



**Republic v Ngwekwe (Criminal Case 38 of 2015)
[2022] KEHC 11608 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 38 OF 2015**

RK LIMO, J

MAY 25, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

ROBERT MBUVI NGWEKWE ACCUSED

JUDGMENT

1. Robert Mbuvi Ngwekwe, the accused herein is charged with two counts of offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
The particulars in Count I are that on the night of June 13, 2014 at Kanyonyo Sub-location within Kitui County jointly with another not before court murdered Antony Kasala Nguthu.
2. The particulars in Count II are that on the same night on June 13, 2014, at the same location jointly with another not before court murdered Kalimi Musangi.
3. The accused denied the offence. The record of proceedings in this old matter which has been through different courts show that the trial commenced in 2014 but the state through the Director of Public Prosecution on April 20, 2015 entered a nolle prosequi after 3 witnesses had been heard. That nolle terminated Machakos High Court Criminal Case Number 38 of 2014.
4. The reasons for nolle prosequi was that the prosecution needed time to review the evidence they had because there were some grey areas that needed sorting out. The court in Machakos allowed them.
5. Later, the State preferred fresh charges through this case in Kitui and the following is the summary of the evidence tendered by the prosecution.
6. Musee Musyoki (PW1) testified that on June 14, 2014 he was from watching a World Cup Football Match and decided to pass by Antony's Workers house to ask for a cigarette and that he found Mbuvi (the accused) and one Tondo. He added that after exchanging pleasantries, Tondo asked him if he could



go over the place and stand over for them so that both the accused and Tondo could take time off and travel. The witness testified that the two promised to inform their boss (Antony). He added that the two left at around 5 am and left him in charge of herding animals after being paid Kshs 500.

7. He continued that the two workers somehow did not notify him when they would return adding that the two told him that they were going to look for a wife for the accused and so he took charge of the goats from Saturday, to Monday. He testified that the goats strayed into Antony's homestead on Monday and when he went to drive them back he noticed a foul smell emanating from the house and on peeping through an aperture, he saw Antony's motorcycle inside the room. He informed this court that he knew that Antony's mode of transport was that motorcycle and sensing that something was amiss, he went and called a neighbour known as Vundi Mwendwa who sent one Muthama to go and check. He testified that Muthama went and found the bodies of 2 people and reported back to Vundi who called Community Policing who in turn informed the Chief and the Police.
8. The witness stated that he went to the house and saw the body of 2 people in the bedroom and that the body of the male belonged to Antony with the body of a lady he did not know. He added that for the time he was herding the goats he did not venture into the homestead of Antony Kasala and could not tell if he was at home or not.
9. Esther Mwendu Mbethi (PW2) a bar maid at Club known as Malipi Highway Bar testified that she was on duty at the hotel on a date in June 2014 assisting her mother when he saw one Antony Mbithi in the company of another man having drinks. She added that she did not know the other man though she identified him in court as the accused person. She added that after drinking some alcohol, the two left. The witnesses added that after a while, Antony sent for her to join him at Highway lodge. She testified that she could not join him that day but the following day she joined him at Highway bar and later slept with him until the following day. She testified that they parted ways in the morning adding that the said Antony told her he was going to see the accused person herein. She added that she saw the accused person later that morning boarding a vehicle heading to Mutitu.

She added that she was later summoned by the police to pick out or identify the accused in an identification parade conducted which she did.
10. Paul Vundi Mwendwa (PW3) testified that on 11th June 2014 at around 10 am while he was at his shop, PW1 went to his shop and reported to him that there was a foul smell emanating from Antony Kasala's house. He stated that he asked one Muthembi to accompany PW1 to the house and that when they came back they confirmed that there was indeed a bad smell in the house. He stated that on receiving the news he called a "Nyumba Kumi" Chairman known as Cheupi Alias Mwenui and the Assistant Chief.
11. The witness testified that he later went to Antony Kasala's house and found the Assistant Chief had already arrived with other people. He added that they broke the house after alerting the police and that inside the house they found the body of Antony Kasala with the body of a woman he knew as Antony's girlfriend adding that the necks of both deceased persons had been severed and the bodies piled on top of each other.
12. The witness further testified that he knew Antony had 2 workers known as Mbuvi (accused) and Tondo who stayed in a house that used to be Antony's previously. He added that the workers were missing from the homestead and he could not tell where they were.
13. He recalled that on June 13, 2014, the two workers Mbuvi and Tondo went to his shop and bought bread and milk and left.



14. Cedric Kavili Ngugi (PW 4) a brother to the deceased testified and informed this court that he was informed on June 16, 2014 by Assistant Chief Kanyonyo that his brother, the deceased herein had been killed. He stated that he rushed to where his deceased brother had constructed a house and found his body on the bed with the body of a woman. He added that the heads had been severed from the neck. He recalled that on 11.06.2014 they collected Kshs 100,000 and gave it to the deceased Antony for purposes of stocking a bar which they run as a family business and that from the time they gave him the money they never saw him again.
15. David Nguto (PW5) on his part had little to state other than the fact that he went and identified the body of his elder brother Antony Kasala before the post mortem was done.
16. CPL Charles Wahome (PW6) testified that he received information regarding the murder of 2 deceased persons on 16.06.2014 at Kabati police station. He testified that after booking the report he visited the scene in the company of the Officer in Charge of Station (OCS). He testified that when they arrived at the scene at Katotani Kanyonyo with the Assistant Chief Jacob Mwathi who was leading them, they found many people had gathered around the homestead.
17. The officer testified that he went into a 3-bedroom house and found a body of a male and female on the bed covered with a leather jacket. He stated that the bodies had started decomposing. He added that he took some photographs and handed them to scenes of crime officer named as Katui. He identified the photographs which he said he took of the two bodies and that after taking photographs they collected the bodies. He averred that the bodies had injuries or the neck.
18. The officer further testified that on 22.06.2014, a brother to the deceased known as Nguthu (PW5) went to the station and reported to him that one of the workers who had been employed by the deceased brother had been seen in Nairobi. The Officer stated that one of his colleagues went to Nairobi and arrested the suspect and brought him to Kabati where they interrogated him, in the company of the Officer in Charge of the Station.

According to the officer, the suspect led them back to the scene where they recovered a panga in a corner in one of the rooms of the deceased. He tendered the panga as P Ex 13. The officer clarified that they had searched for any weapon that could have been used to commit the murder in the first visit but had failed to get it.

19. The Officer further stated that the accused person confessed to them that the panga recovered was used for his general work and that the confession was made in the presence of Officer in Charge of the Station. He further testified that he later went to the mortuary during post mortem and took more photographs and handed over the films to CPL Katui, a Scenes of Crime Officer to develop it.
20. Dr. Patrick Mutuku (PW7) of Kitui District Hospital stated that he conducted post mortems on the bodies of the two deceased persons. He stated that the body of Antony Kasala was identified to him by his brother, PW5 on June 27, 2016. He stated that he body had slight decomposition. Externally the deceased sustained a cut wound on the interior side of the neck. That there was cut on the trachea, esophagus, left carotid artery and the jugular vein. He produced the post mortem report in respect to Antony Kasala, as PEXH 4.

The witness also produced a post mortem report in respect to Kanini Musangi. He stated that her body was identified by two of her relatives. Her body also had slight decomposition. That externally, she had a very large wound on the side of the neck through to her carotid artery and jugular vein. He stated that she also had two smaller cuts on the right side of her ear. The cause of her death was cardio pulmonary collapse due to severe bleeding. He produced the report as P. Ex. 5.



21. Jacob Mwetii Sammy (PW8) the Area Assistant Chief Kanyonyo sub-location, testified that he received a call from area Head of Community Policing that there was a foul smell emanating from the house of Antony Kasala. He testified that he headed to the compound in the company of Jackson Mwendwa and that on reaching there, they removed a brick on the wall of the house and peeped inside and saw a body of a human being. He testified that he called the brother to Antony and the Officer Commanding Station –Kabati who advised them to break into the house which they did. He testified that they found 2 decomposing bodies in the bedroom covered with a jacket.
22. He added that the police later arrived and lifted the jacket covering their bodies and he recognized one of the bodies as that of Antony Kasala. He could not recognize the body of the woman adding that the police carried out their investigations and later carried the bodies to the mortuary. He added that inside the room he saw a bunch of keys, alcohol, cigarettes and a pack of condoms.
23. Kyalo Musangi (PW9) on his part testified that he was a brother to the deceased woman Kalimi Musangi who was found murdered together with Antony Kasala. He testified that he just received information on 13.6.2014 that his sister had been murdered and that on 23.06.2014 he travelled to Kitui Hospital mortuary where he identified her body before autopsy was conducted on her body. He testified that he saw a cut wound on her neck.
24. Morris Kioko (PW10), testified that he was from Machakos and was working as a conductor in a matatu Registration No KBP 519 V which used to operate between Nairobi and Mutitu Andei.
He recalled that on June 16, 2014 the accused boarded the said matatu at Karetini headed to Nairobi. He testified that the accused had no fare and said that there was a person in Nairobi who would pay for him. The witness testified that when they reached Nairobi, the person who had promised to pay disappeared.
25. He testified that the accused left them with a bag and promised to come and pay the fare the following day but never returned forcing them to hand over the luggage to the Police in Mtito Andei.
26. The witness added that on January 2015, he was called by Criminal Investigations Department-Kitui to go there in respect to the bag he had surrendered at Mutito Andei Police Station. The witness stated that on reaching Kitui, an identification parade was conducted where he picked the accused as the passenger who had left the bag. The witness upon cross examination clarified that the bag remained in the driver's cabin for 3 days before they eventually gave it to the police.
27. He further testified that he saw the accused at Kitui Director of Criminal Investigation Offices prior to the Identification Parade being conducted. He also testified that the bag left with the driver had 3 colours, red, black and white.
28. Jackson Kyalo Muswili (PW11) was the driver of the vehicle that the accused allegedly travelled in. The witness however stated that he did not see the accused. He stated that he was called on January 16, 2015 by an officer from the CID unit Kitui who inquired about the bag. He states that he took the bag on January 21, 2015 and the police took an inventory of the following items marked for identification from MFI8a–n respectively, a T-shirt that had blood stains, toothbrush, two pairs of shoes, chisel, inner wear, red t-shirt, white and blue patch shirt, crotchet porch, trouser with belt, short with stripes, checked shirt, long trouser and akala shoes.
29. IP Julius Omari (PW12), testified that he conducted an Identification parade on June 22, 2015 where the accused was a member of the Identification Parade. According to the officer the first witness (PW2) positively identified the accused as the person she reportedly slept with. The officer however testified that Morris Kioko (PW10) was unable to identify him. The witness accounts on the identification



parade appears mixed up but I will get back to that issue later in the judgement suffices to state that he tendered the Identification Parade Form as P Ex 9 and 10 respectively.

30. Henry Kiptoo Sang (PW13) a Government Analyst testified that they received the following items on April 28, 2015 from the police for forensic analysis;
 - a. Blue mattress covers in a khaki envelope marked B
 - b. A blue t-shirt in a khaki envelope marked B
 - c. A blue t-shirt in a khaki envelope marked C
 - d. Curvy blanket in a khaki envelope marked D
31. The expert indicated that they further received the following items later on June 22, 2015
 - a. Blood samples and finger nails in a khaki envelope and another sample belonging to Antony Kasala's mother Syonthe Nguthu.
 - b. Blood sample and finger nails belonging to Musangi's mother.
32. That they also received blood samples from the accused. The witness stated that from the analysis carried out he could not generate any DNA profile from the blood on the blanket as it has decomposed. He however found that DNA profiles generated from the mattress and T-shirt originated from a child of Syonthe Nguthu. (The mother of Antony Kasala-deceased).
33. Sergeant Elkana Mogire (PW14) the Investigation Officer who took over the investigation from Kabati Police Post testified that he interrogated the 3 brothers of Antony Kasala (the deceased) on January 16, 2015 and was informed that the accused wore a blue T-shirt on the night of June 13 and 14, 2014 when the offence was believed to have been committed.
34. The Investigation Officer stated that the blue T-shirt was found in a bag that was left in the motor vehicle Christened "Wonders of Africa" that the accused reportedly used from Mahiki to Nairobi on June 16, 2014.

The officer testified that he got information that the accused could not pay upon reaching Nairobi which forced the conductor to retain his bag pending payment of fare. He further testified that the conductor handed over the T-shirt to the driver and that on January 21, 2015 the Investigating Officer traced the driver and found at Kanyonyo Road Block where he handed over the bag containing the T-shirt which the officer confirmed was blood stained. He also stated that he found inside the bag

 - a. Akala shoes
 - b. Rastafarian hat
 - c. Under Wear
 - d. Tooth brush
 - e. Shoes
 - f. A knife
 - g. A white short and other personal effects
35. The officer testified that he later prepared an inventory and forwarded the following items for DNA forensic analysis namely: -



- a. Blue t-shirt exhibit 8 (a)
- b. Blanket
- c. Mattress cover
- d. Exhibit memo form- exhibit 12
- e. Bag exhibit 8(g)
- f. 2nd t-shirt exhibit 8 (f)

He added he also had DNA samples extracted from the mother of the deceased (Antony Kasala) for purposes of DNA analysis.

36. When placed on his defence, the accused in his sworn statement, the accused stated that he started working from Antony Kasala (deceased) in 2014. His duties entailed tending his employer's animals. He was accommodated in the homestead. That he ordinarily worked alone but the deceased would engage the services of another person, Tondo during the drought season. He stated that the employer/employee relationship was good. He stated that he got another job of selling charcoal in Nairobi and informed his employer that he needed to leave which he did on May 29, 2014 at around 2pm leaving PW1 to take care of his employer's animals. He denied committing the offence. He denied travelling by bus to Nairobi and stated that he travelled in a lorry ferrying charcoal. He denied owning the bag retrieved from the bus. He also denied confessing that he committed the murders. He stated that he showed the police where the pangas was as he knew where it was kept, adding the pangas were used for work.
37. The accused further stated that when he left the work, the deceased paid him all his dues and that he had no differences with his deceased boss or his girlfriend Kalimi (deceased) and had never differed adding that he knew the late Kalimi as an employee of his boss (Antony) and that she worked at Antony's Bar at Kabati. He further stated that he left for Nairobi on May 29, 2014 using a lorry that was carrying charcoal. He denied having anything to do with the murder of the two people adding that he also heard about the killings.
38. In his written submissions through counsel, Mr Kilonzi Advocate, the accused have have pointed out the following gaps in the prosecution's case. Firstly, that the prosecution did not make attempts to arrest the other worker, Antony Tondo. Secondly, that the state failed to take the defendant's alibi into account. Thirdly, that the bag recovered was never identified as belonging to the accused or the contents thereto i.e the blue t-shirt. Fifth, that PW2 failed to identify the accused as the person she had relations with. The defence also stated that the theory that the accused was unable to pay for his bus fare was untrue seeing as the brother to the deceased stated that the deceased had Kshs 100,000/- which was not recovered at the scene. The defence also submit that if at all the accused committed the murders, he could have gotten away with the money as well.

Counsel for the defence also faulted the identification parade stating that same was botched as PW10 saw the accused before the parade was conducted. Counsel also submit that PW6's testimony was unreliable as the officer stated that the accused confessed in his presence then later recanted the testimony by stating that the accused made the confession to the OCS. In closing, the defence argues that the prosecution has failed to prove its case to the required standard.

39. The State or its part has submitted that it has proved its case to the required standard pointing that the death of the two deceased persons were proved through P Ex 4 and P Ex 5. The State contends that



the deceased persons died as a result of deep cuts inflicted by a sharp object pointing out that the sharp object is the panga which was tendered as P Ex 3.

40. It further submits that malice aforethought can be inferred and has relied on the decision of *Ndungu versus Republic* (1985) eKLR. In its view, the element of Actus reus having been proven, the element of mens rea can be inferred pursuant to the provisions of Section 206 of the [Penal Code](#).

41. It further submit that the defence did not sway its case which it maintains was steadfast and consistent.

42. Determination

This court has taken time to go through this long winding case that started in Machakos and has been handled by more than three Judges. This court has had to go through the twists and turns in this case which perhaps was due to the number of witnesses lined up by the prosecution. At the final end, this court is called upon to determine whether the prosecution has proved its case against the accused to the required standard which is beyond reasonable doubt.

43. As observed above the accused is charged with two counts of the offence of murder contrary to Section 203 of the Penal Code which provide as follows: -

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

For a charge of murder to be sustained as per the above cited provision, the following elements must be established and proved to the required standard by the prosecution.

- a. The death and its cause.
- b. That the accused committed the unlawful act or omission which caused the death of the deceased and
- c. That the action by the accused was actuated by malice aforethought or mens rea.

44. This will consider each and every element on the basis of the evidence tendered in this case.

45.

(a) The fact of deaths and their causes.

The deaths of the two deceased persons namely Antony Kasala Nguthu (deceased in Count 1) and Kalimi Musangi (deceased in Count II) are not disputed. The two decomposing bodies were discovered in the home of Antony Kasala on June 16, 2014. PW5 identified the body of his brother to the pathologist at Kitui General Hospital before a post mortem was conducted. PW9 did the same and identified his sister's body before a post mortem was conducted. Dr. Mutuku (PW7) tendered post mortem report of Antony Kasala (P Ex. 4) and Kalimi Musangi (P Ex5).

46. The cause of the two deaths was documented in the post mortem reports as cardio-pulmonary collapse due to severe haemorrhage (bleeding) secondary to cut wounds. The fact of deaths was well established.

47. The two died through violent deaths, as evident from the injuries they sustained well documented in the post mortem report. PW7 stated that Antony Kasala sustained a cut wound on the interior side of the neck and there was a cut on the trachea, oesophagus, left carotid artery and the jugular vein. He also stated that the female victim (Kanini Musangi) had a very large wound on the side of the neck through to her carotid artery and jugular vein and that she also had two smaller cuts on the right side of her ear. It is therefore clear that whoever inflicted these injuries on the two intended to cause death or grievous harm to them. The question asked is who was it/they?



48. Actus Reus/whether the accused inflicted the injuries that caused the deaths.

The evidence tendered in this case shows that the prosecution's case on this element is purely reliant on circumstantial evidence. This is because there is no witness who saw the killer(s) of the deceased persons. The prosecution initially was forced to withdraw the charges to allow them tighten the loose ends in their case but even then their case appears to have been afflicted by combination of ineptitude in investigations and the circumstances of the case.

49. It is true that a prosecution's case can be based on circumstantial evidence and still sustain a conviction. But before a court can rely on such evidence to render a conviction, it must satisfy itself that the evidence in its entirety points to an inference of guilt on the accused and that no other reasonable hypothesis can be drawn from the facts.

50. In the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal had this to say on the probative value of circumstantial evidence as opposed to direct evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances by which intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

51. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence sustain a conviction. The court held as follows:-

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

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

52. In the case of *Joan Chebichii Sawe v Republic* [2003] eKLR that;

“before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate



as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution...”

53. In this instance, PW1 stated that he was on his way home on 14th June 2014 at around 3.00am when he decided to stop by the house of the accused for a cigarette. That while there the accused who was in the company of another person, Tondo informed PW1 that he needed him to look after his employer’s animals as he was planning to travel with Tondo.
54. The witness stated that the two left at 5.00am and that he stayed at the homestead in the workers’ house from Saturday until Monday when he discovered a foul smell emanating from the main house. He stated that he alerted a neighbor, PW3 who called a member of the community policing personnel as well as the chief who then called the police. That the house was broken into and two bodies were discovered inside. The scene was documented through photographs taken by PW6 and the police commenced the search for the accused.
55. On his part, the accused stated that he left his herding job on May 29, 2014 and not June 14/15, 2014 and was alleged by PW1. He stated that he had gotten another job which he informed his deceased employer of and that it was in-fact his employer who brought PW1 as his replacement. He stated that he left for Nairobi on May 29, 2014 at around 2.00pm by a lorry and not a bus. He stated that he was arrested by police in Nairobi. The circumstances surrounding PW1 working at the homestead are not clear, he said that he was instructed by the accused while the accused stated that he was employed by the deceased. It is their words against each other, what is clear however is that the accused did not call PW1 into the home.
56. The evidence presented by the prosecution was scanty and quite convoluted for one to draw a chain of events from the information. PW6 an officer who was called to the scene stated that upon arriving at the scene, he took pictures. He described the state in which the bodies were discovered and how they were removed and transported to the mortuary. He also stated that the police searched the house for any weapon but did not get anything. These events transpired on June 16, 2014. The officer then stated that PW4 a brother to the deceased informed the police that the accused has been seen in Nairobi and the police moved to arrest him. That upon his arrest, the officer and the OCS interrogated the accused and he took them back to the crime scene where they discovered pangas in one of the rooms in the house. That at that point, the accused pointed out one of the pangas as the murder weapon and also confessed to the officer and the OCS that he used it to murder his employer and his partner. Unfortunately, this panga was not submitted for DNA testing which is puzzling because the other items were submitted to the government chemist for DNA analysis. The officer also retracted the statement that the accused confessed to the murder in his presence and stated that the accused confessed to the murder only to the OCS. The OCS was not called to testify.
57. The other point considered is that the investigating officer stated that DNA testing was conducted to provide more information on the events that took place leading to the death of the two. PW14 Sergeant Elkana Mogire told the court that the charges against the accused were initially dropped because DNA testing had not been done. He stated; “...the other case was withdrawn because DNA analysis had not been done. When I took over, I knew what I was looking for...”
58. The conundrum here is that after the DNA results were presented in court, the only issue that was established was that the blood found at the scene was human blood that matched that of the mother of the Antony Kasala, essentially establishing the identity of the deceased which was never in dispute in the first place. Blood samples were taken from the accused but there was no comment on whether it matched any of which was found at the scene or the bag recovered from the bus.



59. There was also some mystery surrounding a blue t-shirt which allegedly belonged to the accused and was retrieved from a bus which the accused reportedly travelled in to Nairobi. The testimony from PW14 was that it was suspected that the accused wore the t-shirt on the night of June 13 or 14, 2014 when the murders were suspected to have taken place. The officer stated that he received this information from the brothers of Antony, the deceased. It is quite odd that the brothers indicated that the accused wore the t-shirt yet as none of them saw him on the night of the murder. Furthermore, while the officer stated in his testimony that the t-shirt which he retrieved himself from the bus driver contained blood stains, the DNA analysis concluded that the DNA profiles generated from the bloodstains on both the mattress cover (item B) and the T-shirt (item C) matched and originated from a biological child of Syonathi Nguthi.
60. The DNA analysis undertaken did not pinpoint the accused or show any nexus between the blood found on the blue T-shirt or any other item found at the scene with the accused. The accused person reportedly readily gave in and consented to the DNA sample being extracted from him.
61. Besides the above uncertainties, the identification parade conducted by the police were of no value to the prosecution's case. As a matter of fact, it even served to contradict its case. The evidence of Esther Mwendu (PW2) indicates that she slept with a man called Antony Mbithi at Highway bar and Lodge on a date she could not recall on June 2014. The accused here is called Robert Mbuvi and therefore not the person PW2 slept with.
62. The above evidence contradicts the evidence of IP Julius Omari who testified that PW2 (Esther Mwendu) was to pick out the man she slept with at Highway Lodge. According to PW12 the said witness (PW2) identified the accused as the person she slept with. That evidence is contained in P Ex 9 tendered by PW12.
63. The evidence of PW2 however indicates that she did not know the accused person and saw him at Highway Bar with the person she slept with. She even testified that she was able to pick out that person at the parade. This what she stated; "I went to Kitui Police Station and they wanted me to identify the person who was with Antony..... I identified the accused in the dock." She added that the following day after a night with her companion, she saw the accused board a vehicle and headed to Mutitu. That evidence is also inconsistent with the evidence of PW10 Morris Kioko and conductor of motor vehicle, Registration No. KBP 519V, who stated that he picked a person he did not know at Mutito Andei and took him to Nairobi. That evidence has no connection with the evidence of PW2 in respect to where the accused was seen heading to when he boarded a motor vehicle.
64. The identification parade was also done un-procedurally and was unreliable because PW10 stated that he had seen the accused prior to the identification parade being conducted. This is what he said under cross-examination; "I also saw him (accused) at the office prior to the parade being conducted" That omission by the police whether deliberate or not tainted the probative value of the evidence of positive identification in the Identification parade conducted and brought to naught efforts and resources used to conduct the said parade which really is a pity.
65. The doubts created by the prosecution's case are plenty. I have looked at the evidence of Jackson Kyalo Muswili (PW11) who was the driver of the motor vehicle KBP 519V. He says he drove the motor vehicle which operated from Mutitu and Nairobi. The conductor (PW10) had stated that the motor vehicle operated from Mutito Wa Ndei and Nairobi which is inconsistent with what the driver stated because according to the driver he surrendered the bag left by a passenger at Kanyonyo Road Block which means that the two were talking of different geographical locations.



66. Besides that, as I have observed, the contents on the recovered bag were subjected to forensic analysis and there was no connection established between the contents of the bag and the accused. The accused in his defence, denied having anything to do with that bag and the DNA analysis fortifies that defence.
67. Now as have analyzed the apparent inconsistencies and contradictions in the prosecution's case above it is really difficult to put any weight on the circumstantial evidence relied on by the prosecution. It is clear that the prosecution's case was built around the fact that because the accused worked for the deceased and had left a few days to the date of the incident, he was the prime suspect. However, there was another worker with the accused at the time known as Tondo. There is also PW1 who came to take over from the accused. There is a possibility also that there could have been another person who was unhappy with the relationship between the deceased Antony and the lady she was killed with. That means more than one hypothesis can be drawn from the facts presented. The prosecution's case did not show any ill will on the part of the accused on his employer. The accused himself stated that he had no issue and that he was paid all his dues and was going to Nairobi for greener pastures. It is therefore, difficult to find the accused guilty in the face of the evidence presented. The evidence presented is far too remote and a mere suspicion. A conviction cannot be based on mere suspicion. There must be concrete evidence presented is whether direct or circumstantial.

The element of *actus reus* has not been established and linked to the accused in this case.

(c) *mens rea*

68. The prosecution's case in respect to this crucial element is completely lacking. The prosecution's submissions that the provisions of Section 206 of the Penal Code can be invoked is not applicable here. These provisions are only applicable when the element of actus reus is positive and has been proved. In the absence of the element of actus reus Section 206 do not apply. This court finds that no evidence was laid by the prosecution to show that the accused was ill motivated against his boss or had even differed in the past owing to their previous engagements.
69. In the end this court based on the above finds that the prosecution's case against the accused is wanting and far too weak to sustain a conviction. This court has no option but to return a verdict of not guilty. The accused shall be set free forthwith unless otherwise lawfully held.

DATED,SIGNED AND DELIVERED AT KITUI THIS 25TH DAY OF MAY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

