



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 56 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

WAMBUA MBITHI.....ACCUSED

JUDGEMENT

1. The accused, **Wambua Mbithi**, was charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that on 23rd day of June, 2015 at Kimongo Area in Athi River Sub-County within Machakos County, the accused murdered **Esther Nthoki**.

2. The prosecution's case was based on the evidence of 13 witnesses.

3. On 23rd June, 2015, PW2, **Agnes Wayua Mulwa**, was at home as she was not feeling well. With her at home were her children **Muoti Mulwa** (PW8), **Esther Mulwa** (the deceased), **Samuel Mutua Mulwa** and **Monica Mulwa**, the deceased being her 8th born child.

4. After sending the said two children to the farm back at 8am, she went back to sleep. When she woke up at about 10.00 a.m. the children were playing outside the house while PW8 was washing clothes. At about 11.00 a.m. the children informed her they were hungry so they took the food that was left over. After the said children ate, she went back to sleep till around 11.30 a.m. when she heard PW8 calling **Samuel**, then aged 4 years, asking the whereabouts of the deceased who was then aged 3 years old. When she sought to know from **Samuel** the whereabouts of the deceased, **Samuel** who was shocked said he did not know. According to **Samuel** they were with the deceased at the gate but he did not know where she went.

5. When PW2 got outside, she met the accused, her neighbour, and upon inquiring from him if he had seen the deceased, the accused, who was standing at the door, informed her that he saw the children, chased them and they returned home. She then told **Samuel** to go check whether the deceased went to my sister's home. When **Samuel** returned from the house of PW2's sister with PW1's mother PW3, PW2 explained to her that they did not know where the deceased was and that the accused had informed her that he had chased them to return home. They then started looking for the deceased with her mother, her neighbours and PW8 and dispatched the other children to go out and look for her.

6. Upon failing to get the deceased in the neighbouring homes, they decided to go search for her in the toilet pits, starting with her own and upon failing to find her there, they proceeded to that of the accused. PW2 however, did not proceed there as she was held back by and took her back to her home from the gate. She then heard her mother crying, got shocked and fainted. When she regained her consciousness, she was informed that the deceased was discovered inside the latrine. The Police officers were the called and they removed the body of the deceased. Since she did not come out of the house, it was her sister and her cousin's wife who accompanied the body of the child. When her sister returned from the mortuary she informed PW2 that while they were at the police station they saw the accused being taken to the police station in connection with the death of the deceased.

7. According to PW2, when she went to check at her gate, she found it open though it was held by a chain. In her evidence, the children **Samuel** and the deceased could not have reached where the chain was. She was however informed by Samuel that they were inside and just heard the gate being opened but did not tell her that they had been chased by the accused. According to Samuel, they just went out when they realized the gate was open but he did not know where the deceased went.

8. According to PW2, the accused who was the nearest neighbour was staying with his sister and his brother at their home though on that day, it was only the accused that she saw at the home.

9. According to PW2, the plot where she was staying with her family was facing that of the accused's with a path in between. There were however many other many plots on both sides. It was her evidence that both their gates were made by iron sheets and that the gate to the accused's home was open. According to her the other neighbours were there but because her mind was on her child, she did not check if there were other people.

10. PW2's sister, who testified as PW.3, **Serah Kalondu Mulwa**, that on 23rd June, 2015, she was from a women's meeting at about 9.30 a.m. when upon reaching PW2's house she saw PW.2's son, **Danieli**, then aged about 3 years, who asked her if she had seen the deceased. PW3 then decided to go to PW.2's house to get the details where she found PW8 washing clothes and who informed her that the deceased had left with another child and did not return. Since PW2 was unwell, she told PW8 that they should go and search for the child. They proceeded to search for the deceased in the company of PW4, **Mwikali**, a neighbour who accompanied them in the search together with other neighbours.

11. When they failed to find the deceased even in the bush, they returned to PW2's house where she suggested that they check in the house and the latrine but they failed to get her in PW2's latrine. She then brought a torch and they proceeded to the latrine of the accused who was a neighbour. The accused informed them that he saw the children but told them to return home. They found the door to the latrine tied with a wire outside which she removed and checked inside the hole and saw something looking like a leg which was confirmed by PW4. Because of her pressure, PW3 fell down and fainted and when she came to, she found herself in her house where PW8 informed her the deceased was taken to Athi River Police Station and then Machakos.

12. According to PW3, the latrine was tied with a wire but she did not know who opened it. It was her evidence that apart from the accused, they found no other person in the compound. She confirmed that she did not witness the removal of the body.

13. PW4, **Florence Mwikali Mutono**, a neighbour was on 23rd June, 2015 at home when PW3 went and asked if she saw her grandchild called Esther. Upon responding in the negative, PW3 requested her to accompany her to look for the deceased and they conducted a search in the house but did not find her. When they met the accused, he informed them that he saw the children but chased them away, closed the gate and went to the farm. On PW3's suggestion, they decided to look in the latrines together with other members of the public and started with PW.2's latrine but did not get the child. They then proceeded to the next neighbour's home, the accused's home, whom they found at home where one of them opened the door to the latrine which they found tied by a twisted wire and PW3 entered. After PW3 checked, screamed and informed PW4 that she saw a leg and handed over the torch to PW4 to also check.

14. Upon checking PW4 saw the child inside the latrine. With the help of the accused, the latrine was then demolished to remove the child using a rope. According to PW4, the body of the deceased was swollen with bruises on the face and though she had the top clothes, the long trousers she had was lowered to half the waist. There were a lot of maggots on the body which she identified as that of the deceased. The body was then taken away by the police. She later heard screams coming from the accused's home who was later arrested by the administration.

15. According to the witness the time when they were informed by the accused that he had chased the children away at 12pm though they did not ask him the exact time when he chased them away. They then proceeded to a number of plots in the neighbourhood. It was her evidence that the crowd arrived after the body had been removed and that by the time the body was being removed, they were the two of them with PW3 and though the accused was present standing outside, it was a neighbour called **Jackson Kioko**, PW9, who opened the toilet. By then they were 4 people. The crowd, according to her, arrived after PW3 screamed. According to her, after the child was removed, she did not know where the accused went to. It was her evidence that the accused's home, which had iron sheet and sisal gate, was surrounded by sisal to the extent that no one could access the same and while the gate to the accused's home had a wire, which he opened, the deceased's home had a chain and one could not open it from outside if locked from inside.

16. **Grace Muoti**, PW8, the deceased's Sister was with her mother, PW2, who was unwell and her two siblings, the deceased, then aged 2½ years and **Samuel Mutua**, then aged 4 years on 23rd June, 2015 at 11.30am. The two children were playing in front of the house as she proceeded to wash clothes outside when she realised that they were not there. When she went to look for them, she only found **Samuel** but not the deceased and upon asking **Samuel** the whereabouts of the deceased, **Samuel** informed her that they were playing in the accused's home when the accused told him to leave leaving the deceased there. When she relayed the information to PW2, PW2 told her to start looking for the deceased but upon doing so, they did not find her within the compound and when they went to her Aunt's place, they found her grandmother, **Sella** (PW.3) who informed them that she had not seen the deceased but who accompanied them in searching for the deceased in company of the neighbours but they failed to find the deceased. They even went to the home where the two children were playing but the deceased was not there. It was then that PW3 suggested that they should take a torch and search the latrines. The first latrine to be searched as theirs but they did not find the deceased after which they proceeded to the accused's toilet which was in the nearest home.

17. At the accused's home's latrine, the people who had entered started screaming and when she entered she saw the deceased inside the latrine in the clothes that PW8 had dressed her in. The latrine, which was closed by a wire was then demolished and the body was removed. The accused, according her, came and stood at the gate and because the latrine was theirs, people started beating the accused whom she heard asking for forgiveness. This was prior to the arrival of the police. It was however her evidence that by the time the body was removed, she had gone back to their house and was not aware if the deceased had been taken away. It was however her evidence that the accused was badly beaten up and was only rescued by the police. According to her, she had seen the accused in their home that that morning. Though the home had a sisal fence one could see someone in the accused's compound from the compound of PW2 through the gaps. It was her evidence that the accused confirmed to her and her mother that he had chased the children.

18. **Jackson Kioko Nzeki**, PW9, testified that on 23rd June, 2015 between 1 – 2 p.m. he was going home from work when he heard wailing behind him and he decided to go back and check. He then met a lady who informed him that a child had been found in a latrine. On proceeding to the accused's home he found some who said that there was a child in the latrine. When he peeped into the latrine, he saw a child inside and informed them that they should demolish the latrine which was constructed by bricks. They then removed the bricks and the slab and when he entered the latrine, he saw the child already dead. Using a rope, he removed the child who had a trouser on one leg only and a sweater top. By then, the police had already been notified. Though he initially thought that the child had fallen in, however from the

look of the latrine it looked like the hole had been enlarged in order to put her into the toilet. It his evidence that the body had bruises on the head and was covered with the worms.

19. While accompanying the body with the police to the mortuary, they examined the body and saw blood near her private part. He then called one of the neighbours, **Musyoki**, and informed him not to allow the accused go away. Upon his return in the evening about 7.00 p.m., he was informed that the police took the accused to the police station.

20. According to the witness, when he went where the body of the deceased was found, the accused was present and he was the one who he was sending to fetch for water and the soap. The home, according to the witness, belonged to his friend, the late **Mbithi Muloki**, the accused's father who was alive by then though on that day, he was not present. In that home, he stated, were the accused, his father, mother and his sisters though that day, it was only the accused was there.

21. **Alice Mumbi Mbotela**, PW10, the wife to PW2's cousin, was in her shop on 23rd June, 2015, between 11.00 a.m. and 12.00 p.m. when PW2, who was staying less than a kilometre away, went and informed her that the latter's child had gotten lost. She decided to close the shop to search for the deceased. They then heard screams coming from their home and when they went to the home opposite she heard the people saying that the child was in the toilet. The child was then removed and police were called. However, she took the family home before the latrine was demolished. By the time she came out the body had been removed and was lying outside covered. While accompanying the body, on the road, she saw the child's trousers hanging loosely on the leg and noticed that there was bleeding in her private parts. She also saw bruises on the neck and body. Upon their return from the mortuary, they found that the accused, whom they had left at his home, had been by the police. It was her evidence that that when they were at that home, there was nobody else apart from the accused from that family and that the accused was staying at that home with the mother and father.

22. According to her, while they were in the police vehicle with PW9 and a sister to the mother of the child, they did not discuss about the likely suspect. She also did not notice the presence of one **Teddy Musyoki** though there were many people there. She could not recall PW9 making a call to the said **Musyoki**. It was her testimony that by the time they were going to the mortuary, they left the accused just standing there.

23. PW11, **Naomi Munyiva Nzioka**, an aunt to the deceased was on 29th June, 2015 informed that the deceased had passed away and that the body had been taken to the mortuary. On 30th June, 2015 she went to the mortuary and identified the body as that of the deceased. In her evidence, the body was decomposed and she had no lower clothes. Her private parts and face had no injuries. She was able to identify her as she used to take care of the deceased when her mother was unwell. In cross-examination, she stated that she saw a cut in her private parts which was not due to decomposition. In re-examination, she stated that she did not see injuries on any other part of the body apart from her private parts.

24. PW12, **PC Edwin Ratemo**, who was in June 2015 attached to Athi River police station in the crime branch doing investigations, was on 23rd June, 2015 at the station when at about 1500 hours, he in the company of **Cpl. Abbas**, were informed by the OCS that a child's body was recovered in a latrine at Kimangu. They, in the company of the driver, **Teresia**, proceeded to the scene where they found a crowd. The body of the child, covered by a cloth, had been removed from a latrine. They then put the body into the vehicle and took it to Machakos mortuary. The body had injuries on the face, hip joint and private parts. By the time they arrived at the scene, the slab of the latrine had already been demolished. In his evidence the latrine hole was too small for the child to have accidentally slipped inside. In his view, the child could only have been inserted inside. On 24th June, 2015, the accused was arrested by AP police officers and was taken to the station the following day on the allegation that he had confessed to the commission of the crime. When he went to the scene, the accused was standing in front of their house. According to the witness, in company of **Madam Mutinda** and **Mr. Olago**, scene of crime officer they went back to the scene, took photographs and got witnesses whom they went with to the station.

25. According to the witness, prior to the arrest of the accused, they had no evidence connecting him with the death of the child. However, the witnesses recorded statement after his arrest and before we received any statement connecting him to death of the child. There, however, was no eye witnesses evidence who alleged having seen the accused being involved in the incident and they never discussed the accused's connection with the death of the deceased.

26. PW13, **IP. Lydia Mutinda**, the investigating officer, was in June, 2015, at Athi River police station in charge of crime. On 23rd June, 2015 she was in the office in the afternoon when she was called by the OCS, **CIP Jared Gitau**, and informed that a body found inside a pit latrine. She sent the duty office and crime standby, **Cpl. Abbas Itariu** and **PC. Edward Ratemo** (PW12) to go to the scene at Kimango village. They then returned to the station with the body of the deceased before proceeding to the mortuary. The following day 24th June, 2015, the morning she found the accused accompanied by police officers from the nearby police post who said that he was a suspect in the case.

27. Accompanied by scene of crime personal she went to the scene of the incident to revisit the scene where the scene of crime personnel took the photos of demolished toilet. It was however, her evidence that none of the witnesses whose statements she recorded witnessed the incident. Though the accused who was physically alright was taken to the hospital for samples, she was not aware if any samples were taken and was not informed that the accused was beaten by the public

28. **Dr Waithera Githendu**, PW1, examined the deceased's body 30th June, 2016, seven days after the child was found in a pit latrine. According to her, the clothes of the child were intact but the body had started decomposing and it was difficult to examine the body because of the presence of maggots. There was, however, no evidence of external injury. Upon dissecting the body, she found that the respiratory systems were poorly aerated with mucus secretion meaning that the lungs did not have enough air and she was not able to breath because of fluid in the lungs and mucus in the airway. The main cause of mucus and fluid in the lungs could either be due to a disease or suffocation. Her genital or private parts were gaping and had laceration showing that there was penetration. The cause of death, according to her, was suffocation (asphyxia) though they were unable to establish if she was suffocated before being thrown into the pit latrine or died from drowning in the pit latrine because of the extent of decomposition of the body. Though they took high vaginal swabs and blood, they did not

expect much results as the body had stayed for long before examination. According to the witness, they normally give the swabs to the police to take to the Government Analyst but also retain some to test in our labs for spermatozoa. The results from their labs were however, negative but they never received the results from the Government Analyst. From the results, they established there was sexual assault on the deceased.

29. PW5, **Elizabeth Waithera Oyiengo**, a Government Analyst on 1st July, 2015 received from **PC. Edwin Ratemo** of Athi River police station Item 'A', blood sample indicated as of accused; Item 'B', high vagina swab indicated as of deceased; Item 'C', blood sample indicated as of deceased; Item 'D', green underpant indicated as of accused. They were to examine the items and establish the presence and origin of blood stains and semen stains. The findings, according to her, were that the underpant item 'D' was not stained with blood and the high vaginal swab 'B' was stained with semen but did not generate a DNA profile hence no concurrency. According to her, Item B was high vaginal swab from the deceased. But it could not generate DNA profile. In her opinion, it ought to have generated spermatozoa unless the person does not have spermatozoa. It may also have degraded due to bacterial activity if not well stored. She could not tell why they could not generate the DNA. In the result, the tests did not connect the accused with the deceased.

30. PW7, **CPL Joseph Mwangangi James** was on 23rd June, 2015 at around 14.30 hours at Kinanie police post where he was the in charge when one **John** called and informed him that there was female child who had disappeared and was found in a latrine at Kimangu Phase One. He obtained a vehicle from the OCS and in company of **Snr Sgt Enos Ngari** and with the help of the members of the public demolished the latrine and removed the body. The latrine was within a certain home where they found an agitated crowd which assisted in demolishing the latrine and they removed the body which had already started being eaten by maggots. When police officers from Athi River police station arrived, they took the body away. Later in the evening he received a call that the members of the public had apprehended the accused and he returned to the scene where he restrained the public from lynching the accused. According to him, he did not see the accused when they went to recover the body though he could not tell if he was present. At the time of his arrest, he had slight injuries but had been manhandled, had bruises and was covered in dust. They then took him to Athi River police station.

31. On being placed on his defence, the accused in his sworn evidence testified that on 23rd June, 2015 the deceased's mother went to him at the gate and asked him whether he had seen the deceased and he told her that he had not seen her and she requested her to assist her searching for the deceased. They started searching for the deceased. While in the village, they heard screams from his home and they ran back home where they found many people and heard the mother of the deceased saying that the deceased was in the toilet.

32. The police from Kinani were then called by someone he did not know, demolished the toilet and removed the deceased's body which was washed and put into the police vehicle. According to him, he was left behind after which he covered the toilet. He then went to the house to wash his hands. One of the people, asked what he did to the deceased and when he did not respond, they started beating him threatening to kill him if he did not admit that it was him who killed the deceased. The police late returned and arrested him.

33. According to the accused, he never saw the deceased that day. He however admitted that he knew the deceased as his neighbour and that he knew her and her brothers very well though their compound were separated by a rod. He however admitted that the deceased's body was recovered in the toilet from his compound. On that day, he stated that he had gone to the stream at 8am.

34. On behalf of the accused it was submitted that of the witnesses, 3 did not place the accused at the scene while only 2 adversely mentioned him. Though PW3 stated that the accused told her that the deceased and another child had been at his home and that he chased him away on the material day. PW8, on the other hand, testified that it was the deceased's brother who was supposedly with the deceased who informed her that they had been chased away.

35. It was submitted that the information from the deceased's brother was hearsay since he was not availed to testify and his statement should not be considered and ought to be disregarded since it was not a confession.

36. It was further submitted that the items which had been collected and taken to the Government Chemist for analysis returned negative results as there was nothing to connect the accused with the offence. According to the defence, there was no evidence tendered to show that there was malice aforethought on the part of the accused and that all that the prosecution relied on was circumstantial evidence.

37. On the part of the accused, it was submitted that he denied the offence and his evidence was never shaken. Since there was no evidence placing him at the scene, the Court was urged to find that the prosecution failed to prove beyond reasonable doubt that it was the accused that killed the deceased and he ought to be acquitted.

38. On behalf of the prosecution, it was submitted that the death of the deceased was proved by the testimony of PW4 (**Florence Mwikali**) and PW11 (**Naomi Nzioka**) and that the cause of death of the deceased was not disputed in cross-examination or otherwise.

39. As to what caused the death of the deceased, it was submitted that according to the evidence on record it is not in dispute that the death of the deceased was not by a natural calamity but by external force and based on the evidence of PW1, **Dr. Withera**, who performed an autopsy on the body of the deceased, the prosecution evidence properly established the cause of death to the required threshold.

40. As regards the issue whether it was the accused who caused the death of the deceased, it was submitted that section 203 of the penal code provides that any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder. Based on section 206 of the **Penal Code**, it was noted that once the prosecution proves one or a combination therein, malice aforethought, will be deemed to have been established; and in such situation there will be no escape route for the accused person.

41. Based on the evidence on record, it was submitted that the accused was a neighbour to the deceased and while the deceased and her brother **Simon** were playing at his compound on the material day, he chased away the **Simon** and he remained with the deceased at his compound where he was alone. It was submitted that the accused person set upon the deceased who was a vulnerable minor, defiled her and forced her into the pit latrine and threw her inside pit hole, and closed it with a wire. Such action in the mind of the accused person was

clearly having an outcome of grievous harm or death of the victim. Indeed, this is what exactly happened. The deceased suffocated and passed on. The accused person had unlawful intention, acted on his intention with malice aforethought thus ingredient for murder has been proved beyond reasonable doubt.

42. In light of the foregoing, it was submitted that the prosecution had discharged its burden of proving their case beyond any reasonable doubt against the accused person. The Court was thus urged to find the accused person guilty of the offence of murder and proceed to sentence him accordingly.

Determination

43. The prosecution's case in summary is that on 23rd June, 2015, the deceased's mother, PW2, who was unwell, was sleeping in her house while some of her children, including the deceased were playing outside where her elder daughter, PW8, was washing clothes. At around 11.30 a.m. she heard PW8 asking one of her sons, **Samuel**, then aged 4 years, the whereabouts of the deceased who was then aged 3 years old. When she sought to know from **Samuel** the whereabouts of the deceased, **Samuel** informed her that they were with the deceased at the gate but he did not know where she went.

44. When PW2 got outside, she met the accused, her neighbour, and upon inquiring from him if he had seen the deceased, the accused, who was standing at the door, informed her that he saw the children, chased them and they returned home. She then told **Samuel** to go check whether the deceased went to my sister's home. However, the deceased was not found. A search for the deceased was then mounted and after unsuccessful search, on the suggestion of PW3, the search party decided to conduct the search in the pit latrines starting with PW2's latrine where the search did not yield anything. When she came across the accused, the accused informed her that he had seen the deceased and the said Samuel playing in his compound but had chased them away. Some other witnesses who confirmed that the accused told them the same were PW3 and PW4. According to PW8, Samuel had similarly told her that they were playing with the deceased in the accused's compound when the accused chased them away and that he left the deceased behind.

45. When the search party proceeded to the next compound, they found the door to the latrine closed with a twisted wire which they removed and upon checking inside, PW3 who was the first to enter the latrine with a torch, saw a leg, screamed, handed over the torch to PW4 and fainted. PW4 then confirmed what PW3 had seen. With the help of the police officers from Kinanie Police Post, the body of the deceased was retrieved from the toilet after the same was demolished and was loaded into a police vehicle and taken to the mortuary by police officers from Athi River Police Station who had arrived.

46. During the process of the removal of the body of the deceased, the evidence was that the accused was present and even lent a hand in the process. However, while the body was being taken away, PW9, who had helped in the retrieval of the body, realised that the deceased might have been defiled. He then relayed information that the accused be apprehended. It would seem that in the process of apprehending the accused, he sustained some injuries and was saved by the police officers from Kinanie Police Post who received information that the accused was about to be lynched. The accused was then arraigned in court and charged with the present offence after the post mortem report revealed that the cause of death was asphyxia caused by lack of air.

47. I have considered the evidence on record. Section 203 of the *Penal Code* under which the accused is charged provides that:-

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

48. Arising from the foregoing the ingredients of murder were explained in the case of **Roba Galma Wario vs. Republic [2015] eKLR** where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

49. In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M. Odero, J** as follows:-

1) The fact of the death of the deceased.

2) The cause of such death.

3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4) Proof that said unlawful act or omission was committed with malice aforethought.

50. In Mombasa High Court Case Number 42 of 2009 between **Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang** the court expressed itself as hereunder:

“The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:

a) Proof of the fact as well as the cause of the death of the deceased persons.

b) Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.

c) Proof that such unlawful act or omission was committed with malice aforethought."

51. In this case, there was no doubt as to the fact of death of the deceased. There was ample evidence from the witnesses at the scene that the body of the deceased was retrieved from the latrine. The body was formally identified by PW11, the deceased's aunt during the post mortem examination.

52. As regards the cause of death, according to PW1, the cause of death was suffocation (asphyxia) though it was not possible to ascertain whether the suffocation was before being thrown into the pit latrine or whether the deceased died from drowning in the pit latrine because of the extent of decomposition of the body. Though high vaginal swabs and blood were taken from the deceased in order to determine whether there was sexual intercourse and the possible perpetrator, they were unable to match the same with the samples taken from the accused, notwithstanding the evidence of penetration of the deceased's genital organs.

53. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no direct evidence that the accused caused the death of the deceased.

54. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

55. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

56. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}**, at pages 361-64 stated that:-

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

57. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

58. In **JOO vs. Republic [2015] eKLR**, **Mrima, J** held that:

"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to

acquit ten guilty persons than to convict one innocent person.”

59. **Mativo, J** in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

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

60. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated: -

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

61. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness’ testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in Neema Mwandoro Ndurya v. R [2008] eKLR, the Court of Appeal cited with approval the case of R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20 where the court stated 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. It is no derogation of evidence to say that it is circumstantial.”

62. In this case, as stated above, in the absence of any direct evidence linking the accused with the death of the deceased, this court must rely on the circumstantial evidence if the case against the accused is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In Sawe –vs- Rep [2003] KLR 364 the Court of Appeal held.

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

63. In R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135, in the Court of Appeal for Eastern Africa had this to say:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

64. In Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

65. In Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA and Chesoni Ag. J. A. held:-

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co -existing

circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”

66. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with his innocence and be incapable of explanation upon any other hypothesis than that of his guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** as follows:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

67. In **Teper v. R [1952] AC at p. 489** the Court had this to say:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

68. It is clear, in this case, that no one suspected that the accused was involved in the death of the deceased since all along the accused was present and he even assisted in the retrieval of the deceased from the latrine. It would seem that notwithstanding the fact that the body of the deceased was found in the accused’s compound and that the accused had informed some of the witnesses that he had seen the deceased earlier in the day and chased them away, no one connected the accused to the death of the deceased. It would seem that it was only after PW9 noticed, while accompanying the body with the police to the mortuary, that there was blood near the deceased’s private parts, that he prompted the neighbours not to allow the accused to go away. It would seem that it was after this information that suspicion was placed on the accused, he was manhandled by the members of the public and arrested by the police.

69. The case against the accused seems to be based on the fact that the deceased and her brother were playing in the accused’s compound when he chased them away. Though there was an allegation that the deceased was left behind, the deceased’s brother who was allegedly with the deceased at the time was never called to give evidence in the matter. According to PW2, the deceased’s mother, she was informed by the said **Samuel**, her son that they were playing with the deceased at the gate when the deceased disappeared. The body of the deceased was then found inside a latrine in the compound of the accused where the accused was also found.

70. In this case, the question is whether the circumstantial evidence was overwhelming. In other words, can it be said that the circumstantial evidence against the accused was overwhelming that it was incompatible with his innocence and hence incapable of explanation upon any other reasonable hypotheses than that of his guilt? Or can it be said that there exist other circumstances either from the prosecution or the defence that weaken the chain of circumstances relied on?

71. In this case, it may well be had analysis of the samples taken from the deceased and the accused connected the accused to the sexual assault on the deceased, the accused could have been linked to the death of the deceased. By taking too long to undertake the examination of the body of the deceased and to take samples before the body decomposed, the investigation officer made it difficult for this crucial evidence to be availed. In my view an examination of this piece of evidence might have given a clue as to whether the accused was the perpetrator of the death of the deceased. It would have been that missing link; that circumstantial evidence so incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

72. Just like the members of the public who were involved in the retrieval of the body of the deceased, and who, it seems had no suspicion about the accused before the instigation of PW9, this Court is unable to find any inculpatory evidence against the accused that could be said to irresistibly point to the accused to the exclusion of any other hypothesis, as the killer of the deceased. It may well be that had PW9 not instigated the apprehension of the accused and in the absence of the sexual assault, the accused would never have stood in the dock charged with the present offence.

73. It was the sexual assault on the deceased that seems to have been the turning point in the attitude of the members of the public and which made them believe that it must have been the accused that caused the death of the deceased. Whereas one may reasonably infer that the person who committed the sexual assault must have been the one who threw the deceased into the pit latrine whether alive or dead, there is no concrete evidence that it was the accused who did so, apart from the suspicion.

74. According to the evidence, the accused was staying in the home with his father, mother and sisters. Though it was stated that his parents and siblings were not around, it was not explained whether they were not around at the time of the recovery of the body or they had been away before that day. In those circumstances, can it be said that the accused, who in his evidence stated that he was not at home at the time the incident occurred, must have been the perpetrator? This home was next to the road. On that day, the gate was just closed by a wire as opposed to a padlock. In the circumstances of this case, can it be said that it was only the accused who had the access to the home that day?

75. While it may well be that the suspicion against the accused as the perpetrator of the offence was so strong, I am not satisfied that the evidence, circumstantial as it was, pointed to the accused as the person who killed the deceased. I rely on the decision of the Court of Appeal in **PON vs. Republic [2019] eKLR** where the Court expressed itself as hereunder:

“We are of the considered view that the instances of what was presented as circumstantial evidence were below the threshold enunciated in the leading cases we have cited in this judgment, namely Rex V Kipkerring (supra), Simoni Musoke V R. (supra) and Omar Mzungu Chimera V. R (supra). The evidence does not amount to a compelling rational inference of the appellant’s guilt. The facts do not lead to one irresistible conclusion that the appellant and no one else could have committed the crime, taking into consideration the natural course of human conduct. The evidence was not compelling, credible or cogent. There was no evidence of the appellant’s or the deceased’s movement prior to the incident. There was no proof that

the appellant and the deceased spent the last hours of the deceased together. In conclusion, and to reiterate what the courts have stated time without end, no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. See: Sawe V. Republic [2003] KLR 364. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not. The appellant may have acted strangely upon his return from Sierra Leone, for instance, walking with a metal bar and sleeping in the guest house yet he had a house. His warmth and attitude towards the deceased may have changed; he may have had little interest in the issue of the lost child; he may even have denied knowing J. But all these only amount to suspicion and not evidence upon which a conviction may be found.”

76. In this case, the accused was present all through. There is no evidence that he conducted himself in a manner that could have drawn suspicion to him. From the evidence on record, the conduct of the accused seems to have been incompatible with that of a guilty person. As was noted by the Court of Appeal in David Merita Gichuhi vs. Republic Nairobi Criminal Appeal No. 158 of 2003:

“It is incredible that the appellant could have given his correct name to the members of the vigilante group near the home of the deceased when he was proceeding to her home to commit a crime. The fact that the appellant gave his correct name near the home of the deceased is a co-existing circumstance which destroys the inference that he was going to the home of the deceased on the night on 18th April, 1999 when Bakari met him...Lastly, Njambi (PW10) testified that she is the one who told the appellant about the death of Elizabeth Naymbura on 21/4/99 and that the appellant decided to remain at the home of the deceased and even slept there. The learned Judge concluded that the appellant went to the home of the deceased as a cover up. There was no evidence to support this finding. If the appellant had indeed committed the crime charged and had in fact seen by Bakari and the members of the vigilante group near the home of the deceased on the night of 18th April, 1999, the natural reaction would have been to go into hiding. The fact that he went to the home of the deceased after her death to console the family and even slept there is another co-existing circumstance which destroys any inference that he was the one who committed the offence. On our evaluation of the evidence we have come to the conclusion that the circumstantial evidence relied on by the trial Judge was so weak as to amount to a mere suspicion and could not have been a sound basis for a conviction.”

77. As was held by the Court of Appeal in Joan Chebichii Sawe vs Republic [2003] eKLR:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt...Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

78. In that case the court relied on Mary Wanjiku Gichira vs. Republic, Criminal Appeal No 17 of 1998, where it was held that:

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life.”

79. The rationale for this position was explained in John Mutua Munyoki vs. Republic [2017] eKLR where the Court of Appeal opined that:

“...in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged.”

80. As was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

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

81. In a criminal trial, the evidence presented in proof of a charge is critical. For the prosecution, the evidence, whether direct or circumstantial must show beyond reasonable doubt that the person charged was involved in the commission of the offence.

82. Based on the foregoing, I find that the evidence placed before the court fell short of the proof required in such cases. Consequently, I find that the prosecution has failed to prove, beyond reasonable doubt, that it was the accused who caused the death of the deceased. There was no direct evidence linking him to the death and the circumstances of the case do not justify an inference of guilt since the so called inculpatory facts cannot be said to have been so incompatible with his innocence and that the same is incapable of explanation upon any other reasonable hypotheses than that of his guilt, a burden which must always be on the prosecution.

83. Accordingly, I acquit the accused of the charges against him and direct that he be set at liberty unless otherwise lawfully held.

84. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 25th day of January, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwangangi for the accused

Mr Ngetich for the State

CA Susan