



**Republic v Marango & another (Criminal Case 22 of 2018)
[2022] KEHC 15076 (KLR) (27 October 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE 22 OF 2018
LW GITARI, J
OCTOBER 27, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

BENSON KIMATHI MARANGO 1ST ACCUSED

FRANCIS OTUNDO 2ND ACCUSED

JUDGMENT

1. Benson Kimathi Marango and Francis Otundo the 1st and 2nd accused respectively are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence as per the information provided are that on between September 6, 2018 and September 16, 2018 at unknown location within the Republic of Kenya jointly with others not before court murdered MAK (herein after to be referred to as the deceased child for ease of reference).
2. Both the accused persons denied committing the offence. The prosecution has presented a total of twenty-two witnesses in support of their case while the defence gave sworn statement of defence and presented no witnesses.
The prosecution's case against the accused persons herein, in summary is based mainly on indirect or circumstantial evidence but with a touch of direct evidence adduced through forensic evidence.
3. GC (PW1), a house help of the victim's mother, CK told this court the deceased child was aged around 9 years old and a day scholar at [particulars withheld] school in Meru which in her estimation was around 15Km, from where they lived in Meru Town. She testified that the deceased child used to be dropped at a location near Total Petrol Station within Meru Town by the mother in the morning and that a school bus would pick the girl together with other children who also lived near the locality and would be dropped in the evening by the same school bus at the same place.



4. The witness testified that when the mother was unavailable she would walk with the child to the same pick up and drop off point near Total Petrol Station in Meru Town.
5. She added that on the September 6, 2018, (the material date the child disappeared), she woke up at 5am as usual prepared the deceased child before the mother dropped her at Total Petrol Station. She testified that the mother went back home after dropping her that day because she was not on duty and that they both spent the day at home. She added that at around 4pm, they expected the deceased child back home as usual but the child did not turn up. She testified that at 4:30pm after wondering about why the child had not come, she went out to the road to check out if perhaps she could be there with her friends who were schooling with her but did not find her. She stated that she then went to the nearby houses of the child's friends to inquire and was told that as the children were walking home from Total Petrol Station where they were dropped as usual, a person the children referred to as "uncle" reportedly called the deceased child aside and that the deceased child left with "uncle" a person they described as tall and had his face partly covered with a cap.
6. She testified that she, together with the victim's mother (PW10) and A (PW9) embarked on a search which went on until midnight but all was in vain. The deceased child was nowhere to be seen. The witness broke down as she narrated how the search went on for a week and that eventually the deceased child's was found dead at Gitoro Forest within Meru County. She testified that she proceeded to the Meru Hospital mortuary the following day to view the body but could not gather enough strength to clearly look at the body and recall seeing just her body still in school uniform.
7. The witness further testified that she came to know the 1st accused herein in Meru and knew him by his pet name Kim. She added that she knew him as a boyfriend to her boss, CK, the victim's mother. She further testified that the said accused person used to visit her boss at their home adding that he could visit them once a month and whenever he visited he could stay at their home for about 3 hours before leaving. She however added that the 1st accused could also stay for months without visiting and testified that she last saw him in the month of August 2018. She testified that the deceased child was quite familiar with the 1st accused and that on September 4, 2018, the deceased child reported to her that Kim (1st accused) had dropped her home after picking her from Total Petrol Station and dropped her at the gate leading to their home.
8. She recalled that the deceased child used to refer to the 1st accused as "uncle" and was fond of him and that the 1st accused always treated her well and could not recall any incident when the 1st accused mistreated her in any way.
9. DW (PW2), a minor aged 12 years after *voire dire* examination testified on oath and informed this court that she was a friend to the deceased child and the schooled together at [particulars withheld], Meru at the material time. She confirmed that she lived in the same neighborhood with the deceased child and that the two used to be picked together by their school's bus near Total Petrol Station.
10. She recalled that on the material date in the morning she used a different bus to school from the one the deceased child used but in the evening she stated that she travelled back in the same bus and the two were dropped at Total Petrol Station at around 3:40 pm as usual. She recalled that apart from the deceased child, she was also dropped with M, M, K, A, and S. She testified that after being dropped she remained behind with her friend M because she was waiting for her younger brother who schooled at [particulars withheld] Academy to be dropped. She added that the other children including M (deceased child) walked to their homes adding that after about 5 minutes, her brother was dropped. She stated that they began walking home together following the children who had gone ahead of her. She added that when they reached a black gate along the road, she saw the deceased child talking to a man who was a stranger but thought that he was probably a relative to the deceased child. The witness however stated that she



recalled seeing the same man on September 4, 2018 at around 4pm talking to the deceased child along the same route after being dropped at Total Petrol Station by the school bus.

11. She testified that on that date (September 4, 2018), the same man offered a lift to the deceased child and dropped her at her home. The girl recalled that the man called the deceased child by name while the two were walking home on September 4, 2018 and he picked M, she got into his car alone and left them behind. She added that when they reached near the home of the deceased child, they saw the car parked at the gate and that as she passed by she noticed that the deceased child was inside the case with the man. The witness recalled that the man's skin tone was brown but she could not recall the kind of clothes he wore. With regards to the day the deceased disappeared, the witness stated that upon alighting from the school bus, she saw a silver car parked near Total petrol station. She testified that as she walked home from the dropping point, she saw the deceased child and a man standing at a distance from M's home. That when they had walked past them, she saw the deceased girl and the man walking back alongside each other towards Total Petrol Station. She later learnt that the deceased girl was missing.
12. When pressed under cross-examination the girl testified that she passed the deceased girl and the man but she did not talk to them because she did not want to intrude. She was emphatic that the man she saw calling M to his car on September 4, 2018 was the same man she saw standing with her near a black gate that was situated along the road from Total Petrol Station to her home on the date that the deceased disappeared. When the witness was asked why she did not pick out the man from an identification parade conducted by the police, she stated that she lied to the police that she could not recognize him though she reportedly did. She justified her action stating that she was apprehensive that man could have harmed her and feared picking him out in the identification parade.
13. MK (PW3) a child aged 10 years old testified after voire dire examination and told this court that she lived at Milimani Area of Meru Town the locality where the victim's mother also lived. She testified that she was in same class 4 with deceased child but she was in class 4 West while M was in class 4East.
14. The girl recalled that on the material day (September 6, 2018) at around 3pm she and other pupils from the said locality were dropped at Total Petrol Station. She testified that together with deceased child (M), M, D, M, S and R they walked home on foot from Total Petrol Station and that when they reached a black gate along the road a brown man appeared and called M by name and the deceased girl obliged. She recalled that the man was in jeans trouser and black jumper. She recalled that the man called M three times and beckoned her to where he was standing and the deceased girl obliged saying that the man was her uncle. The girl stated that the man was a stranger and tried discouraging her friend from going to talk to him but M insisted on going.
15. She further testified that though she identified the man during an identification parade, she did not point out the man as she feared him because she had gotten sad news that her friend (M) had been killed.
16. AK (PW4), another minor aged 15 years old testified and corroborated the evidence of PW2 and PW3. She testified that she lived at Romano Centre- a Catholic Institution next to where the deceased child and her mother lived. She testified that she used to school in Meru Junior and that she used to be picked and dropped at the same location as the deceased child who schooled at [particulars withheld]. That on the material day, they were dropped by their school bus after classes at around 4pm near Total Petrol Station where the deceased child and other children from xxxxx were also dropped but they went ahead of her as she waited for other children to be dropped from the school bus. She testified that M and her friends walked ahead of them but she walked with the other children behind the deceased who was about 100 meters ahead of them.



17. She told this court that as she was about to branch off to her destination near a black gate when a man in a jumper and a cap which she described as worn close to the eyes called the deceased child. She stated that the man was slightly tall and that he called M three times. That when the deceased girl saw him from across the road, she went and hugged him, talked briefly before the two walked back towards Total Petrol Station.
18. AM (PW5) a minor aged 12 years old gave unsworn testimony because she was unable to appreciate the significance of giving evidence on oath she testified that she schooled in xxxxx together with PW3. Her other evidence majorly corroborated the evidence tendered by PW2 and PW3. She stated that she lived at Romano Centre and was dropped from school at Total Petrol Station on the material date. She repeated the narrative given by PW3 on how the deceased child was called by a man that was standing near a black gate. The girl recalled that the man called M loudly and that M went across the road and hugged him before the two walked back together towards Total Petrol Station. The girl further testified that though the man had covered his head with a hood she could see the mouth and nose adding that she thought the man was a relative to the deceased girl and that probably the two were going back to do some shopping at a nearby kiosk. She testified that she later learnt M had been killed.
19. PGR (PW6) testified that he was a driver employed by [particulars withheld]. He stated that he had driven the school bus for 3 years and gave the details of where he picked the school children in the morning and where he dropped them in the evening. He confirmed that he used to drop and pick some of them near Total Petrol Station. That on September 6, 2018, he dropped the children near Total Petrol Station and recalled doing 2 trips that day but could not tell if the deceased child was in the 1st group he dropped at 3:30 pm or the 2nd group of students he dropped at around 5pm because he did not know her.
20. FNM (PW7) also testified that he was employed by [particulars withheld] as school bus conductor. He stated that he had worked for 4 years in the school. He testified that he assisted the school bus driver (PW6) and recalled that on September 6, 2018 at Milimani Total Petrol Station they dropped school children and g them was the deceased child. He recalled that the children left as usual but at around 5:30 pm they got the news that M was missing.
21. Wilson Mwiti Kirigia (PW8). The Area Assistant Chief testified that on September 16, 2018 at around 6:15pm he received a call from the area manager one Douglas Mugambi who notified him about a missing child. He testified that he mobilized a group of people to search for her having been informed that the child was in her school uniform when she disappeared.
22. He further testified that he later learnt from the area manager (Douglas Mugambi) that there was a youth who had spotted a child's body in Gitoro Forest and that the body was of a female in school uniform of [particulars withheld].
23. He testified that the issue of disappearance of the child was a sensitive issue which had been broadcasted on radio, social media and everywhere in Meru Town. He testified that he alerted the police as he headed to Kinoru AP Compound and that after around 20 minutes, the police arrived and they proceeded to the forest being led by area manager and the youth who had seen the body in the forest. He testified that they reached the scene where the body was around 6:25pm. He stated that the body lay near a huge oak tree known in Kimeru as "King Muuuru". He added that the body was around 20 metres from a murram road in the forest and it had started decomposing. He added that the body was in school uniform of [particulars withheld] primary, it had with one shoe on one foot and that the socks were still on both legs. He testified that he left the place well-guarded by Kenya Wildlife Service Officers and that he also saw the police taking pictures.



24. AK (PW9) testified that he was a brother to the victim's mother and that at the material time he was living with deceased's child and her mother at Milimani Meru. He stated that he had lived with them from August 2018 as he sought for employment.
25. The witness stated that he came to know the 1st accused as Kim and that he first met him in Eldoret in August of 2018 after he was introduced to him by his sister, the mother to the deceased child. He recalled that sometime in August 2018, on a date he could not recall he travelled together with 1st accused and the victim's mother in 1st accused's car registration No Kxx xxxK. He stated that the 1st accused drove the car all the way from Eldoret to Meru where they all took dinner before the 1st accused left them and went his ways. He testified that the following day after that trip the 1st accused told him that his car had developed some mechanical problems and he accompanied him together with the deceased child to a garage where the car was fixed and that after lunch he took them back home and he left.
26. The witness also testified that when school opened on September 3, 2018, his niece (M) went to school and returned home chewing some ball gum. He stated that when he asked her who had bought the ball gum and she told him that it was Kim (1st accused herein). The witness broke down as he narrated that particular event adding that he was with the house help at home then as the mother of the victim was away at her place of work.
27. He also testified that on September 4, 2018, M arrived back home in the evening from school and appeared to be in a hurry and when he inquired from her what the haste was all about, she told him that she had been dropped at the gate by Kim (1st accused herein) and that Kim had requested her to get him a glass of water. He stated that he got surprised as to why the 1st accused had not come into the house and so he followed M outside where he met and greeted the 1st accused who was inside his car. According to the witness, the 1st accused appeared freaky and was sweating. He said that he inquired from him what the problem was and he (1st accused) replied that he was unwell and was from hospital. He testified that after taking water he left and M told him that Kim had picked her at Total Petrol Station when she got off the school bus. He added that from Total Petrol Station to where his sister lived with her two children was about a five minutes' walk.
28. The witness testified that the 1st accused related well with his sister, the mother of the victim and that the two appeared close.
29. With regards to the day the deceased disappeared, the witness told this court that he was returning from a job interview at Meru Town at around 4:10 pm when he realized that school children had been dropped from school at the usual point at Milimani Total Petrol Station. That he proceeded home and when he reached, he found that M had not arrived. The witness stated that he decided to go back to the drop off point to look for her and waited for the 2nd school bus to drop the other group of children thinking that perhaps M had remained behind. He stated that when the children alighted, the deceased child was not among them and so he went back home to inform the mother, his sister. He added that he went searching for her from the nearby houses of her friends who schooled with her as well but he did not find her. That he however got reports from the children that the deceased girl had been called aside by "uncle" as they walked home after being dropped their school bus. He testified that they continued with the search until September 13, 2018 when he went back home to get more assistance from his brothers because he felt the situation was getting critical. He stated that he later received the bad news that the deceased girl had been found dead near a forest.
30. CK (PW 10), a judicial officer then working as a Senior Magistrate at xxxx Law Courts within xxxx, testified amidst a lot of emotional distress telling this court that the deceased child was her daughter



who was aged 9 years when she was killed. She testified that she met the 1st accused in Maua in 2015 when she was serving as a Magistrate in Maua. She stated her relationship with was initially platonic 1st accused. She gave an incident of one time when M was sick and hospitalized during which the 1st accused visited her severally and the girl (M) developed a liking for him. That the two grew quite close and he began visiting her at her residence.

31. She testified that her relationship with the 1st accused transitioned and the two became engaged romantically until the end of year 2015 but the relationship ended after a disagreement she could not elaborate arose. She stated that they were close friends for about 4 months and that he even proposed to marry her but she declined. She added that after the two of them broke up they went their separate ways and did not communicate for about a year until the 1st accused called her and asked for some financial assistance which she obliged.
32. She further testified that sometime in 2017, he asked her for her personal vehicle to run some errands and that she gave it to him. She stated that the 1st accused, that time visited her in Meru as she had been transferred from xxxx Law Court to xxx Law Courts in Meru. She further testified that the 1st accused went to pick the car from her house where he interacted with her daughter (M) who she repeatedly stated really liked the 1st accused. She testified that the 1st accused went and requested for the car on two other occasions and that on the 3rd time he called and requested her to pick him up at around 10:30 pm at Total Petrol Station but she declined something she said did not go down well with him because he reportedly remarked that; “umeringa kwa sababu sina yangu...” implying that she had looked down on him. She added that the two not talk again after that incident until July 2018 when the two met again after a church service at St Joseph Catholic Church.
33. She testified that she had attended a church service at the church when she bumped into the 1st accused as she and her daughter (M) were leaving after the service. She stated that her daughter spotted the 1st accused and ran over to him to hug him. She testified that the 1st accused at the time had a car and that the deceased girl insisted she wanted a ride in his car. She testified that she allowed her daughter to be given a lift by the 1st accused as she closely followed him from behind adding that he drove and dropped the girl at a junction near Total Petrol Station. She stated that she picked her daughter and proceeded home with her.
34. She testified that after a week or so, the 1st accused went to her home this time taking some Ndengu to her which he reportedly picked from Tharaka where he had gone. She stated that she welcomed him into her home for a cup of tea and that her daughter was at home at the time. She recalled that after that their relationship became good and the two kept good communication through calls.
35. She further testified that at around the same period one of her friends lost her father in Kapsabet and transport became a challenge because her own car was faulty and that she tried in vain to get a taxi. She stated that she called Kimathi (the 1st accused) and requested for his car which he accepted and even offered to drive her all the way from Meru to Kapsabet. The two made the trip on August 10, 2018 and attended the burial on August 11, 2018. She also elaborated that the two did not did not spend the night together when they reached Kapsabet, instead she stated that she paid for food and accommodation for the 1st accused at a hotel in Eldoret as they had earlier agreed and she proceeded to her brother’s place where she spent the night.
36. The witness stated that after the burial, the two proceeded towards Turbo where her mother lived. She testified that upon reaching Turbo, the 1st accused gave her his car to drive to her mother’s place to greet her as he went back to Eldoret town using a Matatu. She stated that she spent the rest of the day and night with her mother at home and the following day she drove back to Eldoret Town with her



- brother A (PW9) where she picked the 1st accused and the 3 of them drove back to Meru Town and arrived at around 5pm.
37. She testified that on August 13, 2018, she left for work and while at her place of work, the 1st accused reportedly called her informing her that he had been to her house at Milimani Meru where he met a man. She testified that the 1st accused wanted to know who that man was. The witness testified that her son was then in class 8 and a candidate and so she had instructed a teacher by the name Joshua to offer him and M extra tuition.
38. She clarified under cross examination by Mutuma advocate for 1st accused that the 1st accused was courting her back into a relationship and that while it was ordinary and normal for a man to court or woo a woman he fancies, according to her the 1st accused was a man who did not take 'No' for an answer. She testified that when the 1st accused called her at her place of work, on August 13, 2018 asking her to explain who the man he met in my house was, she felt slighted and told him she was under no obligation to explain to him who the visitors in her house were or what they were doing. She added that the man who was in the house was Teacher Joshua who was a strict man even to her and whenever he went into her house for tuition services to her children, she used to let him finish his sessions before engaging him or even her children.
39. She testified that when she told the 1st accused that she could not offer an explanation about the man he had met in the house, he asked for a meeting stating that there was something that needed discussing in order to iron out issues in their relationship. She stated that the accused insisted on meeting in the course of that week but she told him that she could only see him on August 19, 2018. She added that on August 19, 2018 she was unable to meet him much to his chagrin. She stated that the 1st accused got agitated when she failed to see him on August 19, 2018 and that he remarked the following in anger "nyinyi wanawake ni mashetani sana!". She stated that the 1st accused hurled abuses at her stating... "sitaki kusikia tena mambo ya wanawake."
40. She further testified that she tried to calm the 1st accused down asking why he was getting upset just because she could not see him but he never spoke to her again until after a week when she inquired about her driving license which she stated she had inadvertently left in his car during their trip to Eldoret. She stated that the 1st accused told her that he had not seen the driving license but she got suspicious of him because she was sure she had left the driving license in his car. She stated that the two did not speak again until after her daughter (M) got lost.
41. The witness then gave an emotional narrative of the events of September 6, 2018 when her daughter herein disappeared. She told this court that she used to drop her daughter at Total Petrol Station in the morning from where the girl would be picked by her school's bus. She stated that on that material date she dropped her daughter as usual and the bus came and picked her at 7am and she returned home she she spent the rest of the day as she off duty. She stated that her brother A (PW9) was attending an interview at Meru Town and at around 4 pm, he came back and inquired whether the deceased girl had arrived. She said that she sent him to go and check for her at the dropping point and her testimony after that mirrored what the brother A, (PW9) told this court regarding the chain of events of that fateful evening.
42. The witness told this court of the black gate which was the entrance to her home. She stated that the gate was about 300 meters from Total Petrol Station and around 500 meters from her house. She testified that all the inquiries about her daughter from the neighborhood were in vain and that fellow school kids schooling with the deceased girl informed her that her daughter had been called aside by "her uncle" when they were going home but added that at the time, she could not figure out who the "uncle" was.



43. She recalled that it was her house girl who prompted her asking her if she had called Kimathi, the 1st accused. She testified she had been unaware then that her deceased daughter had been dropped home by the 1st accused on 3rd and September 4, 2018 recalling that schools had opened on August 29, 2018. She testified that when she called the 1st accused he told her he had not seen the girl and that he was away.
44. She testified that she later reported the matter to the police following their failed search efforts neighborhood.
45. She recalled that at around 6:30pm on that same day, she tried calling the 1st accused again but he did not pick her calls. She added that at around midnight, the first accused called her asking her what she wanted and that she told him that her daughter was missing to which he replied that he was far and that he had not seen her but did not state where he was.
46. She testified that on September 7, 2018, she received an SMS from a strange line, No 6xxxxxx4 which only read “hi”. She stated that she did not respond and that the following day she received another text from the same and this time asking her if she was searching for M. She stated that the person using that line then instructed her to log onto the WhatsApp platform from where he asked for a ransom of Kshs 2 million in exchange of M’s whereabouts.
47. She testified that the same again with the message that the person was willing to accept Kshs 500,000 instead. She stated that the person kept bothering her asking her if she had raised the money. She testified she stayed in communication with him for 3 days during which she asked him to give her time to raise the funds and that she also asked to see her daughter. The witness stated that she alerted the police who began tracking the caller and that on September 10, 2018 she sent him Kshs 5,200 via M-pesa but the she sent the money to was not registered.
48. She testified that the police later tracked him and arrested him and that after he had been arrested another person called her asking her if her daughter had been taken to her. She testified that they continued searching and on September 16, 2018 the Presiding Judge Meru and other judicial officers visited her in her house at around 8pm and broke the sad news to her that her daughter’s body had been found at a nearby forest.
49. The witness recalled that her relationship with the 1st accused between August 19, 2018 to September 6, 2018 was bad. She added that although she called him informing him that M had gone missing, he was unbothered and not concerned which was an issue to her because she knew that her daughter loved him.
50. The witness was recalled at a later stage to give evidence on some unsavory exchanges she had with the 1st accused via phone due to some photographs sent by the witness to the 1st accused. The photographs were retrieved from the mobile of the 1st accused by the officer investigating the case. The witness testified and identified photographs (P Ex 8 (a) (i) to (viii) and stated that the photographs had been taken during their aforementioned trip to Eldoret. She explained that she took the photos with a group of her former school mates and that they referred themselves as “Samara girls”.
51. She testified that she had received the photographs after the sometime after burial and that since the 1st accused was also in the photographs, she decided to forward them to him on August 26, 2018 at



around 9pm. She testified that after receiving the photos the 1st accused appeared slighted and sent some an unsavory messages which went as follows:-

“The photos are nice but I am like I am having a thousand of questions and they are reminding me of such time and again they are hurting why did you decide to send them to me?”

C (PW10): “I am sorry Kim they were forwarded to me just today. I am deeply sorry if they hurt you.”

1st accused: “I believe that they have no meaning in my life and there is no need of keeping them. I have gone through enough betrayal. I do not see the need of you having them.”

C (PW 10): “Betrayal, By who? Kim did I just become enemy because I told you I could not see you because I had visitors? By the way I do not feel guilty at all because I did not do any wrong to you. My conscience is clear. I will never feel bad but I did not wrong you.”

52. The witness stated that, that was the end of their conversation between her and the 1st accused and that there was no further communication again, until her child (M disappeared).
53. Dr Scholastica Nduta Kimani (PW11) testified that he was a medical doctor with a Bachelor of Medical & Surgery and that she worked at Meru County Hospital where she had been working for nine years. She further stated that she was a pathologist have done post graduate studies in that field from University of Nairobi. She stated that she performed a post mortem examination on the body of the deceased child on September 20, 2018. The post mortem was conducted in the presence of 4 doctors as follows;
- i. Dr Njau Mungai from government chief pathologist.
 - ii. Dr A.K Gachii representing the deceased family
 - iii. Dr Scholastica Nduta from Meru Referral Hospital
 - iv. Henry M.M a clinical officer representing the suspects.
54. She testified that after the postmortem examination there was a concurrence of opinion of what caused the death of the deceased child. She testified that the body presented to them belonged to MA (the deceased herein) and that body was dressed in school uniform consisting of a blue dress with white stripes, white socks, black stockings, white blouse and red pants. She added that the body had red soil and body secretions and that it had signs of advanced decomposition with tissues decomposing. She also noted marks on body which she opined were animal bites. She opined that due to mauling of the body by wild animals in the forest the findings were a bit complicated. That notwithstanding, she made the following findings, that eternally the body had multiple predation artifacts (animal biting) generalized more in the upper and lower limb. She further noted that there were laceration injuries on the face and neck, mutilation of sub dipolar (lower jaw bone), upper neck tissue with loss of floor of the mouth and tongue. The face was mutilated at supra oral (above mouth) and nasal orbital region and frontal facial skull exposing nasal bones and orbit (bone around the eyes).
55. The doctor further noted mutilation on oxipatial (back of the head towards left lastoid area (area behind the ear). The doctor opined that the exposed scalp around the area were not injuries caused by artifacts (wild animals).

She also noted injuries on parietal (side of the head) with bruise lacerations measuring 4 x 2 cm and another measuring 6 x 4 cm. The doctor explained that all these bruises noted were associated with



scalp hematoma (a large blood clot beneath skin covering the head) which suggested that a blunt face injury was used and she explained that that was why there were blood vessels forming a clot.

Internally the doctor noted that there was linear spiral femur fracture and that other organs internally had undergone decomposition.

56. On the head, the doctor observed and noted multiple fractures on the scalp. There was a fracture on intra parietal suture (where bones fuse from frontal part of head to the back). The doctor also noted that the cause of the fracture was likely a blunt force trauma and that the suture had separation caused by a fracture that extended to the oxypital and to the frontal and frontal parietal (side of the head).

She also noted a frontal bone on the right side had linear indentation (bone sinking in without fracturing or breaking) and that the same measured 3 cm in diameter.

She also noted a fracture at the base of the skull (where brain sits) and that the nervous system and the brain had undergone decomposition but she noted there was a subdural and extramural hematoma (bleeding between membrane of the brain and skull bone).

57. The doctor from the above injuries formed the opinion that the cause of death was multiple trauma, mutilation and assault. She testified that a death certificate No xxxxxx was issued and she tendered the post mortem report as P Ex 1. The same is dated September 20, 2018.

58. She confirmed under cross examination by the 1st defence counsel that some specimens from the body of the deceased were taken for further investigations and forensic analysis including DNA and toxicology.

59. She confirmed that the body of the deceased child was duly indentified by one SKK and PM and described them as an uncle to the deceased child and a friend.

60. Elizabeth Waithera Oyengo (PW 12). A forensic analyst testified and told this court that she was a holder of BSc in Chemistry from the University of Nairobi and Master of Science in Applied Analytical Chemistry from Kenyatta University.

61. She testified that she was based at the Government Chemist Nairobi and that in regard to this case she received the following items on September 24, 2018 from Corporal Juliet Kimwei, a police officer attached to Homicide Unit;

- i. Item 1-Two swabs marked “51”
- ii. Item 2-Bottle swab marked “52”
- iii. Item 3-Swab marked “53”
- iv. Item 4-Swab marked “54
- v. Item 5-Swab marked “55”
- vi. Item 6-Swab marked “56”
- vii. Item 7-Swab from spanner marked “57”
- viii. Item 8- four swabs marked “58”
- ix. Item 9- Nylon sack marked “MK2”
- x. Item 10-an adjustable spanner marked “59 (1)”
- xi. Item 11- a wheel spanner marked “59”(ii)



62. She added that above items, 9,10 & 11 were indicated as recovered from a motor vehicle registration No Kxx xxxK. She further stated that the other items forwarded were as follows:-
- i. Items 12-jumper with shades blue and white marked “MK7” indicated as recovered from suspect’s house
 - ii. Items 13-another jumper with brown and white shades marked as “MK8” also indicted as recovered from a suspect’s house
 - iii. Item 14- blood sample in swab stick marked “MK29” recovered from the deceased MAg
 - iv. Item 15-a toe and finger nail in a bottle marked “MK33” recovered from the deceased MAg
 - v. Item 16- cartilage and teeth in a bottle marked “MK37” indicated as recovered from the deceased MAg
 - vi. Item 17-mouth swabs taken from Francis Otundo, a suspect
 - vii. Item 18 –another mouth swab taken from Benson Marangu, another suspect
 - viii. Item 19-buccal (mouth) taken from CK, mother to the deceased.
 - ix. Item 20 –buccal swab taken from BK, brother to the deceased
 - x. Item 21 – buccal swabs taken from JK, alleged father to the deceased.
 - xi. Item 22-high vaginal swab from the deceased
63. The witness upon analyzing the items forwarded to the government chemist came to the following conclusion;
- a. That the DNA profile generated from bottle swab Item 2- matched DNA profile generated from buccal swab generated from Item 18-which was from Benson Kimathi Marango –the 1st accused. She stated that the matching was 100%.
 - b. A partial DNA profile generated from high vaginal swab item 22 March DNA profile of blood sample of Item 14-belonging to the deceased-M.
 - c. That there were 99.9% chances that JMK and CK are biological parents of the deceased-MAg.
64. She testified that she compiled the report signed it and she tendered the said report dated March 11, 2019 as P Ex 2. She further tendered a dark blue jumper with cream marks that had been presented to her as P Ex 3 and a black jumper with white markings as P Ex 4.
65. She clarified under cross-examination that buccal swap item 18 was taken from the 1st accused Benson Marangu and that it matched that DNA profile of bottle swab recovered from his car registration No Kxx xxxK. She further stated that there was no DNA sample of 1st accused that matched with DNA sample recovered from the deceased and that same also applied to DNA sample of 2nd accused. She stated that vaginal swab from deceased was stained with blood but no semen.
66. James Michael Wehimu (PW13), another expert based at Government Chemist Nairobi also testified and told this court that he was a graduate from Egerton University with a degree in science chemistry. He further testified that he was at the time of giving evidence doing his Master’s Degree in Chemistry at University of Nairobi. He stated that he was attached to forensic toxicology section at Government Chemist where he had been working for fifteen years.



67. He testified that his duties entailed carrying out chemical analysis on post mortem samples to ascertain whether any poisonous substances. In that regard, he told this court that on the September 24, 2018, he received the following items from CPL Juliet Kimwei;
- i. MK29- blood sample
 - ii. MK30-a piece of skin
 - iii. MK31- stomach and contents
 - iv. MK32-liver and kidney samples
 - v. MK3-food samples recovered from motor vehicle registration No Kxx xxxK
68. The expert witness testified that all the specimens received were subjected to analysis and his findings were that there were no toxic substances detected from the samples of deceased-MAg and the food material submitted. He tendered his report dated April 10, 2019 as P Ex 5. He further concluded that there were no chemicals detected from body organs of the deceased submitted to them.
69. CPL Evans Evans Mose (PW14), a Crime Scene Investigator attached to Meru North, Imenti Sub-County at the material time. The witness testified giving a vivid description on how he was called to the scene by CIP Ojwang where the body of the deceased child was recovered on September 16, 2018. He testified that the body of the deceased child was within Gitoro Forest within Meru and described the place as just on the outskirts of Meru Town.
70. He testified that upon arrival at the scene, he saw a decomposing body of a girl in school uniform and that there was no sign of struggle at the scene which was an indication that the body was dumped there probably after being murdered elsewhere. He stated that he proceeded to document the scene by taking photographs he described as follows:-
- i. Photograph 1- A footpath which was a few meters from the body
 - ii. Photograph 2-4- medium shots showing the scene and where soil samples were collected.
 - iii. Photograph 5-9-shots of a school girl in uniform
 - iv. Photograph 10-closer shot of the deceased's knees
 - v. Photograph 11-13-shots of decomposing hands
 - vi. Photograph 14-17 general and closer shots of decomposed facial view of the deceased.
71. He testified that he supervised the printing of photograph and a report and a certificate thereof. He tendered them as P Ex 7 (a) and (b) respectively. He tendered the photographs as P Exh 6(i)to (xvii)). He testified that in his estimation the body of the deceased girl had been lying at the scene for more than 7 days adding that he observed that one shoe was missing from one leg and that the body was still in school uniform and also that had it begun being eaten by termites.
- He added that he was a gazette officer in scene of crime giving his gazette No as No 10284 dated December 6, 2006.
72. CPL Lilian Munyinyi (PW 15) on her part testified that she was based at ATP Head quarters Cyber Crime Laboratory and that on September 28, 2018 she was on duty when she received an exhibit memo from one CPL Juliet Kimwei with the following instructions to;
- i. Extract all incoming and outgoing sms messages



- ii. Extract all sent and deleted messages
 - iii. Extract any information that would assist in the investigation
73. The witness stated that the above information was to be extracted from an Infinix mobile phone Imei No 3xxxxxxx4 which had a Safaricom and an Orange line serial number No 8xxxxxxx2 and No 8xxxxxxx5 respectively.
74. She testified that upon receiving the said mobile phone, she subjected it to forensic extraction using a device known as universal forensic extraction device and recovered a nuclear of contents in the phone including call logs, cell towers (i.e locations of the device at particular times), chats from facebook and WhatsApp platforms. She further revealed that she recovered contacts, SMS messages (present and deleted), web history and data files including documents, images and videos.
75. She testified that she prepared a report and printed the messages before handing them to the investigating officer. She testified that the investigating officer upon receiving the report asked her to isolate the messages which were of interest to the investigations, these were messages exchanged from August 26, 2018 and September 6, 2018.
76. The officer stated messages extracted from the phone of one CK on August 26, 2018 sent at 13.22 hours read;
- “alright Ben. I thought I would love to take my responsibility.”
77. She added that on the same date at 13:26 hours another incoming message from CK on WhatsApp came and it read;
- “I thought we talked about this Kim. I have nothing against you. I am travelling to Nairobi this week. I will apply for one.”
78. She testified that on the same day at 13:30 hours there was an outgoing message from the device (+254xxxxx2) directed to CK which read;
- “Thank you enjoy your weekend.” She added that K replied. “You too”.
79. She testified that on the same day, at 21:06 hours there was an outgoing message from the said device directed to K which read;
- “The photos are nice but I am like having a thousand of questions. They are reminding me of such times and they are hurting. Why did you decide to send to to me?” She stated that the response came on the same date from K stating;
- “I am sorry Kim. They were forwarded to me today. I am deeply soory if they hurt you.”
- She added that at 23:57, an outgoing message from the device directed to K WhatApp read;
- “I believe that they have no meaning towards my life and no need keeping them. I have gone through enough betrayal. I even don’t see a reason for you having them.”
80. She testified that on August 27, 2018 at 4:36 (4:36PM) an incoming message from K in response to the earlier message came and it read;
- “Betrayal? By who? Kim did I just become an enemy because I told that I won’t see you because I had visitors. By the way I do not feel guilty at all at all because I did not do any



wrong to you. My conscience is clear and I will never feel bad for I did not wrong you. I pray that you will find a perfect partner who will always have things done the right way.”

81. She added that at 6:46pm on the same day (August 27, 2018) an outgoing message from the device to K WhatsApp went and it read;

“Thanks for the insults. I am done with women. May you also have a prince charming.”

She testified that K responded with word “thanks” and at 9:44PM the outgoing message from the device to K stated,

“Thanks too.”

82. The witness further testified that she found a message from A on September 6, 2018 going to the device stating;

“Haki my nephew is missing Kim” and that the message elicited no response until September 7, 2018 when there was an outgoing message reading;

“How did the interview go?”

83. The witness stated that she printed the report and prepared a certificate pursuant to provisions of section 65 (8) as read with section 106 b of the Evidence Act and tendered the same as P Ex 8 (a) and P Ex 8 (b) respectively. She also tendered the exhibit memo as P Ex 8 and the mobile phone as P Ex 9. She also produced the photographs she got and printed from the device as P Ex 8 (a) (i) to (viii). She later explained that the photographs showed the 1st accused with some ladies and that the photographs were the subject of the WhatsApp communication between the 1st accused and CK (PW10). She stated that the photos were sent on August 21, 2018 (Ex 8(a) (i) and on August 26, 2018 (Exh 8(a) ii to (viii) via WhatApp.

84. Constable Inspector of Police Nancy Ekakoro (PW 16) testified that he was a police officer attached to Director of Criminal Investigations Headquarters, Homicide Unit and that on the September 21, 2019, the in charge Homicide Unit Mr. Martin Nyabuto requested her to accompany a team headed to Imenti North in Meru for investigations of a case of murder. She stated that her role was to document the process of post mortem examination and an exhibit which was a motor-vehicle.

85. She testified that she attended the post mortem examination on the body of the deceased child which was conducted by government and a family pathologist. she stated that others present were:-

- i. Representatives of deceased family and accused persons.
- ii. Representatives from Office of the Director of Public Prosecution and Director of Criminal Investigations.

86. She stated that she took several photographs of the body of the deceased child which she tendered as follows:-

- a. Ex 10 (i) to (vii) –showing general appearance of the body.
- b. Ex 10 (viii) to (xxx) showing the parts of the body on x-ray.
- c. Exh. 10 (xxxii) to L-showing internal examination of the body.

87. She tendered a report made in respect of the photographs tendered as P Ex 11.



88. She further testified that she documented an exhibit which a motor vehicle registration No Kxx xxxK Silver in colour and which she said was suspected to belong to the 1st accused. She testified that she was in a company of a government analyst who collected samples from the car and that she took photographs of the car which she produced as follows:-
- a. Exh 12 (a) and (b)-showing the frontal and rear part of the vehicle respectively.
 - b. Exh. 12 (c) –Showing a black bag that was in front of the car.
89. She added that a swab was taken from the bag. She further stated that there was a plastic bottle (which photo she tendered in P Exh. 12 (e).
90. She testified that there was also a paper bag (clear nylon paper) in the car with some food. She tendered a picture of the same as P Ex 12(g). She added that swabs were taken from upper side of the passenger’s seat and the floor mat of the car. She tendered the photograph of that activity as P Exh. 12(h).
91. She further added that there were stains on the rear passenger seat and as a swab was taken, she took a picture and tendered it as P Exh 12(i). Other items in the car were, an adjustable spanner and wheel spanner (P Ex K (j) and swabs from car boot as P Exh 12 (k) and (l). She added that she found the said motor vehicle parked at Meru Police Station and concentrated on the duties which took her there and that the exercise was conducted in the presence of a suspect whom she stated was the 1st accused.
92. Dennis Owino Onyango (PW 17), another Government Analyst based at Government Chemist Nairobi also testified and told this court that he had bachelor’s degree in chemistry and biology. He also stated that he earned his analytical skills at the University of Helsinki, Finland. He further stated that he was a Masters student at University of Nairobi doing Environmental Science and that he was a gazette analyst through gazette notice No 64 of 12..20
93. The expert witness testified that on September 24, 2018 he received the following samples from CPL Julieth Kimwei for analysis.
- i. Sample MK4- a Soil sample labeled as taken from the scene.
 - ii. MK5- a pair of shoes recovered from a suspect’s home
 - iii. Sample marked MK6-Brown and white shoes in colour labeled recovered from house of a suspect.
94. The witness testified that his instruction was to analyze the soil sample in MK 4 and soil sample from the suspects shoes marked MK5 and MK 6 and determine if they matched.
- He stated that using a technique known as X-ray infraction that analyses soil samples he found the following findings;
- i. That soil sample in MK 4 matched soil sample in MK 5.
 - ii. That the soil sample from MK 6 –(brown & white shoes) did not Match of MK 4 or MK 5. The witness stated he made a report before as P Exh. 13. He also tendered the black shoes as P Ex 13(a) and white and brown shoes as P. Ex 13 (b).
- He clarified that in analyzing the soil samples or particles the technology he used determines presence of a type and quantity of various minerals found in the soil with a view to marching them or for comparison purposes.



95. Kenneth Mwithi Kimathi (PW 18) told the court that he knew the 1st accused and that he sold him a car Toyota Mark II model registration No Kxx xxxK on May 22, 2018. He also told the court that the two had agreed of a purchase price of Kshs 500,000/- but the first accused only paid Kshs 300,000/- but refused to clear the balance. He confirmed that P. Exhibits 12(a) and (b) produced in court were pictures of the said car.
96. CIP Robert Ojwangwa (PW19) the Principal Officer who conducted the investigations in the incident testified and gave a narrative of what transpired after a child was reported missing on September 6, 2018 in Meru.
- He recalled that on September 6, 2018 at around 5:30 Pm he was at the Director of Criminal Investigations Meru Police Station when he received a report of a missing child and that the child was a pupil at [particulars withheld] and a daughter to a Magistrate serving at xxxx Law Courts within Meru County. He testified that the report indicated that the child did not go home as usual after school.
97. The witness testified that he in company of other police officers proceeded to the house of the magistrate within Meru Town where they found a house help known as J who upon interrogation informed them that the child did not go back home after being dropped from school at a usual place. The investigations officer stated that it was 6 pm by then and that he noted from where the girl was dropped to her home was around 800 metres and that she was not the only one dropped at that place. He stated that the house help went and fetched 2 of the pupils with whom the missing was dropped together with. He narrated that one of the pupils named M (PW3) informed them that the school bus dropped 4 of them including the deceased girl at usual place and that after some distance as they walked home, a man standing next to a black gate wearing a hood called M and that the missing girl appeared to be familiar with him and went back with him. The officer stated that when they received that useful lead, they embarked on a search after talking to the mother.
98. He further testified that by the following day, they laid out strategies of locating the missing girl and that part of the plan was to go to where the girl was dropped which was near Total Petrol Station and see if there were CCTV Cameras at the time. He testified that they managed to get CCTV Camera located at Total Petrol Station but the positioning of the camera was such that no useful information could be obtained because the camera was not directed to the drop off point where the school bus used to drop the kids.
99. The officer stated that he then went and interrogated the driver and conductor who confirmed having dropped the deceased child together with other children near Total Petrol Station.
100. He testified that he then interrogated one of the pupils known as M (PW3) and found the witness quite intelligent because she clearly narrated what took place the previous day. The officer stated that the said M told them that the man who called the deceased girl appeared familiar to M and that she referred to him as “uncle” and that the girl (M) wondered why the man had covered his head with a hood that almost covered his eyes. He further stated that the same girl described the car the man used as “long” and silver in colour and that she gave registration No as Kxx but could not recall the other numbers.
101. The officer stated that from the information received he embarked on investigating the identity of that person and that from further information received from the mother of the deceased child, the house help and another family member they got information that the same person had dropped M at home at 4pm from school on September 4, 2018. The witness stated that the name of 1st accused cropped up and he became a person of interest in the investigation.
102. The witness told the court that they traced the 1st accused and arrested him at a leisure joint on September 8, 2018. The 1st accused was escorted to the police station where upon question he informed



the officer that he had a relationship with PW10 and that he was aware that the deceased was missing. The witness stated that the 1st accused gave contradictory statements when he was asked about his whereabouts on the day that the deceased went missing. The witness stated that the accused initially told the police that he had plans of travelling to Nairobi on the material day and that he was in a matatu when he received a call from PW10 with the news. That he travelled to Nairobi and spent the night at a hotel near Tea Room but when he was asked about receipts to prove that he paid for a room in the hotel, he changed his story and stated that he did not travel to Nairobi but he travelled from Maua to his home in Kaaga on the day of the disappearance. That he stayed at his home and travelled to Nairobi on September 7, 2018 at 3am to collect supplies for sale which he delivered at Marimanti Secondary School in Meru on September 8, 2018. The officer stated that the 1st accused did not provide evidence to prove that he had travelled to Nairobi on either of the two days he claimed he travelled, that he also did not provide evidence that he had supplied chemical items to Marimanti Secondary School.

103. The officer also added that they also carried out investigations on another person who was issuing threats to the mother.
104. The officer also stated that after carrying out investigations, they arrested the 2nd accused who was tracked *vide* a cell phone registered to No 22685545 which was being used to send threatening messages to PW10
105. The witness also told the court that they recovered a pair of white and brown shoes and another pair of black shoes, one navy blue jacket with white stripes and one black and white jacket from the 1st accused home.
106. The witness also told the court that the police were also able to recover the following items from the 2nd accused's home;
 - i. 173 fake US dollars
 - ii. One ID No 3xxxx7 registered to Meloda Nkirote
 - iii. One Tecno mobile phone Imei no 354988097299869/77
 - iv. 17 unused orange sim cards
 - v. One sim card 89254021064199 685140
 - vi. One Infinix Phone Imei No 358406089943327/35
 - vii. Sim card serial no 89254021003406125529
 - viii. One nokia phone Imei 356999043505786
 - ix. One sim card 892540210024066284516
 - x. House rent payment receipt no 2617
1. The witness further stated that in the course of their investigations they conducted a search at home of the 1st accused at Kaaga where they recovered a pair of brown shoes with white stripes which he tendered as P Ex 15(a) and black shoes which he stated that it had soil particles as exhibit 15(b). He testified that both pairs of shoes were handed over to the homicide team at Director of Criminal Investigations headquarters for further investigations. He added that they also recovered one navy blue jacket and a white jacket.
108. He also testified that on 16th September, 2018 he was called by Director of Criminal Investigations Officer, Mr. Githinji who informed him that the body of a missing child had been recovered. He stated



- that he accompanied other officer and rushed to the scene where they found the body of a girl in bad state as it had began decomposing adding that the body had been infested with red ants and it was difficult to access the body.
109. Daniel Hamisi (PW20) an employee working with Safaricom came and testified that he was working in Safaricom in the Security Department and that his duties entailed processing call data of Safaricom Users when required by law enforcement officers and agents.
 110. He testified that he was a trained investigator and a data analyst. He stated that on September 7, 2018, he got a request from Director of Criminal Investigation Meru to process data from a mobile No 26xxxx42 and give registration details of the customer. He testified that the number was registered in the name of 1st accused Benson Marangu of ID No 24xxxx35.
 111. The witness stated that he was also asked to confirm the location of the said mobile subscriber on September 6, 2018 at 15: hours.
 112. He testified that his investigation showed that there was voice mail code 132 which showed that the subscriber was located at Milimani Area of Meru Town and that he was able to pinpoint his location using a Safaricom Mast at the location which was closest to the cell phone when the call was made. The witness tendered his report as P Ex 16 and a certificate in respect to generation of the information in the report as P Ex 17.
 113. The witness further testified that he also got a request to process a date in respect to mobile 22xxxx45. He confirmed that the was registered in the name of Francis Otundo of ID 32xxxx32. He testified that he processed the data in respect to all incoming and outgoing calls including SMS in respect to the said from September 1, 2018 to September 8, 2018. He gave the imei of the phone used and tendered his report in that regard as P Ex 18 and a certificate as P Ex 17.
 114. CIP Tobias Mwita (PW21) told the court that he received instructions from homicide in charge DCI Head quarters Mr Martin Nyuguto on September 19, 2018 with regards to the deceased's disappearance. The witness stated that he assigned his personnel the task of attending the post mortem procedure of the deceased which took place on September 19, 2018. The witness also stated that he visited and drew a sketch map of the area where the police suspected the deceased was kidnapped. The officer stated that the sketch map showed a main road along Meru-Makutano road. That before reaching Total Petrol Station, there was a road leading to Milimani Estate which was a few meters from Total Petrol Station. That about 70 meters from Miliamani Estate, there was another road which led to Sypher Hyper store, (a mall). The witness told the court that the school bus had used the down of Sypher Hyper store and dropped the children around 50-70 meters behind the main road opposite Total Petrol Station. The witness also stated that 30 meters into the road leading to Milimani there was a black gate leading to some residential houses which included the house where PW10 lived. The officer produced sketch maps which was marked as P. Exhibit 19 (a), (b) and (k).
 115. The witness also indicated that he interviewed pupils who were dropped by the school bus together with the deceased who told him of how they met a man who conversed with the deceased. That they also told him that the same man had taken the deceased in his vehicle on September 4, 2018. The officer stated that this was confirmed by PW9, the deceased uncle who stated that the 1st accused had dropped the deceased home on September 4, 2018 and hurriedly asked for a glass of water.
 116. The officer also stated that he relied on phone data recovered by Safaricom which placed the 1st accused cell at the scene around Milimani area on the day of the kidnapping at around 4pm.



117. The officer further told the court that an analysis conducted by the Government Chemist of soil samples collected from the scene where the body of the deceased was recovered showed the soil sample found on the black leather shoes found that the 1st accused house P. Exhibit 15 (b)
118. The officer also told the court of the cell data report produced by PW6 containing information relating to the 2nd accused cell phone Imei No 3584060854322327 which was used to demand a ransom of Kshs 2 million from PW10 in exchange of the release of the deceased. Further that the 2nd accused asked for Kshs 500,000/- from PW10 using the same phone with the promise that he could assist her in negotiating for the release of the deceased. The officer produced an inventory of items collected from the 2nd accused house, the same are as indicated above in this judgment.
119. The officer gave a description of the place the deceased child and other pupil used to be dropped and stated that he drew a sketch to illustrate the position of Total Petrol Station and position of the black gate where he was told the man who took the deceased child was standing. He tendered the sketch plan fair sketch and legends marked as P Ex 19(1), (b) and (c) respectively. He gave a narrative of the information he received from pupils in respect to the fateful day when the deceased child disappeared and further information obtained from the mother (PW10) and uncle to the deceased (AK-PW9) and in particular about the events of September 4, 2018 when the 1st accused dropped the deceased home using his car. He testified that he interrogated the pupils on September 24, 2018 and that they described the man well because all of them stated that they had seen him before on September 4, 2018 as he stopped and gave a lift to the deceased child after being dropped from school at the usual drop off point.
120. He further testified that the child was able to identify the 1st accused from a picture he showed them but that same children attended an identification parade but they could not pick him out adding that in his view, the kids probably were scared of him.
121. He testified that he analyzed the call data of the 1st accused obtained by other investigators from Safaricom which confirmed and that the mobile 26xxxx42 was registered in the name of the accused. Further, that from the call data, the witness was able to trace the 1st accused to the scene near Milimani Area of Meru Town at around 4 pm on September 6, 2018 which was the time and area the deceased child was kidnapped. He further obtained messages that had been retrieved from the mobile phone of the accused by cyber crime and Anti Terror Unit which indicated that the relationship between the 1st accused and the other of the deceased at around the material time had turned sour and that the messages exchanged indicated the same.
122. He testified that he also taken soil samples collected from the scene where the deceased child was found a pair of brown canvass shoes, a pair of black shoes and navy blue jacket that were collected from the house of the 1st accused at Kaaga and forwarded them to Government Chemist. He tendered an inventory of items recovered and forwarded to Government Chemist as P Ex 20.
123. He testified that the mother to the deceased (PW10) told him that she was receiving threats of a phone 22xxxx45 and that the threats were communicated to her on September 9, 2018 and September 10, 2018. Further, that the caller told her he was holding the deceased child and was demanding a ransom of Kshs 2 million and had asked for a deposit of Kshs 500,000.

He testified that the 2nd accused had already been arrested by the time he got the report and that he was arrested with the phone used to send the threatening message. He tendered the phone recovered as P Ex 21. He stated that the other items recovered from his house at Tasia Embakasi were

- i. 176 fake United States dollars- The fake dollars 100 notes were tendered as P Ex 22.
- ii. 17 unused cards from Orange Telephone provider. P. Ex 23.



- iii. Two ID Cards- belonging to Meloda Nkirote and Damaris Nkirote P Ex -24. The witness could give an explanation on how he came to be in possession of the two National Identity Cards.
 - iv. Nokia Mobile Phone-imei No 356XXXXX3505-786-PEX 25.
 - v. Rent receipts- P Ex 26.
 - vi. Inventory of items recovered P Ex 27.
124. He testified that the call data from the phone of 1st accused showed that he travelled to Nairobi on September 7, 2018 but according to the investigating officer, when he interviewed the 1st accused he stated that he travelled to Nairobi on September 6, 2018. He stated that the fact that the 1st accused travelled to Nairobi made him suspect that the 1st accused was in cahoots with the 2nd accused and that is why he decided to charge them jointly in this case for murder.
125. PC Peter Mbatha Mutinda (PW 22). A Police Officer based at Director of Criminal Investigations Headquarters testified that he was based at Forensic Laboratory Department and that he had a Bachelor of Science degree in Information Technology Software Engineering Option from KCA University and Master of Science from University of Nairobi. The witness also stated that he had studied Distributed Computing Technology Cyber security and Forensics. He also stated that he was a certified Digital Forensic Examiner by Anti Terrorism Assistance (ATA) from United States of America.
- He testified that on 24/09/ 2018 he received the following exhibits from the Homicide Department under Laboratory No ZC03 of 2018 and that the exhibits were labeled as follows:-
- A-Infinix mobile phone
 - B-Infinix Mobile Phone
 - C-Techno Mobile Phone
 - D-Infinix Mobile Phone
 - E-Nokia Mobile Phone
126. He testified that the request from the Homicide Department was for him to extract text message exchanges from August 1, 2018 to September 24, 2018. He stated that he was requested to extract images of messages and any other information that could assist in the investigation.
127. The officer indicated that he was able to extract messages from exhibit D, Infinix Mobile phone imei 35406089584327 (P Exhibit 21). Below is a text message exchange between the 2nd accused and PW10 on the ransom;
- Messages sent from mobile No T254 00XXXX32 at 12.05 hrs read:
- “ what is your last price”.
- Immediately after an outgoing message from the same phone sent at 12.45 read
- “ 7k”.
- The next message came from mobile no T 254727XXXX37 on 10/9/2018 saying
- “ I have not blocked you, been at bank pleading for a loan am still desperately begging”.



The next message was an outgoing message to 27XXXX37 sent on 10/9/2018 saying:

“I am sorry you are lying to us. We are not going to entertain that. Ok. Good day”.

The same sent a message at 15.47 on the same day saying:

“I am seeing you are sending 5k, what is it for? For travelling or for what?”

In response, the same line received a message saying,

“not at all”

At 15.53 the same line sent a message saying;

“Time is almost up”.

Then at 16.54 the same line sent a message at 16.01.45 saying;

“nine minutes remaining”

Another message at 16.04.35 saying

“now hope I had given you enough time but since you think I am joking, wait for it”.

At 19.04 on September 9, 2018

“So you are making me look like a fool, ok fine let me show you how people who do not cooperate with that we usually do”.

At 19:27 :

“oh no That is not true. I told you the dilemma. I have been. I beg you in fact I have talked to friends and I may be getting money to send you a better amount tomorrow. I wish you can know what I am going through.

At 20:39 hrs;

“I promise to cooperate and that is what I will do.

At 20:45

“I am giving one last chance. Tomorrow at 12 ukue umetuma hizo dooh 500k if not no other chance. We will do it the hard way”.

The last outgoing message September 10, 2018 at 11.39

“30 minutes and you have not yet reached. I have texted you on whats app. You did not answer. You blocked my . You think I am joking ok wait and see what we will do if you wont have done it”

128. The officer stated that he prepared a report in respect to what he extracted and tendered it as P Ex 28 and a certificate pursuant to section 65(8) as read with section 106B of the *Evidence Act* as P Ex 29. He also tendered a memo as P Ex 30.



129. The witness further testified that there were other messages in mobile phone 22xxxx45(belonging to 2nd accused) which were demanding from other people unrelated to the case before court.
130. When placed on their defence after both the accused were found with a case to answer, they both chose to give sworn statement of defence.
131. Benson Kimathi Marangu (DW1), the 1st accused in this case testified and denied any involvement in the murder of the deceased child. He stated that he knew both the deceased child (MK) and the mother CK (PW10). He stated that he came to know K while working as a Prison warden at Kangeta Prison and that they got to know each other because he used to escort prisoners to Maua Law Courts where K worked as a magistrate. He stated that he further interacted with her court when his former girlfriend sued him through a children's case which was handled by K whom he described as Magistrate known as a no nonsense at the time. He added during his time as a prison warden, before the children's case was filed he used to go and buy lunch for the Magistrate and that the children's matter was eventually decided by another magistrate. He added that he later developed a romantic relationship with K between 2013 and 2014 after knowing her from 2012.
132. He testified that in 2014, K got a transfer and that she did not inform him where she was moving to and that they stopped communicating until December 2016 adding that at that time he was working as a tutor at Laikipia Campus Maua Branch after leaving prison on April 12, 2016.
133. He testified that K texted him around November 2016 and that he called her and came to know that she was still within Meru. He testified that they reignited their relationship but just as friends because he had moved on and married one Winfred Kawira.
134. The 1st accused further stated that by virtue of their relationship, he came to know K's children BK and MK and that both children were well known to him. He recalled visiting them in December 2016 at Meru after being directed to where they lived in Meru Town.
135. He also recalled that there was a time he took K and her 2 children to Nakuru from where the brother to K picked them. He added that on 2017 their friendship continued stating that he could take them out and at times he could take the children out alone.
136. He further confirmed that on July 22, 2018 after attending a mass at St. Joseph's Cathedral Meru, he saw M going towards him and after greeting her he went and greeted her mother (K). That thereafter, M insisted on being given a ride in his car which he obliged and drove her from the church grounds to a junction near Total Petrol Station. He added that the registration No of his car was Kxx xxxK, Toyota Mark II Model.
137. He further recalled that on August 10, 2018, he took K on a trip to Eldoret upon her request. He stated that on reaching Eldoret, K sought for a hotel where he insisted that they spent together. He denied a suggestion that he slept in the hotel alone but conceded that K paid for the accommodation. He testified that the following day he accompanied her to a funeral and confirmed that pictures tendered by prosecution in respect to the function were confirmation that they attended the funeral. He added that he was a bit uncomfortable when K introduced him to her friends as "a friend". He however did not elaborate much about the discomfort or why he felt that way.
138. He testified that after the funeral, they drove to Turbo where they took lunch and thereafter parted ways with K driving the car to see her mother as he boarded a matatu back to Eldoret where he spent the night. He testified that the following day on August 12, 2018 K picked him from Eldoret and that they drove together with K's brother A (PW9) to Meru.



139. He further testified that K later sent him the photos they took during the funeral they had attended on August 11, 2018 in Kapsabet. He denied being annoyed with the photos stating that he only asked K why she sent the photographs. According to him, he was apprehensive that K was out to re-ignite their relationship and that he was not ready to go in that direction. He claimed that the tone of his messages to her was intended to put her off.
140. He testified that on August 18, 2018 he met K in Meru Town and that she wanted to get his view regarding a plot she wanted to buy at Nanyuki. He stated that he recommended to her that Meru Town was a better option. He testified that according to him, his suggestion did not go down well with her because after that they did not communicate again.
141. He denied under cross-examination by Maari for Director of Public Prosecution that he was displeased to find another man at K's house on August 13, 2018 but conceded that he indeed went to her house on the said date after the previous day trip from Eldoret to Meru and that he actually met a man known as Kimathi at her house. He however denied that he was mad about that incident and that he wanted to see PW 10 September 19, 2018 because of the same. He said that it was K who wanted to see him and not the other way round. Asked about the message he wrote on August 19, 2018 stating "I expected it" when K told him she was not going to see him, he brushed it saying that it was K who was in bad mood because of his views on September 18, 2018 regarding purchase of a plot in Nanyuki.
142. He also conceded writing an SMS to K stating that he was done with women but could not offer an explanation on the tone of the SMS or why he appeared angry.
143. He stated that he used the word "hurting" in reference to the photos sent to her by K because they had parted ways with K in 2014 and had since moved on. Asked why he used the word "betrayal", he responded that he was referring to his ex-girlfriend and that he never wanted to have another relationship with K because he did not want to be betrayed again. He testified that he did not feel betrayed by K and that he never intended to intimidate her or have fights with her at the time. He however conceded that they did not communicate again after the sour exchanges with her insisting that they parted ways on August 27, 2018 but there was no bitterness.
144. He also stated that K after Eldoret Trip asked him about a misplaced driving license and that he told her of the search he made in his car that did not yield any positive result.
145. He further conceded that on September 4, 2018 he gave a lift to M from Total Petrol Station to her home but stayed in his car upon arrival. He also confirmed that he asked the girl to get him a glass of water as he felt unwell. He said that the deceased child went inside the house and came with water followed by her uncle A (PW9). He doubted if the other children dropped by the school bus saw him pick M at Total Petrol Station but admitted seeing them walk home after being dropped by the school bus.
146. He testified that on August 6, 2018, after some errands he went to a club near Kinoru for a drink. He could not recall the name of the club but on cross examination he recalled that the club was known as Club Dimples which was at Milimani Area. When pressed to explain or tell the distance between the club and where K lived, he stated that he was not good at estimating but guessed that it was around 3Km away. He also stated that he had no receipts to show that he had a drink in a club at that locality.
147. He stated that he left the club at around 4:20pm and went to buy some animal feed and left for his house arriving at 5:30 pm.
148. He testified that he left for Nairobi at 1 am the same night to purchase some lab chemicals for a school in marimanti adding that he had done the job of school supplies for a long time. He testified that at



around 5pm, on September 6, 2018, he received information about the disappearance of M when Kemi called him. He testified that he did not go to K's home or the Police Station where K had told him she was calling him from. He testified that K discouraged him from going telling him she was engaged with the Officer Commanding Station.

149. He also insisted that he travelled to Nairobi at 1:00 am on September 6, 2018 to purchase school supplies and tendered an invoice from Aspect School Supplies as D Ex 1. When asked why he did not pick his phone when K called him at 11pm, he stated that he had slept.

He further stated that after he was arrested his motor vehicle was conspicuously parked near the entrance of Meru Police Station and it was possible for anyone to see it.

150. Francis Otundo (DW2) testified on oath and stated that he came to know the 1st accused 2 days after he was arrested and that he did not know him before. He gave an interesting defence stating that he was just a scammer out to reap from a situation he read about in the media. He denied committing the murder stating that he did not know the deceased child and only came to know the mother after being charged in court.
151. He testified that when he read on Facebook that the girl was missing, he called the mother and demanded for Kshs 500,000 as ransom. He stated that he read about the contact person and used the to call her with a view of obtaining money by falsely pretending that he was in a position to produce the missing child was from Milimani. He stated he that it was Milimani in Nairobi. He conceded that he issued threats on SMS and WhatsApp platform because he just wanted to make money. He also conceded that he was found in possession of several sim cards and phones.
152. He also conceded that he was an extortionist and had engaged in the illegal activities in the past conning people that he was in position to supply goods which he knew were nonexistent.
153. In an interesting revelation he stated that he was a criminal yes but he did not kill M. He defended himself that the call logs did not place him in Meru at the material time but conceded that he was schooling in Meru under some sponsorship when he was 14 years old and that he was last in Meru in the year 2009.
154. At the close of defence hearing parties were given a chance to sum up their respective cases through written submissions. The following is a summary of the submissions made by the defence, the prosecution and the deceased's family through counsel.

Submissions By The 1st Accused

155. The submissions are dated July 24, 2022 and were filed on July 27, 2022. The 1st accused takes issue with the evidence of the PW2 stating that the same was contradictory. Further, that she could not have been able to identify the person who picked the deceased on the material day as he had concealed his face. He takes issue with her identification of the accused's car stating that she was assisted by police to identify the car.
156. On PW8's testimony, it has been submitted that the prosecution failed to prove its case by failing to produce the youth who saw the deceased's body first.
157. On PW19's testimony, counsel submits that it beats logic that the witness failed to see the accused's car around the area where the deceased was abducted despite being in the vicinity when the deceased is said to have been abducted.



158. With regards to PW10's testimony, counsel submits that the father to the deceased ought to have been called to testify and further, that the prosecution should have focused on the status of the parents of the deceased.
159. On PW17 testimony, counsel submits that the analogy that soil samples found the 1st accused person's shoes and the soil sample collected at the scene was false.
160. On PW19's testimony counsel submits that identification of the 1st accused and his car by PW2, PW3 and PW4 was choreographed by the police to implicate him in the disappearance and murder. Further that there was no explanation given by the police on why they selected specific shoes marked as MK5 and MK6 for soil testing.
161. Lastly that there was no report presented by the police so support the claim the 1st accused was tracked within Milimani area.
162. Counsel further submits that the prosecution failed to prove the fact of death as the body of the deceased was not positively identified.
163. Further that the prosecution failed to provide a connection between the two accused persons to prove that the deceased died as a result of the direct consequence of their actions.
164. Counsel further challenges the identification parade conducted by the police stating that the 1st parade only had seven instead of eight people, further that the 1st accused was prejudiced in the second parade when PW2 and PW3 were shown his photo after they had seen him in the first parade.
165. The 1st accused contends that the father of the deceased child should have been presented to shed light arguing that he was charged just because he had a relationship with the mother of the deceased's child.
166. He contends that the samples of the soil from the scene could have been applied on his shoes to implicate him wondering why the police did not subject the shoes he was wearing on the day he was arrested for forensic analysis as well.
167. It is submitted that the prosecution's case against him is purely circumstantial and that the evidence tendered by the prosecution is insufficient to sustain a conviction. He relies on the case of *Musili Tulo v Republic* where the Court of Appeal re-stated the three conditions to be met before circumstantial evidence can form a basis of conviction.
168. He submits that the prosecution failed to prove motive and that the text messages sent to the deceased mother were insufficient to establish motive.
169. He submits that the evidence tendered did not link him to the 2nd accused as there was no evidence of collaboration between him and the accused.
170. He submits that the prosecution case has left out gaps and that there is no evidence linking him to the scene of crime and that the case against him fails for want of proof. He has relied on the following authorities on circumstantial evidence and when the same is reliable.
 - i. *Republic v Richard Hweka Wabiti* [2020]Eklr
 - ii. *Nzuki v Republic* [1993]Eklr
 - iii. *Sawe v Republic* [2003]Eklr
 - iv. *Teper v Republic* [1952]eklr 480
 - v. *Musyoka v Republic* [1958]E.A715



171. It is the first accused case that the prosecution's case against him has failed to meet the threshold to sustain a conviction because in his view the prosecution's case is based only on circumstantial evidence and contends that there are other co-existing circumstances which should entitled him to an acquittal.
172. He points out that the standard of proof in criminal cases is high and that as per the decision of *Philip Nzau Watu v Republic*, a court must be satisfied that the prosecution's case proves the guilt of an accused beyond doubt. He relies on *Stephen Nguli Mulili v Republic* [2014]Eklr and *Director of Public Prosecution v Woolmington* [1935] UKHL in his contention that the prosecution has not discharged its burden of proof. He submits that the prosecution's case left a lot to be desired by living out possible suspects and only flensing on him.
173. He contends that PW2 allegedly testified that she saw a man in a white car picking the deceased girl and that the prosecution never ventured out to find out who that man was. He further points out that the uncle of the deceased (PW9) was within vicinity of kidnapping at the time and wonders why he was not arrested or investigated.
174. He also faults the manner in which the 2nd Identification parade was conducted contending that it was not conducted pursuant to *National Police Act*. He further submits that PW2 & PW3, failed to pick or identify him in the first parade.
- He says that the children had already been exposed to him and hence familiarized themselves with his appearance. He submits that the identification parade was not properly conducted and relies on the case of *Samuel Kilonzo Musau v Republic* [2014]eKLR.
175. He submits that his defence of alibi was well narrated in respect to where he as on September 6, 2018.
- He submits that he spent the evening with friends at Kinoru Gardens up to around midnight and that between 2 am and 3 am he began his journey to Nairobi. He contends that the purchases of school equipment he made on August 7, 2018 and tendered as D Ex. 1 proves his case that he was in Nairobi on August 7, 2018. He says that he was not anywhere near the scene of the crime. He relies on *Kiarie v Republic* [1984] eKLR.
176. He also alleges that his constitutional rights were infringed as he was not arraigned in court within the stipulated timelines under the *Constitution*.
- He submits that the prosecution failed to adduce further evidence to rebut his defence of alibi.
177. Finally, the 1st accused submits that suspicion alone cannot infer guilt and has relied on the decision of *Joan Chebichii Sawe v Republic*[2003]eKLR.

Submissions by the 2nd Accused.

178. The 2nd accused, Francis Otundo on his part submits that the prosecution did not prove the case against him because there was no nexus created by evidence between him and the deceased child. He submits that whereas the prosecution had the burden of proof, that burden was not discharged in respect to the charge against him. He relies on *Joseph Kimanzi v Republic* [2006]eKLR.
179. He contends that the circumstantial evidence tendered against him did not connect him with the murder. He relies on the decision of *Makau & Another v Republic* [2010]EA 283 and *Musili Tulo v Republic* (criminal appeal No 30 of 2013.)
180. He submits that he was broke and was out to look for daily bread and that is why he tried to extort money from the deceased's mother. He pleads that this court invokes the provisions of section 179 of *Criminal Procedure Code* and convict him with any other offence other than murder.



Prosecution's Submissions

181. The prosecution submits that it has presented a total of 22 witnesses in this case and has called upon this court to determine whether based on the evidence, the 1st and 2nd accused are guilty as charged.
182. The State submits that it has proved all the 3 ingredients of murder as illustrated in the case of *Republic versus Antony Kyalo Ndaka & Another* [2020] eKLR it points out that the 3 ingredients are :-
 - i. Proof of death and cause.
 - ii. That the cause of death was as a result of unlawful actions of the accused.
 - iii. That the unlawful action was committed with malice aforethought.
183. It submits that the fact of death was proved by Dr.Scholastica Nduta Kimani (PW11) who conducted a postmortem on the body of the deceased and tendered post mortem report in evidence.
184. On the cause of death, the state has majorly focused on the 1st accused pointing that the evidence of PW2, PW3, PW9, PW10 and PW17 connected him with the murder of the deceased child. It relies on the doctrine of "last seen" and submits that the 1st accused was last seen with the deceased child. The state supports that contention the decision of *Republic v EKK* [2018]eKLR where the court found that where a deceased person was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met her death and that in the absence of an explanation an inference of guilt can be drawn.
185. The State submits that the 1st accused conceded that when the deceased child disappeared he was near the vicinity of the disappearance. It submits that was the last time the deceased was seen alive and in the circumstances there a reasonable presumption that he was responsible for her disappearance.
186. It submits that the Investigating Officer CIP Robert Ojwang (PW19) tendered evidence that placed the 1st accused at the scene at Milimani Area near Total Petrol Station where the deceased child disappeared. It states that PW2, PW3, PW4 and PW5 saw the 1st accused talking to the deceased child shortly before the child disappeared.
187. It contends that the circumstantial evidence points at both accused persons submitting that the 2nd accused issued threats of killing the deceased child unless ransom was paid.
188. The state submits that the circumstantial evidence they have adduced is sufficient to find a conviction against the two accused persons and has drawn the attention of this court to the forensic evidence (data) obtained from the mobile phones of the two.
189. It submits that it has established the element of malice aforethought against the 1st accused contending from the evidence of the mother of the deceased child, demonstrated that the 1st accused was unhappy with the fact after they had begun a romantic relationship with PW10, in 2015 they would remain as just friends. The State points out an incident which occurred on August 13, 2018 when the 1st accused visited the deceased's mother at her home and found another man in the house. It submits that the 1st accused did take the issue kindly.
190. The state contends that the fact that the 1st accused was seen picking and dropping the deceased girl a few days before her disappearance and without authority was strange and points to motive.



Victims Lawyer's Written Submissions

191. The family of the victim through the learned counsel Mitheka and Kariuki has also put in written submission. The victim's family points at the relationship between the 1st accused and the victim's mother and submits that the same developed to the extent of creating a relationship of trust between them.
192. The deceased family submits that the 1st accused was a frequent visitor in their home and would occasionally spend time with family which explains why the deceased child trusted him.
193. It is submitted that the relationship between the mother of the deceased and the 1st accused after a while hit the rocks and that's when the mother ended the relationship. This resulted in 1st accused writing threatening messages to her.
194. They submit that the 2nd accused threatened the deceased's mother that unless a ransom was paid he would harm the child. That after receiving Kshs 5,200 sent to his M-pesa line he kept pestering the deceased's mother and a few days later, on September 16, 2018 the remains of the deceased were found in Gitoro forest.
195. They submit that the cause of death of the deceased child was established by Dr Scholastica Nduta to be multiple blunt trauma mutilation and assault.
196. They submit that the circumstantial evidence relied on by the prosecution is as important as direct evidence and they rely on the decision in *Ndurya v Republic* [2008]eKLR to buttress their submissions. They further cite the decision of *Abamad Abolfathi Mohamed & Another versus Republic* [2018] eKLR as relevant to their contention in that regard.
197. They submit that the 1st accused was last seen with the deceased child alive. They have pointed out the evidence of PW2, PW3 & PW5 and have given a narrative of the events of September 6, 2018 as given by the cited witness. They submit that the evidence of the minors was corroborated by PW 20 who gave the location of 1st accused at around 3:PM *vide* a report tendered as P Ex 16. They submit that the 1st accused did not controvert that he was the last person seen with the deceased child.
198. They submit that the motor vehicle belonging to the 1st accused registration No Kxx xxxK was positively identified by PW2.
199. They point out that the forensic evidence tendered by PW 17 connect the 1st accused because the shoes found in his house were found having soil particles which matched those collected from where the body of the deceased child was recovered.
200. They submit that the prosecution adduced evidence showing that the 1st accused was a bitter and vengeful lover who out of spite towards the deceased's mother committed the offence.
201. They rely on the decision of *Libambula v Republic* [2003] eKLR which found that motive is often proved by the conduct of a person and contend that the vengeance from 1st accused against the mother motivated him to convict the heinous act.

Analysis And Determination

202. This court has considered the evidence by the state, the defence put forward by both the accused persons and extensive written submissions by all the parties. From the onset, I must say that this is one of the cases that really sapped the energies of both the advocates and the court alike because of the



intricacies and emotions involved during trial that at times went for hours with little or no breaks in between. But at the end of it all, all the witnesses and the parties were heard.

203. This is a case of murder contrary to section 203 as read with section 204 of the Penal Code.

Section 203 of the Penal Code defines murder as;

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

204. From those sections three crucial elements emerge regarding the act that causes death.

- i. The fact of death and its cause
- ii. The unlawful act must be connected to the person so charged (*actus reus*).
- iii. The act must be pre-meditated and actuated by malice aforethought (*mens rea*).

205. For a charge of murder to be sustained, the prosecution must prove the above ingredients. The burden of proof in this instance is on the prosecution as clearly stipulated under section 1 of the Evidence Act. The standard required is one beyond any reasonable doubt. This court will examine/analyze the evidence tendered by the prosecution in order to determine whether each and every ingredient cited above has been proved to the required standard.

206. It is an uncontestable fact that the evidence tendered by the prosecution is largely circumstantial evidence which as this court will shortly delve on is equally as good as direct evidence depending of course on a of factors and conditions. I will go straight to the issues raised which are:-

- a. Whether or not the prosecution proved the fact of death and the cause.
- b. Whether the evidence adduced are sufficient to prove the 3 elements of murder and whether the same can be connected to either or both the accused persons.

The Fact Of Death And Its Cause.

20. The evidence of Dr Scholastica Nduta Kimani (PW11) one of the doctors who performed post mortem examination on the body of the deceased child corroborates the evidence of other prosecution witnesses in particular PW8 and PW10.

208. The 1st defendant has submitted that the body owing to the state it was when found was not positively identified but the doctor who performed the postmortem stated clearly that the body was identifiable as part of the face was intact.

209. The mother (PW10) identified the body after it had been taken to the hospital mortuary in Meru. The body was also identified by a member of the family SKK and a family friend PM. The doctor testified that the deceased child’s dental formula was also intact as such, this court is satisfied that the identification of the body was beyond doubt.

210. Furthermore, the DNA analysis that was carried out by Elizabeth Waithera Oyengo (PW12) showed JMK and CK (PW10) were biological parents of the deceased child. PW10 testified that JMK was the father of her deceased child.

211. The post mortem report tendered by Dr Nduta Kimani (PW11) and signed on September 20, 2018 by 3 pathologist in my view proves beyond doubt that fact of death of deceased child. The report indicates that a death certificate serial No Dxxxx1 was issued.



212. The post mortem report also shows that the death was deliberately caused by someone or some people. This is because of the multiple injuries noted in the postmortem report and besides that, the 3 doctors opined in concurrence in the post mortem that the cause of death was multiple blunt trauma/ mutilation and assault. On the basis of that, this court finds that the prosecution's case in respect to the 1st element of fact of death and its cause was well established and proved beyond doubt. The big question for determination in this court is who caused those injuries.

Whether The Cause Of Death Can Be Attributed Or Was Connected With Acts Or Omissions Of The Accused Persons Herein.

213. The element of actus reus in this case is based on circumstantial evidence because there was no witness who accounted of how and who executed the murder of the deceased child. The prosecution's case relies on circumstantial and forensic evidence.

214. The evidence adduced by the prosecution indicates that the deceased child was kidnapped by unknown person while walking home on September 6, 2018 after being dropped by her school's bus at a drop off and pick up point near Total Petro Station. The evidence of PW1, PW9 & PW10 shows that the deceased child walked home in the company of her friends and pupils from the same school known as [particulars withheld]. Those children were availed in this court as prosecution witnesses and were PW2 (DW), PW3 (MK), PW4 (AK) and PW5. AM.

215. In summary, the evidence of those children was to the effect that the unknown person who picked the deceased child as she walked home on foot from Total Petrol Station at around 3:40pm on September 6, 2018 was the 1st accused herein.

216. This court observed the demeanor of the children as they testified and PW2 and PW3 stood out in term of clarity of mind and intelligence. PW2 in particular recalled that she had seen the same man on the September 4, 2018 with M and that the man had a saloon car silver in colour and that she saw M being offered a lift from Total Petrol Station and taken to her home. The girl said and when they reached the gate leading to the home of M, she saw the car parked near the gate with M and the 1st accused inside the car. She stated that her home is after the home of the deceased girl and she made the said observations as she passed where the car was parked. That narrative is corroborated by PW9-AK – an uncle to the deceased girl who was staying with the mother at the time. The 1st accused in his defence also admitted to that fact which reinforces the credibility of PW2, PW3 and PW4 in respect to not only did the events of September 4, 2018 but the events of September 6, 2018 when the girl was kidnapped.

217. PW2 was categorical in her evidence that on September 6, 2018 as they walked home after being dropped by the school bus, she saw the same man she had seen on September 4, 2018. That was the 1st accused dressed in jeans, a black jumper and a dark blue cap and that he was talking to the deceased child near a black gate and in estimation the black gate was far from M's home. The sketch map tendered as P Ex 19 (a) by PW21 (CID Tobias Mwita) shows that from Total Petrol Station to the black gate is about 150 meters. PW10 estimated the distance from her house to the black gate to be about 500 meters. There is a presumption that for a child/PW2 of that age (12 years) would not probably take that distance to be far from home though it was still a walking distance nevertheless, but from the witness (PW2), I could see the sense with which she described the events with impressive clarity and detail. CIP Robert Ojwang (PW19) was one of the investigators who carried out the initial investigations after the child was reported missing. He told this court that he interrogated PW2 and PW3 and found the children to be quite intelligent as they gave useful leads that assisted him and other investigators unravel the mystery behind the chilling murder of the deceased child.



218. I also found the evidence of PW2 quite telling because as she narrated how they walked home with her friends that fateful evening, she recalled having seen the car that the 1st accused had used on September 4, 2018 to drop the deceased child home, parked near Total Petrol Station. This is what she stated;
- “I had seen the silver car near Total Petrol Station where we had been dropped...” She stated that she left M and the man talking and passed them. When she looked back after walking some distance, she saw them (the 1st accused and M) walking towards Total Petrol Station.
219. The evidence of PW2 in respect of the description of the man who was standing near the black gate is corroborated in detail by PW3, MK. She stated that the man called M by name as they walked with her after being dropped by the school bus. Her description of the man was more elaborate because she stated that she did not trust him and had reservations leaving her friend (M) alone with the man. She stated that she tried for about 5 minutes with no avail to talk to M to leave the man and go home. She stated that she looked at the man properly and that she even identified him at the ID parade later conducted by the police but feared picking him out. She stated
- “I was able to identify him but feared he would kill me if I pointed at him...”
220. The 1st accused has submitted in his defence that the evidence of PW2 was unreliable because there was inconsistency on where she saw the silver car but the contention is not factual. PW2 stated that she had seen the 1st accused with the same silver car on September 4, 2018 when he picked the deceased girl at the petrol station and dropped her home and that on September 6, 2018 she had seen the car parked near Total Petrol Station after alighting from the school bus.
221. While it is true that she saw the same silver car parked near police station when she went to record her statement and that he was shown the car by the police, that admission alone in my view does not lessen the probative value of her evidence.
222. I found her concise, firm, well oriented and credible as a witness. I am not persuaded by the 1st accused’s contention that doubts were welter when the witness stated that she had witnessed the girl picked by her father in a white car at an earlier date. She stated under cross-examination that the incident took place in 2016 and this court did not see any connection between what may have taken place in 2016 with what took place in 2018. That issue raised by the 1st accused in my view is a red herring and is reminiscent of the conduct of a common thief when cornered in a street, he begins deflecting attention by pointing another person and shouting “thief” “thief”!
223. The evidence of PW2 and PW4 was well corroborated by PW4 (AK) another pupil who was among the pupils who were dropped together with deceased child at the spot near Total Petrol Station where she was kidnapped. PW4 stated that the man called the deceased by name 3 times near the black gate and that M went and hugged the man and this made them think that the man was a relative or someone close to her.
224. That act of the deceased girl running to the man and hugging him in my considered view was significant in two ways: -
- i. It shows that whoever as calling the deceased girl was a person the girl trusted and liked.
 - ii. According to the evidence of PW10 (mother to the victim) her daughter (deceased girl) really liked the 1st accused which explains an incident that happened on one occasion after a church service at St Joseph Catholic Church. PW10 stated that the deceased child run and hugged the 1st accused and insisted on being carried by the 1st accused in his car. The 1st accused in his defence conceded that the incident happened and that he actually took M in his car and



dropped her at a junction near the Total Petrol Station from where her mother (PW10) picked her.

225. The 1st accused was also a frequent visitor to the home of the deceased child. PW10 went further and gave a history of their relationship specifically of a time while she was still at Maua, in 2015 and. That while her deceased daughter was admitted in hospital the 1st accused visited her at the hospital and that is how the two developed good relationship.
226. The circumstances as narrated by PW2, PW3 and PW4 regarding how the deceased girl was called by a man clearly show that the man who called her was close to her. In fact, the witnesses stated that the deceased girl referred to him as “uncle” and from the evidence tendered it is clear that the deceased girl referred to the 1st accused as “uncle”. PW10 stated that the deceased girl fondly referred to the 1st accused as “Uncle Kim”. The court heard the friends of the deceased girl to wit PW2, PW3, PW 4 and PW5 give a description of the scene where the deceased girl was kidnapped and find that the descriptions were quiet in tandem with the evidence of PW21 CIP Tobias Mwita who drew a sketch map of the scene and tendered it as P Ex 19(a) (b) and (c). The description given by the Investigating Officer corroborates the description given by the cited pupils and that in my view, leads credibility of their testimonies.
227. The other important piece of circumstantial evidence relied on by the prosecution linking the 1st accused with the offence of murder was the forensic evidence both derived from mobile call data, soil sample or particles from the scene, as well as soil sample obtained from the pair of shoes recovered from the house of the 1st accused.
228. I will begin with the calls data. PW20 (Daniel Hamisi) from Safaricom testified and as observed above. The witness told this court that as an expert in the field of data analysis he found that the mobile phone user of mobile 26xxxx42 was the 1st accused Benson Marangu of identify card 240xxxx35. The witness stated that he located the user (1st accused) on September 6, 2018 at around 3: Pm to be at Milimani Area of Meru Town. That area is the same place where Total Petrol Station is situated and that is the area where the deceased girl was kidnapped by a person PW2, PW3, PW4 identified as the 1st accused herein. The evidence of PW21 in regard on how he pieced together the evidence is an enough illustration that circumstantial evidence when properly investigated is capable of giving results with almost mathematical precision. Suffice to state that PW20 tendered his analysis report on the calls data in respect to the 1st accused as P Ex 16 and a certificate certifying that the information was generated from a computer assigned to PW 20 by Safaricom as P ex 17. That satisfied the legal requirements under section 106B of the *Evidence Act*.
229. In my view the forensic evidence (calls data) tendered by the prosecution squarely placed the 1st accused at the scene where the deceased child was last seen alive with a man that PW2,PW3& PW4 identified as him.
230. Given the circumstantial evidence adduced against the 1st accused, what was required of him was an explanation to rebut the presumption created by virtue of the fact his phone data placed him in the same area where the deceased was suspected to have been abducted. However, when asked about his whereabouts on the material day at the material time of between 3pm and 4pm, the 1st accused in his



statement initially denied having been in the area at the time in his testimony in chief, he stated as follows;

I supplied the chemicals. After Kegoi at 3pm I left Makutano. I went to a club to enjoy a drink. It was near Kinoru. It was around 4pm, I do not recall exact time. I am not sure there is a route leading to K's house. I am poor in estimation...

231. His evidence during cross examination by counsel Maari however changed, he stated as follows;

On September 6, 2018, I was in Milimani area Meru near Kinoru. I was taking lunch at that place. It is true I was near Total Petrol Station. My car was seen there. I was at a hotel at Milimani area. I do not have a receipt from the hotel I was in...

232. His testimony while he was cross examined by counsel Kariuki was also a different story, this time he stated as follows when asked about the particulars of his whereabouts at the material time;

On September 6, 2018, at around 4.20pm, I was at club dimples at Milimani area in Meru Town. I do not have evidence from that club that I was there at that time. I also bought some animal feeds after I left club dimples...

233. The technical data placed the 1st accused at the scene. His explanation on whether he was at that scene varied 3 times which belied his defence or explanation that he was having a drink at Kinoru. His dishonesty is evident when he initially denied knowing that there was a road in the area that led to the house of PW10 despite his familiarity of the area. He admitted that he had visited that home severally and that he had picked and dropped the deceased several times including 2 days before she disappeared. When he later changed his narrative and suddenly agreed Milimani Area in Meru is near Kinoru and that Club Dimples is a walking distance to Total Petrol Station shows conduct of person cornered by facts and irrefutable evidence. The explanation as what he was doing at Total Petrol Station on September 4, 2018 and September 6, 2018 when the deceased had been dropped from school is not satisfactory. He submits that there was insufficient evidence that showed that he was at the scene near Total Petrol Station at the material day but his written submissions are inconsistency with his statement of defence where he concedes being at the vicinity of the scene.

234. Furthermore, the evidence of PW19 and forensic evidence of PW20 has placed him to the scene of kidnap beyond any reasonable doubt when coupled with eye witness account of PW2, PW3 & PW4.

235. This court will now turn to the evidence on soil analysis carried out by forensic expert in that field.

236. The prosecution's case in respect to soil extract and subsequent analysis is well captured by PW14 (CPL Evans Mose) and PW17. PW14 gave a narrative about the scene where the body was found and illustrated the narrative with pictures he took. In particular, the tendered photos P Ex II to and IV showing where the soil sample was collected from the scene which was near an earth road in Gitoro Forest.

237. In attempt to further place the 1st accused at the scene of the crime, the prosecution relied on forensic analysis of soil samples collected at the scene of the crime as well as soil samples obtained from shoes belonging to the 1st accused.

238. The prosecution called PW17, a Government Analyst working with the Government Chemist in Nairobi. The witness told the court that he received the following samples from CPL Juliet Kimwei on September 24, 2018;

i. A soil sample exhibit marked MK4 taken from the scene of the crime



- ii. A pair of shoes exhibit marked MK5 recovered from a suspects house
 - iii. Another pair of brown and white gambrel shoes recovered from a suspect's house.
239. The defence counsel for the 1st accused has challenged the forensic evidence in respect to soil particles found on his client's pair of shoes stating that the prosecution failed to provide an explanation for criteria used by the police to choose the pair of shoes belonging to the 1st accused to be subjected to forensic analysis. He wondered why the police did not for example decide to take the shoes the accused was wearing when he was arrested.
240. The police investigators however, were seasoned police officers whose many years of service appears to have really become handy in their meticulous investigations carried out in this case. They acted professionally in my view and the manner in which they went about their duty was found admirable by this court in this instance.
241. PW19 CIP Robert Ojwang, Deputy DCIO Meru Police Station at the material time inform the court in his evidence that while the police were conducting investigations, they conducted a search at the house of the 1st accused, and retrieved the shoes. The search was done in the presence of police officer, the 1st accused and his brother Nicholas.
242. Section 55 of the [National Police Service Act](#) grants power to the police to take photographs, fingerprints and forensic evidence as follows;
- A magistrate or a police officer, and any other person appointed to give certificates under subsection (2) of section 142 of the [Criminal Procedure Code](#) (cap 75), may take, or cause to be taken in his presence, for the purposes of record and identification, the measurements, photographs, footprints and casts thereof, palm-prints, finger-prints and other forensic evidence of any person in lawful custody or who is subject to police supervision.
243. The items collected by the police officers were done in presence of the 1st accused and his brother. This court has not been told by the 1st accused that his shoes were clean at the time they were collected. He only expresses reservations about why the police chose those black shoes but the police for good measure collected the black leather shoes (P Ex 13(a) and brown canvass shoes, (P Ex 13 (b). PW17), tendered a report P Ex 13 which showed that the soil sample in the brown canvass shoes (P Ex 13 (b)) did not match soil sample collected at the scene (MK4). The soil sample from the pair of shoes (MK 5-P Ex 13 (a)) marked those collected (MK4) from the scene where the body of the deceased girl was dumped.
244. The fact that the soil sample from the scene matched those of one pair of shoes shows that the wearer of those shoes is very likely to have visited the scene of crime where the body was dumped. If the soil samples from the 2 pairs had matched, the 1st accused could have a case to accuse the investigators of trying to fix him. But it can clearly be deduced from the independent findings by PW17 that the police officers were professional in their work. When they collected the samples and shoes they had no idea about the outcome of an independent analysis that was to be done by other experts at the government chemist.



245. Circumstantial evidence is often the perfect mode of proof in a criminal case, it was held as such in the English case *R v Taylor, Weaver and Donovan* [1928] 21 Cr App R. 20:

“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.”

246. The Supreme Court in *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, held that:

In the above context, it is our view that, while confessions under section 25A are often made to the police during investigations, as counsel for the respondents argued, section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only “within the knowledge” of the accused person so that if he does not offer an explanation, he risks conviction.

247. Section 111(1) of the *Evidence Act*:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

248. This court finds the circumstantial evidence adduced by the prosecution in respect to the element of actus reus has proved that element in regard to the 1st accused. This court finds no doubt absolutely in reaching that conclusion. That conclusion is fortified by the Court of Appeal decision in *Chiragu & another v Republic* [2021]eKLR. The court in reference to the decision in *Ahammed Abolfathi Mohammed & another v Republic* [2018]eKLR, held;

249. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr App R 21: -‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances 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.’”



250. The fact that the 1st accused without authority picked the deceased from her dropping point on September 4, 2018 and was confirmed to have been at the scene of her disappearance on September 6, 2018 without proper explanation and had forensic evidence collected from his house leads to legitimate suspicion that he was responsible for the murder.
251. The 1st accused gave a detailed account of his relationship with PW10 and the personal relationship he had with the deceased. He stated that he was very close to the girl to the extent that she felt conformable accompanying him in his car even in the absence of her mother. It therefore beats logic that he displayed very little concern if any when he learnt of her disappearance. According to his own account of the events, and despite learning of her disappearance at 5pm while being at the same vicinity, he managed to go to a club, have some food and drinks and his plans to travel to Nairobi remained unchanged. His behaviour in my opinion adds up to his culpability.
252. In respect to the 2nd accused this court finds that the prosecution failed to connect him with the act that caused the death of the deceased girl. It is true, and it is admitted by the 2nd accused, that he sent threatening messages to the deceased's mother when he learnt of the disappearance of the deceased's child. There is no evidence from call logs tendered that showed that he was communicating with the 1st accused or that he was anywhere near the scene of the disappearance of the deceased child or where her body was found. The evidence against the 2nd accused in regard to the element of actus reus cannot sustain the charge.

Whether the 1st accused persons committed the unlawful act with malice aforethought.

253. Malice aforethought is an integral ingredient for the offence of murder. It is a technical term associated with the state of mind of the accused charged with the offence of murder, as at the time the act or omission which caused death was executed. The prosecution must prove that the act(s) or omission(s) of the accused that caused death were actuated by malice.
254. The circumstances that constitute malice aforethought are set out under section 206 of the [Penal Code](#) as follows;

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.
255. The cause of death of the deceased as stated above was multiple blunt trauma, mutilation and assault. The injuries sustained by the deceased are documented in detail in the post mortem report. PW11 stated that the blunt trauma was prominent on the head and the chest. Injuries to the side of the head were documented as bruise laceration measuring 4x2 cm and another 6x4cm, fracture on the intra



parietal suture, which extended to the back of the head (occipital). Internally, the deceased sustained a fracture of the sternum. She stated that the deceased also suffered a fracture on the femur and the doctors observed a reddish reaction on the bone which meant that the fracture was caused prior to the death of the deceased. PW11 told the court that in her opinion, the deceased underwent a painful death. That the amount of force used on her was significant. That when she looked at the traumas on the head, chest and the leg, she concluded that the force used was great, it was high impact with a lot of energy.

256. The nature and extent of the multiple injuries inflicted on the body of the deceased indicate that the injuries were caused with malice aforethought.
257. This court besides the above finds that the evidence adduced by the prosecution showed that the act committed was deliberate, planned and executed with clear evidence of spite and ill will. The evidence tendered by PW1, PW9 and PW10 is significant when coupled with forensic evidence tendered by PW15. The evidence taken collectively proves the element of malice aforethought in respect to the 1st accused.
258. The testimonies given by both the 1st accused and PW10 without a doubt indicated that the two were in a relationship characterized by on and off romantic escapades that unfortunately ended with tragic consequences.
259. From the account given by PW10, she came to know the 1st accused in 2015 while at xxxx Law Courts as a Magistrate and the relationship developed but ended after 4 months after a disagreement arose. It is apparent that about the same time, PW10 was transferred to G Law Courts and there was no further communication. DW1 states in his defence that he moved on and got married to another woman.
260. The relationship seems to have rekindled in 2017 and continued to August, 2018 when a trip to Eldoret ostensibly caused by a burial that PW10 stated they had to attend. It is unclear what happened during that trip in so far as the relationship between the 2 because each one of them gave a different account of what transpired particularly as to how and where the 2 spent the night in Eldoret. It is however apparent that after that trip, things were never the same again. DW1 paints a rosy picture of how the trip and their engagements were but what came out paints a totally different picture.
261. PW10 stated in her evidence that their relationship from 2017 was platonic and the prosecution has submitted on the subject in its submission. But that is not what caught the attention of this court. The attention of this court was caught by the narrative given by PW10 about the events of August 13, 2018 when the 1st accused visited her house when she was away on duty. PW10 stated that her son was a candidate for the KCPE examination as he was in class 8 hence she had organized tuition for both the candidate and the deceased child. She stated that there was a strict teacher known as Joshua who used to go to her house to offer tuition for her children and that on August 13, 2018, the 1st accused found the man in her house when he visited. That fact is conceded by the 1st accused. This is what he told this court in cross examination by Maari for Director of Public Prosecution;

“...on August 13, 2018 I went back to K’s house I was taking a bunch of bananas. It is true I found a man who told me he was a teacher. I just left the bananas in the house...”

262. PW10 stated that while they were travelling to Eldoret, the 1st accused tried to court her which she found normal but added that the 1st accused was the type that would not take no for an answer. That when he found a man in her house tutoring her kids, he called her demanding for an explanation as to who the man was and that she answered him that she was under no obligation to explain who the man was. That he asked her for a meeting in the course of that week but she was not able to meet him



though she promised to see him on August 19, 2018 which did not materialize. That failure to see him seem to have really enraged him because PW10 stated that he remarked;

“Nyinyi wanawake ni mashetani sana” and that he kept hurling insults at her telling her

“Sitaki kusikia mambo ya wanawake tena.”

263. There is clear evidence from the call data retrieved from the 1st accused’s mobile phone by PW15 that PW10 tried to calm him down as she told this court but the photos sent or forwarded to him on August 26, 2018 appear to have elicited an emotional outburst well captured by extracted chats/ communications tendered by PW15 as P Ex. 9. The sum total of the messages sent by the 1st accused which he admits he sent depicts a person who felt betrayal. When he stated that the photos sent to him had no meaning in his life one gets the sense in which he was on the verge of giving up.

264. This is what he stated about the photos that captured the two attending a funeral with friends in Kapsabet.

“I believe they have no meaning in my life and no need of keeping them. I have gone through enough betrayal. I even do not see a reason of having them.”

265. The 1st accused when pressed to explain the import or what he meant, he tried to explain it away by saying he was referring to his ex-friend with whom he had parted ways. But that answer in my view was evasive and out of context because in the entire conversations between the two, the issue of ex-girlfriend did not crop up.

266. The response by PW10 as per text clearly shows that she was taken aback by what the 1st accused meant by the word “betrayal”. What this court found telling was what was to be a parting shot albeit sarcasm from the 1st accused to PW10 on August 27, 2018 at 6:46Pm. He wrote;

“Thanks for the insults. I am done with you woman may you also have a prince charming.”

267. From August 27, 2018 to the time the deceased child disappeared, there was no communication at all between the 1st accused and PW10. The 1st accused admits the same in his defence. This shows the sense in which PW10 testified and wondered why the 1st accused with whom she had broken up almost a week before and was not in talking terms would go and pick her deceased daughter on September 3, 2018 and September 4, 2018?

268. PW9 testified that the deceased was dropped on September 3, 2018 and September 4, 2018 and what caught his attention was the ball gum the girl was chewing on being asked who had bought it for her she said it was uncle Kim (1st accused).

269. The 1st accused has admitted he actually dropped her on September 4, 2018. In my considered view the 1st accused at that time was bitter with the matter and as the expression goes; “hell hath no fury like a woman scorned” which conversely can be equally be expressed.”

“Hell hath no fury like a man scorned”

270. The mental state of the 1st accused at the time was that of a man feeling deeply betrayed. He had found a man in the house of a woman he was courting and whom he thought perhaps wrongly should be his. He was unable to get PW10 for a meeting to explain or at least give him a chance. The messages sent to PW10 talking about betrayal and remarks like women are devils in my view was not just tantrums but it underlined much worse.



271. This court finds that behind those tantrums or unsavory messages was someone ill motivated for a vengeance which unfortunately was to be directed at an innocent child who had no business with whatever was going on between the 1st accused and her mother. PW10 stated clearly in her evidence that she had known the 1st accused to be tempered and recall an incident in 2015 when they first broke up. She stated that the 1st accused was so mad and that he started posting her pictures on the WhatsApp platform and when she inquired from him why he was doing so, he stated that he wanted people to know she was his. She also stated that the 1st accused is a person who would not take No for an answer and that on August 13, 2018 when he found a man in her house, he asked her for a meeting adding that the tone used was more of a “demand” than a “request”.
272. Those small details revealed by PW10 circumstantially with pieces of evidence I have alluded to above in my view satisfied the conditions set in the celebrated case of *Abamad Abolfathi Mohammed and another* (supra) where it was held;
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy 3 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 in addition the prosecution must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt.”
273. This court from the foregoing finds that the prosecution has proved beyond reasonable doubt that the 1st accused was linked to the disappearance of the deceased child as he was last seen standing with her alive on that fateful day of September 6, 2018 near the black gate.
274. The pictures taken from the body of the deceased together with evidence of a pathologist shows that the murder was gruesome and horrendous. The horrid pictures of the body tendered shows that the innocent girl underwent a painful death before her body was left to be devoured by wild animals in Gitoro forest within Meru County. The evidence tendered showed a chain of events well pieced together by seasoned investigators through direct evidence aided by forensic science. The evidence gathered clearly shows that there is no escape from the only conclusion that the accused is the person who committed the heinous crime.
275. I faced based on the evidence tendered that the prosecution has proved both elements of actus reus and mens rea against him and I have no hesitation to find that the prosecution’s case against him has been proved beyond any reasonable doubt.
276. In respect to the 2nd accused, this court found the 2nd accused to be streetwise and quite informed in legal matters either out of able legal representation by the defence counsel or simply interestingly street smart. He openly admitted in his defence that he is a common criminal who had been extorting and conning people out of their hard earned cash. He conceded that he indeed sent threatening messages to PW10 asking for a ransom of Kshs 2 million in order to release the deceased child. According to him his interest was just to get money regardless of the means used. But on the same breath, he denied having anything to do with the murder of the deceased child.



277. In his own testimony, the 2nd accused stated as follows in court;
- “I issued threats that unless money was sent, the mother would mourn...I threatened Hon Kimei that unless I received the money, it was going to be brutal and she would mourn...”
278. Section 179 of the Criminal Code grants power to the court to convict an accused person for an offence which he was not initially charged with but in which evidence adduced establishes a lesser offence. The said section stipulates as follows:
- “(1). When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charge with it.
- (2). When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”
279. In his written submissions, the 2nd accused pleaded with this court to convict him of the lesser offence he admits he expressly committed.
280. I find the prayer by the 2nd accused sound. In his written submissions, he cites section 179 of the Criminal Procedure Code which section in my view, is in tandem with his prayer given that I have found insufficient evidence to convict him on the principal charge of murder.
281. The Court of Appeal in *Robert Mutungi Muumbi v Republic* [2015] eKLR provided for conditions which a court must satisfy itself with in application of section 179 of the *Criminal Procedure Code*. They are that the substituted conviction is for an offence which is both minor and cognate to the offence charged. It held as follows;
- “An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.....”
282. I do think that the offence of threatening to kill is cognate to the offence of murder, section 223 of the *Criminal Procedure* provides for the offence of threats to kill a follows;
- “Any person who without lawful excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years.”
283. The 2nd accused person is found not guilty of murder but the evidence tendered and by his own admission, he is guilty of threatening to kill contrary to section 223 of the *Penal Code*. He is hereby convicted accordingly.
284. For the 1st accused this court finds that based on the evidence tendered by the prosecution well elucidated above, he is found guilty of murder and he is hereby convicted.
285. Before I pen off I have to appreciate the tireless efforts put in by the Office of the Public Prosecution led by M/s Maari together with the Police particularly the officers from Director of Criminal Investigations



both in Meru and Homicide Unit in the Directorate of Criminal Investigations Headquarter Nairobi who correctly did a tremendous job. As correctly put by M/s Maari from the Office of the Director of Criminal Investigation this was an energy-sapping exercise that took long hours to prepare and during trial.

286. The exemplary work of the defence counsel Mr Mutuma and the family lawyer Mr Kariuki even in the face of emotive moments was commendable. All the advocates must be commended for ensuring that the trial was conducted professionally and expeditiously. That is all.

DATED, SIGNED AT KITUI THIS 27TH DAY OF OCTOBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT CHUKA THIS DAY OF OCTOBER, 2022

HON. LADY JUSTICE LUCY GITARI

JUDGE

S E N T E N C E

I note that the offence committed herein is serious. The deceased did not have to die in the brutal manner in which she died. She was an innocent child full of love even to unknowingly embrace a man who would only a few days later turn to be a monster who would end her life painfully and give her as food to wild animals.

It is evil and beastly to sacrifice an innocent child at the altar of failed love affair. I fail to get suitable words to condemn this crime. It is an offence which needs to be discouraged with severe punishment. I am well guided by the holding by Supreme Court in the now famous Muratetu case. Though I will consider a none custodial sentence it must reflect the seriousness at which this court considers this offence.

As against the 2nd accused, I note that he was an opportunist who was out to enrich himself out of a sad situation. He has been in custody and we trust have learnt a lesson that sometimes when you try to leap where you have not sowed you might land yourself in a bad mess.

I consider the time spent in custody as sufficient sentence and punishment. I will therefore discharge him under Section 35(1) conditionally for a period of one year which I have explained. As for 1st accused, I sentence him to imprisonment for a period of forty (40) years. Right of Appeal in 14 days explained.

L.W. GITARI

JUDGE

27/10/2022

