



REPUBLIC OF KENYA



**Republic v Gacheru (Criminal Case 8 of 2017)
[2022] KEHC 15698 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 8 OF 2017
CM KARIUKI, J
NOVEMBER 24, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

NATHANIEL KIMUNU GACHERU ACCUSED

JUDGMENT

1. The accused is charged with the offense of murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 Laws of Kenya.
2. The particular being that on October 21, 2013, at Muthiga village of Nyandarua North District within Nyandarua county, they murdered David Gakenya Kimani.
3. He pleaded not guilty, and the matter went into full hearing.
4. The prosecution called ten (10) witnesses to prove its case. The accused testified in his defense on oath but did not call witnesses
5. Parties advocates were directed to canvass the submissions via written submissions which they filed and exchanged.
6. The summary of adduced evidence was that PW 1 Amos Kimani Mwangi, the deceased person's elder brother, and a teacher, testified that his brother left home for work on October 21, 2013 but never returned home. He told the court that the deceased,
David Gakenye Kimani, worked as a scrap metal mobile trader between Pesci at Gwa Kungu within Rumuruti and Kiamariga trading center.



7. He was a pastor at a local church. According to PW 1, he tried calling the deceased on a fateful day to no avail. On October 27, 2013, he sometimes received a phone call from the deceased's wife, who inquired whether the deceased had contacted him. Being on a Sunday, they expected him to be back.
8. No phone calls were going through, and this worried PW 1, who, on October 29, 2013, went to the Criminal Investigation Department (CID) Nyahururu Branch and reported the matter. The searches on their brother commenced, and the victim's phone was later traced to Karai within Laikipia County, where the phone holder was a fertilizer seller. His name was Mureithi. On inquiry, Mureithi confirmed to have bought the mobile phone make Nokia from the accused at Kshs 250/=.
9. PW 1 testified that they later inquired from the four (4) people who had earlier possessed the mobile phone, who directed them to Nathaniel Kimunu, the accused, who first misled them about where his home was located. After that, a good samaritan ran them to the accused's house.
10. PW 1 further testified that at the accused person's homestead, they were greeted by a foul smell, and when they searched his house, they found a dismantled motorcycle, registration No KMDF 381 H, which was covered in a bundle of trousers. They later informed the CID, who went to the crime scene and took photographs. They also informed the chief of what had transpired, who then confirmed that the subject house belonged to the accused. On that day, the search team did not find the deceased person.
11. He further testified that he and other people who had accompanied him reported the matter to the CID, requesting backup to search whether the deceased was within the accused person's home. However, their request was turned down, whereby they proceeded independently to search. PW 1 was not present when the remains were discovered in a pit latrine. He came later after the remains were already unearthed and recognized his younger brother from the clothes he wore and the gap in his teeth.
12. He testified that they had also discovered documents belonging to the deceased in the accused's house, including his national identity card, license, receipt dated August 7, 2012, which Wamunene Driving School had issued him, and a photocopy of a receipt of payment for the motorcycle.
13. PW2 Julia Wangari Gakenia testified that on October 21, 2013 at about 2.00 am, the deceased left home to Kiamariga to take a battery to a scrap metal shop. It was the last time that PW2 saw the deceased. Any attempts to get in touch with him went unanswered.
14. She went to her neighbors in search of her husband to no avail. Later she informed her brother of the development, and her brother asked her to wait and see if the deceased would return for church service. However, the deceased never went home, so she reported the matter to the CID Nyahururu for help.
15. The investigators helped trace the deceased phone, and she later learned that they had also traced his motorcycle and found his body. She was never present when the same was discovered. PW2 also told the court that although the deceased used to return home after work, he maintained a rented house at Rumuruti and thus only went home every Saturday.
16. According to PW2's testimony, her husband wore clothes when she saw him at the morgue. The clothes were only placed on him but never worn. She could not identify him other than using the clothes he wore.
17. PW3 Patrick Mwangi Ndirangu's testimony was that the deceased was his brother-in-law who went missing.
18. He testified that the matter was reported at Karai Police Station and later to the District Criminal Investigation Officer (DCIO) Nyahururu. On December 2, 2013, PW3 and PW 1, Pastor Mwaniki,



and one Peter approached the DCIO office at Nyahururu inquiring whether any development had been made regarding their kin's disappearance.

19. They were informed that a suspect had been apprehended and was discovered to have had the deceased's phone. They later learned that the suspect was scheduled for interrogation on December 3, 2013 at Karai Police Station, and the same was conducted in their presence. PW3 later learned of the main suspect in the matter, the accused herein. Nathaniel Kimunu was also interrogated in the presence of PW3 and was asked to take the officers to his house to search the place.
20. The accused apparently took them to Kiamariga Trading Centre, his place of business, where according to PW3, was a bicycle repair shop, and he also used to make and sell jikos. The search at the workshop bore no fruits as there was nothing linking him to the disappeared person.
21. Allegedly, on December 5, 2013, the DCIO told PW3 they would offer backup for the search at the accused person's house. They also advised PW3 to look for help from other civilians. The search party, PW3, and other persons who had joined the search party later located the abandoned house through the use of a good samaritan.
22. They proceeded to break into the house and searched the two-roomed dwellings, where they discovered the deceased' motorcycle covered in clothes. Later, the house was secured as the crime scene, and photographs were taken. He identified the parts of the King Bird motorcycle registration No KMF 381 H was discovered in the said house and identified as the place said to have belonged to the accused.
23. He also testified that they continued the search leading to their discovery of a pit latrine. They uncovered the pit and discovered a white gurney back (gunia), and upon opening the bag, they found the decomposing remains of the deceased.

The body had been cut into two to fit into the bag. They also found a green jacket, brown trousers, a white t-shirt, brown shoes, and an orange shirt.
24. PW3 acknowledged that it was challenging to identify the body as it had already started becoming a skeleton and the clothes were not firmly attached to his body. More photographs were taken before the body was loaded into the police vehicle and taken to the mortuary. PW3 identified the photos dated December 26, 2013 taken at the fire pit and the sack used to conceal the remains.
25. PW4 Margaret Wanjiku Mwangi testified that she took a body to the accused person's home, where the deceased was found. She got to the homestead at night and, together with others who had gathered, was requested to go home.
26. Later, they found that the motorcycle belonged to the accused. She did not see the deceased but heard his remains were buried in the latrine and wrapped in polythene paper. The pit latrine had no walls, and its floor was covered in timber.
27. PW5 was No 6xxx6 Cpl Rashid Ibrahim testified that he circulated the message to establish whether the deceased could be traced.
28. PW6 SGW (minor) testified that he was eleven (11) years old. On October 21, 2013, he was at their farm in Koja village when at around 1.00 pm, he heard a motorbike stopped at the accused person's compound. He saw the accused and the rider of the motorcycle and saw the accused enter the house. The deceased was sitting outside the house. Later he heard three screams, and the accused stated, "I wish you had not died."



29. PW 6 was playing with his cousin then, and they later ran home and told his mother, Lydia, what they heard. His mother was with one Mweje. They never listened to the screams. After one (1) month, he later saw people at the compound, and Kimunu killed someone. He connected the dots.
30. During cross-examination, PW6 confirmed he saw the accused when he was playing with his cousin AW before they left the lower part of the farm. Further, when PW6 heard Kimunu wishing an alleged person was not dead, he was alone. His mother never took any initiative to confirm her son's allegations after PW6 told her what he heard. They never smelled any odor of decomposition coming from the scene. He also confirmed that anyone could access the house without a fence.
31. PW7 Ann Wambui, the Assistance Chief Kiamariga sub-location, took the witness box. She testified that on December 5, 2013, at around 8.00 pm, she received a phone call from a person claiming to be a police officer attached to Karai Police Station. The person requested directions to the accused's home. Before the incident, PW7 was aware that Nathaniel Kimunu had been arrested with others.
32. The officers were directed at around 10.00 pm at the accused person's alleged house. At the time they arrived, a crowd had already gathered. Since the door was locked, PW7 and the officers broke into the house, and upon searching the house, they found a dismantled KCMF 381 H King Bird motorcycle which was blue in color. They took the motorcycle parts.
33. She further testified that the following day on December 6, 2013, together with the area Chief James Elliman, they found a crowd gathered at the subject compound. Some people had already found something in a latrine and were getting agitated. PW7 thus requested the crowd not to tamper with anything in the compound as they waited for the police officers to secure the area.
34. After the said officers arrived, some public members helped remove the soil covering the latrine. They recovered the body parts of the deceased. PW7 had known the accused for more than three (3) years, as her office was close to the accused person's metal shop.
35. PW8 Solomon Ngatia Njoroge testified that he was a tomatoes broker at Kiamariga. In December 2013, Elijah Mburu, his boss, sold him a blue Nokia phone on the condition that he would pay the purchase price little by little. The phone was sold at Kshs 450/=. He further told the court that sometime on December 2, 2013, he was arrested and taken into police custody at Ndaragwa Police Station. PW8 stated that he was arrested with three (3) others, including Elijah Muthee, Nathaniel Kimunu, and Nicholas Mureithi. PW8 further testified that the four were taken to court, but the charges were later dropped.
36. During his testimony, a Blue Nokia Phone was shown to him, but he vehemently denied that the phone he bought was presented before him. A position he reiterated during his cross-examination.
37. PW9 Elijah Muthee Mburu, a farmer, was then called to give his testimony. It was his evidence that on November 6, 2013, he was at Kiamariga Center near Voroson Communication Mpesa when Nathaniel Kimunu told him he was selling a phone for Kshs 500/=. PW9 told the accused that he could borrow money from his neighbor Ann Wangui who lent him Kshs 250/=. He testified that he gave the accused the Kshs 250/ = after he asked a man named Njogu to witness the transaction.
38. However, on December 2, 2013, he was apprehended by police officers from Karai Police Station in the company of CID officers from Nyahururu Police Station inquiring about the phone he allegedly bought from the accused. He was later taken to Karai Police Station on the same day, and on December 4, 2013, PW9 and others were charged with possessing a phone belonging to a missing person.



39. PW 10 Nicholas Muthithi Tatongo was stood down on February 27, 2020 due to heavy rains and never testified after that. And after various adjournments from the prosecution, the prosecution closes its spirit of justice.
40. On the closure of the prosecution case, the honourable court found the accused with a chance to answer and subsequently put him to his defence. On February 7, 2022, the accused person gave his sworn testimony. He espoused as follows:
41. That at all material times, in this case, he did not know the victim by the name of David Gakenye. In particular, in 2013, the accused worked as a blacksmith and bicycle repairer at his shop at Kiamariga Trading Centre, where he was also residing. Consequently, as a general worker he dealt with numerous customers but never with anyone named David Gakenye.
42. The accused person's parents had later purchased the subject property at Raya within Laikipia County. Further, on the day the accused was arrested, the police conducted a three-hour search at his home, which doubled as his place of work. The said search never yielded any evidence of this crime or otherwise.
43. About his parents' farm at Raya, the accused gave evidence that the same had been leased, and he thus never used the farm. He testified that he was unaware of where the accused's remains had been found. Indeed, he was never present when the victim's remains were retrieved.
44. Later, the accused was arrested at his place of business and was never informed of the reason for his arrest. He later found out he was detained concerning a body recovered at the Raya farm.
45. The only dwelling within the farm was a temporary house built by the accused person's deceased father sometime in 1979. From his recollection, the last person to farm on the parcel of land was someone only known to him as Baba Waiganjo. The accused never lived in the house.
46. He narrated that the only person who had grudges against him was baba Gichuki, who had leased the farm between 2013 and 2015. Notably, the said person had initially wanted to lease the land, but the accused refused him as the property was leased to someone else at the time.
47. The accused further stated that after he was arrested on November 28, 2013, he was taken to Karai Police Station. At the station, he discovered several others were captured with the said charge. These individuals later became state witnesses and subsequently testified in this matter.
48. Primary reason for the arrest was a phone which allegedly belonged to the deceased and which, per the claim, the accused person had sold to his co-accused persons later turned into state witnesses. However, the accused never recognized the mobile phone he was interrogated about.
49. It was the accused person's evidence that he never saw any earlier motorcycle produced as an exhibit before the court. It was not true that the said exhibit was recovered at his house. He could not recall being in contact with the clothes brought before the court as exhibits. He had not been present when the police recovered the said clothes. Further, no witness had identified the accused at the crime scene. The only witness who, at the time of the alleged crime, testified to have seen the accused told his mother, but no report was ever made. The accused did not know anything concerning the present case.

Prosecution Case Submissions.

50. The prosecution submits that the ingredients of murder are well set out in the case of [*Republic v Henry Obisa Ouko*](#) (2018) eKLR as:-
 - a. The death of the deceased has occurred.



- b. That the accused committed the unlawful act which caused the deceased's death.
 - c. That the accused had malice aforethought.
51. The death of the deceased has occurred. It is not contested that David Gakenye Kimani was identified as the dead.
 52. PW 1 Amos Kimani Mwangi testified that on December 6, 2013, he to get, with police officers and some villagers, found the deceased's body buried in a pit latrine and that the deceased's body was cut into several pieces. He stated that they positively identified the body as belonging to David Gakenye Kimani because of his clothes, brown trouser, light green jacket, and brown shoes. He also had a gap in his teeth and one tooth missing.
 53. PW Ann Wambui Kimani also confirmed that the body retrieved from the pit latrine belonged to her husband, and she identified him because of his clothing. That the accused committed the unlawful act which caused the deceased's death.
 54. PW 6 SGW testified that on the material day, he saw the deceased and the accused person sitting outside the accused person's. He also saw the said motor motorcycle outside the accused's house. He further told the court that shortly after that, he heard screams from the accused's house. PW6 stated that he rushed to see what had happened and saw the accused coming out of his house. That the accused, talking to himself, said "afadhali hangekufa". The motorcycle parked outside the accused person's house was also missing.
 55. This placed the accused person at the scene of the crime. The accused person was the last person seen with the deceased and knew before anyone else that the deceased was, and that is when he said, "afadhali hangekufa." He later dumped the deceased's body in the pit latrine within his compound.
 56. Dr. Wambui Pauline prepared the post-mortem. Upon examining the deceased body, the doctor testified that the cause of death could not be ascertained because the body had completely decomposed. This is consistent with prosecution evidence that the accused killed the deceased and dumped his body in the pit latrine in his compound.

Malice aforethought is well defined in section 206 of the [Penal Code](#) as: -

- i. An intention to cause the death of or do grievous harm to any person, whether that person is the person actually killed or not.
 - ii. 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 killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by the wish that it may not be driven.
 - iii. An intent to commit a felony
 - iv. An intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit a felony.
57. The accused lured the deceased to his home so that he could kill him. The accused killed the deceased person and dumped his body in the pit latrine that was on his compound.



58. PW5 PC Rashid Ibrahim testified that the accused took police officers to his kiosk within Kiamariga market, where he repaired bicycles and sufurias, but the police found nothing. They then attempted to have him lead them to his house. PW5 testified that the accused had the police officers walk for a long time and led them to a river, he attempted to jump off the cliff, but he was restrained. He further testified that on a later date, they went back to Kiamariga, and that is when the area chief showed them where the accused person lived.
59. PW 1 Amos Kimani Mwangi testified that he, with police officers and some Boda Boda riders, went to the accused person's home. Upon searching the house, they found items belonging to the deceased in the accused's persons house, that is, the dead dismantled motorcycle KMCF 381 H make kingbird as well its number plate.
60. PW9 Elijah Muthee testified that on November 6, 2013, the accused sold the deceased's phone to him for Kshs five hundred, of which he paid the accused Kshs 250 and remained with a balance of Kshs 250. He identified the deceased's phone in court, which the accused sold to him. The mobile phone had a light blue cover and was a Nokia make.
61. The deceased's handset was traced to the accused person. The accused person could not explain why he had the deceased's phone in his possession. The accused kept the deceased's phone and later sold it to PW9 for gain. This demonstrates malice aforethought.
62. The accused testified and gave sworn evidence. He did not call witnesses; his defense was full of mere denials. The Prosecution has proven its case beyond reasonable doubt and prays that the accused be convicted accordingly.

Defence Counsel Submissions

63. It is submitted that the prosecution failed to establish the pertinent elements of murder against the accused person. It is not in contention that the deceased indeed died, as evidenced by the testimonies of PW 1, 2, and 3, who confirmed that they saw the deceased remains. The relevant pathologist or medical officer never produced the post-mortem report.
64. The prosecution called a total of ten (10) witnesses in this case to support the killing of the deceased. Notably, the prosecution's case was tied to a mobile phone that was allegedly at some point in possession of the accused person, motor cycle parts, and the fact that the remains of the deceased person were discovered At Raya farm, which belonged to the accused person's now-deceased parents.
65. By the evidence on record, PW 1, the deceased's brother, testified that a good samaritan who lived near the accused person's parents' farm had told them that he had not seen the accused person in the Raya area for two (2) years. In furtherance, the mobile phone allegedly recovered as an exhibit, in this case, was not similar to what the police had shown him before. PW2 was never present when the deceased remains and the exhibits herein were recovered.
66. She further confirmed that no photographs of the deceased person's clothes were ever taken. Interestingly, PW3 though not a police officer, was present when the accused person was interrogated. He was also present when police officers mounted a search at the accused person's house in Kiamariga. No evidence was ever recovered. PW3 further confirmed there were other accused persons at the onset of this case. However, he could not tell how their charges were dropped.
67. Equally, PW4 and PW5 did not place the accused person at the crime scene. PW6 (minor) confirmed that Raya farm was accessible to anyone as there was no fence. PW7, the area Chief had known the accused person for more than (3) years. She confirmed that he ran a scrap metal and repair shop.



PW7 further confirmed that the accused never lived on Raya's farm. PW8, one of the former accused persons turned state witness, had, during his testimony, vehemently denied that the Blue Nokia Phone presented before him was the phone he bought. PW9, another of the accused's turned witnesses, equally never conclusively identified the phone before the honourable court as the material he had allegedly purchased from the accused.

68. Consequently, none of the witnesses bonded by the prosecution testified they saw the accused committing the offense herein or even placed him at the crime scene. The evidence of PW6 at the time, aged eleven (11) years, could equally not prove that whomever he saw was the accused. It is contended that it defeats logic that no identification evidence was ever adduced to elucidate how PW6 had identified the accused conclusively.
69. In fact, nothing from the evidence indicated why the accused person was ever charged with the offense before the court. Besides, the accused never knew the deceased, never contacted him, and never killed him. On the other hand, anyone, including the former accused person's co-accused persons, could have killed the deceased and used the Raya farm as a dumping site after the heinous killing.
70. The next element the court must determine is whether the accused person, with malice aforethought, inflicted the injuries resulting in the deceased's death. On this, we humbly submit that malice aforethought refers to the state of mind of the accused charged with murder. Central to this position is the explanation offered in section 206 of the [Penal Code](#), which elucidates that malice aforethought is:
 - “(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 killed or not, although such knowledge 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.”
71. The statutory legislation then begs, when can the honorable court infer malice aforethought in murder cases? refer to

Republic v Tubere S/O Ochen [19451 12 EACA 63 as cited in [Republic v Silas Magongo Onzera alias Fredrick](#) name (supra) where the court noted:

“The Eastern Court of Appeal favored this approach in the case of *Republic v Tubere S/ O Ochen* [19451 12 EACA 63. The court held and acknowledged that in determining whether malice aforethought has been established, the following elements should be considered:

- a. The nature of the weapon used.
- b. How it was used.
- c. The part of the body targeted.
- d. The nature of the injuries inflicted, either a single stab/wound or multiple injuries.



- e. The conduct of the accused before, during, and after the incident.

I am satisfied that the Tubere test case continues to guide even the latest issues in interpreting the circumstances and definition of malice aforethought under section 206 of the *Penal Code* i.e *George Ngogho Mutiso v Republic* 2010 eKLR *Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic* Cr Appeal No 32 of 1990, *Karani & 3 others v Republic* [1991] KLR 622."

72. From a casual look at the evidence, no weapon was ever adduced in this case. The prosecution never established any direct line between the accused person's intention and the deceased's alleged unlawful death. Nothing was ever adduced to show that the brutal killing of the deceased was a well-calculated and executed plan to cause him undisputed. The accused had never set foot at Raya farm for more than two years. He had no malice aforethought to injure or kill the deceased, as he never knew or had any contact with him. It is thus evident that the accused person never killed the deceased.
73. The prosecution failed to prove the count against the accused herein to the degree required by our criminal jurisprudence, which is beyond a reasonable doubt.
74. From the preceding, it is submitted that the prosecution did not prove their case beyond any reasonable doubt and pray the same be favored and the accused not guilty as charged and set free.

Issues, Analysis, And Determination.

75. The issues are whether the prosecution proved their case beyond reasonable doubt and if the above is in the affirmative, what is the appropriate verdict?
76. The prosecution called a total of eleven witnesses in support of its case, and at the close of its case, the accused was put on his defence. He gave sworn evidence and did not call any witnesses.
77. Throughout a criminal trial, an accused person bears no duty to prove his innocence. The burden is on the prosecution to prove their case beyond any reasonable doubt. In *Stephen Nguli Mulili v Republic* [2014] eKLR, this is what the court had to say
- “...it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1, where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R* (2013) eKLR”
78. In the famous case of *Miller v Ministry of Pensions* [1947] 2 ALL ER 372, Lord Denning on the burden of proof beyond reasonable doubt stated.

“That degree is well settled. It need not reach certainty but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defeat the cause of justice. Suppose the evidence is so strong against a man that it leaves only a remote possibility in his favor, which can be dismissed with the sentence. In that case, it is possible but not in the least probable; the case is proved beyond a reasonable doubt, but nothing short of that shall suffice.”



79. In the Nigerian case of *Bakare v State* (1987) INNLR (PT 52) 579, the Supreme Court stated;

“Proof beyond reasonable doubt stems from the compelling presumption of innocence inherent in our adversary criminal justice system. To displace the presumption, the prosecution’s evidence must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in an offense adventure, including the administration of criminal justice. Proof beyond a reasonable doubt means what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

80. The ingredients of murder are well set out in the case of *Republic v Henry Obisa Onko* eKLR. -The death of the deceased has occurred. That the accused committed the unlawful act which caused the deceased’s death. That deceased’s death aforesought when he caused the end of the dead.

On whether the death of the deceased occurred;

81. It is not contested that David Gakenye Kimani was identified as the deceased. PW 1 Amos Kimani Mwangi testified that on December 6, 2013, he and police officers, and some villagers found the deceased’s body buried in a pit latrine and that the deceased’s body was cut into several pieces.

82. He stated that they positively identified the body as belonging to David Gakenye Kimani because of his clothes, brown trouser, light green jacket, brown shoes, and also his head-gap teeth, and he had one tooth missing. PW Ann Wambui Kimani also confirmed that the body retrieved from the pit latrine belonged to her husband, and she identified him because of his clothing. The issue of the occurrence of death was not contested.

83. It is submitted that a pathologist or a medical officer never produced the post-mortem report. Death can be proved through circumstantial evidence is based on several reported cases. The most notable one is *Wahib & another v Uganda* 1968 EA 278, where the facts were these. The decomposed body of the deceased had been found buried fully clothed, enclosed in a sack, with a strip of elastic wound tightly around the neck and the hands tied behind the back.

84. The main evidence against the two appellants consisted of confessions made to a police officer by them. In addition, there was evidence that the first appellant had been heard to say, about a month before, that he intended to kill the deceased and that the second appellant had been seen, about a week after the murder, with some of the deceased’s property in his possession.

85. The medical evidence about the cause of death was unsatisfactory and did not exclude the possibility of death from natural causes. The learned trial judge held, notwithstanding the medical evidence, that the circumstantial evidence established beyond reasonable doubt that the deceased had been killed.

86. In our instant case, the deceased was seen by PW6 in the accused’s company a day before he disappeared, and the accused also sold the deceased person’s phone after the deceased disappeared. The deceased’s person’s body was found buried in a pit latrine, and the deceased’s body was cut into several pieces.

87. As to who did the act that caused the death of the victim and whether there was malice aforesought; the law provides *vide* section 206 of the *Penal Code* as: -

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) the 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.

It is the prosecution's case that the accused lured the deceased to his home so that he could kill him. The accused killed the deceased person and dumped his body in the pit latrine that was on his compound.

88. PW5 PC Rashid Ibrahim testified that the accused took police officers to his kiosk within Kiamariga market, where he repaired bicycles and sufurias, but the police found nothing. They then attempted to have him lead them to his house. PW5 testified that the accused had the police officers walk for a long time and led them to a river, he attempted to jump off the cliff, but he was restrained. He then testified that on a later date, they went back to Kiamariga when the area chief showed them where the accused person lived.
89. PW 1 Amos Kimani Mwangi testified that he, together with police officers and some Boda Boda riders went to the accused person's home, and upon searching the house, they found items belonging deceased. Upon search in the accused's place, they found the deceased person's dismantled motorcycle KMCF 381 H, and its number plate.
90. PW9 Elijah Muthee testified that on 6th November, the accused person sold the deceased's phone to him for Kshs five hundred of which he paid the five hundred used Kshs 250 and remained with a balance of Kshs 250. He identified the deceased's phone in court, which the accused sold to him. The mobile phone had a light blue cover and was a Nokia make.
91. The deceased's handset was traced to the accused person. The accused person could not explain why he had the deceased phone in his possession. The accused kept the deceased's person's phone and later sold it to PW9 for gain. This demonstrates malice aforethought. He never gave any reasons why PW9 would implicate him if it were false.
92. The big question, however, is whether the appellants were responsible for the deceased's death. Alternatively, did the prosecution prove beyond reasonable doubt that the appellants and nobody else committed the unlawful act that led to the deceased's death? From the evidence tendered before the court, it is clear that none of the prosecution witnesses saw or witnessed the appellants or any other person kill the deceased.
93. Thus, there was no direct evidence linking the appellants to the deceased's death. The prosecution case, on this aspect, therefore, hinged on circumstantial evidence. In the case of *Abamad Abolfathi Mohammed and another v Republic* [2018] eKLR, this court had this to say on circumstantial evidence:

“However, it is a truism that either direct or circumstantial evidence can prove the guilt of an accused person. Circumstantial evidence enables a court to deduce a particular fact from circumstances or facts that have been demonstrated. Such evidence can form a strong basis for establishing the guilt of an accused person just as direct evidence. In 1928, Lord Heward,



CJ, stated 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 that, by intensified examination, can prove a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

94. Further, the conditions for the application of circumstantial evidence to sustain a conviction in any criminal trial have been laid down by several authorities of this court. Suffice to mention *Abanga alias Onyango v Republic* CR App No 32 of 1990(UR), in which this court held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

95. And in *Save v Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:

“To justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify drawing this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused.”

96. The only circumstantial evidence tending to link the accused to the crime was that of PW6, a minor PW 6 SGW, who testified that on the material day, he saw the deceased and the accused person sitting outside the accused persons. He also saw the said motorcycle parked outside the accused’s house.
97. He further told the court that shortly after that, he heard after that the accused’s house. PW6 after that, he rushed to see what had happened and saw the accused coming out of his house. That the accused, talking to himself, said, “afadhali hangekufa.” The motorcycle parked outside the accused person’s house had gone.
98. This places the person at the crime scene, namely the accused person, as he was the last person seen with the deceased person. He knew before anyone else that the deceased was dead, and that is when he said, “afadhali hangekufa.” He later dumped.” the deceased’s body in the pit latrine.”
99. The accused also sold a phone owned by the deceased to PW9, which was recovered by police and produced as an exhibit. The “last seen with” criminal law doctrine can be invoked in this circumstance. That as the accused was seen with the deceased and the deceased was later found dead, they must have had a hand in his death.



100. Regarding the doctrine of “last seen with,” I will revert to the Nigerian case of *Moses Jua v The State* (2007) LPELR-CA/IL/42/2006. The court, while considering the ‘last seen alive with’ doctrine, held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met their death. In the absence of explanation, the court is justified in drawing the inference that the accused killed the deceased.”

101. In yet another Nigerian case considering the same doctrine, in *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 LW/CA/A/86/C/2009, the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bear full responsibility for his death.”

Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the accused to give an explanation relating to how the deceased met his death in such circumstances. Without a satisfactory answer, a trial and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

102. Quoting from another jurisdiction, to be specific India, the courts have developed the doctrine further. In the case of *Ramreddy Rajeshkbhanna Reddy & another v State of Andhra Pradesh*, JT 2006 (4) SC 16, for instance, the court held:

“That even in the cases where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too short, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

103. PW 6 SGW testified that on the material day, he saw the deceased and the accused person sitting outside the accused person’s house. He also saw the said motor motorcycle outside the accused’s house. He further told the court that shortly after that, he heard screams from the accused’s house. PW6 stated that he rushed to see what had happened and saw the accused coming out of his house. He heard the accused talking to himself, saying, “afadhali hangekufa.” The motorcycle parked outside the accused person’s house was also missing.

104. This placed the accused person at the scene of the crime. The accused person was the last person seen with the deceased and knew before anyone else that the deceased was, and that is when he said, “afadhali hangekufa.” He later dumped the deceased’s body in the pit latrine within his compound. The accused never gave reasons why pw6 would implicate him if he were not telling the truth.

105. The accused testified and gave sworn evidence. He did not call witnesses, and his defence was full of denials. On arrest, police searched at home, which doubled as his place of work. The said search never yielded any evidence of this crime or otherwise. About his parents’ farm at Raya, he testified that it had been leased, and he thus never used the farm it.

106. He testified that he was not aware of where the remains of the deceased had been found. He testified that another reason for the arrest was a phone which allegedly belonged to the deceased and which, per the claim, the suspected persons had said he had sold to them and later turned state witnesses, which he



denied. He said he never saw a motorcycle produced as an exhibit in court. He never gave any reasons why PW6 and 9 implicated him in their testimonies nor rebutted the same save tendering mere denials.

107. The court finds that the accused defence never raised any doubt on the balance of probabilities for the same doubt to be held in his favour. Thus, the same failed, leading to the verdict of murder as the prosecution proved its case beyond any reasonable doubt.

i. Thus, the court finds the accused responsible for the deceased person's death, and therefore he is found guilty of murder and convicted accordingly.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 24TH DAY OF NOVEMBER 2022.

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CHARLES KARIUKI

JUDGE

