



REPUBLIC OF KENYA



**Republic v Mbula (Criminal Case 33 of 2014)
[2022] KEHC 11776 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CRIMINAL CASE 33 OF 2014

MW MUIGAI, J

JULY 28, 2022

BETWEEN

REPUBLIC STATE

AND

JACKSON MUTUA MBULA ACCUSED

JUDGMENT

BACKGROUND

1. The Accused person herein JACKSON MUTUA MBULA was charged with two Counts of Murder;-
 - (i) Count I: Murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 laws of Kenya. Particulars are that on the 24th day of April, 2014 at Mlolongo Township in Athi River District within Machakos County murdered SHAREEN KANINI NZUKI.
 - (ii) Count II: Murder contrary to Section 203 as read with Section and 204 of the Penal Code, Cap 63. Particulars are that on the 25th day of April, 2014, at Mlolongo Township in Athi River District within Machakos County murdered KELVIN MWENDWA MUTUA.
2. The plea was taken on 2/07/2014 after the Accused person was confirmed to be fit to plead vide the Psychiatrist Report dated 18/06/2014 filed in Court. The information/charges were read out and each and every ingredient of the offences was explained to him in Kiswahili a language of his choice. The Accused person denied the charges and a Plea of Not guilty was entered.
3. The Prosecution called a total of Seven (7) witnesses in support of its case.

EVIDENCE

4. Pw.1 Mary Mukonyo Nzuki testified on 28/9/2017 when the hearing commenced. The witness stated that she was/is a resident and business lady selling grains and based at Mlolongo. That on 24/04/2014,



- at around 11.00 a.m, her daughter Sharleen Kanini Nzuki (deceased) visited her and claimed that she needed some money with which to plait her hair and had been sent by her husband who is the accused person herein. She then spoke to the accused on phone. The accused told her to give the money as he would refund afterwards. Later she visited her daughter and found her at her house. Later she learnt some of the money was missing since she had allowed the daughter to go pick the money for plaiting her hair. She then enquired from her the amount she had taken and she claimed she had picked 1000/=.
5. The following day, a neighbour came to the house and advised her to go and see what was happening at the daughter's house.. She went there and found a large crowd. She learnt that her daughter and her son had been killed. Police officers visited the scene around 8.00 a.m. and took away the bodies. She did not view the bodies. Post mortems were later conducted.
 6. On cross – examination by Accused's Advocate; Mrs Mulundu she stated that the daughter and her grandchild were alright the previous day. That the daughter and the husband had no problems. She did not witness the incident.
 7. Pw.2 Loraine Nzilani Nzuki stated that she is a resident of Mlolongo and a trainer at EPZ Company. On 24/04/2014 at around 7.00 a.m, she visited her sister's house - Sharleen Kanini Nzuki. The deceased left her with her child as she left for salon to do her hair. The child was called Kelvin Mwendwa Mutua. She stayed there till 9.00 p.m. when she left her sister and her child and the accused person in their house who was/is her husband. There was no problem. She left for her house which was a few metres away.
 8. Later, early the following morning around 5.00 a.m. she heard a knock on their door and her mother was advised to rush to her sister's place to see what was happening. She then followed her mother there. She saw a large crowd and she learnt her sister and her child had died. She did not enter the house. Police visited the scene and picked up the bodies. She later recorded a statement. Later she learnt the accused had been arrested and she saw him at the Police Station.
 9. On cross – examination by Accused's Advocate; Mrs Mwangi she stated that when she left the deceased's house at around 9 p.m. the previous night everything was alright. The deceased and her husband were living harmoniously. She did not witness the incident and she could not pinpoint the culprit.
 10. Pw.3 Joseph Muli stated that he is a resident of Utawala area of Nairobi and a businessman. He knew both deceased persons herein. Sharleen was his cousin while Kevin Mutua was his nephew. On 30/04/2014, he went to Machakos General Hospital to identify the bodies during the postmortem.
 11. On Cross – examination by Accused's Advocate; Mrs Mulundu he stated that he was at the mortuary on 30/04/2014 on his own volition. He was in the company of his uncle Joseph Kioko.
 12. Pw.4 Stephen Muendo stated that he was/is currently residing in Isiolo. Previously, he lived in Mlolongo Township as Caretaker of some rental houses. He knew both deceased persons herein who were his tenants. On 25/04/2014 at 5.30 a.m. when he woke up he noticed emission of smoke in one of the houses. He went there and learnt it was being occupied by Sharleen Kanini Nzuki. He knocked at the door but there was no response. He also called out her husband Jackson Mutua, the Accused person (identified in Court) but there was no response. When he managed to open the door he saw clothes near a bed which were burning. The house was a single room. He, together with one of the tenants by the name Joseph Okello fetched water and managed to extinguish the fire. Inside the house, he saw the body of a child whose neck appeared to have been slit. The child was already dead. At that time, Joseph Okello and Benjamin were with him near the door. He learnt that the child was Kevin Mwendwa Mutua. Sharleen's body lay on the bed covered with some bedsheets. He reported the matter



- to the police who rushed to the scene. The officers removed the bodies and took them to Machakos. He had not witnessed any squabble before between the Accused person and Sharleen Kanini Nzuki.
13. On cross – examination by Accused’s Advocate; Mrs Mulonde he stated that on that day the 25/04/2014, he did not find the Accused at the scene. The child appeared to have been cut with a sharp object but he did not see the sharp object. He had not witnessed any squabbles between accused and his wife Shareen Kanini Nzuki.
 14. Pw.5 Dr. John Mutunga stated that he is based at Machakos Level Five Hospital. He performed the Post Mortem in respect of Sharleen Kanini Nzuki. The relatives were in company of Cpl. Allan Adalo and they identified the body. The relatives were Muli Munyasya and Joseph Kikuve. The body had been discovered at Mlolongo on 25/04/2014. It had been claimed that the deceased had been killed by a person well known to her. He carried out the post mortem on 30/04/2014.
 15. On observation, the clothes were blood stained, the body had been well preserved, there were cut wound on the neck (behind) and it was a deep cut wound on the nape of the neck and which extended to the spine.
 16. On internal examination he noted that the spinal (cervical bone) was fractured and the spinal cord was severed. He formed the opinion that the cause of death was hypovolemic shock as a result of assault with a sharp object. The deceased had bled profusely. The Post Mortem Report was marked MF1-1 (a) dated 30/04/2014.
 17. Pw5 also performed a post mortem in respect of Kelvin Mutua Mwendwa on 30/04/2014. The body was identified by Muli Munyasya and Joseph Kikuve Kioko in the company of Cpl. Allan Adalo. The clothings were bloodstained. The age of the victim was nine months and he was a male child. The body was well preserved.
 18. On external examination, he noted a deep cut wound at the back of the neck. The cervical cord had been severed. The cervical bones were fractured and neck vessels were cut. He formed the opinion that the cause of death was shock due to assault with a sharp object. The Post Mortem Report was marked MFI-1 (b) dated 30/04/2014.
 19. On cross – examination by Accused’s Advocate; Mrs Mulonde he stated that he did not indicate the type of weapons used. The weapons used had to be sharp objects.
 20. Pw.6 No. 236772 – Jamilah Murubu stated that he was/is currently at Police headquarters. Previously, he was stationed at Mlolongo in 2014 performing general duties. On the 25/04/2014 he was the duty officer. At around 6.00 a.m, he received a report from a Caretaker of Kathangaita Plot who called and reported that at around 5.20 a.m. he found one of the houses billowing with smoke. The house had been occupied by the deceased. The Caretaker was in charge of the premises within the plot. He directed him to record a statement. He also alerted the OCS C.I.P. Jacob Walukho as well as C.I.P. Ndungi, to proceed to the scene and they were led by the Reportee.
 21. On arrival they established that the fire had been put out and there were burnt clothes. Neighbours were outside the house. They entered the house and found two bodies lying on a bed. It was a single room. The bodies were covered by the partly burnt clothes. The victims were one adult female and a young male child. The bodies had deep cuts on their necks and blood oozed from the cuts. He could not recall the position of the necks but from his observations the cuts were deep. The OCS interrogated the neighbours and had the scene preserved. He later recorded his statement.
 22. On cross examination by Mrs Mulonde he stated that the report was made by the caretaker. He could not tell if the house was occupied by the deceased persons alone or with another person. The room



- was a single one. The bodies were lying facing upwards (on their backs). He could not tell if there was somebody who entered the house prior to the incident. He was not the investigating officer. The injuries were on the side of the necks. He did not know the accused herein. There were neighbours there. He could not remember seeing the accused person at the premises.
23. Pw.7 No. 74802 Sgt. Allan Odalo stated that he was/is currently stationed at the Kisumu Criminal Investigations office. Previously he was stationed at DCI Mlolongo. On 27/04/2014 while at the General Investigations Office, he was called by his superior who minuted a case of murder to him to investigate. Already the matter had been booked at the station and scene visited. Several items were handed over to him as exhibits namely a metal axe (MFI-2) and a kitchen knife (MFI-3) which were suspected to be murder weapons.
 24. Pw7 then started the investigations by recording statements from witnesses and arranged for the post mortem to be conducted at Machakos Hospital. During these investigations he learnt that the deceased persons Sharleen Kanini and Kelvin Mwendwa and the accused herein had been living together as a family within Mlolongo. The accused herein was the father of the infant. He learnt that on the night of 9th April, 2014 the relatives of the deceased had taken supper together with the deceased and the accused herein. The relatives later left the family. He also established that the accused went into hiding after the incident. It was the caretaker (PW.4) who noticed the bodies after putting off fire at the house and alerted the Police.
 25. He got the telephone number of the accused and relayed to the Safaricom so as to get the call data. He established that the accused had communicated with certain persons, and traced one Kevin Wambua Mutua at Mukuru slums and recovered a mobile handset serial number 888501018202489 marked MFI-4. He established the same belonged to the accused herein. After interrogating Kevin Wambua Mutua who confirmed that the accused had exchanged the mobile handset and retrieved his sim card. The accused later surrendered himself at Machakos Police Station. By that time, he had already had Kevin Wambua Mutua in custody at Mlolongo Police Station. He later re-arrested the accused herein. He established that the accused person used to quarrel with his wife prior to the incident. He produced all the exhibits in Court.
 26. On cross – examination by Mr. Mulei holding brief for Mrs Mulundu, he stated that he visited the scene on 27/04/2014 two days after the incident. The bodies had already been removed from the scene and could not tell the position the bodies lay on the bed. He spoke with the Caretaker and recorded his statement. The room was a single room. He could not recall if the plot had a gate. There was no watchman since the Caretaker was in charge. The Caretaker claimed that he checked the premises around 5.00 a.m. He recorded statements of Nzuki and Loreen who confirmed that they left the home of the deceased and there were no quarrels. He did not record anywhere that there existed quarrels between the deceased and the Accused Person. The Accused claimed that he was a businessman and he did not enquire on his usual times of arrival and departure. The time of the incident is unknown. The clothings were not completely burnt. He could not tell the time accused left his house.
 27. The Caretaker did not see or confirm the time accused left the premises. The accused's son was arrested. He maintained that the accused surrendered himself at Machakos Police Station as per the investigations diary OB No. 43 of 26/5/ 2014. The OB is for Mlolongo Police Station. The OB Number at Machakos Police Station is No. 22/ 27/5/2014. No officer from Machakos Police Station has testified over the matter. The accused's son confirmed in his statement that the accused had called him. He did not charge accused's son as an accomplice. The accused's son was using the father's mobile phone handset. He requested Safaricom for the call data but did not avail the same in Court. He is not the one who recovered the knife and metallic axe. The said Officer who recovered the exhibits from the scene had since passed on and could not come and testify. He did not have a record of the recovery of



- the exhibits from the scene. The axe had some bloodstains. He did not collect the bloodstains on the weapons for DNA matching and profiling. The fire was placed under the bed to conceal the murder.
28. On re-examination he reiterated that the caretaker noted the fire from the house around 5.00 a.m. The first people to arrive noticed the fresh blood. The late Chief Inspector Harun Ndumbi handed to him the exhibits recovered from the scene. He visited the scene 2 days later.
 29. The Prosecution closed its case on 10th June, 2019 and parties through Counsel filed Written Submissions. The Trial Judge Hon D.K. Kemei delivered Ruling on case to answer delivered on 30th October, 2019.
 30. This Court took over the matter on 5/10/2021 and proceedings were typed and availed to Accused person and/or through his Advocate on record and the ODPP/Prosecution.

DEFENCE EVIDENCE

31. Dw.1 Jackson Mutua Mbula in his unsworn testimony stated that while at the Police station they recorded a statement and he was forced to sign it. The relationship with the deceased, Shareen Kanini Nzuki (deceased) was his 2nd wife and they had a child named Mwendwa(deceased). That on the 24/04/2014 he slept at the victim's house and in the morning, they had breakfast, the tea she made and she left to go to her mother to get some money for salon, to do her hair and he left for work.
32. The Accused checked his phone at 10 am and it was Sharlene's mother checking if he had sent money for hair dressing/salon. At 4pm, Sharlene called him and told him that she asked him to visit her as she had something to tell him. He came home around 7 p.m. and they had dinner together with the deceased and his sister in-law, Loraine Nzilani Nzuki. Her mother (PW1) came and asked if she took Ksh 1000/- and then she left. After her mother and sister left, the deceased told him she had nothing to tell him but wanted to be with him. He said it was OK and gave her Ksh 1,000/- for maintenance. The deceased later escorted him to go to Embakasi to his 1st wife.
33. On 25/04/2014 he was at Embakasi and he called her in the morning and found her phone was off and her sister and mother's phones were also off. He called the neighbor, one Mary and asked her if Sharleen was at home and she was informed him that Sharleen had been killed. The sister to Sharleen later sent him a message threatening him that what he did to Sharleen would also be done to him hence he opted to stay away. At that time he had two phones and his son Kevin Mutua used one of them. The Police tracked the phone and Kevin Mutua (his son) was arrested. He went to the police station and he was arrested and charged with the offence before this Court. He did not know who killed Sharleen. That they had stayed together for 4 years. They had not fought or quarreled.

ODPP'S STATE'S SUBMISSIONS

34. The state filed its submissions dated 4th April, 2022 based on the following issues:
 - (a) Was the accused involved in the murder of the deceased?
 - (b) Did the accused have malice aforethought?
 - (c) Was the accused identified appropriately?
 - (d) Was the cause of death as a result of the injuries?
35. It was submitted by the testimony of Pw.1 & Pw.2 and placed the accused person as the last person to be seen with the deceased and the son; that the accused fled the house after the fire incident clearly showed the presumption of guilt.



36. On the issue of malice Section 206 of the Penal Code states that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
37. It is evident that the accused person had malice aforethought because he inflicted injury to the deceased and her son before burning the house.
38. On the issue of accused's identification it was submitted that the accused was properly identified by PW.1 and PW.2 as the last person to be seen with the deceased and her son on that fateful day.
39. On the issue of cause of death it was submitted that Pw.5 confirmed that the deceased and her son had deep cuts and he formed the opinion that the deceased persons died as a result of shock caused by assault with a sharp object.
40. Reliance was made in the following cases;
- (1) Ronald Nyaga Kiura –vs- Republic [2018] eKLR wherein par. 22 stated as follows;-

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person.
 - (2) 2) Ramanlal Trambakla Bhatt –vs- republic E.A 332 at 334 and 335 the Court states as follows;

“It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable Tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
41. This Court placed the accused person on his defence, the accused person opted to give unsworn statement. The law relating to unsworn statements is well expressed by Emukule, J in the case of Mercy Kajuju & 4 Others –vs- Republic [2009] eKLR where he stated as follows:-
- “I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.....



Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused person elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross-examination whose purpose directed;-

- (1) To test the credibility of the witness,
- (2) To the facts to which he has deposed in chief including the cross examiners version thereof, and
- (3) The facts to which the witness has not deposed but to which the cross examiner thinks he is able to depose,
- (4) Failure to cross – examine a witness on some material part of his evidence, or at all, may be treated as acceptance of the truth of that part or the whole of his evidence.

42. Also, in *Amber May v The Republic* [1999] K.L.R. 38, the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as *May v The Republic* [1981] KLR. 129, the Court of Appeal held, inter alia;

“ 1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.

2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya).”

43. It was finally submitted that the evidence adduced by the accused cannot shake the prosecution cogent before this Court. The Accused person was the last person to be seen in the house with the deceased and her son. He is the prime suspect responsible for the death of his wife and child. In addition the prosecution availed testimonies and documentary evidence produced as exhibits hence it proved its case beyond reasonable doubt and the accused ought to be convicted contrary to Section 203 as read with Section 204 of the Penal Code.

DEFENSE SUBMISSIONS

44. The defense filed his defence dated 22nd March, 2022 and submitted that on an overview of the whole prosecution case, it leaves one with the conclusion that there is no case against the accused as there is no direct evidence linking him to the murder of the deceased persons as their case was based on circumstantial and uncorroborated evidence. According to Pw.1 and Pw.2 they testified that they were at accused person's house the day before the murder incident and there were no quarrels or disagreement between the accused and the deceased.

45. Reference was made in the cases of *Eric Odhiambo Okumu –vs- Republic* [2015] eKLR – Msa Cr. Appeal No. 84 of 2012, in the case of *Abanga alias Onyango –vs- Republic* Cr. Appeal No. 32 of 1990.



46. The defense further submitted that the cause of fire was never established. Again no witness placed the accused person at the scene of crime. In the case of Pius Arap Maina –vs- Republic [2013] eKLR (Cr. Appeal No. 247 of 2011), that

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”

47. It was finally submitted that he was elsewhere that night with his wife which evidence was controverted.

DETERMINATION

48. The Court considered the evidence on record, written submissions by Prosecution and Defense and the issue for determination is whether the Prosecution proved that the Accused person committed the offence of murder contrary to Section 203 as read with Section and 204 of the Penal Code.

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

MALICE AFORETHOUGHT

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

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

BURDEN & STANDARD OF PROOF

(Section 107-109-111 *Evidence Act*)

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

111. Burden on accused in certain cases

- (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.....

49. In Miller vs Minister for Pensions [1947] 2 All ER 372 (Kings Bench) referred to in Republic vs Jane Muthoni Mucheru & Isaack Nganga Wambui alias Kikuyu High Court Criminal Case No 45 of 2018



(Nakuru High Court) Formerly (Kiambu High Court Crim case 89 of 2016) Hon J. Ngugi J; the standard of proof in criminal cases was stated as follows;

.....the evidence must reach the same degree of cogency as is required in a criminal case before an Accused person is found guilty. The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be dismissed with the sentence; 'of course it is possible but not in the least probable'; the case is beyond reasonable doubt, but nothing short of that will suffice.

50. To prove the elements of the offence of murder, in *Republic vs Mohammed Dadi Kokane & 7 Others* [2014] eKLR, Hon LJ M. Odero stated;
- a) The fact of death of the deceased [actus reus]
 - b) The cause of death
 - c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused person and lastly;
 - d) Proof of unlawful act or omission was committed with malice aforethought. [mens rea]

CIRCUMSTANTIAL EVIDENCE

51. The evidence advanced by the Prosecution to prove the case consists of circumstantial evidence. Courts have considered the import and probative value of circumstantial evidence as follows;

52. The Court of Appeal in *Criminal Appeal No 2 of 2002 Joan Chebichii Sawe vs Republic Kwach Okubasu Lakha*JA observed;

‘As we have already pointed out, the evidence in this case was entirely circumstantial. 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 no other co-existing circumstances weakening the chain of circumstances relied on. 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 is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.’

53. In *Republic vs Kipkering arap Koske & Another* 16 EACA 135, the Court held;

‘In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.’

54. In *Abanga alias Onyango vs Republic Criminal Appeal No 32 of 1990(UR)* referred to in *Republic vs Joseph Kioko Muthoka* [2022] eKLR by Hon G.V.Odunga J; *Abanga* case supra it was held;

“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;



- a) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- b) those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused
- c) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and no one else.”

55. In *PON vs Republic* [2019] eKLR the Court of Appeal considered parameters of circumstantial evidence as follows; in *Musili Tulo vs Republic* Criminal Appeal No 30 of 2013;

[circumstantial evidence]...is as good as any evidence if it is properly evaluated and as is usually put, it can prove a case with the accuracy of mathematics as was stated in *Rvs Taylor Weaver & Donovan* (19280 21 Cr App R 20)but circumstantial evidence should be closely examined before basis of a conviction on it.

56. In *Ahamad Abolfahi Mohammed & Anor vs Republic* [2018] eKLR the Court of Appeal stated as follows;

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 that 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....

EVIDENCE ON RECORD BY DIFFERENT COURTS

57. In *Abdi Adan Mohammed vs Republic* Criminal Appeal No 1 of 2017, the Court of Appeal considered an appeal from Criminal Appeal 271of 2012 where the Trial Court applied Section 200 CPC to have the hearing start denovo changed its mind upon application by the prosecution to invoke Section 34 of the *Evidence Act* after it failed to procure the attendance of the witnesses who had previously testified.

58. The Court referred to the case of *Ndegwa vs Republic* (1985) KLR 535 where Madan, Kneller & Nyarangi JJA (as they then were) stated;

It could also be argued that the statutory and time-honored formula that the Trial Magistrate being the best person to do so; he should himself see, hear, assess and gauge demeanor and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the 2nd Magistrate did not himself see and hear all prosecution witnesses even though he said that he carefully ‘observed’ the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanor of all witnesses in the cases. A fatal vacuum in this case in our opinion.....for these reasons we have stated in our view the trial was unsatisfactory.

59. In *Joseph Kamau Gichuki vs R* Criminal appeal 523 of 2010 cited in *Nyabutu & Another*, the Court stressed that;

“By dint of Section 200(1) (b) of the CPC, a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances,



not only are likely, but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete trial..... See Ndegwa vs R (1985) supra. In this case the Trial Judge passed on after having fully recorded evidence of 7 witnesses....in fact [he] had summed up to the Assessors. The trial, moreover, was not a short one but a protracted one which had taken 5 years to conclude. The passage of time militated against the Trial being started de novo.....”

60. The principles in the above cited case-law applied to the instant case, the trial herein commenced in 2014 and the Prosecution closed its case on 10th June, 2019. The Trial Judge Hon D.K. Kemei delivered Ruling on case to answer on 30th October, 2019. The matter was heard over a span of almost 6 years. The Trial Judge due to explained logistical and personal challenges was unable to grant the request to come back and complete part-heard cases as per official letter to the Presiding Judge.
61. The evidence adduced by all Prosecution witnesses was heard by the Trial Judge Hon. D.K. Kemei J, culminating with the Ruling delivered on 30/10/2019 on a case to answer, which read in part on evaluation and finding on the evidence as follows;

“I have carefully evaluated the Prosecution’s evidence. I find that in the absence of any explanation to the contrary by the Defense, the Prosecution evidence does establish 3 ingredients of the offence of murder. It is not in dispute that there was death as a result of an assault by a sharp object. On the question of the accused person’s participation, this Court finds that , in the absence of any evidence to the contrary , the evidence of Pw1. Pw2 & Pw4 does point to the participation of the Accused person.”
62. With regard to the fact that the proceedings were partly conducted by the Trial Judge Hon. D.K Kemei and partly before this Court particularly only with regard to the Defense Hearing; the provisions of Section 200 (3) CPC were/are not applicable in that the provision provides;

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
63. In the instant case, this Court took over the matter after the Prosecution case was closed before the Trial Judge, parties’ through their respective Counsel were granted opportunity to file written submissions and thereafter, the Trial Judge after considering the evidence adduced, the law and submissions filed rendered the Ruling of 30/10/2019 and set down the matter for Defense Hearing under Section 306 (2) CPC.
64. The Ruling of 30/10/2019 is and remains a valid, regular and legal order of the Trial Court with/ of similar, concurrent, competent and equal jurisdiction to/with this Court and this Court cannot reopen the Prosecution case in light of Section 200(3) CPC by recall of witnesses and /or hearing of the matter de novo because it would amount to rehearing a matter already heard and possibly setting aside Ruling delivered by the Trial Court. It is the Trial Court that heard the witnesses and thereafter evaluated the evidence. To allow reopening and rehearing of the Prosecution case and possibly setting aside the Ruling would amount to sitting on appeal of this Court’s decision which jurisdiction, this Court lacks.
65. Therefore, this Court applied Section 200 (1)CPC that provides;



(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a).....

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

Section 201 CPC also provides;

(1)

(2) The provisions of Section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.

66. This Court guided by the law as set out above, availed typed proceedings to the ODPP, accused person and/or Defense Counsel and thereafter conducted Defense proceedings. After close of Defense hearing written submissions were filed scheduled the matter for judgment based on the evidence on record.

ANALYSIS OF EVIDENCE ON RECORD

- a. The fact of death of the deceased [actus reus]
- b. The cause of death
- c. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused person and lastly;
- d. Proof of unlawful act or omission was committed with malice aforethought. [mens rea]

FACT OF DEATH

67. Pw5 Dr John Mutunga testified on 27/11/2018 that he conducted postmortem on both deceased persons on 30/4/2014 upon identification by relatives Mulli Munyasia and Joseph Kikuve. The Deceased persons' had deep cuts at the nape (back) of the neck and fractured and severed spinal cord and neck vessels. The cause of deaths of deceased persons was due to hypovolemic shock and spinal injuries from assaults by sharp object(s).

68. Pw4 Stephen Muendo; Caretaker of Rental houses where the Accused person, and deceased wife and child resided confirmed that at 5.30 am on 25/4/2014, he woke up and found one of the houses emitting smoke and rushed to the scene and found it was the house that Sharleen, Mwendwa and the Accused resided. He called them out and there was no response. He called the Accused person and there was no response. He opened the door and found clothes near the bed burning. He rushed and called out neighbours and put out the fire by fetching and pouring water. He saw the body of the child whose neck appeared to have been slit and the child was dead. His mother's body lay on the bed covered with bedsheets. So Pw4 also witnessed finding dead bodies of the 2 deceased persons in the house after he put off the fire. Pw7 the Scene Visiting Officer found the bodies of deceased's persons with deep cuts on their necks and blood oozed out.

CAUSE OF DEATH

Proof that the deceased(s) met his/her death as a result of an unlawful act or omission on the part of the accused person



69. Based on the prosecution witnesses' evidence, there is no direct evidence that the accused person caused the death of the deceased persons. There being no direct evidence, this court can only base its findings on circumstantial evidence. Circumstantial evidence was defined by court in *Mohamed & 3 others vs. Republic* [2005] 1KLR 722 supra & in *Republic vs. Ahmad Abolfathi Mohammed & another* [2019] eKLR supra.
70. However, for a conviction to be based on circumstantial evidence, a certain threshold has to be met as set out in the case of *Abanga alias Onyango vs. Rep CR. A No.32 of 1990(UR)* supra the threshold to be met so as to rely on circumstantial evidence is that inculpatory facts must be incompatible with the innocence and incapable of explanation upon any other hypothesis than that of guilt of /by the Accused person. Secondly, the chain of facts and events based on circumstantial evidence that the accused is guilty of the offence must not be broken at any stage.
71. Applying the above outlined principles to the instant case on establishing the cause of deaths of deceased persons was by unlawful act of omission by the Accused person based on circumstantial evidence; as to whether the accused person, was involved in the murder of the deceased, the Prosecution placed reliance on the evidence of Pw1 and Pw2. I keenly read the evidence of Pw1 and Pw2 as per the Court record. The evidence by Pw1 & Pw2 is that on the fateful night 24/4/2014, they visited the deceased daughter and sister to Pw1 & Pw2 respectively; Pw2 had dinner with the Sharlene (Deceased) and the Accused person and then she left at 9 pm and Sharlene, her husband, the Accused person and child were left in the house and she went to her house a few metres away.
72. The next morning, they were informed of the death of Sharlene and her son, the Accused person was nowhere to be found. PW 4, the caretaker was the 1st person to the scene and he called neighbours and together put out the fire. They found Sharlene and her son dead and had been cut on the necks.
73. In cross examination by Defense Counsel Ms Mwangi Pw2 reiterated that she left her sister, the deceased person with her husband the Accused person when she left at 9 pm and she did not witness the incident or pinpoint the culprit.
74. The evidence of Pw1 & Pw2, who visited Sharlene on the previous night and left at or about 9pm left Sharleen, the child Mwendwa and her husband the Accused person. The Court's view is that there is sufficient evidence from Pw1 t& Pw2 that the last person to be with the deceased persons was the accused person.
75. In the case of *R vs. ECK Hon J. Lessit, LJ.* stated as follows on the doctrine of the last seen with deceased alive;
- “Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria: Court case of *Moses Jua vs. The state* (2007) (PELR – CA/11 42/2006.
- The court while considering the last seen doctrine held: -
- “Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”
76. The Accused person in his Defense based on unsworn statement told this Court, that on 24/4/2014 he was with Sharlene and slept at their home but in the evening, Sharleen escorted the Accused person



- to go to Embakasi to his 1st wife. This evidence that he Accused person was not at the scene or with the deceased persons on 24/4/2014 amounts to an alibi defense, was said for the 1st time during the defense.
77. In the case of Mercy Kajuju & 4 Others –vs- Republic [2009] eKLR supra, the Court observed that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. In the case of Amber May vs the Republic [1999] K.L.R. 38, supra the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code.
78. . The evidence of Pw1 & Pw2 identified and placed the Accused Person as the last person to be seen and was with the deceased and their son on the night of 24/4/2014. The Accused person’s alibi defense does not cast any doubt to the Prosecution case because, by giving unsworn statement of defense as entitled under the law to do, such evidence in the absence of cross examination to test its veracity and the Court to test credibility of the Accused person cannot be of probative value to contest the Prosecution evidence whose witnesses were subjected to cross examination.
79. The evidence on record discloses that the deceased person and the Accused person were man and wife and the deceased child was their child. The evidence on record also discloses that the deceased and Accused person lived some metres away from Pw1& Pw2. The deceased wife, Accused person and their child (deceased) lived together nearby his mother and sister in law (Pw1& Pw2) respectively. Therefore, Pw1& Pw2, The accused person Deceased wife and deceased child were not strangers and knew each other well. Secondly, the Accused person deceased wife and deceased child knew each other intimately and lived together at the home where the deceased persons was found in. It cannot be a case of mistaken identity at all by Pw1 & Pw2 that the Accused person was the last person seen and was with the Deceased wife and child.
80. The deceased wife and child to /of the Accused person would not by any stretch of imagination stab themselves and self- inflict excruciating pain and suffering and then set themselves on fire that was set out by Pw4 and other neighbours called to the scene. Pw1 & Pw2 testimonies/ evidence on record is that they left the Accused person with the deceased wife and deceased child in the house at 9 pm that night on 24/4/2014. The Accused person was left with his family in their house on the night of 24/4/2014. The next early morning as per the evidence from Pw4 Caretaker, the Accused person was not in the house and he found the deceased persons on the bed injured with bloodstains and an ensuing fire which he called neighbours to help and put it off.
81. Pw7 testified that during investigations of the case, the Accused person fled, he enlisted Safaricom to provide the Accused person’s call data and traced his son, Kevin Wambua Mutua whom he interrogated and arrested him until the Accused person surfaced and he was arrested. The accused person’s explanation that he left for Embakasi that same evening of 24/4/2014 is not borne out by any legal evidence on record.
82. So in the above outlined circumstances, who would have the special knowledge of the fact that the deceased wife and deceased child were in their house at night and at the same time had the opportunity and access to their home and ample time to commit the unlawful act? There was no evidence adduced of a breaking in, any damage or any stolen items and even if it was a burglary, maybe the deceased wife would be harmed in the event of a struggle to prevent the burglary but it highly unlikely that an innocent child would be killed to aid a burglary. It there was any struggle the neighbours would have



heard and responded. Therefore, it is only the last person seen and was with the deceased wife and deceased child, the Accused person.

Proof of unlawful act or omission was committed with malice aforethought. [mens rea]

83. In Joseph Kimani Njau vs. Republic [2014] eKLR the Court of Appeal stated that:-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard.....

We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

84. Pw 7 Sgt Allan Odalo testified that the Scene Visiting Officer the late Chief Inspector Harun Ndumbi handed over to him murder weapons recovered namely; 1 kitchen knife, 1 metallic axe and they were not taken for examination and could not conclusively confirm that they were the weapons used to commit the murders. The Call Data obtained from Safaricom was not produced as evidence in Court.

85. This Court finds that there is no direct evidence from the prosecution to conclude that the accused had intention and/or the malice aforethought to kill the deceased. The weapons were not examined. Pw1 & Pw2 placed the Accused person as the last seen person with deceased wife and deceased child on the night of 24/4/2014. The witnesses testified that they did not hear or know of any quarrel between the Accused person and deceased wife.

86. However, Pw7, the Investigation Officer testified and on the evidence on record in examination in chief that he established that the Accused person used to quarrel with his wife prior to the incident. Pw7 stated in examination in chief as per the Court record, that the Accused person went into hiding after the incident. On obtaining the Accused person's Call data he traced his son and recovered a mobile handset that belonged to the Accused person and he had changed the sim card with his son. Apart from the evidence disclosed from investigations by Pw7, the witnesses did not know the motive of the perpetrator.

87. In the absence of proof of malice aforethought to the required standard as required by law, the murder charges against the accused person cannot be legally sustained. The Court finds that evidence on record proves death of the deceased wife and deceased child and their deaths were caused by unlawful acts by the Accused person based on circumstantial evidence on record. The evidence on record does not amount to proof of unlawful act(s) or omission(s) was/were committed with malice aforethought by the Accused person. The Accused person is therefore found guilty of the offence of manslaughter on both Counts.

DISPOSITION

1. The accused person Jackson Mutua Mbula is found guilty of manslaughter of Sharleen Kanini Nzuki under Section 179(1) and (2) of the CPC. The Court has reduced the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code to the charge of manslaughter contrary to Section 202 as read with section 205 of the Penal Code.
2. The accused person Jackson Mutua Mbula is found guilty of manslaughter of Kelvin Mwendwa Mutua under Section 179(1) and (2) of the CPC. The Court has reduced the charge of murder contrary



to Section 203 as read with Section 204 of the Penal Code to the charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

3. The Accused person is found guilty under reduced charge of manslaughter on both Counts under Section 202 as read with Section 205 of the Penal Code.
4. The Court will await Pre – Sentence Report and/or Victim Impact Assessment Report to be availed before Pre-Sentence proceedings are conducted.

DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 12TH JULY 2022.
(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

JACKSON MUTUA MBULA - ACCUSED PRESENT IN COURT

NO APPEARANCE - FOR ACCUSED PERSON

MR. MWONGERA - FOR ODPP/PROSECUTION

GEOFFREY MUTONGA COURT ASSISTANT

COURT: FURTHER MENTION ON 28/07/2022.

M.W. MUIGAI

Judge

