



REPUBLIC OF KENYA



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**State v Wanzala (Criminal Case E014 of 2021)
[2022] KEHC 12347 (KLR) (22 June 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E014 OF 2021
RE ABURILI, J
JUNE 22, 2022**

BETWEEN

STATE PROSECUTION

AND

PAUL OTIENO WANZALA ACCUSED

JUDGMENT

Introduction

1. The accused person Paul Otieno Wanzala 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 3rd day of February 2020 at Jera sub-location within Ugenya sub county within Siaya County murdered one Mary Christine Ongesa. The accused person pleaded not guilty to the charge against him and the matter proceeded to full trial. The prosecution called a total of ten (10) witnesses in support of its case while the accused testified on oath and called one witness.

The Prosecution's Case

2. PW1 Dennis Mayabi Okoki, testified that on the 3.2.2020, he was at home at 5.30 towards 6 am when he was called by the wife to his boss Mrs. Emily James Awino, who was in Nairobi telling him to go and check on what had happened at a neighbour's home of Ongesa. It was his testimony that he went and found that a lady who had been cut severally had been taken to hospital. He testified that he saw a lot of blood in her house in the sitting room.
3. PW1 testified that the neighbours told him that the injured lady had been taken to hospital. He testified that together with a youth from that home they walked round the house and found utensils scattered near a cut fence. He testified that it was still a bit dark in the early morning.



4. In cross-examination, PW1 stated that he did not know the accused and that he had never met him. He stated that he was new in the area and further stated that he never met the accused at the scene of crime.
5. PW2 Benard Otieno Sanda testified that in February 2020 at night on a date he could not recall, he heard Mama Mary Ongesa, the deceased, screaming saying in Dholuo, "Ongesa, a thief is killing me". He testified that Ongesa was her husband who was dead. It was his testimony that he went to her house with his brother Evans Albert Otieno and on arrival at the home they found Mary Ongesa still screaming at her bedroom window.
6. It was his testimony that she continued screaming even after they talked to her to find out her situation. He further testified that they asked her to open her door for them so that they could help which she did and told them how she had been cut. He testified that he lit a torch at her and saw blood after which they called for a vehicle and helped her go to Sega Mission Hospital. PW2 reiterated that they saw blood everywhere, scattered in her house. He testified that Ochieng Oloo drove the vehicle until Sega Mission Hospital where the deceased was attended to and that they were given an ambulance to take her to Siaya District Hospital.
7. PW2 testified that they called the children of the injured lady who came the following day. He further testified that she told them that a thief had cut her. He testified that they left her in Siaya Hospital at 4 pm. He further testified that when he asked her who had cut her, she told him that it was a tall man in shorts and further that her assailant did not say anything to her. PW2 testified that the deceased did not tell him that she knew the name of her assailant.
8. In cross-examination, PW2 testified that he knew the accused person who used to work as a farm hand for the deceased's son and sometimes helped the deceased with work. He testified that when he lit a torch at the deceased, he saw her bleeding and with blood all over. He stated that the deceased's home has electricity which was lighting the area. He further testified that the deceased told them that she had been robbed of a television set and gas. He further testified that when they reached the deceased, she recognized them well. He further testified that his home is next to hers and that the deceased said her assailant was tall.
9. PW3 Francis Omollo Ongesa, the deceased's son testified that he worked with the Kenya Defence Forces [KDF]. It was his testimony that he knew the accused who was his workman whom he had employed from July 2019 until 2020 February 3rd. PW3 testified that on 3rd February 2020 while going to work, at about 4.30 am, he received a call that his mother had been attacked. He testified that he called Paul Wanzala to find out what was happening at home but he did not pick his calls. He testified that his wife also called but Paul did not respond so he called PW1 and requested him to go to his home and find out what was happening to his mother and where his workman Paul Wanzala was.
10. PW3 testified that PW1 went there and called him back saying he found blood all over his mother's house and that some people had taken her to hospital. PW3 stated that he told PW1 to establish where his workman was and to go look for him and that PW1 told him that they found his workman washing utensils.
11. It was his testimony that he travelled from Nairobi to his and on arrival, he found his mother at Siaya District Hospital where she was for one week and that he spoke to her and she was in pain saying that his workman had cut her. He testified that she explained to him how Paul entered her house, found her sitting on her bed. That she told him that she switched on the lights and Paul started cutting her. It was his testimony that she told PW3 that Paul had killed her and that together with his brother they should go and look for money, Kshs. 42,000, which she had kept. He stated that they did not find the money. It was his testimony that they went and found that clothes and other items were stolen from the store.



12. PW3 testified that they went to Ukwala Police Station where the accused had been arrested and detained in connection with the attack. He testified that he met the accused and asked him what had transpired and that the accused told him that he had gone to save PW3's mother.
13. PW3 testified that he also started looking for a way of knowing why and who killed his mother and that from his own private investigations of tracking the phone for Paul Wanzala, the accused, herein, and his mother's phone which had been stolen when she was attacked, he discovered that the accused was using his mother's phone to communicate with other people and he gave all that evidence to the Investigating officer.
14. It was his testimony that he discovered that Wanzala the accused was communicating with another person called Meshack and that on the same night of the killing at 5 am, they had already started using his mother's phone at Murumba. He testified that he tracked the phone and gave information to the Investigating officer but the Investigating Officer never arrested the persons who collaborated with the accused to kill his mother.
15. He testified that the case was not well investigated and that he complained to Kisumu and gave information on who was involved but when they called Ukwala Police, they were told it was Oloo who had also died. He testified that he insisted that the person was Meshack Omondi Wakaya who was in possession of his mother's phone and communicating with his workman, the accused herein.
16. It was his testimony that when he employed Paul, Paul came with a suitcase and clothing and that after his mother was attacked, PW3 went to the accused's house and found nothing and that his identity card was found in PW3's mother's store. He testified that his mother's assailants stole a gas cooker (Meko), bags with clothes, thermos flasks, beddings and many other household goods and clothing. He identified Paul Wanzala as the accused in dock.
17. In cross-examination, PW3 stated that he went to see his mother in hospital the same day, 3/2/2020 and she told him that it was Paul who had 'killed' her. He further stated that she told him that she told those who went to rescue her, including Ochieng and Evans that she wanted Paul, her son's workman to come because he had attacked her.
18. PW3 testified that he used his mother's line to track those who had used it to communicate. He stated that he recorded his statement in April 2020 though it said that he recorded it on 10/12/2020. He testified that he shared his findings with the investigators. It was his testimony that his mother never told him that she had issues with Paul but that she told him that the accused introduced himself to her when she asked him upon her hearing of the footsteps.
19. He testified that it was not true that he and his brother convinced his mother to say that Paul was the person who had attacked her. In re-examination, PW3 stated that he commenced the tracking of Paul and Meshack in the months of April and May 2020. He stated that he got full information after he had recorded his statements.
20. PW4 Evans Otieno Albert testified that on 3/2/2020 at about 4 am he was asleep when he heard screams from his neighbour Mary Ongesa. He testified that he woke up and got out. He further stated that his brother, Benard Ochieng had also heard and woken up so they went together to the home of Mary Ongesa where they found her at her bedroom window.
21. PW4 testified that they called her out and then entered her house to find her badly injured with blood all over. He stated that her head was cut and her hand and fingers were chopped. He further testified that she was crying saying, "why has the person cut me like this?" It was his testimony that they tried to



- get help and managed to get a vehicle and that they mobilized many people who came and also called her son who worked in Nairobi to alert him of what had happened.
22. It was his testimony that they helped Mama Mary to Jera Hospital but that he did not go to hospital with her. He testified that he knew the accused, Paul, who was a workman in that home. He further testified that he found a lot of blood in the sitting room and bedroom and that as she was crying saying she had been cut, she was calling out the name of Paul saying she wanted to see him and that she wanted to see her son's workman.
 23. PW4 stated that while he was still at the home of Mary, he started having an informal communication with the neighbours. It was his testimony that they went and found the accused at the home of Francis and asked him why he was not bothered about the attack on Mary. He further testified that he heard the accused talk on phone saying Mary had been taken to the mortuary. He further stated that there were other people at the scene. PW4 identified the accused in the dock.
 24. In cross-examination, PW4 stated that he and his brother were first to arrive at the scene. He testified that the deceased was crying saying the 'person' had cut her badly and asking where her son's worker was. He testified that they identified themselves and she knew them. He further testified that the accused was talking on phone openly saying, 'Mama' had been taken to the mortuary. PW4 testified that when they looked for the accused, they found him in the home of his employer washing utensils. He stated that he could not tell the accused's state of mind.
 25. PW5 Charles Ochieng Onyoro a village elder in Jera sub-location testified that on the 3/2/2020 at about 6 am he was in his home when Evans went and told him that Mama Mary had been attacked and cut by robbers. He testified that he went to Mary's home and found other people present. It was his testimony that he found the deceased already taken to hospital and that he walked around and found some utensils dropped near the cut fence.
 26. PW5 testified that he heard the workman to Mary's son, on phone telling the other person that, "huyo amekufa amesha pelekwa mortuary". He testified that people started lamenting asking him why he was saying so but he calmed them down. It was his testimony that the deceased's son, Peter, arrived from Nairobi and went to check on his injured mother in hospital. He further testified that he advised that the workman should not be left to go away because he seemed to have some information on the attack on the deceased. He testified that he then went to his home. PW5 identified Mary's son's workman as the accused.
 27. In cross-examination, PW5 reiterated that he heard the accused talking loudly on phone that Mama had been taken to the mortuary because she was dead. He testified that he suspected him because when people went to the home, he was nowhere yet he lived with Mama Mary and should have known what had happened to her.
 28. PW6 Peter Edwin Agutu Ongesa testified that the deceased was her mother. He testified that on 2/2/2020 he left Nairobi for his home to go see his mother with his daughter. It was his testimony that he reached Kisumu at about 5.30 pm when his brother Francis Omollo Ongesa called him and told him to rush home because their mother had been cut badly. PW6 testified that he boarded Bungoma Shuttle and went home. It was his testimony that he called his brother's workman Paul on his Airtel and Safaricom lines but he could not pick calls.
 29. PW6 further testified that people from home also called him saying they were taking his mother to Segu Mission Hospital. It was his testimony that on reaching Ugenya, he was called and informed that they were taking her to Siaya Hospital. He testified that he heard his mother asking if they were talking to Peter, PW6 and she was told that it was him. PW6 testified that he reached home at 8.30 am and



- that when Paul saw him, he went and opened the house and took PW6's bags and kept them in the house. He testified that he took the keys and gave them to his daughter then boarded a boda boda to Siaya District Hospital where he found his mother before she was taken to theatre and doctors allowed him to speak to her.
30. It was his testimony that he spoke to her and she explained to him that at night, she heard dogs barking and heard footsteps and upon asking, she got a response from Paul who said he was the one and that he had heard movements of cats on the roof. He testified that his mother told him that she then slept and was woken up by footsteps with people cutting her and that she saw Paul cut her so she screamed.
 31. PW6 testified that his mother remained in hospital being treated and that until her death, she kept telling him that Paul had cut her. He testified that he met the village elder at home when he arrived from Nairobi. He further stated that he later learnt that Paul had been arrested. It was his testimony that his mother told him that she had money which she had kept in her bedroom Kshs. 12,500 which he found and that there was money in the store about Kshs. 45,000 but they never found it.
 32. It was his testimony that his mother told him that they took away her phone. He further testified that they discovered that the gas cooker, cylinder and clothes were all stolen. He testified that he knew Paul very well as he used to call him and even give him extra assignments and pay him via MPESA.
 33. In cross-examination, PW6 stated that When he arrived at home, he found Paul. He stated that Paul had the keys and could access his mother's house. He stated that there was a gate and that he checked around and saw footsteps of getting in and out. He testified that the people who entered his mother's home entered through the roof. He further testified that he did not inquire of her on the first people who arrived at the scene. He stated that he spoke to his mother when she was at the theatre. It was his testimony that they discovered the loss of other items later after burial but with the money, he checked on his arrival after his mother informed him. He testified that the accused was arrested from their (PW6's) home.
 34. PW7 No. 88315 CPL Musa Galgithale based at CID Ugenya testified that he was involved in the investigations. It was his testimony that on the 8/2/2020, he received a phone call from Sgt Abuyekha Arihu, the investigating officer in this case to go to Siaya Referral Hospital and record a statement of a lady who had been injured.
 35. He testified that he went to Siaya Referral Hospital and proceeded to the nurse in charge of female ward who showed him Mary Christine Ongesa. He testified that he went and found Mary on a patient's bed in great pain. He testified that he greeted her and asked her if she could tell him what she could recall. He further stated that she was in pain but she agreed to speak to him. He further testified that she had bandages on her hands and was being assisted by her daughter Rose Ongesa.
 36. PW7 testified that the deceased was in her senses and could recall vividly what had happened to her which she did as she narrated to him as he recorded. He testified that she narrated to him in Kiswahili as he recorded in English as he understands both languages. It was his testimony that he recorded in English because he understands and writes better in English than in Kiswahili.
 37. PW7 testified that after recording the statement of Mary Ongesa, the deceased thumb printed it and he signed it. He testified that he could not tell when she died but it was after recording her statement. PW7 produced the deceased's statement as PEx 1.
 38. In cross-examination, PW7 stated that he was not part of the investigations. He stated that he was not aware of previous attempts to record the deceased's statement. He stated that he found the deceased with her daughter Rose Ongesa and that he recorded in English but she gave the statement in Kiswahili. He further testified that the deceased told him that she recalled the things which were stolen during



- the incident namely; 32-inch flat screen TV, DVD Player Sony, a 6kg gas cylinder, assorted clothes and Kshs. 25,000. He further testified that she informed him that when the suspect cut her and left, she woke up, went to the main door to close it, to avoid being re-attacked and that is when she saw the items missing. PW7 reiterated that the deceased's daughter Rose did not assist her in giving him the information.
39. PW8 Barnabas Okello Onyango testified that he worked as a driver for hire (free-lance driving) and that on the 2/2/2020 he was at home in Jera when someone went to his house at 5 am on a motorcycle and shouted his name. It was his testimony that he recognized the person to be Evans so he asked him what the problem was and Evans told him that "Mathe Nyaenga" was injured by people so he wanted PW8 to drive her to hospital. He testified that he told him that his vehicle had mechanical issues so it could not move after which Evans left immediately.
 40. PW8 testified that he got out to try start his vehicle but it refused so he went to 'Nyaenga' home and found many people gathered. He testified that he found the house locked and asked the people around whether the police or local administration were aware but they said no so he called the Assistant Chief and police officers at Bar-Ober, as he had CPL Wasike's number and directed them to the home of 'Nyaenga'.
 41. It was his testimony that he is a police officer and that before the police arrived, he walked around the home and saw a ladder used to climb the roof top as well as footsteps in the fence, a panga, thermos flask and wires. He testified that he helped secure those items until the police arrived and showed them but they only picked a panga. He testified that he tried to call other police officers to avail scenes of crimes personnel to go and dust or collect the exhibits but that the scene of crime told him that he was busy in Siaya. He testified that after some time, he went and recorded his statement at Barober Police Station. PW8 further testified that on the 26/10/2021 he was in court and wanted to testify but nobody called him. He stated that he had not been bonded and had come to court as a friend.
 42. In cross-examination, PW8 stated that he found the door to the deceased's house locked with a padlock and that he found the accused herein just laughing. In re-examination, PW8 stated that he asked the accused who worked for his cousin, whether he knew what had happened but the accused said he did not know and said that he saw the deceased the previous night when he went to see her when she told him that she heard people walking on her rooftop. PW8 stated that the accused was evasive in explaining what he knew especially the ladder and how it reached the home of the deceased yet there were fences and gates everywhere but that the accused just laughed off.
 43. PW9 Dr. Cedrick Tumbo from Busia County Referral Hospital testified that he carried out a postmortem on the body of Mary Christine Obwar on 18/2/2020. It was his testimony that the general observations of the body were that it was of a African female 84 years, obese, 1.65 cm.
 44. Externally, there were 2 major lacerations on the head, One frontal about 12cm and another on the middle of the head 6cm (pointing with hands). He testified that the left hand had an amputated index finger with several lacerations on the palm while the right hand had amputated thumb and lacerations on the palm.
 45. On the internal appearances, he testified that the major finding on the head was 2 main fractures on the right frontal measuring 12 cm and posteriously 6 cm. He stated that both fractures caused internal bleeding.
 46. It was his testimony that as a result of examination, he formed the opinion that the cause of the death was severe head injury due to sharp object trauma on the head. He signed the postmortem on



18/2/2020 and stamped it. He further stated that he was never involved in the treatment of this patient. He produced the postmortem Report as PEx2.

47. In cross-examination, PW9 stated that the skull of the victim was not intact. He stated that he had captured this in the postmortem report. He further testified that the lacerations caused fractures and penetrated inside the head and skull. It was his testimony that he did not treat the victim and that given the injuries she would have been treated for oedema of the brain and comprehensive surgery by a neurosurgeon and IV fluid with medication to stabilize her. He further testified that he was not aware that the medication given would have interfered with the deceased's memory.
48. PW10 No. 46263 Sgt Abuyeka Ariwo currently the DCI Ugenya testified that he was the investigating officer in this case. He testified that on the 3/2/2020 he received instructions to investigate an alleged case of Robbery with violence reported to have taken place at Jerra Inn within Segla. He testified that he proceeded to the scene accompanied by their driver and on arrival, they were directed to a house where the alleged offence had taken place the previous night.
49. He testified that they were taken through the rooms where they saw splashes of blood and were informed that the owner of the house, Mary Ongesa had been cut by unknown persons the previous night and she had been taken to Segla Mission Hospital. It was his testimony that the OCS Ukwala Police Station had earlier visited the scene and had been given a Panga and a pair of Scissors allegedly used in gaining access into the house by cutting iron sheets of the roof of the house of the deceased. He testified that he spoke to the locals around on what they knew of what transpired in their neighbour's homestead.
50. PW10 further testified that they discovered that some of the witnesses had given their statements to the officers who had visited the scene earlier with the OCS Ukwala and that the suspect in this case had been arrested by the OCS Ukwala police station so he visited the victim at the hospital who had been transferred to Siaya County Referral Hospital and discussed with her at length in the presence of her two sons whom he found at her bedside namely Francis Omollo and Peter.
51. It was his testimony that during his discussion with the victim before she died, she told him how she heard somebody outside and later people got into her house, cut her severely. He testified that when he opted to record her statement, she told him in front of her sons that she was very exhausted and asked him to record her statement the following day. He testified that the following day, he could not make it so he assigned CPL Musa Galgithale who was then a Police Constable and recorded the said victim's statement He testified that the deceased mentioned the accused as the person who had assaulted her.
52. It was his testimony that after about 3 days, they received information that the victim had succumbed to the injuries sustained so they organized for postmortem with the assistance of Peter and Francis Ongesa which was witnessed by then PC Musa on 9/2/2020 at Sameday Classmate Funeral Parlour at Segla, by Dr. Cedrick Tumbo, a Medical Officer. He further testified that when he was forwarding the file to ODPP for directions on 2/3/2020, the two sons of the deceased, Peter and Francis Ongesa, had not recorded their statements. He testified that they later recorded their statements which he received, one year later, through his boss and that he then included those statements in the file.
53. PW10 testified that he later received a response from ODPP saying the matter remained under investigations as it did not meet the threshold for a charge so the suspect was released pending investigations. He testified that they looked for the 2 other suspects mentioned, arrested them, interrogated them and released them as he did not find anything against them. He testified that they got information that Collins Owino was also involved so they looked for him but he had vanished and relocated to Nyalenda, Kisumu. He further testified that they got news that he had been beaten by



a mob in Kisumu and died as was confirmed by his local Chief for Marachi Central, Busia who gave them his burial permit showing that he was buried at Sigomere village.

54. PW10 testified that as they continued investigating, the file was recalled by ODPP, Ukwala and it was also forwarded to ODPP Siaya, following several correspondences received from Francis and Peter Ongesa, the deceased's sons. He testified that they were then directed by ODPP Siaya to arrest the accused and arraign him for the offence of Manslaughter which they did and the accused was charged before Ukwala Court with Manslaughter. He testified that as this was ongoing, he was asked to record further statements from Evans Ngala and Ochieng Ngala Bernard, who are 2 brothers and who were the first people to arrive at the scene. He testified that the two still maintained their stance as per their earlier statements to the police on what they knew. He testified that he wanted to know if the deceased mentioned anything to them but they never told them that the deceased informed them on who attacked and assaulted her.
55. It was his testimony that later, the ODPP directed that the charge of Manslaughter be withdrawn and a fresh charge of Murder be preferred against the accused. He produced a panga as PEX 3 and a small pair of scissors as PEX 4. He testified that he visited the scene where he saw an open roof that had no ceiling board. PW10 testified that the accused who was arrested in connection with this case was the accused in the dock. He further testified that the accused was an employee of the deceased's son, Francis Ongesa.
56. In cross-examination, PW10 stated that the accused person was arrested at the compound of the deceased's son Francis. He further stated that the OCS Ukwala arrested him to assist in the investigations so he was at the police station as PW10 got involved in the investigations. He admitted that the accused was released on instructions of ODPP that the evidence did not meet the threshold for murder. He further stated that they did not give him police bond as he availed himself when he was required.
57. PW10 further testified that he only received witness's statements of PW3 and PW6 after they recorded and send to the OCS. He stated that Francis Omollo Ongesa's statements had a date of 10/12/2020 and Peter Edwin Ongesa recorded his statements on 29/4/2021. He admitted that he interviewed the victim at Siaya Referral Hospital though he did not remember if the deceased mentioned the name of the person who attacked and assaulted her but that when his colleague Musa recorded her statement, she told him that it was the accused who had attacked and assaulted her.
58. PW10 testified that when he was in Hospital with the deceased, her son PW3 and PW6 and a lady were present. He stated that the victim was talking in Kiswahili although she was not very fluent in it. He further stated that in his investigations, he did not get to know the link between Collins Ochieng and the accused Paul Wanzala. He stated that the Collins Ochieng they were looking for had since died. He stated that no dusting was done on the panga and pair of scissors because they were picked by members of the public and surrendered to OCS who gave him the 2 items. It was his testimony that in the evidence he gathered in his investigations, nobody placed the accused at the scene as Edwin and Albert denied any knowledge of their mother's assailants.

The Defence Case

59. The accused Paul Otieno Wanzala testified as DW1 and recalled that on 3/2/2020 he was at the deceased's son's home, that it was at night when he heard dogs barking. He testified that he heard the deceased praying so he went and spoke to her from outside. He testified that he introduced himself to her as Paul Wanzala the worker for her son Francis and she told him that things were walking on her roof. He further stated that he checked and saw nothing so he went to sleep.



60. It was his testimony that at 6.30am, Gladys the wife to Francis called him and told asked him as to why he was asleep yet the decease had been attacked. He testified that he went and saw the invasion. It was his testimony that when the dogs were barking, the deceased was praying loudly in Dholuo. He testified that he never heard the deceased screaming but that she only prayed loudly.
61. It was his testimony that in the morning, he saw the roof cut and a ladder at the house. He denied that he spoke to someone in the morning telling them that the deceased had been taken to the mortuary. He stated that he was at home all the time. He further testified that he was arrested at the house where he lived and that he had not moved his wife and items away. He testified that he had never quarreled with the deceased or her sons. He stated that his ID Card was given to him at Ukwala police cells. He denied taking the deceased's phone or using it to talk to anyone. He reiterated that he never committed the offence.
62. In cross-examination, the accused testified that he had a good relationship with the deceased and that it was not true about what the deceased said about him. He stated that the house of the deceased was less than 50 meters from where he lived. He further stated that he knew Evans Ngala who was also a neighbour to the deceased. He reiterated that he never heard the deceased scream or the iron sheets being cut. He stated that the deceased knew him well. The accused testified that nobody called him at night but that he was called at 6.30am not at 4.00am.
63. He testified that he did not know Meshack Omondi and that he had never spoken to anyone telling them that the deceased had been taken to the mortuary. He further testified that it was the wife of Francis who lamented that he was asleep yet her mother-in-law was attacked. He testified that he spoke to his sister telling her that the deceased had been taken to hospital not mortuary.
64. In re-examination, the accused stated that his sister was called Rael and that he called her telling her that his boss had been attacked. He stated that he had worked for Francis for 7 months so he did not know many people.
65. DW2 Bosswell Omondi Owuor testified that the accused was his neighbour at home whereas the victim's family was related to him as Francis Odhiambo had married his cousin Gladys Awuor. He testified that he was the one who took the accused to work for them as he knew him as a well behaved person. He testified that the accused had worked for the family for at least 7 months. He stated that he personally took the accused to the home of the victim and that the accused had a black suitcase with his clothing and that he handed him to Francis and Gladys.
66. He testified that after this incident on 3/2/2020 at 9.00am, Gladys called him and informed him of what had happened. He stated that he visited them after about 3-4 days to tell them 'pole' and met Gladys and Francis in the presence of the accused who was sick so they took him to hospital at Sega. He further stated that the accused was already arrested so he asked Gladys on what would happen to Paul's items and Gladys told him that Paul's items were safe and that investigations were ongoing and that they were in her custody until after investigations.
67. He testified that the accused was released after about 9 days and that he returned to his home and lived with them peacefully until later when he was told to go back to the police which he did and was charged with Manslaughter. He testified that he followed up and asked the Prosecutor in Ukwala on what was happening and she, Miss Omunyolo, told him that they were proceeding with a case that was not supported by any evidence. It was his testimony that when they were taking Peter to the hospital, his sister showed him land which she had bought and which the accused had cleared and she praised him saying he was very efficient and effective at work.



68. It was his testimony that he went and spoke to the investigating officer who told him that there was no evidence against the accused but that it was a grandson of the deceased who attacked her and stole her phone and had even died. He further testified that at the same police station, when he visited the accused, he was given the accused's mobile phone by the police but it was later taken by the police. He further stated that he was doubtful that the deceased recorded a statement implicating the accused as the thumbprint was not hers.
69. In cross-examination, DW2 stated that the accused had stayed at the home of Francis for 7 months. He further admitted that he was not present to know what transpired on the night of 3/2/2020 and that he never visited the deceased in hospital.
70. When questioned by the court as to why he said that the statement allegedly recorded by the deceased was not hers and why he believed that the thumbprint was also not hers, DW2 stated that it was because from the beginning there was no evidence of the accused's involvement and that that was why he was released from police custody and further that if the police had that statement, then they could not have taken such a long time to decide whether or not to charge him.

Analysis and Determination

71. I have considered the evidence adduced by the prosecution witnesses and the accused together with his witness. 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".
72. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of all prosecution witnesses. The cause of death was confirmed through the evidence of PW9 Dr. Cedric Tumbo who conducted a postmortem examination on the deceased and produced postmortem report, PEXB 2 confirming the cause of death as severe head injury due to sharp object trauma to the head.
73. The only issue is whether the said death was caused by unlawful act of omission or commission on the part of the accused person. None of the prosecution witness actually saw the accused committing the said act of attacking the deceased thus the prosecution case against the accused is based on circumstantial evidence.
74. For the prosecution to sustain a conviction on circumstantial evidence, the Court of Appeal in the case of *Sawe v Republic* [2003] eKLR stated as follows:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable 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 shift to the party accused.”



75. 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 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 get 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. See the case of *Republic v Elizabeth Anyango Ojwang* [2018] eKLR
76. In the case of *Abamad Abolfathi Mobammed and Another v Republic* [2018] eKLR, the Court of Appeal had this to say on this point:
- “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 which, by 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.”
77. See also *Musili Tulo v Republic* Cr. App. No. 30 of 2013.
78. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -
- “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.
- (see also *Sawe v Republic* (2003) eKLR and *GMI v R* Cr. App. No. 38 of 2011).
- In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.
- (see *Teper v R* [1952] ALLER 480 and *Musoke V R* [1958] E.A 715). In *Dhalay Singh v Republic*, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:



“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

79. In this case, the evidence that the prosecution relied on to implicate the accused came mainly from PW3 and PW7. PW3 testified that through his investigations, he discovered that the accused as using his deceased mother’s stolen phone to speak with other people specifically one Meshack Oloo. He further testified that his mother told him that the accused was the one who killed her.
80. On his part, PW7 testified that he recorded the deceased’s statement at the hospital to the effect that the accused was the one who attacked her and cut her. He testified that the deceased thumb printed on the written statement which he had taken down. He produced the statement as PEXB 2.
81. Turning to the other evidence adduced by the prosecution, PW2 who together with his brother PW4 were first at the scene testified that the deceased told him that she was attacked by a tall man in shorts. He further testified that the deceased did not tell him who her assailants were. His brother PW4 testified that the deceased called out for the accused saying she wanted to see him. PW4 further testified that he heard the accused speaking on phone saying that the deceased had been taken to the mortuary. This was also reported by PW5. PW4 further testified that he found the accused at his employer’s home washing utensils.
82. PW6, the deceased’s other son and a brother to PW3, did not testify that his mother mentioned the accused as her attacker despite being with her after the attack and during her stay at the hospital prior to her death.
83. PW10, the investigating officer testified that during his talk with the deceased in hospital, he does not remember her mentioning the accused as her attacker. He further testified that nobody placed the accused at the scene. He also testified that the accused was arrested to assist with investigations and that he was initially released from custody as there was no evidence to warrant his being charged. He further stated that upon his release, the accused was not given police bond but still availed himself when needed by the police.
84. The accused denied committing the offence stating that he was alerted by dogs barking and went and inquired from the deceased what was happening. He testified that the deceased informed him that she heard people walking on the roof but he stated that he could not see anyone. He further testified that he did not hear the deceased scream or the roof being cut.
85. DW2 testified to the deceased’s good behaviour and further questioned the legitimacy of the thumbprint placed on PEXB 2 and alleged to belong to the deceased.
86. The prosecution was given ample time to establish the legitimacy of the deceased’s thumbprint and despite many opportunities to verify the same, the prosecution failed to prove this.
87. Based on the evidence adduced above, I find that the circumstantial evidence herein taken cumulatively does not form a chain so complete that there is no escape from the conclusion that within all human probability, the crime herein was committed by the accused and no one else.
88. The prosecution evidence clearly alluded to other persons not linked to the accused as the attackers who climbed the deceased’s roof, cut it and perpetrated the act against the deceased. Even the alleged written statement in the form of a dying declaration from the deceased raised more doubts as the prosecution failed to prove that the thumbprint therein definitely belonged to the deceased. In addition, the allegation by Francis that he carried out his own investigations and established that the



accused was using his mother's phone to communicate with other people or that those other people namely Meshack was communicating with the accused moments after her attack, was not proved by any material evidence despite the accused having surrendered his phone to the police, no forensic examination was carried out on the said phone to establish the allegations and connection between the accused and the person alleged to have been communicating with him. No call data or tracking was produced as evidence of that contradictory allegation. I say contradictory because it is not clear whether it was the accused who was using the deceased's phone to communicate with Meshack or whether it was Meshack who was using the deceased's phone to communicate with the accused.

89. The testimony of PW3, one of the deceased's sons, as to the accused being his mother's attacker was similarly wanting considering that his brother, PW6, who was also present at his mother's bedside from the time he was called upon and joined her in hospital, was silent on the deceased mentioning the accused as her assailant. PW10, the investigating officer also testified that despite interviewing the deceased, he could not remember her mentioning the accused as her assailant.
90. There are various lacunae in the case for the prosecution in establishing the chain of circumstantial evidence against the accused and neither did the prosecution establish last seen evidence beyond any reasonable doubt nor any motive on the part of the accused for the commission of the offence. In criminal cases, motive is not necessary but in the instant case, the prosecution failed to link the accused with the death of the deceased. The evidence adduced by the prosecution witnesses is so weak that it does not meet the threshold for a finding of guilt against the accused who was arrested on suspicion simply because he lived in that home with the deceased. Suspicion, however strong, cannot be a basis to find a conviction.
91. For the aforesaid reasons, I find and hold that the case against the accused was not proved beyond reasonable doubt and that any conviction of the accused would be unsafe in the circumstances of this case. Accordingly, I find and hold that the charge of murder against the accused person Paul Otieno Wanzala fails. I find the accused Paul Otieno Wanzala not guilty of the Information of murder. He is hereby acquitted of the charge and unless otherwise lawfully held, he is hereby set at liberty forthwith. The court sends it condolences to the family of the deceased Mary Ongesa. His sons tried their very level best to get justice done for their mother by getting this case resuscitated against the accused person. However, justice is for both parties in every case. Both the accused and the victim of the offence. A conviction would off course mean justice to the victim while an acquittal is justice to the accused, according to simple understanding by the parties. However, to this court, justice is served when the court properly applies itself to the law and facts. If facts are not supported by the law or are insufficient to prove an offence, the court cannot convict to satisfy the wishes of the victim's family.
92. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF JUNE, 2022

R.E. ABURILI

JUDGE

