REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 20 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

PALINE MUGENDI NYAGA.....ACCUSED

JUDGMENT

1. The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and the particulars of the offence being that on 10.12.2017 at Kapingazi bridge of Majimbo area in Embu West Sub County within Embu County, jointly with others not before court, murdered Lorraine Wambui.

2. When the accused was arraigned in court he pleaded not guilty to the charge and a plea of not guilty entered and hence the case proceeded to a full hearing.

3. PW1, Kennedy Thiong'o Wairimu testified that he knew the accused person who was an employee of his land lady at Majimbo ya Chini. That on 10.12.2017 at around 8.00 p.m., he was with the accused whom he had accompanied to cut cattle fodder and brought it to the employer's home as he used to help the accused in his work sometimes. That, they got fodder from the Rupingazi river and carried the same on a wheelbarrow and while on their way home, they met a lady wearing a light grey dress, carrying some alcohol in a bottle and she was headed to the river as they went upwards towards home. He then left for work to return home at 9.00 p.m. and he never saw the accused herein on that evening. It was his evidence that he later received information that the accused had been arrested in connection with a phone and that a body of a lady had been found in the river. He further stated that he managed to see the body after a period of seven days from the day they had gone to cut fodder and that it resembled the lady they had met with accused person on 10.12.2017. Upon cross examination, he confirmed that it was around 6.00 a.m. when they had gone for cattle fodder on the material day and it was on their way back home towards the main road that they met the lady carrying alcohol and that there is a hotel called Catmos at the place where they met the deceased. Upon re-examination, he stated that the river where they cut fodder from was Kapingazi and not Rupingazi.

4. PW2, Irene Wanjiku testified that previously, she was working as a bar attendant before she quit. That on 10.12.2017 around 7.00 and 7.30 a.m., while at the City Man Bar, she got a customer who demanded to be served. That the customer had been brought by a rider and that she served her a bottle of Kenya Cane and a small soda which she paid for, via mpesa. That the lady looked drunk. That after a week, she was summoned by DCI Itabua Police Station to record a statement. Upon cross examination, she informed court that she did not know the rider who had accompanied the deceased to the bar.

5. PW3, Peris Njeri Muchami testified that the deceased was her daughter and that the accused is not a person known to her. It was her evidence that on 09.12.2017 while at home in Gatundu, the deceased sent her some photos of herself and two ladies whom she didn't know. That in the evening of 10.12.2017, her son Michael said that he had talked to the deceased and that she was crying. She then proceeded to call the deceased but she could not be reached. She then decided to call the deceased's boyfriend who said he did not know where the deceased was but instead gave her the phone number of one of the deceased's friends whom upon calling, informed her that they had gone to Java joint but had parted ways. She also told her that, she travelled to Embu to report the matter at Itabua Police station.

6. It was her further evidence that she called her brother PW4 to help her look for the deceased. She stated that as PW4 was travelling in a matatu, he saw a crowd near a river next to Itabua Police Station and he decided to approach the scene to find out was happening and it was the deceased's body which was being removed from the river. Upon cross examination, she stated that she had seen the deceased on 03.12.2017 when she had gone home and that she had a boyfriend by the name of Tony Irari and that they related well. That she did not know Ashley and that the deceased's bag was recovered from Kababa who said that it had been left behind and so he took it for safe custody. She further said that the deceased's phone was black in colour and that it was recovered even though she did not know the mobile number that had been inserted. That her son had tried calling the deceased between 9.00 a.m. to 10.00 a.m. on 10.12.2017 but the phone was not answered.

7. PW4, Dennis Githaiga Wakahenya stated that the deceased was his niece and that on18.12.2017, he went to Embu Level 5 Hospital where he identified the body of the deceased for post mortem.

8. PW5, Francis Kimathi Njogu stated that he knew the accused person herein but not the deceased. That while travelling on boda boda from his home at Mutunduri, near Kangaru Church, he saw a lady outside Java Bar and Restaurant who flagged him to stop. That he could not recall how the lady was dressed but nonetheless, she requested him for a lift to Mini Inn; he further stated that the lady gave him her phone to call a friend to go to Mini Inn and that she was speaking coherently. That upon dropping her at Mini Inn, she paid through M-pesa and then walked towards the restaurant while he left for church. It was his evidence that he was later summoned by the police to record a statement.

9. PW6, Thomas Gitonga Muriithi stated that he neither knew the accused person nor the deceased and that on 10.12.2019 while on Mama Ngina Street at around 7.30 a.m., a brown lady in a black sleeveless dress approached him and asked to be dropped at Kapingazi River. He told the court that the lady looked drunk and so he sought for clarification from her whether she wanted to go to Rupingazi or Kapingazi River but she responded that she wanted to be taken to Kapingazi River. That the lady boarded his bike and he rode her towards Majimbo area where the river could be accessed and upon reaching a pub along the way, she stopped him to buy a bottle of Kenya Cane and a soda. She thereafter boarded the bike and they rode to Kapingazi River where upon being paid his dues, dropped the lady. Upon cross examination, he stated that he communicated with the lady in Kiswahili language and that he dropped her opposite Cathmores where tree seedlings are sold.

10. PW7, Macharia George Kithinji stated that the deceased and himself were mutual friends having known each other from Ruaka where the deceased previously lived with her parents. That on 08.12.2018,there was an event called' Smile Drive Event' where together with other friends including the deceased, Ashley, Thomas Kimotho and Said did attend. He stated that they went to Java Bar and Restaurant for refreshments at around 9.00 p.m. and that they started drinking alcohol. It was his further evidence that the friends of the deceased thereafter left and she requested him to drop her at Mini Hotel since Thomas, Gabriel, Said and Joseph Gikonyo and himself were to return to Nairobi in the morning. That at around 4.00 a.m., Morris, Ashley and Leah left Java and requested them to drop the deceased at Royal Mini Inn, Embu. That when they dropped the deceased at Royal Mini Inn, they tried to take her to her room but she refused to share the room number. They arrived in Nairobi at around 7.30a.m. and at around midday, he called one Mukuria who told him that Said had told him that the deceased was missing and so they immediately formed a WhatsApp group to try and trace her. That after a few days, they went to Itabua Police Station to report that the deceased was missing and later on recorded his statement.

11. PW 8, Ashley Mukami Mungai stated that she knew the deceased since 2010 when they met on a social media site known as 'Ruaka Living It and Loving It'. That on 09.12.2017, they left Nairobi for Embu in a private vehicle for an event at the Moi Stadium; she was in company of a driver namely Morris Katiba, deceased and Leah Said. She stated that after the event, they left for Java Club and since Leah Said she was tired, she instead left for the hotel (Royal Minni) where they were to put up while the deceased, Morris and herself went to the club where they stayed till 3.00 a.m. when they left the club but the deceased said she was not yet tired and so stayed on. The deceased was left with George Macharia, Githinji, Thomas, Said, Ngugi and Anthony Kibunyi and that she requested them to take the deceased back to the hotel. She stated that the deceased had asked her to carry her purse and that they proceeded to discuss on how they would return to Nairobi the following afternoon. That they left for Nairobi after two days and that the deceased had not returned to the hotel and so she called the people she had left the deceased with, and they told her that they had left the deceased screaming in the hotel.

12. She further stated that she previously had called the deceased and informed her that she had her handbag and the deceased had told her that she had boarded a boda boda to Royal Minni but never got to reach the hotel. It was her evidence that the rider she had spoken to, was PW5. That she had previously talked to the deceased at around 7.00 a. m. and she did tell her that she was in Nairobi but out rightly she knew the deceased was lying because, she later said she was going to a river to unwind. Upon cross examination, she confirmed that by the time they were leaving Java, they had been drinking for about Six (6) hours and by the time that she left, the deceased was fine but was still drinking. She proceeded to state that she was not aware what Kadaddy (George Macharia) could have done to her; further, she stated that the deceased left Java between 6.44 a.m. and 7.00 a.m. and that betwee 8.13 a.m and 8.45 a.m. the deceased called her to tell her that she was at Ngara of which could not be possible because it turned out that she was found at the river instead.

13. PW9, Dr. Moses Njue Gachoki conducted postmortem on the body of the deceased. He stated that the deceased had a hematoma at the back of the head measuring 5 cms diameter and that there was bruising of the muscles under the neck on the front part which was moderate. That when he opened the skin on the neck, there was bruising (collection of blood) which was of moderate degree and so he formed the opinion that strangulation could not be ruled out .He produced the postmortem report as PExbt 1. He also produced a mental assessment report which was prepared by Dr. Thuo who found the accused mentally fit to stand trial. In cross examination, he testified that strangulation was ruled out in the report but there were other factors which could have contributed to the cause of death but strangulation was a significant contributor. That the pressure on the neck was caused by a blunt object. He further stated that if the deceased had been thrown into the river dead she could not have had injuries. He reiterated that the head was swollen and the same was caused by a blunt object. That the bruises on the deceased's body were within the time that she disappeared and her body found.

14. PW10 Robert Karanja Kariuki testified that previously there have been two investigating officers in the case and that he was handed over a phone which was black in colour and the model being Infinix 358048404354620.That he established that the phone in question was recovered from the accused herein a resident of Majimbo estate. That the previous investigating officer by the name of Murgor (who had since retired) using Safaricom Support team and data and other investigators were able to recover the phone from the accused herein who could not offer any explanation on how he came into possession of the same. He then proceeded to produce the phone as PExbt 3. On cross examination, he confirmed that he was not part of the investigating team and that Murgor did not state the serial number of the phone. He further explained that he did not produce the call data since he did not know how the people were arrested in connection with the case at hand. He reiterated that the accused person herein had inserted his number in the phone. That several people were interrogated in the process of investigations but only the accused person was charged with the murder of the deceased herein since he was directly connected with the death of the deceased through the phone. In re-examination, the officer stated that they had asked Safaricom to give them the number that was paired with that of the deceased and which was being used in the phone in question. That Shabban Idd was equally a suspect who gave information about the accused and connected the accused person with the death of the deceased herein.

15. The prosecution proceeded to close its case and in a ruling delivered on 17.11.2021, the accused person was put to his defence upon the court finding that the prosecution had established a *prima facie case.*

16. The accused in his defence gave a sworn statement wherein he stated that on 16.12.2017, the D.C.I officers went and found him by the

river watering miraa and then proceeded to arrest him. That after the arrest, he was taken to Itabua Police Station where he realized that there were allegations that he had killed someone since he was never told exactly the person that he had allegedly killed. It was his evidence that he was physically assaulted to explain what exactly had ensued; further that, on 10.12.2017 he was near Kapingazi River cutting grass and that he was never arrested with any phone. That he was later charged with the offence before the court on 18.12.2017. Upon cross examination, he confirmed that his boss is called Wangui and that Kariburi is in Majimbo and equally near Kalmos Bar and Restaurant. He reiterated that he did not kill the deceased herein.

17. The defence proceeded to file written submissions while the prosecution chose to rely on the evidence on record. The defense on its part submitted that the prosecution shifted the burden to the accused herein and therefore, the accused person ought to be acquitted. Further that, the post mortem did not out rightly determine the cause of the deceased's death and that the only evidence against the accused is of having been in possession of a cell phone allegedly believed to belong to the deceased which further was never identified by any one. The accused thus prayed that this court acquits him of the alleged offence.

18. I have considered the evidence tendered before this court by both the prosecution and the defence and the written submissions by the accused person. The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The offence of murder is defined under section 203 of the Penal Code in the following terms;-

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

19. From the above definition, it therefore means that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubts, three ingredients against an accused person. Those ingredients are as follows:-

> ***a) The death of the deceased and the cause of death;***
>
> ***b) That the accused committed the unlawful act which caused the death of the deceased; and***
>
> ***c) That the accused had malice aforethought.***

[See **Anthony Ndegwa Ngari v Republic [2014] eKLR** and **Johnson Njue Peter v Republic [2015] eKLR].**

20. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused herein murdered the deceased (See **Woolmington v DPP (1935) AC 462)**. The standard of proof which was required of the prosecution is that of "beyond any reasonable doubt" (See **Miller v Ministry of Pensions, [1947] 2All ER 372**). The question therefore is whether the above ingredients were proved to the required standards.

21. Right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In **Guzambizi Wesonga v Republic [1948] 15 EACA 63** the court held that;-

> ***"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."***

[See also **Sharm Pal Singh [1962] EA 13** and **Daniel Nzioka Mbuthi & another v Republic (supra)].**

The cause of the death of the deceased herein was not excusable or authorized by law and thus the same was unlawful.

22. Whether the accused person herein committed the unlawful acts which caused the death of the deceased herein.

23. PW1, Kennedy Thiong'o Wairimu testified that on 10.12.2017 at around 8.00 p.m., he was with the accused having cut cattle fodder and brought it to the employer's home as he used to help the accused in his work sometimes. At Kapingazi River, they got fodder then thereafter carried the same on a wheelbarrow and while on their way home, they met the deceased carrying a bottle of alcohol. This was consistent with the evidence of PW6, Thomas Gitonga Muriithi who had dropped the deceased opposite Cathmores where tree seedlings are sold. According to PW7, Macharia George Kithinji who testified that on arrival in Nairobi at around 7.30a.m. and at around midday, he called one Mukuria who told him that Said had told him that the deceased was missing and so they immediately formed a WhatsApp group to try and trace the deceased. They reported the matter at Itabua Police Station and had their statements recorded.

24. It is quite evident from the several pieces of evidence above and as confirmed by Dr. Moses Njue Gachoki that the deceased's body had a hematoma at the back of the head measuring 5 cms diameter and that there was bruising of the muscles under the neck on the front part which was moderate. According to him, there were other factors which could have contributed to the cause of death but strangulation was a significant contributor and equally reiterated that the pressure on the neck was caused by a blunt object.

25. The evidence from the post mortem report clearly shows that the deceased met her death through unlawful acts of assault.

26. As to whether the accused had malice aforethought, malice aforethought is the mental element (*mens rea)* of the offence of murder. **Section 206 of the Penal Code** defines it as follows;

> ***206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -***

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

27. The Court of Appeal in **Bonaya Tutu Ipu & Another v Republic [2015] eKLR** stated as follows on the prove of malice aforethought;-

"It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit v Uganda, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in Rex v Tubere s/o Ochen (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick……"

28. In this case, there was no eye witness. The prosecution is relying on circumstantial evidence to prove the charge of murder against the accused person herein. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of **Abanga alias Onyango v Republic CR A NO.32 of 1990(UR)** in the following terms:

a) The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.

b) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.

c) 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."

[See also **Simon Musoke v R {1958} EA71]**

29. This same principle is reflected in the case of **Sawe v Republic {2003} KLR 364 at pp 375-6** where it was stated that**:**

"In this state of the evidence, the two watchmen are not excluded from being persons who might have started the fire or for that matter any intruder might have done so. If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of R v Kipkering Arap Koske & Another 16 EACA 135 where it held, inter alia, that: 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."

30. In the instant case, the accused person has been charged with the offence of killing the deceased herein; it is of importance to note that the accused was found with the phone allegedly belonging to the deceased. The defence argued that the only evidence against the accused was that of being in possession of a cell phone allegedly believed to belong to the deceased; PW3 on the other hand confirmed that the phone in question belonged to her daughter, the deceased herein but further reiterated that the mobile line in the phone in question remained unknown to her. Further, PW10, testified that previously there have been two investigating officers in the matter and that he was handed over a phone which was black in colour and the model being Infinix 358048404354620.That he also established that the phone in question was recovered from the accused herein a resident of Majimbo estate where the body of the deceased was found. That the previous investigating officer by the name of Murgor (who had since retired) using Safaricom Support team and data and other investigators were able to recover the phone from the accused herein who could not offer any explanation on how he came into possession of the phone.

31. The court restated the legal position in **Joseph Wafula Mukenya v Republic, Nairobi Criminal Appeal No. 96 of 2005 (UR):**

"Be in possession of" have in possession" includes not only having in own personal possession, but also knowledge having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of one self or of any other person if there are one or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each of them……" on the definition of possession under Section 4 of the Penal Code. [See **Gachuru v R (2005) 1 KLR 689**].

32. Similarly, the Court of Appeal in **Kinyatti v R *[1984] eKLR*** held that in defining "*being in possession"*, full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It further held that in order to prove possession,

it is enough to prove either that the accused was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The Court further explained that knowledge that the item is in actual possession or in one's custody or of another person may be inferred from the circumstances or proved facts of the particular case.

33. A person found with an item recently stolen who fails to explain how he came into possession of the item is presumed to have stolen the item. In order for the doctrine to be successfully relied upon by the prosecution, certain conditions must be met. The Court of Appeal explained the ingredients of the doctrine of recent possession in the case of **Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR; Criminal Appeal No. 272 of 2005 (Nyeri)** as follows:

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

34. Once the primary facts are established, the accused bears the evidential burden to offer a reasonable explanation for the possession. This burden is evidential only and does not relief the prosecution from proving its case to the required standard. That explanation need only be plausible (See **Malingi v Republic [1988] KLR 225. In Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008,** the Court of Appeal observed that;

> ***"Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden".***

35. Given that the prosecution's evidence places upon the accused a burden to discharge a rebuttable presumption of having been in possession of the phone in question, he therefore should explain how he came to be in possession of the said phone. The statutory rebuttable presumption is spelt out under **Sections 111(1) and 119** of the **Evidence Act**. These sections stipulate as follows:

> ***111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***
>
> ***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***
>
> ***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."***
>
> ***"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

36. Where the prosecution proves that an article which is proved to be connected directly with crime after commission of the crime may in certain circumstances lead to the irresistible inference that the possessor of the article participated in the crime. **(**See **Andrea Obonyo & Others –vs Republic 1962 EA. 542).**

37. The accused herein in his defence stated that police officers came and found him by the river watering miraa and then proceeded to arrest him. That after the arrest, he was taken to Itabua Police Station where he realized that there were allegations that he had killed someone since he was never told exactly the person that he had allegedly killed but equally readily admits that on 10.12.2017 he was near Kapingazi River cutting grass. In his defence, he simply denied having been in possession of the phone in question and further that he did not kill the deceased herein. It is not lost to this court that PW10, testified that the phone in question was recovered from the accused herein a resident of Majimbo estate where the body of deceased was found. That by using Safaricom Support team and data, him and other investigators were able to recover the phone from the accused herein who could not offer any explanation on how he came into possession of the said phone. Further that, they requested Safaricom to give them the number that was paired with that of the deceased and which was being used in the phone of the deceased. In the premises, the explanation by the accused herein should or ought to be to such a standard as to satisfy this court that the phone in question was lawfully possessed and failure to discharge that evidential burden, this court then under the doctrine of recent possession drives the inference that the accused herein obtained the phone in question from the deceased at the time of the murder.

38. According to PW10, Dr. Moses Njue Gachoki who formed the opinion that when he opened the skin on the neck of the deceased, there was bruising (collection of blood) which was of moderate degree and that strangulation was ruled out but there were other factors which could have contributed to the cause of death but strangulation was a significant contributor and equally reiterated that the pressure on the neck was caused by a blunt object. It is thus clear that it was not possible to say which of these injuries singly caused the death of the deceased since the body was also moderately decomposed. But nonetheless, it was also clear from his statement that the head of the deceased was swollen and the same was caused by a blunt object. It is clear that any individual arming himself with a weapon and applying the kind of force that was applied on the deceased could not have had any other intention but to cause either the death or grievous harm to the deceased herein. Malice aforethought can thus be inferred not only from the weapons used to inflict injuries but also the nature of the injuries inflicted on the deceased resulting to her death.

39. In the end, I find that the prosecution has proved the case of murder against the accused person and I therefore find him guilty as charged

and convict him accordingly.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the Respondent