



**State v DMO (Criminal Case E027 of 2021)
[2022] KEHC 12865 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E027 OF 2021
RE ABURILI, J
JUNE 30, 2022**

BETWEEN

STATE PROSECUTION

AND

DMO ACCUSED

JUDGMENT

Introduction

1. The accused person herein DMO is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya. The particulars of the offence are that on the August 23, 2021 at [Particulars Withheld] village, Naya sub location in South Uyoma location, Rarieda sub county within Siaya County, the accused murdered one JAO
2. The accused person pleaded not guilty to the charge against him and the matter proceeded to full trial where the prosecution called a total of eleven (11) witnesses in support of its case that is summarised herein below. The accused testified and called one witness, a doctor.

The Prosecution's Case

3. PW1 EAO, the deceased's aunt testified that she lived with the deceased. She stated that she also knew that the deceased had a child with the deceased called AA. It was her testimony that on August 23, 2021 after leaving school at 6 pm, she was with the deceased at their home together with GA, MJ, MM her mother and MM her father. She testified that they prepared dinner and ate then at 10 pm, the deceased's child started crying. She testified that her mother took the child and told J, now deceased, to go and prepare beddings in another house different from PW1 mother's house.
4. PW1 testified that Jackline left to prepare the beddings and that her mother then took the child to J and met Jackline returning with her mother's phone. She testified that J went to the other house where the



- child was, with a lamp. She testified that the houses were in the same homestead. It was her testimony that M and Gift then left to go and sleep and she was the last to leave. She stated that on her way to the place where they used to sleep, she saw J standing out and talking to 'A', the accused. She stated that J on seeing the children relieve themselves on the farm told them to go to the toilet and not to urinate in the farm.
5. PW1 testified that there was a very bright moonlight so she could see very well and that G said to J and Daniel that: 'Tunawaona', which prompted the two to move further down as PW1 entered the house to sleep. She testified that G and M also entered the house. It was her testimony that at 11 pm, the child woke up and she sent G and M to take the child who was crying, to J outside who had by then not gotten into the house to sleep. That when G and M went out and called J, the latter never responded so PW1 told them to give the child porridge which they did then the child slept.
 6. It was her testimony that at around 1 am, she heard a knock on the door of her mother and when she opened the door, she saw policemen who went to where she was and asked if she had seen J and where J was. PW1 testified that she explained to the police officers how J had left with Daniel. It was her testimony that the police officers entered the house where PW1 had slept and asked her what time J left and whether she knew J's boyfriend to which she answered in the affirmative telling them that J had left with 'A' and had not returned.
 7. PW1 testified that one of the policemen told her that 'A' had killed J but warned PW1 not to tell anyone in the home, especially J's mother. She testified that she heard the police officer speaking on phone asking, 'where have you left her'? It was her testimony that she called out her mother and told her how one police officer had told her that A had killed J. She testified that a police officer then asked her if she knew the bushes where A used to talk to J from and she showed them the bush near their home. She testified that she led them to the bushes and as they lit a torch in addition to the bright moonlight, she saw J lying on the ground and so she started crying.
 8. It was her testimony that the police officer photographed the deceased's body and that she went to her home while crying and alerting many people to the scene. She testified that other police officers from Aram Police Station went and removed J's body. She reiterated that she knew the accused as he went to that home regularly and that she also knew his voice. She stated that she heard the accused talking to Jackline and saw them very well using moonlight. It was her testimony that the accused had an intimate relationship with Jackline since 2018 and that he used to visit her home at about 9 pm after which he would leave with J as they conversed. PW1 testified that J was older than her. She identified 'A' as the accused in the dock.
 9. In cross-examination, PW1 stated that she saw D who wore black clothes and who was with J as they stood near where PW1 went to sleep. She testified that the two were not quarrelling. PW1 testified that she had a radio so she knew the time was about 11 pm. It was her testimony that they slept while J was outside. She stated that it was normal for J and 'A' to talk from outside their house before she returned and slept. She testified that D had gone to their home the previous Friday and Sunday and that no other person used to go there.
 10. PW2 MAM testified that the deceased was her granddaughter and that the deceased's mother lived in Nairobi where she worked. She testified that she knew the accused who was the deceased's boyfriend and had a child with J, a one year and 4 months old baby when the deceased passed on. It was her testimony that the deceased and the accused had a long standing love affair and that initially, they had no disagreements until later in June 2021 when Daniel assaulted J who went home with a swollen head which led PW2 to confront Daniel's mother so they went to the Chief's office and a meeting was convened at PW2's homestead where the Chief also attended and promised to take action against D.



11. She further testified that Daniel then escaped upon hearing that the Chief had reported him to the police and in the month of June, D went to PW2's home with a rope which he tied on a tree nearby threatening to hang himself. She testified that the children called her as she was sleeping and on getting out she saw the rope but D had run away so she called the Assistant Chief and informed him of what had transpired. It was her testimony that the Assistant Chief advised her to remove J from where she and he promised to return the following day but he did not honour the promise. According to PW2, the accused then ceased visiting her home.
12. She testified that on one occasion, she saw D riding a motorcycle and that she saw him again after which J had died. PW2 testified that on the evening of August 23, 2021, J returned from school and passed by where PW2 was selling clothes so PW2 left Jackline there as she went to look for food and upon returning, she found Daniel sitting near J with his motorcycle besides him. She testified that it was about 6 pm. She further testified that she went home and Daniel followed and passed her as she was being carried on another motorcycle. She stated that she then went to where J was, picked clothes and went home and made dinner which they ate but that Jackline's child was crying and J had a painful leg so PW2 told her to go and prepare beddings for the child to sleep.
13. PW2 testified that she tied the baby on her back as J proceeded to make beddings and PW2 followed her with the baby. She testified that she then realized that J was not there so she placed the baby to sleep and as she got out, J appeared. She testified that she asked Jackline where she had been and J told her that she had been behind the house. She testified that she went to sleep and PW1 and other children also slept.
14. PW2 further testified that later at about 1 a.m., she heard a knock on her door with someone saying, "hodi hodi", 'sisi ni askari, fungua mlango. Hapa ni kwa boma ya J?" She testified that she told them that she would not open the door at that hour and one of them called her saying, "Mama Albert fungua mlango, sisi ni polisi". She testified that she opened the door and the people asked her where J was and she told them of where Jackline had slept that night. It was her testimony that the children, including PW1 opened their door and when the police saw her, they asked if PW1 was J and she responded in the negative upon which the police officers held her hand while asking PW1 where J was. It was her testimony that the police officers spent time with PW1 asking her about J as PW2 and her husband wondered what was happening.
15. PW2 testified that shortly, PW1 returned and told her that the police had informed her that J had been killed but that the police had told her not to inform her parents. She testified that PW1 left with the police officers towards the nearby bushes and shortly, PW2 heard PW1 screaming and that is when they realized that for sure J had been killed. She testified that a police vehicle arrived and removed J's body to Madiany Mortuary.
16. PW2 identified Daniel as the accused in the dock and stated that she had known him for long as he was befriending J.
17. In cross-examination, PW2 stated that she did not know when the friendship between D and J started or whether Daniel supported the child born of that relationship. She testified that she recalled the accused's mother telling her that her son had locked up J in his house and beat her up. It was her testimony that she could not tell what exactly transpired leading to Daniel assaulting J who returned home with a swollen face. She further testified that on August 23, 2021, she never heard any altercation between Daniel and J as the accused had been on the run after assaulting the deceased and the matter being reported to the police by the Chief. She testified that Jackline's leg was later injured by a knife and a school desk not Daniel and that J had been admitted in hospital for 5 days.



18. PW3 RAO testified that the accused was her fifth born son. She stated that she knew JAO as the two were friends and also bore a child together who she named JA although the child's mother gave her other names. It was her testimony that on August 23, 2021 at about 10 pm while she slept, the accused went to her house after they had eaten dinner and prayed calling out for his father "'Baba', 'Baba' open the door" as he stood at the door saying, "I am feeling very bad".
19. PW3 testified that when her husband asked the accused on what was the matter was, the accused said that he had been with Nyasakwa and that "Nyasakwa" had died. She stated that "Nyasakwa" was J. She further testified that the accused's father was sick and could not walk so he stood up, dressed and prayed then she asked D where he was with J when she died and that D asked her to escort him to the police station.
20. She testified that they walked towards the police station as it was far and that her brother in-law's son, M, was also walking so she asked him to accompany them and M asked them where they were going so she told D to tell Musa where they were going and why, and that D explained that when he was with J, she lost breath so he held her as she was collapsing and she went down and that he tried to do first aid on her for one hour but she died.
21. PW3 testified that they reached the police station and she informed the police why they had gone there and D was placed in the cells. She stated that she suffers from blood pressure so she returned home and left Daniel at the police station. It was her testimony that J lived in her home until she gave birth to D's baby. She testified that before this date, Jackline had a quarrel with D and the matter was reported to the Chief so she went to J's home and that J's grandmother told her that she wanted the friendship between Daniel and J to end and PW3 told her that if she wanted that relationship to end, she should report to the police but J's grandmother said that she was born-again and did not want to involve the police so PW3 told her that they could involve the Area Chief to help resolve the matter.
22. It was PW3's testimony that they had a meeting with the Assistant Chief at PW2's home and they handed over the issue to the Area Chief who promised to deal. She testified that J lived with her grandmother. She identified her son D as the accused in court. In cross-examination, PW3 stated that Daniel did not tell her that he had strangled the deceased but that the accused willingly told her to escort him to the police.
23. PW4 MOJ testified that on August 23, 2020 at 10 pm he was walking from his friend's house to attend a harambee for school fees and on reaching near the home of PW3, he met the latter with DM and she asked PW4 to accompany them to the police. He further stated that PW3 told him that D had told her that he had killed a girl enroute and that when she asked D what had happened, he told her that he had killed a girl called J, using his hands.
24. PW4 testified that he did not ask D the reason for killing J but that they went together up to the police station at Luanda K'otieno and recorded their statements and left Daniel in custody. He testified that they went to look for Jackline at her home and the police traced her body but that he did not wait for the recovery of the body. He testified that he only showed the police J's home then proceeded to Luanda Kotieno Police station. He stated that police from Aram came and took away the deceased's body. He identified D as the accused in the dock.
25. In cross-examination, PW4 stated that when he met the accused and his mother, the accused looked courageous and that is why he wanted to be escorted to the police to report the death.
26. PW5 Victor Owino Otunge, the Assistant Chief of Naya sub-location since January 2021 testified that he knew both the accused and the deceased and that in the month of June 2021, he received a report from Daniel's mother and J's grandmother concerning the relationship between D and J. He testified



- that he confirmed from J at the home of PW2 that Daniel had assaulted her at night at her home. It was his testimony that J's grandmother told him to help Jackline as the accused wanted J to marry him and if not, to take the child to the accused so they used to quarrel over this.
27. He testified that the accused vanished as PW5 was following up the matter and that later, the mother to the accused called him saying the accused was involved in an accident so he should go slow on investigations. It was his testimony that J's grandmother called him saying the accused had gone to her home and was threatening to hang himself but that he had escaped and went away to Homabay. He testified that he continued investigating until he was called and informed J had been killed.
 28. PW5 testified that he had advised PW2 to take J to sleep with her in her house so that D does not disturb her. He further testified that when he went to the scene, he found J's body 50 metres from the house where she slept. He testified that he found the accused already arrested after surrendering to the police on his own volition. He identified Daniel as the accused in the dock. In cross-examination, PW5 stated that he told the family to report to the police what Daniel was doing to the deceased.
 29. PW6 FAM testified that the deceased was her first born child who was born in 2000 and was thus 21 years old. She testified that she did not know DM as the father of J's child but knew that J had a child. She testified that J lived with her –PW6's mother.
 30. It was her testimony that on August 27, 2021 she and her brother went to Madiany Hospital where they identified the body of J to the doctor who performed postmortem. She testified that before J died, they had talked on phone at about 9 pm and that the deceased had told PW6 that the baby was crying so PW6 told the deceased to give the baby porridge and tie her on her back. It was her testimony that at 1 am, she was called and told J was dead. In cross-examination, PW6 stated that the deceased's body had strangulation marks on the neck and swelling and her right hand was swollen.
 31. PW7 Dr. Eric Okongo testified on the postmortem report prepared by Dr. Juma Wanjofu after conducting an autopsy on the body of the deceased J. He testified that the postmortem was done on August 27, 2021 at Madiany Sub County Hospital on a body of a female that was naked and aged 21 years of adequate Nutrition and physique and a height of 5 ½ feet. He testified that the postmortem changes noted were that the body lay supine, cold with resolving rigormortis of extremities. He stated that the time of death was more than 48 hours.
 32. Externally, PW7 testified that the face appeared swollen with purplish cyanotic discoloration of the lips and mucus membranes on the mouth. He stated that there was purplish discoloration of the fingertips and nails beds but that there were no injuries noted on the abdomen, chest, back and extremities.
 33. It was his testimony that there was a deep horizontal mark at the apex of the neck that was not complete suggestive of ligature marks and that other two marks around the neck noted horizontal from one side of the neck to the other.
 34. On the internal appearance of the body, PW7 testified that in the respiratory system, there was unilateral left sided hemorrhagic congestion of the right Sternocleidomastoids muscles but the cricoid cartilage and tracheal rings were normal and that there was no trauma of the hyoid bone.
 35. He testified that in the cardiovascular system, the heart was of normal size whereas in the digestive system, there were normal intestines with stomach containing food specifically ugali and vegetable mixture.
 36. It was his testimony that the liver had multiple nodules suggestive of multi nodular liver disease and that the other systems were not explored. He testified that as a result of the examination, Dr. Juma found the cause of death was hypoxia secondary to manual strangulation. He further testified that



Death Certificate No. xxxx was issued, the Postmortem Report signed on the 27/8/2021 and samples taken. He produced the postmortem report as PEX 1.

37. In cross-examination, PW7 stated that there were no bruises or signs of struggle noted. He stated that there was no human debris on the nails. He clarified that Hypoxia was when one is not able to breathe. He further testified that if air is blocked, one cannot place hands on the neck as they struggle with mouth and nose. He testified that no fractures were noted on the neck.
38. PW8 GAJO, a minor of 15 years old was taken through a voire dire examination and found understanding of the meaning of an oath and telling the truth and thus allowed to give sworn testimony.
39. She testified that the deceased was her sister and the accused, DM Alias “Ababa” whom she knew was the deceased’s boyfriend. She testified that the two were lovers and had a child together. It was her testimony that on August 23, 2021 after dinner, Jackline left to go and prepare a place where they used to sleep. She testified that J left them studying and conversing with her younger brother Michael Juma and Elizabeth Achieng her aunt. It was her testimony that at about 10.00pm, they went to sleep and that she saw ‘A’-D and J standing beside the house where they usually slept. She stated that she and her younger brother told J and ‘A’ that “*Tumewaona*” Swahili for “we have seen you”.
40. PW8 testified that there was bright moonlight and so they saw the two lovers very well as they were not far from where PW8 was, about 20 meters away and that in addition, ‘A’ used to visit her sister J all the time at night and they used to talk. She testified that the deceased and accused heard what PW8 and her siblings say that the latter had seen them so they moved away from where they were standing as PW8 and her siblings entered the house where they found J’s child asleep. She testified that the child woke up and started crying so herself and Michael carried the child and got out of the house to look for J but that they never found J and ‘A’ despite calling out J.
41. It was PW8’s testimony that they returned to the house then PW8 gave the child porridge and he slept then they also slept. According to PW8, they were later awakened by the police officers who asked E where J was and E told them that J had left at night. She testified that she heard one of the police officers talking on phone and from the other side she could hear ‘A’ also talking. She testified that the police officer asked ‘A’ – where did you place her? and ‘A’ responded “down there” in Kiswahili.
42. She testified that the policeman directed them with E and they went to a lower part of the land and found J’s body lying on the ground. She testified that the police told them not to scream but E started crying asking why J was lying down. It was her testimony that when their grandmother heard them screaming, she went to where PW8 and others were and confirmed that J was dead. It was her testimony that other police officers arrived at the scene in a vehicle and removed J’s body to the mortuary. PW8 identified DM as the accused in the dock and stated that he used to ride a motor cycle and that he frequented the home of PW8.
43. In cross-examination, PW8 stated that when she saw J and D, she never heard them argue nor heard any screams. She testified that the police man who went to their home that night spoke to Daniel on the other end and she heard D’s voice responding when he was asked, “Ulimweka wapi?” – “where did you place her?” and he responded “*Njia inaelekea uko chini*” - “the road that goes to the lower part.”
44. PW9 No 243924 PC Edwin Anyango testified that on the night of August 23 and 24, 2021 at around midnight, he was at the report office when two young men went to the Police station one of whom introduced himself as Daniel Mwembe and the other as MOA which latter said that he was a cousin to DM. He testified that D then told him that he had gone to report that he had killed his girlfriend



- and a mother to his child so PW9 booked the report and informed CPL Nderitu who directed PW9 to place DM in Custody.
45. PW9 testified that PC Mwangi then accompanied M to the scene where D said he had kept the body and when they reached the scene, they called PW9 and he gave the phone to D who explained to PC Mwangi where the body of J was. It was his testimony that they traced the body which was later removed to Madiany Mortuary. He later handed D to the OCS who transferred him to Aram Police Station for further action.
 46. PW9 testified that he is the one who recorded the report made by DM in the company of his cousin M, PW4 in the OB of 03/24/8/2021 at 0045 hours. He identified DM as the accused in court and stated that he did not know the accused before that date.
 47. In cross-examination, PW9 stated that when the report was made, he, PW4 and the reportee were present. He stated that he only booked the initial report and never recorded any statements from D. It was his testimony that the investigating officer could tell if there was a confession recorded from the suspect DMwembe.
 48. PW10 No 227803, Jonah Nderitu testified that on the night of August 23 and 24, 2021 he was at the patrol base when PC Edwin Anyango told him that two people had gone to report a murder incident. He stated that he walked to the report desk where he met two young men DM and MO. He then instructed PC Anyango to place Daniel in custody then called the OCS. He further stated that he accompanied Moses Ouma and PC Mwangi Alex to the scene where the accused had guided them on where they would find the body of J Ai.
 49. PW10 testified that they reached the homestead and knocked the door and a lady got out saying that she was J's grandmother so they asked her where J. He stated that while they were still with the said grandmother to J, a young girl went to where they were and told them that J had left their sleeping place and had not returned. He testified that he called PC Anyango to ask DM to confirm where J was and PC Anyango gave the phone to Daniel with whom PW10 spoke and were directed to where the body was, about 30 meters near her brother's house.
 50. According to PW10, they did not see physical injuries on the deceased. He stated that they returned to the Patrol base after which he led other officers to the scene where they found the body lying and facing up. He testified that the OCS was also present so they took details and later the body was removed to the mortuary at Madiany. PW10 identified DM as the accused in the dock.
 51. PW11 No. 96927 PC Jason Mogaka the Investigating officer in this case testified that on August 24, 2021 at around 2 am, he was asleep when he received a call from Mr. Benson Omondi his Sub-county DCI, of a murder case reported at Luanda Kotieno Police Post. He testified that he woke up and went to join Chief Inspector (CIP) Osano, the Officer Commanding Station (OCS), and other officers and they rushed to the Luanda Kotieno Police Post and found DM Oloo who had surrendered to the police post accompanied by MA and his mother called R.
 52. It was his testimony that the accused had reported vide OB No. 3/24/8/2021 at 0045 hours of his involvement in the Murder of JAO. PW11 produced the Occurrence Book (OB) in question as PEX2. He also produced the 3 photographs as PEX3(a)(b)(c) and the Certificate of photographic evidence dated 24/11/2021 and Statutory declaration of November 24, 2021 as PEX 3(d).
 53. It was his testimony that after processing the scene, they removed the deceased's body to Madiany Hospital Mortuary and on August 27, 2021, a post mortem was carried out on the deceased's body, in his presence. He testified that he escorted the accused to Bondo Law Courts where he was granted 10 days to complete investigations then he escorted the accused for mental assessment before arraigning



him. PW11 identified the accused before court and stated that he did not know the accused prior to the date when he found him surrendered at the police post.

54. In cross-examination, PW11 stated that he did not see visible physical injuries on the deceased's body.

The Defence Case

55. Placed on his defence, the accused DMO gave sworn testimony as DW1 and stated that on the evening of August 23, 2021 he was in his home and after dinner, he went to see his friend JAM with whom they conversed for a while then she took the baby she was carrying to sleep. He testified that EM, the deceased's sister saw them and greeted them. It was his testimony that the deceased used to be sick and had been previously admitted at Madiany Hospital and that as he was talking to her about her health, she was still on medication.
56. The accused testified that J dropped down and he tried to hold her but she could not respond. He stated that he was shocked and removed his shirt and tried to aerate her and give her first aid several times but she could not respond. He further testified that he went to his home and called his father and that it was his mother who opened the door and asked him why he had not slept by that time to which he responded that he wanted to talk to his father as they were close but his mother told him that his father was asleep so he told her what had happened to Nyasakwa while they were talking, when she fell down.
57. The accused testified that his mother woke his father and that the latter got out of bed and went to the accused in their sitting room. He stated that he then explained to his father what had happened then his mother suggested that they go back to the scene but his father refused and advised that they go and ereport to the police station.
58. It was his testimony that his mother escorted him to M who accompanied them to Luanda Kotieno Police Station and on arrival at the police station, he explained to the police officers of what had happened and the police left after calling a doctor and returned and escorted him to Aram Police Station. The accused stated that he had a good relationship with Jackline and that they had no disagreements between them. He further testified that J told him that she was not breathing well and that her leg was painful. He further stated that from August 15 to 21, J was admitted at Madiany District Hospital.
59. The accused testified that he got shocked at what happened to J and that the police officers tried to force him to say the truth and threatened him to give the truth but that what he knew is what he was telling the court and was what he told the police.
60. In cross-examination, the accused stated that when he left the scene where J was, he did not know that J was dead. He stated that his parents, specifically his father, advised him to report to the police that Jackline was already dead. He stated that when he left the scene where J was, he left after she had fallen to the ground. The accused stated that when he reached home, he told his parents that he was with J who had fallen down and that he had tried helping her in vain.
61. The accused stated that J fell near her home and that he did not have any reason why he did not tell her parents and sisters. He stated that he was shocked after seeing J fall down and his mind told him to go to his home. He further stated that when J fell ill, he visited her and found her legs swollen so he told his mother and her grandmother who escorted her to hospital. He stated that he impregnated J and they had a child together. The accused reiterated that he never fought with the deceased. He denied that J's grandmother reported him to the Chief for assaulting J. It was his testimony that the police only threatened him but never beat him up.



62. DW2 Wilber Lusamba testified that he was a Family Doctor and Medical Practitioner qualified in Havana Cuba and that he had returned 1½ years ago and had been practicing for the last 13 years at Busia County Referral Hospital. He testified that he was contacted by the family of the accused to give an opinion on the Postmortem Report PEX1 and that he had been shown the photographs of the deceased as produced in evidence.
63. DW2 testified that Hypoxia means low oxygen supply to any part of the body. He testified according to the post mortem report, externally, there was a deep horizontal mark on the apex of the neck that is not complete suggestive of ligature marks, and other two marks on the neck and the conclusion of manual strangulation. It was his testimony that ligature strangulation is by use of a rope or cloth but manual can be by use of a hand or an elbow or a knee.
64. He testified that in manual strangulation, the victim will resist to remove the hand of the assailant while in ligature strangulation, the mark on the neck will be one and a carbon copy of material used i.e. a string or a rope. He stated that looking at the photographs produced, they did not show any sign of either ligature or manual strangulation as during manual strangulation, there is a struggle so some injuries could be on the face or chest whereas in this case there was no sign of injury on the face or chest of the deceased.
65. DW2 stated that where there is no sign of struggle, the victim was drunk or in smothering - covering of the mouth and nose with a pillow or cloth. He testified that his assessment of the report that the liver had some swellings showed that the patient may have had hepatitis or other liver disease which should have been ruled out. It was his testimony that the conclusion of the doctor on the autopsy report did not agree with the manual strangulation and that the police should have taken photographs of the neck to show any sign of strangulation whether manually or by ligature. He stated that ligature marks had to be complete unless the victim had long hair or heavy clothing covering their neck. He further stated that they depend on what was found at the scene, to show if there were visible injuries on the body and that the photographs produced do not show any injuries.
66. In cross-examination, DW2 stated that he was a family doctor and not a Pathologist as he had a Masters in Family Medicine. He stated that his opinion was based on his training in Bachelors of Medicine & Bachelors of Surgery. He stated that if the photographs produced showed no external injuries then the report was wrong.
67. DW2 admitted to not having had the advantage of seeing the body of the deceased. He stated that ligature and manual strangulation were two different terms. He stated that ligatures were a string like material, either a rope or a wire which goes round the neck, leaving marks resembling the materials used. He stated that if the hands were used, there would be bruise marks depending on whether one hand or 2 hands were used. He stated that the marks harden and remain visible upon death, if the skin was compressed.
68. DW2 testified that the issue he had was that the ligature was incomplete yet there was no explanation why the ligature did not go round the neck. He stated that it was not in all cases of strangulation that defensive marks were left.

Analysis and Determination

69. Having considered the evidence for the prosecution and the defence, the main issue for determination is whether the prosecution proved its case against the accused person to the required standard of beyond reasonable doubt. To sustain a conviction on a charge of murder under Section 203 of the Penal Code, the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:



- a. The fact and the cause of death of the deceased.
 - b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - "*actus reus*".
 - c. That the said unlawful act of omission or commission was committed with malice aforethought - "*mens rea*."
70. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of PW1, PW2, PW6, PW8, PW10 and PW11. The cause of death was confirmed by the evidence of PW7 Dr. Eric Okonga, who produced a post-mortem report prepared by Dr. Juma Wanjofu who conducted a post-mortem examination on the deceased's body and concluded that the cause of death was hypoxia secondary to manual strangulation.
71. As to whether the deceased's death was caused by an unlawful act or omission, Article 26 (1) of the [Constitution](#) guarantees every person the right to life. The postmortem report prepared by PW3 and produced as PEX1 showed that the cause of death was hypoxia secondary to manual strangulation. There is no lawful basis for the aforementioned cause of death. There was no evidence that the deceased committed suicide. In the circumstances, it is my finding that indeed the deceased's death was unlawfully caused.
72. The only issue is whether the said death was caused by unlawful act of omission or commission on the part of the accused person. There was no eye witness called by the prosecution to the alleged murder of the deceased JAO and the only link between the accused and the offence is that he was allegedly the last person with the deceased prior to her death.
73. For the prosecution to sustain a conviction on circumstantial evidence, the Court of Appeal in the case of [Sawe v Republic](#) [2003] eKLR stated that:
- “In order to justify a conviction based 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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused.”
74. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must therefore satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously, it may happen to be a short step between moral certainty and legal proof.
75. In *Abanga alias Onyango v Republic* CR ANO.32 OF 1990 (UR), the Court of Appeal set out the principles applicable in order to determine whether circumstantial evidence adduced in a is sufficient to sustain a conviction. These principles 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 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 was committed by the accused and none else.”

76. In the instant case, the circumstantial evidence adduced came from PW1 who testified that she last saw the deceased in the company of the accused and that she was able to identify the accused who was well known to her. This was corroborated by PW8 who also testified to seeing the deceased last in the company of the accused. The two witnesses testified that they knew the accused very well as the deceased’s lover and that he was accustomed to visiting the deceased at night. The accused person in his defence also admitted that on the material night and time, he was at the home of the deceased and that they were having a talk when she told him that she was not breathing well then she collapsed and that despite his efforts to resuscitate her, she did not respond so he got scared and left her at the scene and went to inform his parents of what had happened and his father advised him to go and report to the police station.
77. The above evidence establishes beyond reasonable doubt that the accused was the last person with the deceased. PW1, PW8 and the accused himself testified of the same. Under Sections 111 (1) and 119 of the *Evidence Act*, a statutory rebuttable presumption exists. In this case it exists against the accused person. The two 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.”

78. The accused had a rebuttable burden to explain either how the deceased whom he met that evening met her death; or, how he, the accused parted with the deceased.



79. The accused has in his defence, explained how he parted with the deceased whom he claims collapsed. He denied unlawfully killing her. The question is whether the prosecution evidence that the accused had a hand in the death of the deceased was watertight.
80. PW3, the accused person's mother testified that the accused informed her and her husband who was sick that he was with N and that Na had died. She further testified that they went to the police station with the accused in the company of PW4 to report the incident. PW4 corroborated PW3's testimony and stated that indeed he joined the accused and PW3 on their way to the police station and that upon inquiring from the accused on what had happened, the accused told him that he had killed a girl called J using his hands.
81. PW9 testified that the accused in the company of PW4 reported vide OB of 03/24/8/2021 (PEX2) that he had killed his girlfriend and mother to his child. He further testified that when officers went to the scene of the accident, they called PW9 and he gave the phone to the accused who directed the Police officers to where the deceased's body was. This evidence was corroborated by PW10 who was at the scene and communicated with the accused via phone as to the location of the deceased's body, which the accused revealed and which directions the police officers followed and traced the body of the deceased.
82. The medical evidence adduced by PW7 as contained in the postmortem report also corroborated the mode of death as testified by PW4, PW9 and PW10. PW7 testified that there was a deep horizontal mark at the apex of the neck that was not complete suggestive of ligature marks and that other two marks around the neck were noted, horizontal from one side of the neck to the other that contributed in Dr. Juma concluding that the cause of death was hypoxia secondary to manual strangulation.
83. In his defence, the accused denied killing the deceased stating that the deceased fell down which shocked him so he went home. The accused further denied ever being reported to the Chief for assaulting the deceased earlier on. However, this was contrary to what his own mother, PW3, testified and as corroborated by PW4.
84. DW2, Wilber Lusamba testified that the conclusion of the doctor who carried out an autopsy on the deceased's body did not agree with manual strangulation. He further testified that in manual strangulation, there would be signs of a struggle though not in all cases and that the photographs produced did not show any sign of either ligature or manual strangulation. However, in cross-examination, DW2 admitted to not having had the advantage of seeing the body of the deceased and further stated that if the hands were used, there would be bruise marks depending on whether one hand or 2 hands were used which marks harden and remain visible upon death, if the skin was compressed.
85. With the above contradictory evidence by the defence, I am not persuaded by the accused that the deceased collapsed on her own, considering what the accused reported to the police on his own accord, in an initial report as was recorded in the Occurrence Book as contained in PEX2 and further his testimony that he was never reported to the Chief for assaulting the deceased in spite of contrary evidence from his own mother PW3 as corroborated by PW5.
86. Regarding the testimony by DW2, it is my opinion that the same is not credible as he claims that there was no manual strangulation based on the evidence adduced by the prosecution in PEX1 which he states does not provide any signs of struggle so as to be consistent with manual strangulation and further that if the hands were used, there would be bruise marks depending on whether one hand or 2 hands.
87. To the contrary, PEX1 is clear that there was a deep horizontal mark at the apex of the neck that was not complete suggestive of ligature marks and that other two marks around the neck were noted



horizontal from one side of the neck to the other clearly supporting the prosecution's case that the accused manually strangled the deceased. DW2 did not have the advantage of seeing the body of the deceased and neither was he called upon to carry out a separate independent autopsy for him to reach a different conclusion. His testimony was based on the photographs yet the prosecution did not rely wholly on the photographs to establish the cause of death or type of injuries sustained by the deceased.

88. I am therefore persuaded that the evidence adduced by the prosecution points at the accused as the one who caused the unlawful death of the deceased through manual strangulation. I am not persuaded by the evidence adduced by the accused that the deceased collapsed, and the assertion by his witness that the deceased had no signs of manual strangulation. I find and hold that the prosecution proved beyond reasonable doubt that the accused Daniel Mwembe Oloo and no other person caused the unlawful death of the deceased through manual strangulation.

89. On whether the accused had malice aforethought when he unlawfully killed the deceased, in the case of *Rex v Tubere S/O Ochen 1945 12EACA 63* the Court laid down the guidelines for trial Judges in consideration of malice aforethought and stated that:

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.

90. In the cases of *Ernest Asami Bwire Abang Alias Onyango v republic Ndumbe CACKA No. 32 of 1990*, *Karani and three others v Republic* 1991 KLR 622, *Republic v Godfrey Ngotho Mutiso* 2008 eKLR and *James Masomo Mbacha v republic* 2015 eKLR the courts have inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries to the victim.

91. In this case, the accused's motive is discernible from the manner of death that the deceased met. Manual strangulation is a very personal act that takes time to be complete, time which the accused would have seen the deceased's life ooze out of her for him to do something to stop the heinous act which he did not. I am persuaded that by manually strangling the deceased, the accused intended to cause her grievous harm and eventual death.

92. Taking all the circumstances into account, there is a clear manifestation of malice aforethought on the part of the accused person. I thus find and hold that the prosecution has proved malice aforethought beyond reasonable doubt on the part of the accused person.

93. In the end, I find that the accused person herein Daniel Mwembe Oloo is guilty of the offence of murder of the deceased JAO as charged and he is hereby convicted accordingly. Sentence to follow after records and mitigation.

94. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF JUNE, 2022

R.E. ABURILI

JUDGE

Page 34 of 34

