he was told that on Sundays there are no skiing. He proceeded to the stage where he found someone (PW 10) who knew the deceased and the Accused and had seen them together on the 6th at Connection Pub. He then went to Friend's Bar where he confirmed that the same belonged to an uncle of the Accused and that he had been there on the 6th in the evening.



78. He later on recorded statement from PW 15 who said that he texted the deceased while he was at his house in Ruaka and denied having love affairs with her and he confirmed that the deceased was at Mlolongo at that time and the caretaker of his plot confirmed that the deceased was not his regular girlfriend, whom he found in the house who confirmed that they were together from Friday the 4th up to Monday the 7th when she went back to work. He later confirmed from Shiro that the last time she saw the deceased was 4th and at K1 they confirmed that she was last there on the 3rd in the evening.
79. He later interviewed Mutuku who said that he last met with the Accused on the 4th and denied talking to him on phone and when they scrolled his phone they found text messages with the full name of the Accused and ID card but denied having spoken to the Accused who had confirmed doing so. When asked why he did not report on duty on the 7th he said that there was another Driver called Kimiti who called him and told him that their boss had an accident on Mombasa road and died yet Kimiti denied doing so, so he found it odd that he had known the death of the deceased.
80. It was his evidence that when he later tried to have the Accused arrested and was unable to locate him, he called his mother who told him that the deceased had died in road accident and that they should not disturb the Accused, she later handed over her phone to The Commandant General Service Unit training school who introduced himself as a relative of the Accused and who also confirmed that the deceased had died in road traffic accident and that the father of the deceased was bribing the investigators. He was therefore advised to hand over the file to the serious crime unit.
81. On the 26th July he talked with Melvin who said that he was at the Coast General Hospital with a patient who confirmed that he met the deceased in the year 2014 while operating an M peas Shop in Mlolongo and that they became friends and that his text to the deceased was on the world cup which was then on going and on which they had placed a bet and he later made a recommendation that both the Accused and Joseph Mutuku Kalove be charged with the murder based on the fact that she had died of strangulation after having been beaten and that there was evidence of that the Accused had investigated his wife on allegation of infidelity confirming that he was reading his wife's messages which must have upset him and that there was no benefit the alleged lovers would have gained in killing the deceased as both of them had direct benefit in her being alive. It was the Accused who would have had a direct benefit in the death of the deceased since he was the beneficiary of the life cover and the same was planning to leave home and take away the children.
82. In cross examination he stated that they handed the car to the owners on instructions from the CID headquarters after the Accused had been charged and that he had access to the same between 7th and 9th and did not object to the same being released. He stated that the police had formed their opinion on the cause of death before the post-mortem was conducted. Since the Accused was disputing their conclusion, he advised him to seek a second post-mortem and that the deceased was not at the gym on the 6th according to their records even though she had gym clothes and that the bottle of Jameson was planted in the car by the killers. He confirmed that the Accused had caused a scene at carnivore on the 24th of June 2014 and that whereas the Accused and the deceased had been sleeping in separate rooms, on the night of 4th and 5th they came together and that the Accused did not attempt to call his wife thereafter.
83. He stated that the last time she was seen alive was outside Connection Hotel and that the Accused was at home at 6.00am when the car was found at the scene, he stated that it would have taken the Accused between ten to fifteen minutes from the scene to his house. He stated that the Accused alibi defence was dislodged by the house help and that on the 7th the Accused checked his credit balance while at Mlolongo at 0.45 and that the deceased was at Mlolongo when she made her last call where she was at



12.23 hours on 6th July and that during his investigations he eliminated other numbers which called or texted the deceased after interviewing the subscribers.

84. Pw22 Inspector Clement Mwangi stated that he was handed over the investigations file from DCI Embakasi since there was a complaint of interference with investigations by a senior officer and that the file had several exhibits including four mobile phones and statements and that he discussed with the initial investigating officer and decided to revisit the scene before the subject motor vehicle was handed over to him and that from the review of the statements, the fact of the death was not disputed with the cause being strangulation and since they did not have an eye witness, they relied on circumstantial evidence and that a plain statement had been recorded from the Accused, which was contradicted by many witnesses, whose evidence corroborated each other.
85. He stated that from the call data, the Accused called the deceased at 2.16 pm on the 6th while within Mlolongo area and that on the 7th at 1249 hours, he checked his credit while at the same area and not at Mlolongo and that the Accused did not mention what happened to his wife after they had met outside Connection Bar and that he met with Mutuku at the same area, a fact that Mutuku denied, creating an impression that he knew of what had happened to the deceased as he stopped going to work soon after her death and that he was the first person to call the Accused on the 7th at 6.45 am while the body was recovered at 6.00 am and disappeared soon thereafter.
86. He stated further that from the affidavit which the Accused swore at the Children Court, he had indicated that the deceased died on the 6th while the body was recovered on the 7th and that the cause of death was fatal road accident which he found strange as the post mortem had confirmed strangulation, which showed that he was involved in the death as at 3rd of July he had applied for the birth certificates for the children, three days before the death and that he formed an opinion that the Accused had motive since there were allegations of infidelity to the extent that the Accused had sent a message to the father of the deceased that he was about to lose his family and that there was insurance policy wherein he was the beneficiary in case the deceased died in an accident.
87. From the call data, on the 5th and 6th of July, the Accused and the deceased were together at home and at 12.31 hours, the Accused called Mutuku, at 1223 there was a message from Valeria, at 1.00 pm the mother tried to reach her and she called her back at 2.08 and at 2.16 she called the Accused who met with her at Connection Bar at 3.00 pm which was the last time she was seen alive.
88. In cross examination he stated that the Accused did not attempt to leave Nairobi after the death of deceased and that they zeroed on the Accused and Mutuku as the suspects after they eliminated peter Muchekeu and Melvin Nganga as they did not have any motive to cause the death.

Defence Case.

89. Dw1 Alex Luguka Mutuku A Member Of Scout Boda Boda Association Stated That Pw10 Boniface Wachira Kairu Was Known To Him As A Registered Member And The Registered Owner Of His Motor Cycle Was David Njogoo Muchoki Whose Motor Cycle Was Registration Number Kmdg 085. contrary to what he had told the court. In cross examination, he stated that he as the chairman and confirmed that if your motor vehicle is spoilt, you can get another one and that PW10 was a member of good standing.
90. Dw 2 Antony K Kalungu, a brother of the Accused stated that he knew the deceased since they were kids as they lived together in Baba Dogo. He later met her in the year 2003 while in High School when they were living at South B police lines with the Accused, they later on moved to Donholm from Eastleigh and when the Accused left Police force they moved to Garden Estate where he used to visit them. In the year 2014 they moved to Mlolongo and whenever he visited them, they would go out



together for drinks and her favourite brand was Jameson and that between 29th of June to 7th of July, he was in Thika for a religious retreat. On the burial day, when they got to Lee Funeral Home, they found that the procession had left and that the Accused was on that day dressed in a suit and did not leave his house to go anywhere.

91. It was his evidence that in the year 2014, the relationship between the Accused and the deceased became an open relationship and that the Accused used to say that she was involved in extra marital relationship with Anindo Melvin and Muchekeu and that it is Anindo who made the deceased to slap the Accused at carnivore in 2014 and that most of the times she would get home sat 4.00 am drunk as confirmed through messages to the same from the Accused as on 18th June 2014 the deceased stated that she did not come home since she had been arrested by the police. He confirmed that he knew Kalove whom he last saw after the burial of the deceased.
92. Dw3 Henry Mwaura Kamau a motor vehicle engineer was instructed to do motor vehicle accident reconstruction which he was doing for the first time and which was to look at the state of the motor vehicle and the level of the impact based on the photographs and that the motor vehicle could have veered off the road and rolled down or it was hit from behind which was not supported by evidence and that the impact was very low indicating that the speed was very low.
93. Pw 4 Dominic Nduto Kuoki an uncle of the Accused and a former police officer and an expert witness whose opinion was sought and concluded that the handling of the car, the scene and the body was not as per police standing orders as the body was removed before photographing and sketch map taken and no eye witness was found at the scene and neither did they secure items found in the motor vehicle and neither did they take the body to the mortuary to be certified dead by a medical officer.
94. Dw5 Dr Emily Rugena a forensic pathologist was instructed on 21st May 2021 and noted that strangulation is a type of injury male inflict on female and common in sexual assault and in this case there was no indication of the status of the deceased inner wear and post mortem changes were not indicated and that the body should not have been moved. She contended that if it was strangulation there would have been finger prints of both the victim and the assailant. In cross examination, she stated that she based her report on the what Dr Njeru had done and that there was a focal injury on the head and that there should have been a pattern of the hand if it was strangulation.
95. PW6 NELLY GACHERI stated that in the year 2014, they had a customer who had a child called Aron, so they knew the wife as Mama Aron while the customer was Baba Aron. On the 6th he came alone and bought beer at the counter which he drank and left and did not see him again until the year 2015 when PW14 Akinyi left employment at the said bar and went to work an MOBILUS. It was her evidence that she was not dismissed and that during the time she worked with her, she had a boyfriend who was a police officer who used to come for her, whom she identified as the Investigating Officer (PW21). She confirmed that the Accused was Baba Aron and that he did not come to the bar at 6.00am as stated by Akinyi, since the opening hours were at 10.00 am. In cross examination, she stated that she used to work at Friends' Bar until 2020 when it closed because of corona and that she did not know the name of PW21 whom PW14 told them was her boyfriend but that he used to come to the bar in either a saloon car or police land cruiser. She confirmed that she knew the deceased whom she had not seen that time. She was approached by the family of the Accused in the year 2016 and was told that the deceased had died out of a road traffic accident.
96. Dw7 Christopher Uvyu Mbole a brother in law of the Accused stated that they had issues in their marriage with the Accused complaining that the deceased had affairs and would either come home late or sleep outside and that when they got their last child, the Accused asked him whether the baby was looking like him. He stated that the relationship grew worse until the deceased moved out but they



later patched the issue and they moved together in the house of the Accused uncle. The compliant of the Accused was on infidelity and drunkenness on the part of both parties. On the 7th his mother in law called him and told him that the deceased had an accident, so he joined the family at Chromo and the Accused later joined them smelling of alcohol and confused and that they were not briefed on the post mortem report.

97. At the mortuary he heard a lady called Teresia say in kikuyu that the dogs from Kitui had killed their daughter and that he was at the police station when the family of the deceased were handed her personal items found in the car and that they moved to the house of the Accused with the police only to find some other police at the place. The parents of the deceased then took the children with them and on the 8th he went to the police station with his wife because they thought something was not right so they thought it right to take photographs of the car using his phone. He later attended the burial at the deceased parents' home at Ngong on the 11th where the Accused was not allowed to address the mourners, he later went back to the police station where he was given the OB on the accident and the next time he visited the station he found that the motor vehicle had been removed and the case file transferred to the CID headquarters.
98. He confirmed that he had a face book account where he was friends with the deceased and once the Accused was charged, he decided to do a search on the account of the deceased and that her profile picture was of her son. He confirmed that the Accused would from time to time like her posts and comment on them and that on 6th July 2014 she posted to her brother asking for alcohol and that she was always wearing glasses yet when she was found dead she did not have eye glasses. He later checked whether Joseph Mutuku had a driver's licence using his identity card number which he got from the police file.
99. It was his evidence that there was a time he together with his wife and the deceased and the Accused went to view some property at Kitengela and the deceased said that she would have wanted to bring Peter to view some of the property and they later discussed why she would share the information of men she was in relationship with since the Accused had shared the name with him. It was his evidence that in the year 2014 the issue of her infidelity was known to the family.
100. In cross examination, he stated that whereas the Accused and the deceased had frictions in their marriage on June 14th she posted on her face book account what sounds as if they had been on talking terms.
101. Dw8 Raphael Muoki Kalungi gave unsworn statement and stated that he joined the police force in 2002 and worked until 2008 when he resigned to join his father in laws company where he worked until 201. On the 7th of July he woke up and asked the house help whether the deceased had called her which she answered in the negative, so he decided to go and buy a newspaper and when he returned back he received a call from a lady who identified herself as a police officer who told him that the deceased was involved in a road traffic accident and the body taken to Chiromo. He then called his mum who told him not to call his in laws before confirming the information. He was then called by the deceased driver who told him to wait for him at home where he handed to him a phone and he spoke to Mr Momanyi who confirmed the information so he proceeded to Chiromo where a police woman took his phone and asked whether he had communicated with his wife and he said he did at 10.30 pm but her phone was off and that when he saw the body he was turn with grief so he went out for fresh air.
102. He stated that his in-laws did not engage them when they called for a pathologist and neither did he identify the body nor given the post mortem report and that as it was being done, the in-laws had gone to take his children without his knowledge. On the 8th when they were supposed to report to the police station to record his statement, the father of the deceased called his father on phone and asked that



- they go to ngong for funeral arrangements and when he got there he was told that the father and the maid had gone to record statements and as he waited for him the sister of the deceased Accused him of having killed her so he decided not to go back there.
103. He stated that he never used to beat the deceased and whereas they used to have disagreements, he would call his mother in law whom he would meet with to solve the issue and that it was not true that she was planning to move out of the home. He stated that the deceased used to drink and that on 18th June 2014, she informed him through a text message that she had spent the night at central police station having been arrested by the alcohol blow unit and that she used to sleep outside the house twice in a week and would switch off her phone. He stated that she once had an accident on 28th August 2012 on Mombasa road at 4.00am and the motor vehicle written off.
104. His text to his father in law of 25th May 2014, was not a threatening text and that he did not respond to it. On the 6th, he left the house between 11-1.30 am with the children whom he took skating and the deceased was to join them but they found the place closed so he took them to Food Palace on a motor bike as she had planned to go to town using the car. He did not leave the children save for when he went to buy milk. He denied having an argument with her on the said date. He confirmed that the deceased called him at 2.00 pm and told him that she had left the house and would join them and when she didn't he called her back and found her phone switched off so he went back home in a taxi and was in the house up to 9.00pm when he went to Park place and took a bottle of beer and bought cigarettes before he returned home at 10.00pm.
105. He stated that his in laws took his children and changed their names and causing him to go back to drinking since his manhood had been injured so he filed case at the children court on 12th August 2014 and he immediately thereafter was asked to go record his statement and put under arrest. His affidavit was prepared by an advocate who asked him the last time he had seen the deceased and he answered 6th and that he did not have a copy of the post-mortem report at that time. It was evidence that the Accused used to record all her expenses and should have recorded the double puncture as per the evidence of PW10 if it happened. He denied killing his wife.

Submissions

106. . The parties filed comprehensive written submissions at the close of the defence case. The prosecution submitted that the fact and cause of death was prove through PW1 Dr. Njeru and that the fact that it was unlawful act was proved through the evidence of PW20 that she had been slapped by the house and that save for that she was in good health as per the evidence of PW5. It was submitted that malice aforethought was also established through the evidence that the relationship between the Accused and the deceased was broken and that the same was inferred through the conduct of the Accused in support of which the case of R v Tubere s/o ochen {1945} 12 EACA63 was tendered in support of the fact of the conduct of the Accused. It was submitted that the Accused was positively identified as the perpetrator through circumstantial evidence including that of the last person seen with.in support of which the cases of Deepak sauna vs State of Delhi, Achie vs State, R vs ECK and Lokito Epeyon & another v R were tendered.
107. It was finally submitted that the Accused opted to give unsworn evidence and did not offer any clarification into the discrepancies for which the case of Jamaal Omar Hussein v republic [2019] e KLR that the court ought to look at the unsworn statement with circumspection.
108. . On behalf of the defence it was submitted that the evidence tendered to show that the Accused was the last seen with the deceased was unreliable and that the evidence of identification by PW10 ought to be treated with caution as was stated in the case of Paul Etole and another v Republic. It was submitted



that the Accused was not at the scene of crime having given an account of where he was between 6th July at 2.00pm and 7th July 2014 at 10.00am in support of which the cases of Erick Otieno v Republic and David Munyui Chiragu and Another were submitted.

109. It was contended that the prosecution conclusion based on the call data records were wrong when viewed against the evidence on record and that the investigation was tainted as the police withheld crucial evidence and interfered with the scene including driving the motor vehicle from the scene and removing the body contrary to police standing orders. It was submitted that the circumstantial evidence tendered by the prosecution had glaring inconsistency which raised doubt in the prosecution case the benefit of which should have been given to the Accused including the fact that there was no proof that the deceased was a victim of domestic violence as this evidence was based on hearsay evidence which is inadmissible.

Analysis And Determination

110. . To sustain a conviction on a charge of murder, the prosecution must prove beyond any reasonable doubt, the following elements of the offence: (a) the fact and cause of death (b) that the said death was unnatural (c) that the death was caused by the Accused person with malice aforethought.
111. The fact of the death of the deceased was not disputed throughout the trial having been found dead in her motor vehicle along Mombasa road by PW 8 who then called PW9 Jenifer Mutuku alias Bensuda who then called for PW13 who came with PW12 a scene of Crime Officer. It is through these first Respondents that the family of the deceased were notified. The Accused confirmed he went at Chiromo and at the time of this judgement she was still dead, so I find and hold that the fact of death was proved.
112. The cause of death was disputed, with the prosecution theory being that she died as a result of strangulation, whereas the defence put up the theory of injuries sustained as a result of road traffic accident. In support of the prosecution Dr Dorothy Njeru a Government pathologist (PW1) concluded that based on the fact that she had injuries on the neck with a fracture thereof as the major injury and the fact that the impact on the motor vehicle could not have resulted into death, the cause of death was strangulation and therefore homicide.
113. . The defence on the other hand called Professor Emily Rogena (DW5) whose opinion was based on the review of documents supplied to her by the Accused including the post-mortem report by PW1 and formed an opinion that the abrasions on the neck of the deceased as seen from the photographs could not have been caused by strangulation and that there was no evidence of any defensive injuries indicating a struggle between the deceased and the assailants and therefore the injuries were consistent with road traffic accident. She stated that there were several lapses in the report by PW1, which made her opinion inconclusive.
114. I have looked at the two contrasted opinions on the cause of death. Professor Rugena did not have the advantage of seeing and examining the body. His report is based upon a review of the documents and photographs supplied and whereas she stated that there was no evidence of strangulation, she did not rule it out. Dr. Njeru's report is supported by the examination of the body which was supported by Dr. Rutere for the family and the cogent circumstantial evidence provided for by the officers who responded to the scene and who upon looking at the motor vehicle the position of the deceased on the co-driver's seat and the missing driver ruled out road traffic accident.

If the impact was enough to kill the deceased, then where was the driver, unless the deceased was the one driving after the accident was removed is or removed herself from the driver's seat.



115. . In the evidence tendered, I have come to the conclusion that the opinion by Dr. Njeru is supported by physical examination and unlike that of Prof. Rugena and I therefore believe the same on the cause of death, dismiss the defence theory by holding that the cause of death was proved by the prosecution beyond reasonable doubt to be strangulation and therefore homicide.
116. On whether the said death was caused by unlawful act on the part of the Accused person, as rightly submitted the prosecution and defence case was based solely on circumstantial as there is no eye witness on how she met her death and therefore the Court is called upon to interrogate the circumstantial evidence presented by the prosecution and as dislodged by the defence.
117. . The law on circumstantial evidence has now been stated and seems settled following its entry into the Supreme Court of Kenya through the infamous Iranian case: Republic v Ahmed Abofathi Mohammed and another [2019] e KLR where the apex Court stated

(55)] The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect [or] oblique evidence ... that is not given by eyewitness testimony.” It is “[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact.”[6] It is also said to be “[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....”[7]

(56) On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case,[8] and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact[9], circumstantial evidence should never be given a derogatory tag. Jowitt’s Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:

“... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the Accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the Accused’s fingerprints, ... [or where there is] a ... DNA match between the Accused’s control sample and genetic material recovered from the scene of the crime”

(57) This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence “is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”[10]

(58) However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.”[11] The court should also consider circumstantial evidence in its totality and not in piece-meal.[12] As the Privy Council stated in Teper v. R. [1952] AC at p. 489 “Circumstantial evidence



must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”

(59) To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant[13], reasonable and not speculative[14], but also, in the words of the Indian Supreme Court, “the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established....”[15] As was stated in the case of *Kipkering Arap Koskei & Another v. R.* (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “... 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, ...”

[60] As was further stated in the case of *Musili v. Republic* CRA No.30 of 2013 (UR) “to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.” The chain must never be broken at any stage.[16] In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on”[17] and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the Accused.[18] “Suspicion however strong, cannot provide a basis for inferring guilt.”[19]

118. . This Court is bound by the application of the law as stated above and will therefore proceed to analyse the circumstantial evidence as presented by the prosecution and as challenged by the defence to see if the same meets the threshold set herein above.
119. . The fact that the marriage between the Accused and the deceased was on the rock is not disputed, the Accused honestly believed that the deceased was having affairs outside their marriage and in particular identified Peter Muchekeu as the one who had taken the heart of his love and issued warning to the same to stop seeing her. The evidence tendered before the court confirmed that there was an emotional infidelity between the deceased and PW 15 going by the nature and time of their communication. The Accused further believed that there was also Melvin who was also having his feel at the cookie jar and he stated so to DW 7. The Accused had expressed to his Father in law PW3 that there was the possibility of him losing his family without explaining what that means, and even though he was under no obligation to offer an explanation, the same did not in his evidence in chief denied the context of the message and neither did he offer any explanation, save for saying that it was not a threatening message.
120. There is uncontroverted evidence that the deceased had had enough of the Accused physical and emotional abuse and was planning to call it a day by moving out which she had expressed to her hair Dresser, her mother and to her driver, the Accused was looking at the possibility of losing all at a time when he was jobless and the only logical thing to do was to stop the deceased in the way he best knew.
121. I have taken note of the Accused hypothesis that the deceased might have been killed by her lovers, but if it is true that she had transferred her love to the said lovers, then the only person who would have the motive to eliminate the deceased is the Accused as opposed to the new guys in life thereby providing circumstantial evidence pointing to the Accused by eliminating the two named persons.
122. . There is also the Accused past conduct of assaulting the deceased and the pattern of constantly strangling her as was confirmed through the evidence of her driver and mother and the deceased dying



declaration. There is evidence that the last time the deceased spoke to her mother, she told her that the Accused had threatened to kill her which was corroborated by PW20, whose evidence was that the Accused had threatened to kill the deceased before they left the house thereby making her statement admissible under the provisions of section 33(c) of the *Evidence Act*, confirmed by the Court in *Moses Wanjala Ngaira v Republic* [2019] e KLR where the court said that statements made by the deceased relating to his cause of death is admissible in evidence.

123. . The other circumstantial evidence which irresistibly link the Accused to the offence is the issue of the birth certificates for the children. There is uncontroverted evidence that as at the 3rd of July 2014, the Accused had applied for and obtained the birth certificates for the children, which he used in support of his application for their custody which was filed on the 8th just a day after the body of the deceased was discovered and before her burial. It is clear to my mind that in applying for the said birth certificates, the Accused had known that the deceased was not going to be there and that explains why he had to secure the said certificates, the application for the said birth certificates at that time and their purpose was an issue which was only in the special knowledge of the Accused and under section 111 of the *Evidence Act* as read with section 119, the burden of proving that they were not obtained in anticipation of or in execution of the plan for the death of the deceased was upon the Accused and at the close of the defence case the same did not discharge the said burden.
124. . In this I find support in the case of *Douglas Kibocha vs Republic* [2009] e KLR submitted by the Prosecution where the court stated that there are situations when an Accused person must be called upon to offer explanation on certain matters especially within his knowledge hence the purpose of section 111 which places an evidential burden on the Accused.
125. . The other circumstantial evidence which points to the Accused person is based on the doctrine of last seen with. It has been submitted by the defence that the evidence in support of this was unreliable as it was solely on the evidence of PW10 Boniface Wachira whose evidence it was submitted was not credible, while the prosecution submitted that he was with the deceased at 3.00 pm on the 6th July 2014 when she mentioned to him that she was waiting for the Accused who later on joined her and which evidence was corroborated through the call data which placed the Accused, the deceased and Mutuku within the same location.
126. The doctrine of the last seen with is premised on the presumption that the person last seen with the deceased bears full responsibility of his death and has now been trodden well with this Court joining those who have had a bite at it in the case of *Elizabeth Anyango Ojwanga v R* [2018] e KLR thus “This doctrine has been discussed in the Supreme Court of India case of *ANJAN KUMAR SARMA v STATE OF ASSAM*, CRIMINAL APPEAL NO. 560 of 2014 submitted by the defense in which the following principles were set out: -

“ 18. The circumstances of last seen cannot by itself form the basis of holding the Accused guilty of the offence . . . There must be something more establishing connectivity between the Accused and the crime.

21. It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the Accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”



127. In the case of *R v EKK*, [2018] eKLR the Court quoted with approval the Nigerian case of *Moses Jua v the state* (2007) (PELP-CA / 1142/2006 where the court held that where the deceased was last seen with the Accused, there is a duty placed on him to give an explanation relating to how the deceased met his death and in the absence of any explanation, the court is justified in drawing an inference that the Accused killed the deceased. In the case of *Lokito Epeyon and another v Republic* [2018] e KLR submitted by the prosecution, this court emphasized the impotence of identification of the person last seen with as an ingredient to the application of the doctrine.
128. Once the theory of the last seen with is established by the prosecution, the Accused was expected to after some explanation as to when and under what circumstances the he had parted the company with the deceased and if the Accused after no explanation, furnish a wrong explanation, then coupled with other circumstantial evidence, a conviction can be based upon it.
129. . In this case the Accused and the deceased were known to the said witness who had at some time helped them change and repair some two tyres. DW1 confirmed that he was an operator within the area and whereas the defence cast a doubt in his evidence, there remains no doubt in the mind of the Court that the Accused was the last person seen with the deceased. The evidence of her mother confirms that she was going to meet with him, having left the home with the children one of whom was unwell. The Accused confirmed that he was with the children without the deceased and the evidence of PW20, PW6 a waitress at the Food Palace confirmed that the Accused left the children at about 2.30 pm to unknown location contrary to his evidence that he did not leave them. The call data placed the Accused at Connection Bar and in his defence he confirmed that indeed the deceased called him and was to join them, thereby corroborating the evidence that he was the last person the deceased called before her mobile phone went off.
130. . Whereas the defence attempted to discredit the evidence of PW10, I find the same reliable based on how he was identified as a witness. When the police approached the stage with the picture of the deceased and the Accused, at that stage they were looking for the boda boda operator who had carried the Accused and his children when PW10 indicated that he knew the couple and narrated how he had assisted then change tyre, the fact that it was not reflected on the decease record does not eliminate the fact that he knew the couple, a fact which the Accused did not deny in his evidence in chief and contrary to the submission by the Accused that he was not seen at the scene, his alibi defence was contradicted by the prosecution witnesses and therefore the possibility of him being at the scene either by himself and or his agent was not ruled out by the evidence on record taking into account the fact that the evidence before the court was that it could have taken him ten to fifteen minutes from the scene to his house.
131. . I therefore find and hold that the Accused was positively placed with the deceased and was therefore under the provisions of section 111 of the *Evidence Act* under an evidential duty to offer an explanation on how the deceased met her death which he did not. This is further corroborated by the evidence from the house help that when she returned from her off duty and asked the Accused where the deceased was, his answer was that she had gone to work contrary to what he told the police that she had a salon appointment. The Accused further made no attempt to contact any of the relatives of the deceased and or her colleagues at work when he did not find the same at home and even after according to his evidence, he was called by a police woman, who informed him that the deceased had an accident, which information he did not give to her driver, PW 10 who had been sent to look for him, when he did not answer his phone, leading the court to draw an inference that he knew well where she was.
132. . The other circumstantial evidence tendered by the prosecution linking the Accused to the offense is his relationship with Joseph Mutuku Kalovi who was his cousin and whom he had secured for employment at the company. PW6 placed him together with the Accused on the 6th at 2.00pm and



- they were later on placed together by PW14 at 8.00 pm, whose further evidence was that on the 11th after she had recorded her statement with the police, the Accused and the said Mutuku asked her what she had told the police and threatened her after the Accused had been arrested. It was her evidence that the Accused in the presence of Mutuku told her to forget about the deceased whom he called a prostitute and that it was good that she had died.
133. . According to the evidence of PW21 the said Mutuku was with the Accused in his house when he went to interview him and his remark was that the house now belonged to men with the Accused being more free than when the ladies were present. The call data confirmed that the Accused called him ten times and that he is the one who facilitated the acquisition of the birth certificates for the Accused children on his behalf. The said Mutuku failed to report on duty on the 7th and disappeared never to be found soon after he was interviewed by the police. The Accused though under no duty to offer any explanation was silent on the what he knew about Mutuku and or his whereabouts, leading to the irresistible conclusion of a conspiracy between the Accused and the said Mutuku to cause and indeed caused the death of the deceased.
134. The other circumstantial evidence linking the Accused to the death of the deceased is his conduct soon after the body of the deceased was found, the Accused was very clear in his mind that the deceased had died as a result of a road traffic accident, which theory he advanced to the police and tried to influence the direction the investigations were taking. He further interfered with the investigation including using his friend PC Kyalo, the rumour from Embakasi police station, that the deceased was unfaithful to her husband who used to spend nights out of the home and the compliant by his relative who was the Deputy commandant of the General service unit training school. Whereas it was his right to seek legal representation, the evidence of PW 21 is that even before he was considered as a suspect, he showed up with an Advocate at his initial interview, thereby portraying a guilty mind.
135. The other circumstantial evidence linking the Accused to the offence, is the fact that the deceased was a victim of domestic violence and whereas the Accused through the evidence of DW7 stated that the relationship was normal, this is contradicted by his main evidence that the issue of the deceased infidelity was a known secret as corroborated by the evidence of DW2 that they had an open relationship. He confirmed that it was because of the allegation of infidelity that the Accused slapped the deceased at Carnivore on the 28th of June. The mother of the deceased (PW5) evidence was that the Accused used to assault the deceased as corroborated by her father PW3 and her driver PW7, her hair dresser and her insurance Agent PW14 and her son PW20. The court has taken judicial notice of the fact that those we love most are the ones we hurt most and that the actions of the Accused fell within the definition of domestic violence as ably stated by the court in *State v Truphena Ndungi Aswani* [2021] eKLR to the effect that according to Amnesty International a slap, a punch a kick a forceful shove intimidation coercion power and control are elements of domestic violence.
136. .The issue then for the Court to determine is whether this chain in circumstantial evidence was broken. The Accused theory that the deceased would have been killed by Peter Muchekau whom he considered her lover and whom he had warned to keep off his wife and who might have killed her since there was now a new man in her life called Melvin Nganga was dislodged by the evidence of PW14 who accounted to where he was on the said night as corroborated by the evidence of PW21. Nganga was eliminated since he was in Mombasa and further there is no motive which would have led the either of the two killing the deceased as PW14 knew very well that she was married.
137. I am in the agreement by the evidence of PW21 that both of them were beneficiaries of the existence of the life of the deceased as PW14 was getting insurance commissions from the cover he had sold to her and from the references she had given him and assuming that the Accused theory that they were lovers was true, he had won her heart and they had emotional infidelity going by the times they used



to exchange text messages none which showed that they had any underlining issue which would lead to him killing her. As regards Melvin Nganga, she was his client at the Mpesa Shop and that he was also assisting in training her. Both of them and the deceased were lovers of football. PW21 evidence which I found credible was that when PW14 met the deceased in the year 2011, she disclosed to him that they were having issues in their marriage which was corroborated by DW2 and DW7 and that they reconciled thereafter, I therefore see no reason why he would want to kill her assuming that Melvin had taken her if he was willing to share her with the husband.

138. . The accident theory was further discounted by the evidence of the traffic officers who first visited the scene and of most interesting thing as regards this theory is that the deceased was not on the driver's seat but on the co-drivers. If the impact was enough to kill the deceased, then the driver who was with her in the same motor vehicle would have also died, the Accused own expert witness who did not complete his testimony DW3 stated that the motor vehicle must have slowed down to leave the high way and had a controlled descent since the slope was deep and it would have accelerated and that the impact was very low indicating the speed. He further stated that a controlled descent does not need a drive. The only people who had unlimited access to the said motor vehicle were the deceased, the Accused and her driver PW7, who gave an account of where he was. This leads the Court to conclude as submitted by the prosecution that the same was stage managed. This is supported by the fact that it is the Accused, who had knowledge that the deceased had previously had an accident on the same road on 28th August 2012. He is the one who of the deceased's favourite alcohol Jameson whose bottle was found next to her body to create an impression that she was drunk at the time of the accident.
139. . The final issue is whether the Accused had motive in killing the deceased. The prosecution has advance the theory that the Accused killed the same so as to benefit from the insurance policy cover wherein he was the beneficiary, however this remains mere suspicion as there was no evidence tendered before the court to confirm whether the Accused knew of the existence of the said policy and mere suspicion however strong cannot be a basis of a conviction in a criminal proceeding.
140. From the evidence on record it is clear to my mind that the relationship between the Accused and the deceased had reached its rocket bottom, the Accused suspected the deceased of infidelity and had complained to his brother in law DW7 to the extent that he suspected their daughter not to be his child, the deceased was planning to move out of the home and from the text message to his father in law, he feared losing his family at a time when he had lost his job and as he stated in his defence his manhood was injured. He was reading his wife's messages and through them got to know the people he thought were her lovers, which must have made him very insecure and this to me provided the motive for the Accused to stop the deceased from leaving him and retaining the custody of his children and therefore the Accused with Mutuku planned and executed the murder of the deceased , the insurance might have been an icing on the cake but there is no evidence to support it.
141. . Whereas the defence has poked holes on the lapse in the conduct of the investigation the same does not exonerate the Accused from the offence herein and therefore find and hold that the prosecution has proved beyond all reasonable doubt that the circumstantial evidence herein irresistible points to the Accused either with Mutuku or others to have planned and executed the death of the deceased and as submitted by the prosecution forgot one vital link in the plot to create an impression that it was a road accident, the missing driver.
142. . I accordingly find the Accused guilty of murder of his wife Mary Waruguru and convict the same accordingly. And it is ordered.
143. As has become my custom, before I pen off this judgement, I must make mention of two silent actors in this cause, the father of the deceased and the sister of the Accused. Their love for the two is beyond



measure, the father stood with his daughter in death and the sister with her brother throughout the trial to the end, which is commendable save that sometimes they both became overzealous in the exercise of their love.

DATED SIGNED AND DELIVERD AT NAIROBI THIS 20th DAY OF FEBRUARY 2023

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Omirera for the State.

Ms Kilonzo for the Accused

Mr. Kagiri for the family

Ms Habiba – Court Assistant.

