



**Republic v Daddy & 3 others (Criminal Case 69 of 2012)
[2022] KEHC 15586 (KLR) (Crim) (17 November 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 69 OF 2012**

**J WAKIAGA, J
NOVEMBER 17, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL OCHIENG DADDY 1ST ACCUSED

GEOFFREY OBWAGE ONDIEKI 2ND ACCUSED

ASIFU NYAKUNDI OMYAMO 3RD ACCUSED

COLLINS RAMADHAN ISSA 4TH ACCUSED

JUDGMENT

Introduction

1. The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, the particulars of which were that on the night of August 28, 2012 at Kamiti Maximum prison in the then Kasarani district within Nairobi county jointly murdered FN.
2. They first appeared before Odunga J on September 12, 2012 without representation and on the 26th September, Mr Ojienda appeared for all of them before Ombija J as he then was, when they all pleaded not guilty to the charge and hearing date set for 7th and February 8, 2013.
3. By way of background all the accused persons were at the time of the alleged commission of the offence, either remandees or serving sentence at Kamiti Maximum prison and therefore by consent of the prosecution and defence, were on October 31, 2021 transferred to Naivasha Maximum Security prison for their safety and were to be produced in court during their trial. This information will be relevant while explaining why this trial took this long to conclude.



4. On February 13, 2013, they appeared before R L Korir J, when the hearing dates were fixed for 2nd and October 3, 2013 and an order made that they be taken to Mathare national hospital which was not done as at May 23, 2013 when they again appeared before the judge and after several mentions on September 24, 2013, the judge directed that the matter be mentioned before Muchemi J then presiding judge of the division on 15th October, for purposes of fixing fresh hearing dated, which was deferred to the November 4, 2013, when once again the file was placed before Korir J in the absence of the defence counsel and the matter was fixed for further mention on December 4, 2013 when the accused persons were not produced in court, leading to another mention dated for 4th February, which was deferred to 27th February and then to 14th March and then to 18th March and May 14, 2014 since the accused persons were not produced in court.
5. On the July 16, 2014, the cause was fixed for hearing and the matter did not proceed at the instance of the defence same with September 23, 2014. On November 27, 2014, the prosecution did not have witnesses in court and the matter was adjourned to the May 11, 2015 when it could not be reached since the court had confirmed other matters for hearing despite the fact that the prosecution had six witnesses in court.
6. On the October 5, 2015, this trial commenced before Korir J with an opening statement by Miss Matiru, before calling the first prosecution witness and the good judge proceeded to hear and record the evidence of four prosecution witnesses between the said date and January 25, 2017 when she proceeded on transfer and on February 13, 2017 the matter was placed before Lesiit J as she then was and on May 9, 2017 directed that the cause proceeds for hearing before me.
7. For record purposes, by the time justice Korir proceeded on transfer, she had heard and recorded the evidence of nine prosecution witnesses and it must be placed on record that September 28, 2016, when the accused persons appeared before the judge all the accused persons indicated that they did not want to take further hearing dates before the judge and indicated that they had lost faith in the court and proceeded to abuse and threaten the court before they were ordered out of the court.
8. I have taken the liberty of taking an account of this trial from the time the accused persons took their plea and to the conclusion of trials so that Kenyans may understand why trials take long to conclude and for judicial accountability.

On the May 9, 2017, the then presiding judge, of the division, Lesiit J directed that the matter proceed for hearing before me and on October 2, 2017 the accused persons appeared before me and started the journey of their trial, with the continuation of the testimony of PW9 having complied with the provision of section 200 of the [Criminal Procedure Code](#) and the evidence of PW10, 11 and 12 before putting the accused persons on their defence. It must therefore be stated that I did not hear and see eight prosecution witnesses testify but have read, analysed and understood their testimony for the purposes of this judgement.

Prosecution Case

9. The prosecution case was that all the accused persons were in custody at Kamiti Maximum prison together with the deceased, sharing a cell within block D at the said facility when they turned against him. PW1 Sammy Musembi Mbugu testified that he was serving a life sentence and that on the August 24, 2012 while asleep at the cell was awoken for the purposes of roll call by CPL Keino when he was called by the occupants of the cell where the accused persons and the deceased were, and since his work was to oversee and to listen to any misunderstanding between the inmates, he learned that there was a misunderstanding between the deceased and another inmate called Wafula and that the officer in charge separated the two, taking Wafula to No 40 while the deceased was taken to No 3.



10. It was his evidence that he later learned that the deceased had died in his cell. In cross examination, he stated that block D had One hundred and seventy (170) inmates and that the deceased and Wafula had a homo sexual relationship and that the deceased, all the accused persons and Wafula were in the same cell.
11. PW2 Richard Evans Wafulastated that he was serving a sentence on conviction from a rape charge and that when he was transferred to Kamiti, he was placed in D block cell number 14 where he met the accused persons and after some times he was taken to cell number 40 leaving the accused persons and the deceased together. He denied having a relationship with the deceased and in cross examination, stated that he did not know the reason which led to him and the deceased being separated from the same cell.
12. PW3 inspector Maurice Okumu Aginastated that he was on duty on August 28, 2012 at Kamiti prison having reported on duty at 8.00 am and left at 5.00 pm and that when he reported on duty he found the accused persons together with the deceased in their cell with the body lying in a mattress covered with a blanket and when he interrogated the accused persons they did not answer him.

He was later informed by SGT Mbui that the accused persons had quarrelled with the deceased on counter band, a phone which he had in his possession.
13. In cross examination he stated that the deceased had been returned to the said cell on the 27th and that he was strangled. PW4 CPL Stephen Kinyua Mabeya stated that he reported on duty and found the four accused persons in cell No 14 with the deceased and that he locked them into the cell at night and recorded them as such and handed over the lock up sheet to the duty office Mr. Makale and handed over the key to the gate clerk. He reported back on duty on 29th at 5.30 am and was assigned duty at the same block and went there together with PC Barasa and when they proceeded to the door, they heard a voice from inside saying in kiswahili “tumeua mutu” meaning we have killed someone.
14. He unlocked the door and found all the accused persons seated, each on their personal belonging with the deceased lying on the mattress, they locked the door again and went to report to the duty officer their finding. When they returned back, they confirmed the death and removed the body. In cross examination, he stated that he knew the deceased who was serving a death sentence and that he had seen him on 28th alive when he locked their cell. He stated that the toilets were next to the cells and that it was Barasa who was in charge of opening the toilets.
15. PW5 inspector Gabriel Mugo Mbuthiastated that he reported on duty at 6.00 pm and the was handed over the shift and that he went around the cells without any incidence. At 2.30 pm he went around with CPL Koskei and found CPL Kiplagatin block D The following morning when new officers reported, CPT Kinyuawent to do count at block D only for the same to return back with the report of the death in block D cell No 14.

They proceeded to the cell where they found the accused persons sitting down and the deceased lying down on the mattress covered with a blanket, they ordered them to uncover him and called a doctor who confirmed his death
16. In cross examination he stated that there are always officers on duty who would go around the cells at night and that he did not know the time the deceased died, he further stated that the night officer in block D did not know of the death until in the morning. PW6 Gilbert Kipkoech Kiplagatstated that he was assigned the duties of patrolling block D having taken over from CPT Kinyua and that at 1.00 am he passed through cell No 14 and saw that the inmates had covered themselves with either blankets or bed sheets and therefore did not detect anything until the following morning, when he heard some noise and when he responded, he met with Kinyua and Katete who informed him of the death.



17. He stated that when they went into the cell, they found the accused persons having packed and arranged their belonging as if they were ready to leave. They then reported to the officer in charge. In cross examination, he stated that he did not know what had killed the deceased and that throughout the night he did not hear of any commotion from cell number 14 and that he believed that the accused persons killed the deceased because they were together with him in the cell.
18. PW7 Temesi Lenkostatated that he reported on duty on the August 28, 2012 at 6 pm and was assigned to block D with Kiplagat and took their position in cell No 1 which was the guard room. He did his patrol between 7.00 pm and 12.00 pm and checked cell number 14 which he confirmed was locked, he then heard commotion in cell number 15 where an inmate was accusing the other of urinating, he proceeded to the said cell and sorted out the issue.

He then moved to cell number 14 at 9.40 pm and found the four accused persons holding their blankets as if preparing to sleep, he then heard a groaning sound and when he asked the 2nd accused told him that one of them was dreaming, so he left for cell number 15.
19. He continued patrolling and when he found that they had slept he stooped patrolling at midnight and thereafter he did not hear of any incidence until the following day at 6.00 am when the new shift reported, when he heard that someone had died, when the inmates in cell number 14 raised an alarm. In cross examination he stated that he did not know the time when the deceased died and neither did he see the accused persons kill him. He stated that in cell number 14, there were five inmates and that he counted them at 6.00 pm.
20. PW8 Stanley Njogu, the father of the deceased testified that he was an inmate at Kamiti serving a sentence for stealing and that he went to visit him on the August 29, 2012 and was told to go back at 2.00 pm, at about noon he heard from a passer-by that there was a condemn prisoners who had killed each other and he later on learned that it was his child, the deceased. He saw a hearse leaving Kamiti and followed it to City mortuary. On the 30th he went back to Kamiti to make inquiry and was informed that he had been killed by fellow inmates. On the 31st he identified the body for purposes of post mortem examination and later on transferred the body to Kigumo mortuary before they buried him.
21. PW9 Ambrose Gichane, testified that on the 29th August he was instructed to go to Kamiti and carry out investigations and was taken to the cell where he found the body of the deceased lying down on the floor with the four accused persons sitting therein. When he looked at the body of the deceased he noticed that the neck had marks. He called the scene of crime personnel who processed the scene
22. When he interviewed the accused persons, they told him that they woke up and found the deceased lying down on the mattress and could not talk. He recorded statements and had the body removed to the mortuary. On the 31st he attended to the post mortem examination, which established that the cause of death was strangulation and had the accused persons taken for mental assessment.
23. He stated that the 4th accused was serving death sentence in criminal case number 17 of 2011, the 2nd accused was also serving death sentence, while the 3rd accused was serving ten years. He testified that the deceased was also serving a death sentence. In cross examination, he stated that he went to the scene with PC Njoroge, PC Nygweso and PC Musembi and that their role was to investigate the offence and that he did not know what had happened before that morning. They searched the cell and recovered nothing which would have been used to commit the offence and only saw marks on the neck of the deceased.



24. He stated further that the accused persons and the deceased were friends and that nobody told them what had happened. PW10 Dr Joseph Maundustated that he examined the accused persons and found all of them fit to take plea. In cross examination, he stated the 1st and the 4th accused persons had cases of mental illness which was well managed with medication.
25. PW11 PC Martin Mwenda Njerua scene of crime officer proceeded cell number 14 in block D where the body of the deceased was and took photographs. He stated that the neck of the deceased had strangulation marks. In cross examination, he stated that there was nothing recovered at the scene which could have been used to strangle the deceased but that the marks looked fresh with the age estimated as one day.
26. PW12 Dr Johansen Oduorconducted post mortem examination on the body of the deceased at the City mortuary on the 31st August and that the body had scars on the chest, bruises around the neck caused by something like a rope, the tongue had protruded from the mouth with bleeding in the eyes, as a result of his examination, he formed an opinion that the cause of death was asphyxia due to manual strangulation. In cross examination, he stated that the strangulation was by something like a rope which was put around the neck which left a mark and that it could not have been caused by the fingers as there were no finger marks.

Defence Case

27. When put on their defence DW1 inspector Evans Ondiektstified on their behalf and stated CCTV footage were not available since at the time of the offence they had not been installed at block D and had only been installed on the perimeter wall. DW2 Eugen Shibekaa clinical officer at Kamiti testified that he drafted a letter dated November 16, 2017. On the 4th accused in response to a court order and in cross examination stayed that he used the treatment notes and confirmed that he was suffering from schizophrenia which is sometimes treatable.
28. DW3 Samuel Ochieng Daddystated on oath that he did not kill the deceased and that on 28th he was in cell number 14 block D with the other accused persons when police brought in the deceased so as to balance the cell and that they heard him refusing to be searched at the door and there arose an altercation between them since he had something which the police wanted to retrieve and that the deceased was with two wardens one being Kinyua and that when the deceased came into the cell, he told them that he had been injured and therefore requested for a place to sleep at.
29. It was his further evidence that in the morning, when it was time for inspection, they noticed that he was not responding and could not wake up. He stated that there was an open space where they could see from. In cross examination, he stated that the deceased was brought to their cell at night alive, and that when you are inside the cell you cannot hear what is happening outside.
30. DW4 Geoffrey Obwoye Ondiekitstified on oath that, that on the material day while waiting for medicine and to be counted, he heard commotion outside their cell like someone resisting a search, and heard that he had put it in his mouth and that one of the warders pressed the deceased on the wall, who then spit out the sim card, he was then brought to their cell and they let him sleep until the morning, when he didn't wake up at the time when they were being counted. He stated that they were able to see through the hole in the door which the warders were using to inspect the cells and that the cells must always have odd numbers.
31. In cross examination, he stated that when he heard noise from outside the cell he peeped through the hole in the door and saw two warders conducting a search on the deceased and that one of them



assaulted the deceased using a stick before bringing him into the cell and that he thereafter fell asleep until the following morning when the same was found dead.

32. DW5 Asifu Nyakundi Oyamoto testified that he was taken to Kamiti in the year 2011 while sick and it was then that he met his co-accused, who introduced him to where he could get medicine. On the night of 28th /29th, he was sick and his time for taking medicine was changed by the Doctor to 5.00 pm from 6.00 pm and immediately he took his medicine, he fell asleep, until the following morning, when he heard the in charge say that someone had died and that he went and confirmed and that he asked how the deceased came into the cell, since he was not there as at the time he fell asleep and was informed that he was brought into the cell while he was asleep. He thereafter sought to be taken to the police station to record a statement but was not. In cross examination, he stated that he woke up between 6.30 - 6.50 am when he heard the 1st accused tell the in charge that someone had died in their cell and that you could hear someone who was outside the cell from inside and that the 1st accused was the in charge of their cell.
33. DW6 Collins Ramathan Issa stated that he was in cell No 40 up to August 24, 2012 when he was transferred to cell number 14, where he found his co-accused and that on the 28th when they were given medicine at 5.00 pm, he heard noise from outside the cell and then the door was opened and the deceased brought into the cell. He sat on the toilet bucket while waiting for the in charge to show him a place to sleep. In the morning, the 1st accused told a guard called Barasa that the deceased could not wake up and he opened the door and confirmed that the deceased had died.
34. He then went and called the officer in charge, whom they explained to what had happened, before they were re-allocated to allow for investigations, after the search conducted in the celled yielded nothing. He stated further that when he sought to record his statement with the investigating officer, he was not allowed and that when the deceased was brought to the cell, all of them were asleep.
35. In cross examination, he stated that it was only the 3rd accused who was asleep, when the deceased was brought into the cell and that immediately he was brought into the cell, the door was closed and that when Barasa came to inspect, he was awake and that it was only those who had been in the cell in the evening, who were present at that time.

He confirmed hearing the doctor say that the deceased had been strangled using a rope but that he did not see him being strangled, it was his evidence that when he came into the cell, he was alive but not well since there had been an altercation between him and the warder.
36. DW7 Victor Ochieng testified on oath and stated that he had been at Kamiti since March 2019 and that his co-accused had been with him in Kamiti in the year 2012. He stated that he was with them in the same cell on the material night when at 6.30 he looked through the cell window and saw the deceased being searched and he saw him remove something from his pocket which he put in his mouth, with the officers trying to remove it, he saw one officer pin him on the wall using a baton, but he refused to open his mouth, he then saw him fall down and he thought that he had lost consciousness. At that stage the door was opened and the officers told them to drag him into cell number 14 which they did and they then locked the door.
37. It was his evidence that he saw CPL Kinyua who was in charge together with three other officers, one known as Roba and that the following morning, when it was time for head count, he heard people tell Kinyua that there was someone who had not woken up and that is when they heard of the death of the deceased. He thereafter recorded his statement with the police.
38. In cross examination, he stated that he was in cell number 13 with two other people one of them who was called Caroli and that the only thing he had in common with his co-accused was that they were



sharing the same block and that he only knew Godfrey Obwage whom he first met in the year 2010 at Kodiaga prison before they were transferred to Kamiti, and further that the deceased was known to him and that when he heard commotion from cell number 17 he peeped through the wall and saw the warder pin him on the wall, with a baton on his neck and after three minutes he fell down and the officers pulled him to the door of cell number 13 and ordered those inside to pull him in.

Submissions

39. At the close of the defence case the prosecution opted not to make final submissions and relied on the evidence on record. On behalf of the defence it was submitted that the prosecution had failed to establish its case beyond reasonable doubt, it was contended that the fact and cause of death was alleged to have been as a result of strangulation but there was no evidence tendered to show case that which was allegedly used to by the accused persons to strangle the deceased other than the inconsistent witness testimony of PW3, PW9 PW10 and PW12 who conducted the post mortem examination but whose testimony was not conclusive as regards that which was used to strangle the deceased .
40. It was submitted that other than the fact that the accused persons were in the same cell with the deceased, there was no other evidence that was produced by the prosecution to substantiate the charges and that the circumstantial evidence tendered failed to meet the definition thereof established in the case of *Mohammed & 3 others v Republic* [2005]1KLR722, the court was therefore urged to exercise caution and warn itself on the admission of the said evidence as was stated in the case of *Erick Odhiambo Okumu v Republic* [2015] eKLR as the evidence submitted did not point directly to the accused persons
41. It was further submitted that the prosecution failed to establish mens rea, that is to say the intention to kill the deceased on the part of the accused persons. It was contended that the prosecution through the evidence of PW10 established that the accused persons were not sane persons and there being no evidence tendered to show that the accused persons were on medication at the material time and therefore even if the court was to find them guilty, it was submitted that they did not have the mind or knowledge of their action
42. It was stated that to establish malice aforethought, the court has to consider the nature of the weapon used, the manner in which it was used, the part of the body injured, the nature and number of injuries inflicted, the conduct of the accused immediately before and after the attack, as was stated in the case of *Republic v Edward Kamau Mburu & 2 others* [2016]eKLR, it was contended that the alleged murder weapon was not recovered and there was no evidence that the accused persons tried to destroy the said weapon, and therefore the prosecution failed to prove its case for which the accused were entitled to an acquittal.

Analysis and Determination

43. To sustain a conviction on a charge of murder, the prosecution is under a duty to prove beyond any reasonable doubt the fact and the cause of death, that the said death was caused by an unlawful act on the part of the accused persons with malice aforethought.
44. In this cause, the fact and the cause of death of the deceased was proved through the evidence tendered by the prosecution as confirmed by the accused persons who were all with the deceased at the cell and all who confirmed in their evidence that in deed the deceased died on the material night. The cause of death though disputed by the defence in their submission, was proved through the evidence of PW12 Dr Jahansen Oduor, who testified and produced a post-mortem report to the effect that the deceased had scars on the chest and bruises on the neck caused by something like rope, with the tongue



protruding out which was consistent with strangulation and therefore the cause of death was asphyxia due to strangulation.

45. At the close of the case herein, there was no any other evidence tendered to dispel the scientific and medical evidence by PW12 and as at the time of writing this judgement, there was no evidence to show that the deceased was not dead. I therefore find and hold that the death and cause thereof was proved beyond any reasonable doubt.
46. The only issue in dispute is whether the said death was caused by an unlawful act on the part of the accused persons. As submitted by them, there was no direct eye witness who saw them kill the deceased and therefore the prosecution case was solely based on circumstantial evidence.
47. The law on circumstantial evidence is now well settled in Kenya and the best this court can do is to reproduce the jurisprudences thereon and apply the same to the case at hand, so that should I find that the prosecution tendered before me cogent circumstantial evidence, then I will have no other than to render a verdict of guilty but should I find otherwise then the only verdict available would be that of not guilty.
48. In the case of *Abamed Abolfadbi Mohammed and another v Republic* [2018] eKLR, the Court of Appeal stated that the guilt of an accused person can be proved by either direct or circumstantial evidence and that circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proven and can form a strong basis for proving the guilt of an accused person just as direct evidence and for it to form a basis of a conviction it must unerringly point to the guilt of an accused person and nobody else
49. In the case of *Mwangi and Another v Republic* [2004] 2 KLR 32 the court stated that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis than that the accused is guilty as charged.
50. In the classic case of *Sawe v Republic* [2003] eKLR the court stated that in order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon reasonable hypothesis than that of his guilt and there must be no other co-existing circumstances weakening the chain of circumstances relied upon.
51. In this case the following circumstantial evidence were tendered by the prosecution, that all the accused persons were together with the deceased in cell number 14 on the material day and that the last time the deceased was seen with the accused persons he was alive and in good health, only for him to be found the following day dead. This therefore brought all the accused persons within the doctrine of last seen with as was stated by the Court of Appeal in the case of *Chiragu & another v Republic* [2021] KACE342(KLR) thus

“The only circumstantial evidence tending to link the appellants to the crime was that of PW1, a minor who attested to the fact that it was the appellants and the third persons whom she last saw leaving with the deceased. The other strand of circumstantial evidence is that sometimes after the deceased had left, the stranger came back and took the money and cell phones belonging to the deceased. Other than PW1 seeing the appellants and a stranger leave with the deceased in intervals there is nothing else that shows that the deceased died under the hands of the appellants. To boost their case against the appellants however, the prosecution invoked the criminal law doctrine of “last seen with”. That as the appellants



were the last people to be seen with the deceased and the deceased was later found dead then they must have had a hand in her death. Regarding the doctrine of “last seen with” we will revert to 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 his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased. “In yet another Nigerian case considering the same doctrine, in *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 iLAW/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 bears 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 appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased. “Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of *Ramreddy Rajeshkhanna Reddy & another v State of Andhra Pradesh*, JT 2006 (4) SC 16 for instance the court held:

““That even in the cases where 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 small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

25. Locally, this doctrine has been invoked in the case of *Republic v EEK* [2018] eKLR. The prosecution adduced evidence on this aspect through PW1. She confirmed that indeed the deceased was last seen alive in the company of the appellants. Her evidence was not corroborated at all by any other witness (ess), as required being a minor. This requirement is statutorily underpinned by section 124 of the *Evidence Act*. The appellants contested that evidence by stating that in fact, at the particular time they were asleep in their houses.

This being the case, it was absolutely necessary for the trial court to look for corroboration or other evidence implicating the appellants. No such attempt was made by the trial court. We are persuaded by the holding in Indian case that even where evidence establishes that an accused was last seen with the deceased before she met her death, it is desirable to exercise caution and look for some other corroborative evidence “

52. Having been the last persons seen with the deceased while he was alive, the burden therefore shifted to the accused persons to offer an explanation on how the deceased met his death and when offered this opportunity in their defence, all the accused persons gave contradictory statements on what happened on the material night and I therefore find and hold that the death of the deceased was caused by the accused persons either jointly and or severally and having been together I find that they all had common intention in causing the death of the deceased.
53. The other circumstantial evidence linking the accused person to the crime herein is their conduct thereafter. The evidence on record is that when the warders came into the scene in the morning, they



found all the accused persons having packed their belonging as if ready to leave the scene thereby portraying a guilty mind, further they each gave a contradictory account as to what happened while they were all in the same cell at the material time. When PW4 visited the cell and in spite and while outside, he heard what could have amounted to a confession that one of the accused persons said in kiswahili that they had killed someone and when PW7 heard a groaning sound from the cell and inquired on what was happening, the said accused told him that one of them was dreaming.

54. The final issue is whether the accused persons had the necessary *mens rea*. In their submissions, the accused persons though not supported by their evidence in chief raised the defence of insanity based on the medical records tendered by PW 10 Dr Joseph Maundu, whose evidence was that he examined Collins Ramathan Isaa and Samuel Ochieng Daddy and concluded that they had medical history of psychoprennia and immunio suppression and therefore did not have the necessary mental capacity

55. However, for the defence of insanity to hold, the following elements must exist, “40. For defense of insanity to stand, the accused must satisfy the grounds set out under the McNaughton rule in *McNaughten Case* (1843) 10 C1 & Fin 200. The test is purely cognitive and the defence must show whether the accused understood her actions or that her actions were wrong. The M’Naughten rules require that the following three tests should be proved:

- i. That an individual suffers from a “defect of reason,
- ii. That it was caused by a “disease of the mind”,
- iii. That as a result, he or she does not know the “nature and quality” of the act or that it is wrong.

41. In *Richard Kaitany Chemagong v Republic*; Criminal Appeal No 150 of 1983 the Court of Appeal had sought to distinguish a malfunctioning of the mind from non-functioning of the mind due to epilepsy and held:

“There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but cause of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason, memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a ‘disease of the mind’ within the meaning of the Mc’Naghten Rules in Mc’Naghten’s Case (1843) 10 C1 & Fin 200, even if the effect was transient or intermittent. On the evidence the defendant was therefore ‘insane’ at the time of his act, and the only possible verdict was that provided for by the Act of 1883 as amended.”.

42. It’s now trite law that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing what was wrong.

43. Section 166(1) of the *Criminal Procedure Code* provides:

“ 166(1). Where an act or omission is charged against a person as an offence and it is given in evidence on the trial of that person for that offence that he was insane so as not be responsible for the acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made



the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the “see R v CMW [2018] eKLR

56. There was no evidence tendered by the defence to prove that they were so suffering from a disease of the mind to the extent that they did not know what they were doing and or that it was wrong and therefore find and hold that the defence of insanity was not proved and that the same was an after thought which I hereby dismiss.
57. On the motive for the offence, PW3’s evidence was that the deceased had a same contraband that it is an illegal item with him a cell phone which the other accused persons wanted to use which might have lead into the fight for it. There is also the issue of the homosexual relationship which the accused is alleged to have engaged into with one Wafula and which might have exposed him to the desires of the accused persons.
58. I therefore find and hold that the prosecution proved all the elements of the charge of murder against all the accused persons and subsequent find all of the guilty and convict all of them for the murder of FNN on the night of 28th/August 29, 2012 contrary to section 203 of the *Penal Code*.

DATED AND SIGNED THIS 11TH DAY OF NOVEMBER, 2022.

J. WAKIAGA

JUDGE

DELIVERED AT NAIROBI ON 17TH DAY OF NOVEMBER, 2022.

BY JUSTICE D. OGEMBO

On behalf of Justice Wakiaga

Signed.....

In the presence of

